# INCONSISTENCIES IN COMMONWEALTH MERITS REVIEW

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## Introduction

Government intervention in the financial and social affairs of citizens increased dramatically in the last century. As a result, government administrative decisions continually affect the everyday lives of people. Many of these decisions are discretionary. The growth of modern administrative law has been due to the need to supervise the exercise of administrative power so that injustice resulting from misuse of power can be avoided. To do this, modern Australian administrative law has supplemented judicial review with review by other institutions that are independent of the executive government, even though they exercise executive power.

The Commonwealth administrative law system has been developed in response to the recommendations of the Commonwealth Administrative Review Committee (the Kerr Committee), which was established in 1968. One of the terms of reference of the Kerr Committee required a consideration of what jurisdiction (if any) should be given to a proposed federal court to review administrative decisions made under Commonwealth law (Kerr Report 1971: 1). At the time that it established the Kerr Committee, the Commonwealth Parliament had recognised the need to provide for tribunal or court review of many administrative decisions. However, review of administrative decisions was by no means the general rule for in the vast majority of instances Commonwealth legislation did not provide for review of the merits of an administrative decision (Kerr Report 1971: 5). One of the Kerr Committee's recommendations was that a general policy of providing for a review of the merits of administrative decisions should be adopted on a broader basis than existed at that time (Kerr Report 1971: 115). The Kerr Committee concluded that this policy would require a detailed consideration of each discretion and power of decision that might be subjected to review. However it did not undertake this task itself but preferred that it be left to a permanent Administrative Review Council (Kerr Report 1971: 83, 90). This council would be established to examine existing and new legislation and, subject to maintaining a balance between justice to the individual and efficient administration, recommend what provision should be made for review of administrative decisions that could affect a person's rights, property, privileges or liberties (Kerr Report 1971: 4, 91).

In 1971 Parliament established the Committee on Administrative Discretions (the Bland Committee) to examine existing administrative discretions under Commonwealth statutes and regulations and to advise as to those in respect of which review on the merits should be provided (Bland Report 1973: 1). After an analysis of all statutes and regulations in existence up to the end of 1972, the Bland Committee reported on the suitability of existing provisions of review of administrative discretions and identified those administrative

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discretions that were not subject to any provision for review but in respect of which some external tribunal review was considered appropriate (Bland Report 1973: 2, 20, 21, 41). The Bland Committee recommended that Parliament enact legislation (the Principal Act) that would provide for the establishment of a General Administrative Tribunal and would identify those sections of existing legislation that contained discretionary powers in respect of which Parliament had determined to make provision for review. Furthermore, Parliament would identify those sections conferring discretionary decision-making powers that would be subject to review when enacting new legislation (Bland Report 1973: 25, 34, 35). The Principal Act would standardise legislation dealing with tribunals and provide uniformity of legislative provisions (Bland Report 1973: 37). The Bland Committee considered that the Parliamentary Counsel, who had responsibility for certifying that a bill conformed to a decision of cabinet, was well placed to either persuade departments to avoid open-ended discretions in draft legislation or else justify and explain to cabinet any provisions in draft bills conferring discretions that may be regarded as departures from the uniform code of the Principal Act. Consequently, the Parliamentary Counsel would be in a position to facilitate uniformity of review provisions in new legislation (Bland Report 1973: 38, 39). Furthermore, the Bland Committee recommended that cabinet issue a general instruction for departments to observe its requirement to provide for review of administrative discretions in drafting bills unless justifiable reasons for departing from the uniform code of the Principal Act were provided (the Bland Report 1973: 39).

The Commonwealth Parliament enacted the Administrative Appeals Tribunal Act 1975 (AAT Act) to give effect to a combination of the recommendations of the Kerr and Bland Committees. The AAT Act established the Administrative Appeals Tribunal (AAT) as a general review tribunal and included a schedule of those administrative decision-making sections incorporated in Acts existing in 1975 that would be subject to merits review by the AAT. Section 25[1] of the AAT Act made allowance for an expansion of the AAT's jurisdiction by providing for an external review by the AAT of the merits of administrative decisions in new legislation if a specific Act, which proposed to confer a power to make an administrative decision, so provided. The AAT Act also established the Administrative Review Council (ARC) to give effect to the permanent council recommendation of the Kerr Committee. Consequently, by 1975, the Commonwealth Parliament had established a legislative framework that provided for external review of the merits of administrative decisions made under Commonwealth law. There had been an analysis of decision-making powers conferred by existing Acts to determine which decisions should be subject to a review on their merits, while section 25 of the AAT Act allowed for the provision of merits review of decisions empowered by new legislation. The Kerr Committee had also settled on the general criteria that decisions, which affected a person's rights, property, privilege or liberties, were suitable for review.

The AAT Act formed a part of a package of legislation that was enacted by Parliament to reform the Commonwealth administrative law system. Other legislative initiatives introduced by Parliament provided for freedom of information, a right to reasons for most statutory decisions, judicial review and the establishment of the office of the Ombudsman[2]. A major part of the vision of the Kerr Committee was realised with the implementation of this administrative law package and, at the time, Australia was generally recognised as being at the forefront internationally in providing its citizens with access to an advanced administrative law system that required the executive government to be accountable for its decisions and to treat its citizens justly. Widespread developments in the provision of external review of the merits of administrative decisions have occurred since the enactment of the AAT Act in 1975. Apart from the AAT, additional external merits review tribunals have been established (for example in the social security and migration areas), Parliament has expanded the jurisdictions of the AAT and the other external review tribunals by the provision of merits review in new legislation, tribunals have set down case law precedents

and the ARC has settled principles for determining those decisions that it considers require merits review.

The opportunity to have a review of the merits of administrative decisions has been a significant element of the reformed administrative law system because it facilitates accountability and justice. However, in more recent times, some Commonwealth public servants appear to have moved away from the merits review principles espoused by the Kerr and Bland Committees. They have formed the view that a process of external merits review leads to ineffective and inefficient public administration and that proper accountability for administrative decisions should come about from the application of best management practices in an internal review process. The emergence of this concept, commonly referred to as management for results (Keating 1990: 395), or managerialism (Douglas and Jones 1996: 235) or the ministerially-based hierarchical model (Waterford 1991: 416), has created some uncertainty about whether the public sector has fully implemented appropriate procedures to provide for external merits review of administrative decisions over the last 26 years which require the executive government to be accountable for its decisions and to treat its citizens justly.

**An analysis of Commonwealth merits review rights**

The effectiveness of the merits review element of the Commonwealth administrative law system is dependent upon Parliament ensuring that the scope of merits review provisions in its legislation is appropriate. A comparative analysis of Commonwealth statutes would be one method of evaluating the scope of the merits review system, as it would show how Parliament makes provision for merits review in legislation. This essay endeavours to determine whether or not the recommended practices of the Kerr and the Bland Committees in relation to merits review have been put into practice by evaluating the existence of rights to have the merits of Commonwealth administrative decisions reviewed. The Commonwealth of Australia Administrative Arrangements Order of 21 October 1998 assigns responsibility for 1070 Commonwealth Acts to federal government departments (Governor-General 1998). An analysis of these Acts enables an assessment of whether a statute confers any powers to make administrative decisions which should be subject to merits review by a body external to or independent of the decision-making department. Whenever such a power is conferred, a determination can then be made about whether the statute then provides for appropriate merits review of any resulting decisions made by a department.

In its publication *What decisions should be subject to merits review?*, the ARC has set down the principles developed by it for classifying decisions that warrant a review of their merits and decisions that are unsuitable for merits review. The ARC has identified a merits reviewable decision as an administrative decision that will, or is likely to, affect the interests of a person and, in the absence of good reason, such a decision should be subject to merits review. In contrast, decisions that are unsuitable for merits review are legislation-like decisions and automatic or mandatory decisions (ARC 1999: 5, 7-9). Furthermore, the ARC has identified factors that may or may not justify excluding a decision from external merits review (ARC 1999: 11-31). For the purposes of this essay, *a reviewable decision* has been defined as a decision of the type that the ARC considers should be subject to external merits review. However, decisions that are made in the exercise of a power conferred by regulation, or in relation to Commonwealth employment (except for superannuation and other employment benefits) or directly in relation to the imposition of levies or charges have also been excluded from the definition. The results of the analysis of a person's right to have an external body independent of the decision-maker review the merits of Commonwealth administrative decisions are provided in Table 1. They show that:

- 68 percent of Acts do not empower any *reviewable decisions* that require merits review;
- 10 percent of Acts empowering *reviewable decisions* provide for a review of the merits of all decisions;
- 14 percent of Acts empowering *reviewable decisions* provide for a review of the merits of some decisions only; and
- 8 percent of Acts empowering *reviewable decisions* do not provide for review of the merits of any decisions.

**Table 1**
**Analysis of commonwealth legislation**

| *Department* | *Acts with no reviewable decisions* | | *Acts with all reviewable decisions subject to external review* | | *Acts with some reviewable decisions only subject to external review* | | *Acts with no reviewable decisions subject to external review* | | *Total number of Acts* |
|---|---|---|---|---|---|---|---|---|---|
| | *No.* | *%* | *No.* | *%* | *No.* | *%* | *No.* | *%* | *No.* |
| Agriculture, Fisheries & Forestry | *85* | *74* | *6* | *5* | *14* | *12* | *10* | *9* | *115* |
| Attorney-General's | *96* | *75* | *7* | *6* | *14* | *11* | *11* | *8* | *128* |
| Communications, Information Technology & the Arts | *20* | *50* | *11* | *28* | *6* | *15* | *3* | *7* | *40* |
| Defence | *18* | *69* | *1* | *4* | *2* | *8* | *5* | *19* | *26* |
| Education, Training & Youth Affairs | *12* | *45* | *4* | *15* | *2* | *7* | *9* | *33* | *27* |
| Employment, Workplace Relations & Small Business | *15* | *47* | *4* | *12* | *7* | *22* | *6* | *19* | *32* |
| Environment & Heritage | *17* | *49* | *7* | *20* | *7* | *20* | *4* | *11* | *35* |
| Family & Community Services | *12* | *42* | *8* | *31* | *5* | *19* | *1* | *8* | *26* |
| Finance and Administration | *47* | *77* | *2* | *3* | *6* | *10* | *6* | *10* | *61* |
| Foreign Affairs and Trade | *31* | *79* | *2* | *5* | *5* | *13* | *1* | *3* | *39* |
| Health and Aged Care | *22* | *52* | *2* | *5* | *13* | *31* | *5* | *12* | *42* |
| Immigration & Multicultural Affairs | *9* | *69* | *-* | *-* | *3* | *23* | *1* | *8* | *13* |
| Industry, Science & Resources | *41* | *52* | *8* | *10* | *24* | *30* | *6* | *8* | *79* |
| Prime Minister & Cabinet | *28* | *82* | *1* | *3* | *4* | *12* | *1* | *3* | *34* |
| Transport & Regional Services | *96* | *71* | *19* | *14* | *13* | *10* | *7* | *5* | *135* |
| Treasury | *171* | *76* | *21* | *9* | *23* | *10* | *10* | *5* | *225* |
| Veterans' Affairs | *10* | *77* | *-* | *-* | *2* | *15* | *1* | *8* | *13* |
| *TOTAL* | *730* | *68* | *103* | *10* | *150* | *14* | *87* | *8* | *1070* |

The analysis uncovers unexplained inconsistencies in the rights granted to a person, whose interests are affected, to have an external review of the merits of a Commonwealth administrative decision. These inconsistencies arise in relation to like decisions made by one department exercising powers conferred by the same or differing statutes as well as from like decisions made by different departments exercising the same or similar powers conferred by separate and unrelated statutes.

Table 2 provides examples of the inconsistencies identified by the analysis. It compares like intra-departmental decisions conferred by statutes under the administration of the government departments indicated in the table.

**Table 2**
**Comparative examples of inconsistencies in rights of review of administrative *decisions within departments***

| LIKE DECISIONS | SUBJECT TO REVIEW | | | NOT SUBJECT TO REVIEW | |
|---|---|---|---|---|---|
| **Department** | **Act** | **Decision section** | **Review section** | **Act** | **Decision section** |
| **Agriculture, Fisheries & Forestry** | | | | | |
| To reject or revoke a target application | Biological Control Act 1984 | 53 [to revoke] | 56(1)(j) | Biological Control Act 1984 | 16(1) [to reject] |
| To suspend a licence | Fisheries Act 1952 | 9A(4) | 16A | Fisheries Act 1952 | 9A(1) |
| **Attorney-General's** | | | | | |
| To make a determination in relation to a complaint | Privacy Act 1988 | 52(1)(b)(iii) | 61 | Privacy Act 1988 | 52(1)(b)(ii) & (iv) |
| To apportion a payment to a child or a dependant | Judges' Pensions Act 1968 | 13 | 17A | High Court Justices (Long Leave Payments) Act 1979<br>Judges (Long Leave Payments) Act 1979<br>Law Officers Act 1964<br>Long Service Leave (Commonwealth Employees) Act 1976 | 5(3)<br>5(3)<br>16A(6)<br>17(5) |
| **Communications, Information Technology & the Arts** | | | | | |
| To make a declaration about a person or corporation | Broadcasting Services Act 1992 | 146D(4) "program supplier" | 204 | Broadcasting Services Act 1992 | 4(5) of sch.1 "authorised lender" |

| LIKE DECISIONS | SUBJECT TO REVIEW | | | NOT SUBJECT TO REVIEW | |
|---|---|---|---|---|---|
| **Department** | **Act** | **Decision section** | **Review section** | **Act** | **Decision section** |
| To make conditions or time period for an exemption order | Trade Practices Act 1974 Part XI & XIC | 152AT | 152AV | Trade Practices Act 1974 Part XI & XIC | 152BE & 152BF |
| **Defence** | | | | | |
| To affirm, vary or revoke an internal review decision | Defence Force (Home Loans Assistance) Act 1990 | 33(6) [to affirm or vary] | 34 | Defence Force (Home Loans Assistance) Act 1990 | 33(6) [to revoke] |
| **Education, Training & Youth Affairs** | | | | | |
| To declare an education institution | Overseas Students (Refunds) Act 1990 | 4(1)(b)(iv) | 4(3) | Overseas Students Charge Act 1979 | 4 "technical and further education institution" |
| To determine to make a grant of financial assistance | Higher Education Funding Act 1988 | 15 | 110 | States Grants (Primary and Secondary Education Assistance) Act 1996 | 47 & 80 |
| **Employment, Workplace Relations & Small Business** | | | | | |
| To approve a provider | Safety Rehabilitation and Compensation Act 1988 | 34 | 60 & 64 | Seafarers Rehabilitation and Compensation Act 1992 | 48 |
| To request information | Seafarers Rehabilitation and Compensation Act 1992 | 126 | 76 & 88 | Seafarers Rehabilitation and Compensation Act 1992<br>Safety Rehabilitation and Compensation Act 1988 | 67<br>58 |
| **Environment & Heritage** | | | | | |
| To declare an approved institution/scientific body | Wildlife Protection (Regulation of Exports) Act 1982 | 11(1) [approved institution] | 80(b) | Whale Protection Act 1980 | 8 [scientific body] |
| To grant a permit to import | Wildlife Protection (Regulation of Exports) Act 1982 | 37 | 80(e) | Wildlife Protection (Regulation of Exports) Act 1982 | 38A |
| **Family & Community Services** | | | | | |

| LIKE DECISIONS | SUBJECT TO REVIEW | | | NOT SUBJECT TO REVIEW | |
|---|---|---|---|---|---|
| **Department** | **Act** | **Decision section** | **Review section** | **Act** | **Decision section** |
| To refuse to vary particulars in a register | Child Support (Registration and Collection) Act 1988 | 38A(3)(a) | 4, 85 & 88 | Child Support (Registration and Collection) Act 1988 | 38B(2) |
| **Finance and Administration** | | | | | |
| To register a political party or accept a nomination | Commonwealth Electoral Act 1918 | Part XI [to register a party] | 141(1) | Commonwealth Electoral Act 1918 | 172 [to reject a nomination] |
| **Foreign Affairs and Trade** | | | | | |
| To give a notice | Registration of Deaths Abroad Act 1984 | 20(4) & 21(4) | 27(d) & 27(e) | Registration of Deaths Abroad Act 1984 | 22(4) [unless provided for by reference to 22(1) in 22(2)] |
| **Health and Aged Care** | | | | | |
| To grant a licence or permit subject to conditions | Narcotics Drug Act 1967 | 9 | 14A | Narcotics Drug Act 1967 | 11 |
| To determine a period | Private Health Insurance Incentives Act 1998 | 18-15(1)(c) [payment by instalment] | 19-10(f) | Private Health Insurance Incentives Act 1998 | 18-10(3) [for repayment] |
| **Immigration & Multicultural Affairs** | | | | | |
| To grant or amend a certificate | Australian Citizenship Act 1948 | 47 [to amend] | 52A | Australian Citizenship Act 1948 | 32 [to grant] |
| **Industry, Science & Resources** | | | | | |
| To allow a further period for a review request | Liquid Fuel Emergency Act 1984 | 44(2) | 44(1) | Industrial Research and Development Incentives Act 1976 | 41(2) |
| To grant or renew a licence | Management and Investment Companies Act 1983 | 25 [to renew] | 47 | Management and Investment Companies Act 1983 | 21(1) [to grant] |
| **Prime Minister & Cabinet** | | | | | |

| LIKE DECISIONS | SUBJECT TO REVIEW | | | NOT SUBJECT TO REVIEW | |
|---|---|---|---|---|---|
| **Department** | **Act** | **Decision section** | **Review section** | **Act** | **Decision section** |
| To fail to fulfil or impose a term or condition | Aboriginal & Torres Strait Islander Commission Act 1989 | 20(1) & (3) [to fail to fulfil] | 196(1)(c) | Aboriginal & Torres Strait Islander Commission Act 1989 | 14(2) |
| **Transport & Regional Services** | | | | | |
| To approve modification or supply of a nonstandard vehicle | Motor Vehicles Standards Act 1989 | 14A [to supply] | 39(1) | Motor Vehicles Standards Act 1989 | 13A [to modify] |
| To extend or cancel an insurance certificate | Protection of the Sea (Civil Liability) Act 1981 | 17(3) [to cancel] | 19(1)(b) | Protection of the Sea (Civil Liability) Act 1981 | 17(1)(b) [to extend] |
| **Treasury** | | | | | |
| To declare a person is not entitled to an exemption | Income Tax Assessment Act 1936 | 202EB(3) | 202F(e) | Income Tax Assessment Act 1936 | 202EA(3) |
| To impose conditions in relation to an acquisition | Insurance Acquisitions and Takeovers Act 1991 | 41(1) | 67(1) | Financial Sector (Shareholdings) Act 1998 | 16 |
| **Veterans' Affairs** | | | | | |
| To determine the terms and conditions of a loan | Defence Service Homes Act 1918 | 36 [maximum term] | 44 | Defence (Re-establishment) Act 1965 | 53 [terms and conditions] |

A detailed comparison of a number of statutes highlights the fact that the legislative drafting process produces inconsistencies in both the existence and form of merits review provisions in Commonwealth legislation. Consider the following:

1. Legislation may provide for general review of all administrative decisions conferred by a statute. For example:

   - section 78 of the *Fringe Benefits Tax Assessment Act 1986* grants a general right of review of decisions made under it;

   - section 33 of the *Trans-Tasman Mutual Recognition Act 1997* grants a review of all decisions conferred by the Act upon a local registration authority; and

- section 99 of the *Defence Force Retirement and Death Benefits Act 1973* grants a review of all decisions of the Defence Force Retirement and Death Benefits Authority under this Act.

2. Legislation may provide for general review of administrative decisions conferred by an enactment except for those decisions that are specified as being not subject to merits review. For example:

   - section 1317B of the Corporations Law3 grants a general review of the merits of administrative decisions conferred under it with the exception of those decisions specified in section 1317C;

   - sections 1240, 1243, 1247 and 1283 of the Social Security Act 1991 provide for a review of decisions conferred by the Act except for the non-reviewable decisions that are detailed in section 12504;

   - section 25 of the Parliamentary Retiring Allowances Act 1948 grants a review of all decisions conferred upon the Parliamentary Retiring Allowances Trust by the Act except for decisions of the Trust that are revoked by it upon reconsideration;

3. Legislation conferring administrative decision-making powers may make no provision for review of resulting decisions. For example, there is no provision for review of any of the administrative decisions conferred by the *States Grants (Primary and Secondary Education Assistance) Act 1996*.

4. Inconsistencies can arise in the provision of merits review of administrative decisions by statutes that form part of a group related by purpose and administered by the same department. There is no explanation for the merits review inconsistencies between each of the *Bounty Acts* in Table 3, even though each Act has been legislated for the same purpose, ie to provide for the payment of a bounty.

**Table 3**

| **Types of decisions** | **Bounty Acts** | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Bed sheeting | Books | Citric Acid | Computers | Fuel Ethanol | Machine Tools & Robots | Photographic Film | Printed Fabrics | Ships | Textile Yarns |
| Definitions | - | N | - | - | - | Y/N | - | Y/N | N | Y/N |
| Declarations & determinations | - | N | - | Y/N | - | - | - | - | Y | Y |
| Specification of bounty | - | - | - | - | - | - | - | - | - | N |
| Terms & conditions of advances | N | N | N | N | - | N | N | N | N | N |
| Determination of cost/value | - | N | - | N | - | N | - | - | N | Y |
| Export to New Zealand | - | - | N | N | N | N | N | - | N | - |
| Conditions of registration | - | - | - | - | - | N | - | - | - | - |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Granting production allocation | - | - | - | - | N | - | - | - | - | - |
| Approving payment of bounty | Y | Y | Y/N | Y | N | Y | Y/N | Y | Y | Y |
| Refusing to approve payment of a bounty | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y |
| Variation or adjustment of a claim | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y |
| Determination of an amount of security | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y |
| Registering (or refusing to register) a person or premises | Y | Y | Y | Y | N | Y | Y | Y | Y | Y |
| Determination of a period of registration | Y | Y | - | N | - | Y/N | - | - | N | - |
| Cancellation of a registration | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y |
| Making a capitalisation grant | - | - | - | - | - | - | - | - | - | N |
| Conditions of agreement | - | - | - | - | - | - | - | - | - | N |
| Sale of identified asset | - | - | - | - | - | - | - | - | - | N |
| Failure to meet conditions | - | - | - | - | - | - | - | - | - | N |

Y: decisions reviewable. Y/N: some decisions reviewable.
N: decisions not reviewable. - no decisions.

5. A statute may not provide for a right of review of an administrative decision conferred by it because of a typographical error or an oversight in drafting. For example, paragraphs 15(l) and (m) of the *Liquefied Petroleum Gas (Grants) Act 1980* provide for a review by the AAT of an estimate made by the Minister or an approved person for the purposes of a provision required by sub-section 7(4) and 7(6) respectively. However, there is no estimate required to be made under sub-section 7(6) nor is there any other decision required to be made under this sub-section. Coincidentally, sub-section 7(5) of the Act does require an estimate to be made by the Minister or an approved person on the exact same terms as is provided in sub-section 7(4) and yet there is no right to have a review of the estimate made under sub-section 7(5) granted by section 15 or any other section of the Act. This anomaly appears to be a drafting error and the reference to sub-section 7(6) in sub-section 15(m) should correctly be to sub-section 7(5). Alternatively, if it is not a drafting error, then there is no explanation for the requirement to make one decision reviewable and the other like decision unreviewable.

6. A statute may provide for:

   - specific merits review of administrative decisions by Parliament, as with sub-section 214(c) of the *Native Title Act 1993* which enables Parliament to review specified decisions by exercising its power to disallow an instrument.

- determination of merits review of administrative decisions by regulation, as with section 74 of the *Sydney Airport Demand Management Act 1997* which does not contain any provisions for review of the administrative decisions conferred by it but allows for review of decisions made under the Act to be determined by regulation.

- merits review by both general and specific merits review provisions, as with the *Taxation Administration Act 1953* which grants a review of the merits of specific decisions of the Commissioner of Taxation under section 14Y of the Act but general merits review of any decision by the Commissioner of Taxation disallowing an objection under section 14ZZ of the Act.

- merits review of decisions in a number of separate sections, as with the *National Health Act 1953* which identifies the reviewable decisions conferred either by the section containing the decision-making power or by another section not containing a decision-making power and makes review available by sub-sections 40AE(6), 105AAB(7), 105AB(1AA), (1A), (2), (2A), (2B), (3), (3A), (3B), (3C), (3D), (4), (4AAA), (4AA), (4A), (4B), (5), (6), (6AA), (6AB), (6A), (6B), (7), (7A), (7B), (8), (8A), (8B), (9), (12), (13), (14), and 105AD(2).

- merits review of decisions in one section for ease of reference, as with section 204 of the *Broadcasting Services Act 1992* which incorporates a tabulated format detailing decisions under the Act that are reviewable, the section of the Act relevant to the decision and the person who may make an application for review.

7. An Explanatory Memorandum accompanying a bill before Parliament may include reasons why administrative decisions proposed to be conferred by legislation are or are not subject to review, as with the Explanatory Memorandum that accompanied the *Lands Acquisition Bill 1988*, or may not provide any comment or explanation about the need for reviewing any of the decisions to be conferred by a bill, as with the Explanatory Memoranda that accompanied the bills in relation to the *Corporations Law*.

Consequently, in providing for merits review of decisions conferred by legislation, statutes may make provision for review of all decisions, make provision for review of some or all decisions in a particular class while limiting or excluding review of decisions of another class, make no provision for review of any decisions, provide for review by disallowable instrument, provide for possible review by regulation, incorporate review provisions in one section, incorporate review provisions in several related or unrelated sections, be presented in general wording, be presented in specific and extensive wording or be presented in tabulated form. Moreover, an explanation of the reasons why provision has or has not been made for merits review of decisions conferred by statutes is made available at random.

**A breakdown in the Commonwealth legislative drafting process**

It is apparent that the executive arm of the Commonwealth government is allowed take an ad hoc approach to the enactment of merits review provisions when legislation is drafted. A summary of the legislative process is outlined in the *Legislation Handbook* of the Department of Prime Minister and Cabinet. While a Minister seeks policy approval for a measure and bids for a place in the legislation programme, a department will be preparing drafting instructions and lodging them with the Office of Parliamentary Counsel (OPC). OPC will then draft a bill in accordance with a policy approval (PMC 2000: 79). The *Legislation Handbook* addresses the preparation of drafting instructions. It provides that where legislation contains provisions conferring discretionary powers (for example, the giving of approvals, the granting of licences or permits, or the imposition of some penalty or obligation) the exercise of those powers should normally be subject to some form of external review on the merits. Moreover,

it provides that the Attorney-General's Department must be consulted on the review procedures to be incorporated in proposed legislation, which confer discretionary powers upon ministers or officials (PMC 2000: 32). It is therefore the responsibility of the instructing officer of an instructing department to determine whether proposed legislation contains provisions conferring discretionary decision-making powers and, if so, consult with the Attorney-General's Department on the review procedures to be incorporated in the proposed legislation.

The Attorney-General's Department has prepared guidelines on administrative law aspects of legislative proposals. The primary aim of these guidelines is to promote good administration through the achievement of an improved legislative basis for decision-making. The purpose of the guidelines is to assist the policy maker by setting out the correct procedures to be followed in relation to administrative review aspects of legislation and to outline the Attorney-General's policies on external review by identifying the types of decisions that are or are not appropriate for administrative review. The guidelines specify that the basic test for deciding if an administrative decision should be subject to merits review is a determination of whether the exercise of a power will affect the interests of a person or organisation. They also list the main categories of decisions that may not be appropriate for merits review (which do not wholly match the exceptions determined by the ARC). Furthermore, the guidelines require the policy maker to consult the Attorney-General's Department if it is considered that one or more of these exceptions may apply or if it is considered that there are other reasons for excluding administrative review (A-G 1991: 1, 2, 5, 6). In discussions about the guidelines, an officer of the Civil Law Division of the Attorney-General's Department, which division is responsible for administrative law issues, has raised several matters that are relevant to any discussion about the inclusion of merits review provisions in draft legislation:

- the Attorney-General has never formally adopted the principles developed by the ARC for determining which decisions are suitable for merits review. This may explain why the exceptions determined by the Attorney-General's Department do not entirely match the exceptions identified by the ARC.

- while the guidelines have only ever been followed by departments on an ad hoc basis, their present-day relevance is questionable as they are "now out of date in parts ... simply have not been revised ... and is not a document that people should have regard to in drafting legislation as it could be misleading". As a result instructing officers who are currently considering the reviewability of the merits of administrative decisions when preparing drafting instructions are operating without any guidelines that are formally recognised by the Attorney-General's Department for the purpose.

- instructing officers, OPC and the Attorney-General's Department share the responsibility for drafting legislation that meets the legal policy requirements of the government. Since the Attorney-General's guidelines are no longer of relevance, they each should have regard to the *Legislation Handbook*, the principles developed by the ARC (even though these have not been adopted by the Attorney-General's Department) and the terms of reference of the Senate Scrutiny of Bills Committee or the Senate Standing Committee on Regulations and Ordinances to ensure that legislation does comply with these legal policy requirements. In addition, they should rely on accepted practice and the scrutiny of the Senate committees to achieve this compliance.

- it is not general practice for instructing officers to contact the Attorney-General's Department at the drafting instruction stage and contacts that are made usually originate from experienced instructing officers.

- there is no formal training for instructing officers, the legislative drafting is not a tightly organised process for drafting a bill, and the pattern for the insertion of review provisions does not meet a clear and consistent standard as each bill is considered on its merits.

The comments of a legal officer in another department (who has been involved in preparing drafting instructions for two separate departments) are also worth noting:

- there is no manual, fixed format or checklist to be followed during drafting, although all departments have a broad template for preparation of drafting instructions but this is not consistent between departments.

- the two departments with which he has had experience follow the *Cabinet* and *Legislation Handbooks* in drafting as there is no other documentation to aid an instructing officer.

- the experience of the people involved in the drafting process (ie policy developers, instructing officers, legal sections, OPC, other interested departments, the relevant minister and Parliament) is relied upon to 'get it right'.

- the instructing officer determines how drafting work is carried out but a policy position is generally settled prior to written instructions being given to either an instructing officer or the legal section of a department who then refine the detail by further contact with the policy developers.

- the format of the instructions may be standard for a department (ie fixed headings and other methods of formatting) or not depending on whether the type of legislation being drafted lends itself to standardisation.

- although administrative review issues that may require consultation with the Attorney-General's Department can arise at the drafting instruction stage, generally the involvement of the department comes after the draft bill has been forwarded to it by OPC, at which time the Attorney-General's Department can determine that a review provision be inserted in a bill. Similarly, OPC can also determine that a review provision be inserted in a bill as it is being drafted.

An officer of OPC has advised that, at the time a draft bill is distributed by OPC to the Attorney-General's Department, an OPC checklist accompanies the draft bill to identify matters arising in a bill which should be considered by the various divisions of the Attorney-General's Department. One item on this checklist refers the Civil Law Division to a matter which "gives an administrative discretion that should perhaps be reviewable" and highlights the matter for consideration by the Civil Law Division if checked by OPC. However the Attorney-General's Department has advised that this checklist does not always accompany draft bills but can be replaced by a memorandum when the bills are forwarded by OPC to the Attorney-General's Department.

Both Parliament and the Executive recognise that the merits of an administrative decision should be externally reviewable if the rights of a person are affected by it unless there is good reason for the decision not to be reviewable. The inconsistencies in rights of external merits review of administrative decisions that have been allowed to develop result in a contravention of this principle. The Senate has established the Scrutiny of Bills Committee and the Standing Committee on Regulations and Ordinances to safeguard this principle while Parliament, through legislation, has established the ARC to oversee the classes of decisions that ought to be subject to review. In the meantime cabinet, through the *Cabinet* and *Legislation Handbooks*, has charged the instructing officers of departments and the

Attorney-General's Department with responsibility for ensuring that external merits review of administrative decisions is provided for in legislation by stipulating that the Attorney-General's Department must be consulted on the review procedures to be incorporated in any legislation that proposes to confer discretionary decision-making powers upon ministers or officials. However, instructing officers do not generally consult with the Attorney-General's Department about the need for review provisions at the drafting stage and they receive no formal training to assist them in assessing the need for merits review provisions in draft legislation. At the same time, the Attorney-General's Department has no formal guidelines for instructing officers to follow in determining whether legislation should provide for review of the merits of administrative decisions conferred therein but expects that the requirements of the *Cabinet* and *Legislation Handbooks*, the principles developed by the ARC and the scrutiny of OPC, the Attorney-General's Department and the two Senate committees will ensure appropriate review provisions are inserted in legislation.

There has been a breakdown in the legislative drafting process because there are no procedures to ensure that merits review rights are uniformly provided for in Commonwealth legislation. This is evidenced by the inconsistencies that the analysis has identified and by the information about the process for including merits review provisions in draft legislation that has been provided by the departmental officers. Consequently, the Commonwealth legislative drafting process is failing to provide a just and fair system of external merits review for persons affected by decisions.

**Diminished executive accountability to Parliament**

Parliament is charged with the oversight of the executive arm of government in Australia. This principle has been recognised by the High Court of Australia in *New South Wales v The Commonwealth*[5] when Barwick CJ said:

> Sections 62 and 64 of the Constitution introduced responsible government: on the one hand, leaving aside most exceptional circumstances, the Crown acts on the advice of its Ministers and, on the other hand, the Ministers are responsible to the Parliament for the actions of the Crown. In the long run the Parliament, comprising the House of Representatives and the Senate, is in a position to control the Executive Government.[6]

In its *Report of the Advisory Committee on Executive Government*, one of the Advisory Committees to the Constitutional Commission described the Australian system of responsible government as a 'parliamentary executive' system because the executive government in Australia retains office only so long as it can maintain the support of a majority of members of the Lower House. Moreover the Advisory Committee recognized that the parliamentary executive system has a prime minister and other ministers who are members of and answerable to Parliament (ACCC 1987: 11, 12). While Parliament provides a ministry to carry on the executive government of Australia and to prepare the greater part of the legislative proposals for Parliament, the House of Representatives has a more significant role than the Senate in the appointment of a ministry. However, both the House of Representatives and the Senate have formal powers of similar scope to keep the performance of the executive government under scrutiny (Sawer 1988: 113, 114). To uphold ministerial responsibility, the lines of accountability of the Executive run from department officers through the relevant minister to the cabinet, then to Parliament and ultimately to the electors. However, in practice this ministerial accountability is confined to those matters under ministerial control whereas it has proved necessary to entrust democratic restraints to other institutions (such as courts, tribunals, parliamentary committees or an ombudsman) to deal with matters partly or wholly outside the ambit of ministerial control and in some cases to check ministerial power itself (Parker 1978: 353, 354).

The political party that controls the House of Representatives influences the decision-making accountability of the executive arm of the government to Parliament after decisions

have been made. As the ministry appointed by the party controlling the Lower House also controls the executive arm of the government, it is in a position to regulate the amount of attention that the House of Representatives pays to administrative decisions of government departments by managing the flow of information between the Executive and the House of Representatives. Ministers who sit in the Senate are similarly able to control the flow of information from the Executive to the Senate. But the Senate, through its system of committees, is in a more effective position to watch over the actions of the Executive particularly when the same political party that holds the balance of power in the House of Representatives does not control the Senate. However, the Senate is generally unable to dictate to the Executive without the acquiescence of the House of Representatives.

Parliament faces similar difficulties when it is endeavouring to ensure that the Executive will be accountable for administrative decisions that are to be empowered by new legislation. Parliament usually relies upon the Executive to formulate the legislative proposals that are submitted to it. Consequently the executive arm of government routinely settles the provisions for merits review of decisions proposed to be conferred upon the Executive by legislation tabled in Parliament. And yet, the same political party that controls the House of Representatives also controls the Executive. The Senate's committee system is able to provide a mechanism for reviewing legislation before it, however the Senate can be constrained from taking action to amend legislation that makes decisions that are suitable for merits review unreviewable if there is no prospect of the House of Representatives agreeing to the amendments. Parliament may have little opportunity to determine what decisions are suitable for merits review as a result. This was not Parliament's intention when it enacted the AAT Act, as the Hon. KE Enderby (who was the minister responsible for the passage of this legislation through the Parliament) pointed out in his Second Reading speech to the House of Representatives:

> The Tribunal is to be regarded as the machinery provided by Parliament for adjudication rather than as part of the machinery of department administration... Parliament will retain control over the matters that are to go before the Tribunal.[7]

The legislative drafting process permits the Executive's officers to determine in the first instance if decisions proposed to be conferred by a bill will be subject to merits review. Consequently, the Executive is able to control the extent to which merits review provisions are incorporated in legislation before it is presented to Parliament. If the Executive excludes otherwise reviewable decisions from merits review at the drafting stage of the legislation process and does not alert Parliament to their exclusion when legislation is tabled, then Parliament more often than not passes the legislation without giving due consideration to the adequacy of the merits review provisions contained therein. In these circumstances, the merits review process is a part of the machinery of the Executive rather than the machinery provided by Parliament for adjudication and Parliament does not necessarily have control over deciding the matters that are to be subject to merits review.

Parliament requires that provision be made in legislation for external merits review of administrative decisions because it cannot monitor the enormous number of administrative decisions that are made by the Executive. As recommended by the Bland Committee, the Department of Prime Minister and Cabinet has issued guidelines by way of the *Cabinet* and *Legislation Handbooks* to ensure that this requirement of Parliament is adhered to. While it is generally accepted that not all administrative decisions are suitable for review on their merits, it is for Parliament to decide the types of decisions that are appropriate for review. Hence, Parliament has established the ARC to advise the Executive on the classes of decisions that should be subject to review and to report annually about its activities.[8] Although the Executive is not required to follow the ARC's recommendations if they have not been formally adopted, it is proper for Parliament to expect that the Executive adheres to appropriate procedural safeguards in drafting legislation so that the intentions of Parliament

and the Department of Prime Minister and Cabinet are put into effect. This would require a legislative drafting process that would ensure the Executive complies with the *Cabinet* and *Legislation Handbooks* in deciding whether or not merits review of decisions should be provided for in a bill. It would also require that Parliament be fully informed of the reasons why the Executive has formed a view that a decision or class of decisions proposed to be conferred by legislation should not be reviewable on their merits. Anything less than this diminishes procedural safeguards and falls short of fundamental legislative principles.

If the Executive does not provide Parliament with the opportunity to properly consider whether there should be merits review of decisions or classes of decisions which are proposed to be conferred by a bill, and decisions that should be reviewable on their merits are left unreviewable as a result, then the Executive is avoiding its obligations to be accountable to Parliament for any unreviewable decisions that are subsequently made unless an unfair or unjust decision is otherwise brought to the attention of the Parliament. Parliament does not have every opportunity to fully consider the need for merits review of all administrative decisions proposed by a bill when it is tabled in Parliament. The volume of new legislation passing before Parliament prevents a detailed debate of every decision that may be conferred by a bill while the means by which bills conferring decision-making powers are tabled in the Parliament can bury the fact that decisions which are suitable for merits review are left unreviewable. Consider the following example.

Section 16A of the *Law Officers Act 1964* was used as an example (in Table 2) of an enactment containing an unreviewable decision even though it was suitable for review. This section was inserted into the *Law Officers Act 1964* by schedule 1 of the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1983*. Schedule 1 of this Act also provided for amendments to a number of other Acts unrelated to the *Law Officers Act 1964*. Inexplicably, schedule 2 of the same *Statute Law (Miscellaneous Provisions) Act (No. 2) 1983* provided for a number of specific amendments to the *Law Officers Act 1964*, but no amendments to any other Act. The adequacy of the proposed merits review provisions in section 16A of the *Law Officers Act 1964* was no doubt obscured by their inclusion in schedule 1 of the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1983*, whereas Parliament would have been provided with a better opportunity to assess the impact of the new section if it had been included in schedule 2 of the Act.

The Access to Justice Advisory Committee recognised a need for improved scrutiny of legislation and recommended better resources for parliamentary committees to fulfil their role in this regard (ALRC 2000: 277). However it is impractical to expect members of Parliament or parliamentary committees to carry out the work of the Executive by sifting through each section and schedule of every bill drafted by the Executive and tabled in Parliament to ensure that the Executive has fulfilled its duties and obligations to Parliament by making proper provision for merits review of the administrative decisions conferred in each bill. Rather, the Executive should ensure that Parliament is fully informed of the reasons why it proposes that any otherwise reviewable administrative decision should not be subject to review. Parliament can then decide whether the merits of such administrative decisions are or are not reviewable.

**Uniform legislative procedures**

Legislative procedures that require the inclusion of uniform merits review provisions in draft legislation would ensure that inconsistencies in the rights of review of the merits of administrative decisions are either eliminated or are at least explained by the Executive. Parliament needs to enact legislation that would:

- specify the principles for determining what decisions are suitable for merits review, which would be based upon the principles and guidelines already developed by the Administrative Review Council and the Attorney-General's Department;

- require these principles to be followed by the Executive in the drafting of all new legislation by inserting provisions for merits review of any decision falling within the merits review principles unless there is good reason not to follow the principles;

- require the communication to the Parliament of any good reasons for not following the merits review principles so that Parliament can consider them before legislation excluding the decisions from merits review is enacted;

- require a review, and where necessary amendment, of existing legislation to ensure that the merits review principles are applied consistently unless there is good reason not to follow them (the analysis in Table 1 shows that this is an achievable task as it would require a review of 32 % of all Commonwealth Acts).

The enactment of these legislative procedure provisions would be in accord with a general principle of the ARC that transparency and accuracy are enhanced if legislative provisions of a general application are contained in a single Act (ARC 1995: 167). On a more practical level, these legislative procedures should address the following considerations:

- standard merits review provisions should be inserted in bills when they are being drafted. Provisions for this purpose would be prepared by the Executive and be reviewable by Parliament as disallowable instruments. They should provide for the several options that could arise as a result of an assessment of the need for merits review by an instructing department in preparing drafting instructions and could include provisions enabling merits review of all decisions, merits review of some decisions with other decisions being excluded because they fall within the predetermined exclusion principles or no merits review of any decisions because they fall within the predetermined exclusion principles;

- the Explanatory Memorandum accompanying a bill should provide for a full explanation of the reasons why a decision or class of decision proposed to be conferred by the bill is excluded from the merits review process so that Parliament can properly assess whether the excluded decision or classes of decisions are not suitable for review;

- the Explanatory Memorandum accompanying a bill should include an explanation by the Executive of the detrimental effects that the provision of merits review of a decision or class of a decision would have on the efficient operation of a department if this is one of the reasons for the proposed exclusion;

- the staff of instructing departments who are responsible for preparation of drafting instructions should be required to undertake training with the Attorney-General's Department to ensure that they are aware of the procedures that ought to be followed in providing for merits review of administrative decisions in legislation in accordance with the wishes of Parliament and cabinet.

The concept of legislating for administrative procedures is not novel. Germany has enacted administrative procedure legislation for the purpose of making rights of merits review of administrative decisions available to its citizens. The German administrative courts deal with the area of law concerned with disputes between government and individuals arising from the exercise of public authority. These courts are regulated by the *Administrative Courts Act*. A noteworthy aspect of the administrative jurisdiction of the German administrative courts is

its generality as their jurisdiction applies to all kinds of administrative disputes unless any of them are specifically excluded from the reach of the courts (Singh 1985: 112). All areas of German public life are covered (Foster 1996: 44).

In the Australian context, the Kerr Committee recommended that an Australian *Administrative Procedure Act* be enacted to provide for (amongst other things) the jurisdiction of review bodies but this recommendation was not acted upon. The Queensland Parliament has enacted the *Legislative Standards Act 1992* for the purpose of ensuring that an effective and efficient legislative drafting service is provided for. Section 7 of the *Legislative Standards Act 1992* requires the Office of the Queensland Parliamentary Counsel (OQPC) to provide advice to ministers and government entities on the application of fundamental legislative principles. Section 4 of the same Act provides that the criteria for fundamental legislative principles includes a requirement that legislation has sufficient regard to rights and liberties of individuals by making the exercise of administrative power subject to appropriate review. Consequently, the Queensland Parliament has legislated to control the procedures for drafting of legislation tabled before it to ensure that appropriate review of administrative power is provided for. Similarly, the Commonwealth Parliament is also able to enact legislation that would regulate the inclusion of merits review provisions in federal legislation. This could be done by amending the *Administrative Appeals Tribunal Act 1975*.

### *Administration overload?*

When any variations to the scope of merits review rights are proposed, a concern is often raised that changes providing for broader or more general rights of merits review can lead to a large increase in the workload of the administrative system. While any proposal for legislation of uniform procedures for merits review may lead to an expansion of the scope of decisions that may be open to merits review, this does not mean that there will be a significant increase in the number of decisions for which review is sought. If this increase did occur, then perhaps the decisions in question are in need of being made subject to merits review, as there are a number of persons affected by them who have a complaint. This point was considered by the ARC in the development of its merits review principles and the Council recommended that the potential for a relatively large number of people to seek merits review of decisions would not justify excluding those decisions from review. Rather, other preferable methods for containing the effect of a high review rate should be employed. These methods would include ensuring a high standard of primary decision-making, implementing appropriate case management techniques and creating a speedy and informal intermediate level of review (ARC 1999: 31).

However, there is no evidence that the administrative system will necessarily be overloaded by the introduction of uniform merits review provisions in the manner proposed. The external merits review provisions in the *Corporations Law* are general in nature with specific exceptions from merits review. When the *Corporations Law* was first legislated, there was concern that the merits review provisions would apply to a large number of administrative decisions and could potentially overload the administration as a consequence (Baker, O'Brien and Mallam 1991: 144). However, the *Administrative Appeals Tribunal Annual Report 1998-1999* reveals that 36 applications relating to the corporations jurisdiction were lodged with the Tribunal in 1999. This was one percent of all applications lodged with the Tribunal in that year (AAT 1999: 100). Furthermore, the fact that Parliament has recently repealed the *Corporations Law* and passed the *Corporations Act 2001* without changing the merits review provisions in relation to corporations shows that Parliament is satisfied with the operation of the review mechanisms in the legislation regulating corporations. Similarly, the *Social Security Act 1991* has merits review provisions that are general in nature with specific exceptions. In 1997, Margaret Guilfoyle undertook a review of the social security review and appeals system in order to determine the impact of the system on the quality and efficiency

of decision-making by Department of Social Security staff. She commented in her report to the Minister for Social Security:

> The (Social Security) system is comprehensive, complex and costly...The legal and administrative systems that give effect to the policies of the government are extensive and the number of primary decisions made awesome. It is a system requiring 'mass decision-making' ...
> The millions of decisions required to deal with the payments to over 6 million recipients, in the year to 30 June 1997 had 8653 appeals against DSS decisions lodged with SSAT and 1224 with the AAT. The applications that proceed to external review are small in number when compared with the number of administrative decisions in the Social Security system. (DSS 1997: 35)

If the merits review processes of the corporations and social security systems can be made properly accountable to Parliament without overburdening the staff of the departments administering them, then the systems administered by other departments should also be able to be made similarly accountable. When, as part of its review of the federal civil justice system, the Australian Law Reform Commission assessed the workload of the federal merits review tribunals it concluded that review of only a small proportion of the administrative decisions made each year by federal government departments is ever sought (ALRC 2000: 632, 633). As a result, it seems unlikely that the federal administrative system will be over-burdened because of the incorporation of a uniform and accountable system of external merits review into Commonwealth legislation. However, Parliament can require the Executive to explain what impact a provision for merits review will have on the administrative system in the Explanatory Memorandum for a bill so that the full effect of providing for merits review can be assessed by Parliament before a bill is passed.

## Conclusion

Ever since Australia adopted the noteworthy administrative law reforms in 1975, the Commonwealth government has been accredited as a world leader in the development of administrative law. Such was the vision of the Kerr and Bland Committees. However, over time, the merits review element of the Commonwealth administrative law system has fallen behind the standard of administrative law provided by some other countries and expected by the people of Australia. It seems inconceivable that a person with a complaint about the merits of a Commonwealth administrative decision has recently been forced to ask the High Court to determine whether the complaint can be reviewed by the Administrative Appeals Tribunal.[9] More importantly, the decision of the High Court highlights the difficulties that must be faced by a person with a complaint about an administrative decision when an ambiguous provision for merits review of the decision is legislated.

Parliament is able to redress the degeneration of the merits review system by standardising the legislative drafting procedures necessary to provide for external merits review in Commonwealth legislation. There is no doubt that good government requires a balance between accountability and efficiency. However the Parliament, not the Executive, has the overriding responsibility to determine the boundaries of accountability and efficiency and to ensure that the system of merits review functions in a just and fair manner. Standardisation of the legislative drafting procedures would enable Parliament to retain control over the determination of what decisions should be subject to merits review. At the same time, the Executive would have the opportunity to ensure that its efficiency is not unduly impaired by allowing Parliament to determine, on the advice of the Executive, that some otherwise reviewable decisions are not suitable for review for good reason.

The parliamentary executive system of government allows the Executive to determine what administrative decisions will be subject to merits review in the legislative process. The House of Representatives, which is controlled by the same political party that appoints the ministers who control the Executive, generally accepts the Executive's determination of what decisions will be subject to merits review while the Senate has little power to require that the House of

Representatives amends a bill to provide for merits review of a reviewable administrative decision that has been left unreviewable. If Parliament does not legislate to ensure that uniform merits review provisions are included in Commonwealth legislation, then it must be concluded that Parliament is satisfied with the current ad hoc system of external merits review and is responsible for the breakdown in the legislative drafting process that is allowing the executive arm of government to be unaccountable to it for some administrative decisions. Parliament must also accept responsibility if a person is affected by a decision in an unjust and unfair manner as a consequence.

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**Endnotes**

1 Section 25(1) An enactment may provide that applications may be made to the Tribunal:
   (a) for review of decisions made in the exercise of powers conferred by that enactment; or
   (b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.

2 The Acts incorporating these legislative initiatives were the Ombudsman Act 1976, the Administrative Decisions (Judicial Review) Act 1977 and the Freedom of Information Act 1982.

3 Although Parliament has repealed the *Corporations Law* and, in its place, passed the *Corporations Act 2001*, the analysis is based upon statutes allocated to departments by the Administrative Arrangement Order of 21 October 1998. However, the review provisions in the *Corporations Act 2001* are the same as the provisions in the *Corporations Law*.

4 Act No. 192 of 1999 repealed these sections. The present system of merits review of social security decisions, which is now provided by Part 4 of the *Social Security (Administration) Act 1999*, remains much the same as the system provided by the *Social Security Act 1991*.

5 (1975) 135 CLR 337.

6 At 364.

7 House of Reps debates, 1975, 1186-1188.

8 ARC Annual Report 1999, 77.

9 *Allan v Transurban City Link Limited* (2001) 183 ALR 380.