

## PUBLIC AND PRIVATE INTERESTS IN AUSTRALIAN ADMINISTRATIVE LAW

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### I INTRODUCTION

The public–private distinction is commonly examined in the administrative law literature in relation to judicial review of private entities exercising public functions.<sup>1</sup> There are however other ways in which the public–private distinction affects administrative law. It is also used in the literature to chart the development of judicial review doctrine and procedures. Well-known academics in the United States (most famously Professor Stewart)<sup>2</sup> and the United Kingdom (primarily Emeritus Professor Harlow and Professor Rawlings)<sup>3</sup> have identified the ways in which judicial review of administrative action in those countries has evolved from a private rights and interests model towards a public interest model.

This article seeks to apply these models to Australian administrative law. There are three primary questions that it seeks to answer. Firstly, what are the

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1 See, eg, Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5<sup>th</sup> ed, 2013) 128–46; Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 70–5; Justice WMC Gummow, ‘A Fourth Branch of Government?’ (2012) 70 *Australian Institute of Administrative Law Forum* 19, 24.

2 Richard B Stewart, ‘The Reformation of American Administrative Law’ (1975) 88 *Harvard Law Review* 1669; Richard B Stewart, ‘Administrative Law in the Twenty-First Century’ (2003) 78 *New York University Law Review* 437. Professor Stewart’s 1975 article was at one time the most cited American administrative law article: Fred R. Shapiro, ‘The Most-Cited Law Review Articles Revisited’ (1996) 71 *Chicago-Kent Law Review* 751, 767.

3 Richard Rawlings, ‘Modelling Judicial Review’ (2008) 61 *Current Legal Problems* 95; Carol Harlow, ‘Public Law and Popular Justice’ (2002) 65 *Modern Law Review* 1; Carol Harlow, ‘A Special Relationship?: American Influences on Judicial Review in England’ in Ian Loveland (ed), *A Special Relationship?: American Influences on Public Law in the UK* (Clarendon Press, 1995) 79; Richard Rawlings, ‘Courts and Interests’ in Ian Loveland (ed), *A Special Relationship?: American Influences on Public Law in the UK* (Clarendon Press, 1995) 99; Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge, 1992) 310–14.

characteristics of a public interest model? Secondly, what characteristics of Australian administrative law can be understood as being within the public interest model and what restricts such a model from operating? And thirdly, how could a public interest model be developed in Australia and what problems would it raise?

The private interest model and an ‘enforcement’ model of judicial review have been utilised by Professor Cane and Leighton McDonald in their explanation of Australian standing laws.<sup>4</sup> Their discussion of these models reflects a common thread in the literature on standing and its relationship to different understandings of the function of judicial review.<sup>5</sup> However, the distinction between the private rights and interests model and the enforcement model is not only made in relation to standing. As Cane and McDonald point out, the distinction has also been made by the High Court in *Bodruddaza v Minister for Immigration and Multicultural Affairs*<sup>6</sup> in relation to the prerogative writs.<sup>7</sup> There is therefore a history of using models to explain judicial review of administrative action. In this article, the use of such models will be extended beyond standing and remedies to the grounds of judicial review.

I will argue that while Australian law has aspects of all three models of judicial review (private rights and interests, enforcement and public interest) the first two models dominate Australian administrative law doctrine, and that further steps towards a public interest model seem possible but come with difficulties. The article proceeds in the following manner. Part II introduces the basic features of the judicial review models and their relationship to understandings of democracy. Part III seeks to answer the question of whether Australia has a public interest model by examining the most relevant areas of judicial review doctrine – standing, procedural fairness and public participation, and rationality review. In Part IV, I examine the steps that could be taken towards such a public interest model and the problems that would be raised by such steps. Part V provides a brief conclusion.

## II JUDICIAL REVIEW MODELS

### A Private Rights and Interests, Enforcement, and Public Interest

It is worthwhile starting with a brief comment about judicial review models. The use of such models is understood by those who have developed and employed them as involving analyses of administrative law that are at a higher

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4 Cane and McDonald, above n 1, 177–8.

5 See, eg, S M Thio, *Locus Standi and Judicial Review* (Singapore University Press, 1971) 2–3. The close link between standing rules and the function of judicial review is one reason that academic interest in standing rules seems disproportionate to its marginal role in the cases: Aronson and Groves, above n 1, 719.

6 (2007) 228 CLR 651, 665 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

7 Cane and McDonald, above n 1, 178.

than usual level of generality. They are intended to be, in Professor Rawlings' words, 'ideal types to illuminate basic contours and so the path of historical development and possible futures'.<sup>8</sup> I intend to explain and apply the judicial review models on the basis that they help to clarify important boundary lines in Australian administrative law.

The private rights and interests model is often referred to as the 'classical'<sup>9</sup> or 'traditional'<sup>10</sup> model. Its primary feature is that judicial review of administrative decisions is designed to deal with challenges by individuals to protect against governmental impositions on their personal interests. As we will see in Part III, this model retains currency in Australia, as it does in the United States and the United Kingdom. It is clearly apparent in the following statement by Scalia J in *Lujan v Defenders of Wildlife*:

'The province of the court,' as Chief Justice Marshall said in *Marbury v Madison*, 5 US (1 Cranch) 137, 170, 'is, solely, to decide on the rights of individuals.' Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.<sup>11</sup>

The private rights and interests model is commonly referred to in metaphors. Professor Stewart refers to it as a 'transmission belt': administrative decision-making is understood as merely implementing legislative directives and the role of the courts is to require administrators to show that intrusions into the personal interests of particular individuals are supported by legislation.<sup>12</sup> Professors Harlow and Rawlings refer to it as a 'drainpipe' as standing rules, the grounds of review, and remedies are restricted and designed to protect individuals' claims against government action that directly affects them.<sup>13</sup>

As mentioned in Part I above, the private rights and interests model has been contrasted in Australia with an 'enforcement' model. The primary feature of the enforcement model is that standing is extended to enable access to the courts to challenge unlawful government actions but the grounds of judicial review and the remedies remain narrow. The enforcement model is reflected in two famous quotes – one by Lord Diplock and the other by Brennan J.

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to

8 Rawlings, 'Modelling Judicial Review', above n 3, 97. See also Stewart, 'Administrative Law in the Twenty-First Century', above n 2; Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, 2007) 27.

9 Rawlings, 'Modelling Judicial Review', above n 3, 98; Harlow, 'A Special Relationship?: American Influences on Judicial Review in England', above n 3, 83–7; Michael Taggart, 'Reinventing Administrative Law' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003) 311, 312–13.

10 Stewart, 'Administrative Law in the Twenty-First Century', above n 2, 439–40.

11 504 US 555, 576 (1992) (emphasis in original).

12 Stewart, 'The Reformation of American Administrative Law', above n 2, 1675; Stewart, 'Administrative Law in the Twenty-First Century', above n 2, 440.

13 Rawlings, 'Modelling Judicial Review' above n 3, 98; Harlow and Rawlings, *Pressure Through Law* above n 3, 311.

the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.<sup>14</sup>

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. ... The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.<sup>15</sup>

Professors Harlow and Rawlings characterise the enforcement model as a 'funnel'<sup>16</sup> – the 'drainpipe' is opened at the top to enable access to the courts for applicants who do not have private rights and interests affected by the particular government action, but the other elements of judicial review retain the restrictiveness of the classical model. They refer to this as sending 'mixed messages' to plaintiffs as the courts open themselves up to, in Lord Diplock's words, pressure groups and 'public-spirited' individuals, while at the same time such plaintiffs are likely to be unsuccessful due to the traditional restrictions inherent in the remaining elements of judicial review.<sup>17</sup>

The public interest model takes the step not taken by the enforcement model. That is, the grounds of judicial review and remedies are extended to match the liberalisation of standing rules. The model is best summarised in the following statement by Professor Stewart explaining changes to judicial review in the United States in 1960s and 1970s:

[J]udges have greatly extended the machinery of the traditional model to protect new classes of interests. ... Indeed, this process has gone beyond the mere extension of participation and standing rights, working a fundamental transformation of the traditional model. Increasingly, the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.<sup>18</sup>

The primary doctrinal developments that came with the public interest model in the United States were the development of procedural and rationality grounds of review in ways designed to protect participation in public interest-based administrative decisions.<sup>19</sup> The court's role shifts in this model from protecting individuals from harm by government action to supervising the participation of members of the public in administrative decision-making. Due to its

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14 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1982] AC 617, 644 (Lord Diplock).

15 *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J).

16 Rawlings, 'Modelling Judicial Review', above n 3, 99–102; Harlow and Rawlings, *Pressure Through Law* above n 3, 311–12.

17 Rawlings, 'Modelling Judicial Review', above n 3, 100–2; Harlow and Rawlings, *Pressure Through Law*, above n 3, 313. See also Andrew Edgar, 'Extended Standing – Enhanced Accountability? Judicial Review of Commonwealth Environmental Decisions' (2011) 39 *Federal Law Review* 435.

18 Stewart, 'The Reformation of American Administrative Law', above n 2, 1670.

19 *Ibid* 1748–52, 1756–60.

liberalisation of the elements of judicial review, Professors Harlow and Rawlings characterise it as the ‘American freeway model’.<sup>20</sup> Professor Stewart refers to it as the ‘interest representation’ model.<sup>21</sup>

## B Understandings of Democracy in the Judicial Review Models

Each of the three judicial review models can be linked to understandings of the court’s role in upholding democratic values. The private rights and interests model emphasises the democratic legitimacy of legislation – the court’s role being to ensure that administrators take actions and make decisions within the boundaries established by the relevant Act.<sup>22</sup> In terms of participation, it enables individuals affected by government action to participate in administrative proceedings according to the rules of procedural fairness and to have access to courts to challenge any decision that is made. The enforcement model also has these features but additionally enables a broader range of plaintiffs to challenge administrative actions in the courts.

The private rights and interests model fits comfortably with administrative decisions that relate to specific individuals, such as occur in much of migration and social security decision-making. Such decisions are often referred to as ‘bipolar’ decisions as the administrator’s decision affects one person only. The model does not however extend well to public interest-based regulatory action. The public interest model was developed in response to decision-making powers that require consideration of the ‘public interest’, and equivalent matters such as community benefits, social, economic and environmental matters, and public health.<sup>23</sup> Such decisions may be referred to as being ‘polycentric’ as they affect numerous persons with different interests.<sup>24</sup> Most importantly, those who are affected by such decisions are often divided into two camps – the regulated persons, usually the businesses that are directly affected by such decisions and regulations, and the ‘beneficiaries’<sup>25</sup> of the decision or regulation, the members of the public whose interests are protected by legislation relating to competition and consumers, broadcasting, the environment, food safety and public health.

There are two points that can be drawn from this understanding of public interest decisions. The first is that they have broader public, even political,

20 Rawlings, ‘Modelling Judicial Review’, above n 3, 102; Harlow and Rawlings, *Pressure Through Law*, above n 3, 311.

21 Stewart, ‘Administrative Law in the Twenty-First Century’, above n 2, 441–3.

22 Fisher, above n 8, 28; Jerry L Mashaw, ‘Bureaucracy, Democracy and Judicial Review’ in Robert F Durant (ed) *Oxford Handbook of American Bureaucracy* (Oxford University Press, 2010) 569, 573.

23 See, eg, *Competition and Consumer Act 2010* (Cth) ss 44X(1), 139G(2); *Broadcasting Services Act 1992* (Cth) ss 4(2), (3), 123; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(1); *Food Standards Australia New Zealand Act 1991* (Cth) ss 29, 59, 99; *National Health and Medical Research Council Act 1992* (Cth) s 3.

24 Lon L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353, 395–7.

25 The use of the term ‘beneficiary’ to describe such members of the public has a long history in the United States administrative law literature: see Louis L Jaffe, ‘The Individual Right to Initiate Administrative Process: The Relation between Public and Private Action’ (1940) 25 *Iowa Law Review* 485, 528; Stewart, ‘The Reformation of American Administrative Law’, above n 2, 1687.

significance that is not apparent in bipolar decisions. The second is that if the private rights and interests model is employed in respect to them, it will favour protecting the interests of regulated persons, as it is their personal or private rights and interests that are affected by the decision or regulation. The beneficiaries of the legislation on the other hand will have difficulties gaining access to the court to challenge any decision or regulation as they are less likely to be harmed by such action in their individual capacity.<sup>26</sup>

The doctrinal developments associated with the public interest model are designed to respond to such concerns. Its democracy-enhancing objective is to ensure that public interest-based decision-making powers are exercised in an informed manner that responds to the concerns of all affected interests.<sup>27</sup> The primary developments in the United States for achieving this objective have related to the judicial interpretation and application of notice and comment requirements,<sup>28</sup> which relate to ensuring decisions are made in an informed manner, and the ‘hard look’ doctrine by which the courts ensure that the decision-maker responds to the concerns of affected persons. Both of these developments have involved the courts extending and enhancing the requirements of the *Administrative Procedure Act 1946*.<sup>29</sup>

Section 553(b) of the *Administrative Procedure Act 1946* establishes a public consultation process for making administrative rules. It requires a ‘general notice’ that includes ‘the terms or substance of the proposed rule’. The courts have developed this terminology so that agencies are required to disclose with the notice the information on which the proposed rule is based.<sup>30</sup> There is also a general requirement that the agency provides reasons for the rule once it is made. Section 553(c) refers to the agency providing a ‘concise general statement of their basis and purpose’. Courts have extended this to require the agency to set out the major issues raised by the comments and the agency’s response to them.<sup>31</sup> Professor Stewart has referred to this as requiring the administrator to have ‘adequate regard to each of the competing interests so that the resulting policy may reflect their due accommodation’.<sup>32</sup> It is an application of the ‘hard look’

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26 Stewart, ‘The Reformation of American Administrative Law’, above n 2, 1687; Mashaw, above n 22, 584.

27 Stewart, ‘Administrative Law in the Twenty-First Century’ above n 2, 442. See also Fisher, above n 8, 31.

28 I will refer to this as ‘public consultation’.

29 5 USC § 553 (1946).

30 *Portland Cement Association v Ruckelshaus*, 486 F2d 375, 392–3 (DC Cir, 1973); Richard J Pierce Jr, *Administrative Law Treatise* (Wolters Kluwer, 5<sup>th</sup> ed, 2010) 583–4; Peter L Strauss, *Administrative Justice in the United States* (Carolina Academic Press, 2<sup>nd</sup> ed, 2002) 237–8.

31 *Automotive Parts and Accessories Association v Boyd*, 407 F2d 330, 338 (DC Cir, 1968).

32 Stewart, ‘The Reformation of American Administrative Law’, above n 2, 1757 (emphasis added).

principle<sup>33</sup> that has been developed from the ‘arbitrary and capricious’ ground of judicial review established by section 706(2)(A) of the *Administrative Procedure Act 1946*. According to this form of review, courts ensure that administrators have properly carried out their task (that is, the administrator has taken a ‘hard look’ at the particular issues involved) which requires the court to undertake an intensive form of judicial review (that is, the court takes a ‘hard look’ at the administrator’s decision).<sup>34</sup>

The general point is that the United States courts have developed interpretations of the provisions of the *Administrative Procedure Act 1946* that require the administrator to do more than the formal requirements of the Act.<sup>35</sup> The apparent purpose is to develop judicial review into an accountability mechanism focused on protecting and enhancing the participation of members of the public in regulatory processes. Underlying these developments was a concern that administrative authorities tend to favour the interests of regulated parties over the beneficiaries of regulations regarding the environment, health and safety, and consumers.<sup>36</sup>

The courts in the United Kingdom have also developed principles with democracy enhancing features that support the objectives of the public interest model. The most relevant relate to public consultation.<sup>37</sup> The consultation principles are often referred to as the ‘Gunning criteria’, after the decision in *R v Brent London Borough Council; Ex parte Gunning*.<sup>38</sup> They are that consultation is to occur when the proposal is at a formative stage, that notice of the proposal is sufficient ‘to permit of intelligent consideration and response’ by members of the public, that adequate time must be given for members of the public to provide their comments, and that the comments are to be ‘conscientiously taken into

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33 Thomas J Miles and Cass R Sunstein, ‘The Real World of Arbitrariness Review’ (2008) 75 *University of Chicago Law Review* 761, 761–2; Strauss, above n 30, 385. For a discussion of the ‘hard look’ doctrine from an Australian perspective, see Justice Ronald Sackville, ‘The Limits of Judicial Review of Executive Action – Some Comparisons between Australia and the United States’ (2000) 28 *Federal Law Review* 315, 326–8; for a United Kingdom perspective, see P P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990) 182–7.

34 Strauss, above n 30, 385; Stephen G Breyer et al, *Administrative Law and Regulatory Policy: Problems, Text and Cases* (Aspen Publishers, 6<sup>th</sup> ed, 2006) 348.

35 Jack M Beermann, ‘Common Law and Statute Law in US Federal Administrative Law’, in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 45, 48–9, 64–5; Pierce, above n 30, 592–3; Strauss, above n 30, 238.

36 Stewart, ‘Administrative Law in the Twenty-First Century’ above n 2, 441; Thomas W Merrill, ‘Capture Theory and the Courts: 1967–1983’ (1997) 72 *Chicago-Kent Law Review* 1039, 1043.

37 At this point I depart from the public interest model utilised by Professors Harlow and Rawlings. Their work focuses on rights-based review and proportionality in relation to the grounds of review: see, eg, Rawlings, ‘Modelling Judicial Review’ above n 3, 102, 105–7. This article focuses on extension of the traditional grounds of review such as procedural fairness and failure to consider relevant matters.

38 (1986) 84 LGR 168.

account' by the decision-maker.<sup>39</sup> These principles apply if public consultation is a statutory requirement or if a consultation process has been conducted even though it was not required by the relevant legislation.<sup>40</sup> They have also been applied on the basis of procedural fairness and, interestingly, according to a legitimate expectation of members of the public that a consultation process would be carried out.<sup>41</sup>

Therefore, in both the United States and the United Kingdom the courts have gone to lengths to establish principles for supervising the procedures utilised for public interest decisions. The doctrinal developments have been designed to enable members of the public to participate in decision-making processes and influence the decision. We will see in Part III that equivalent principles have been developed to a much lesser extent in Australia. There is scope for such developments, as public consultation provisions are commonly included in legislation and responsiveness has been recognised by the High Court,<sup>42</sup> but there are also some restrictions.

### III MODELS OF JUDICIAL REVIEW AND AUSTRALIAN JUDICIAL REVIEW DOCTRINE

This part of the article examines how the three models operate in regards to standing, procedural fairness and public consultation, and the rationality grounds of review. It highlights that while Australian administrative law has aspects of all three judicial review models, the primary models are the private rights and interests model and the enforcement model.

#### A Standing

Steps have been taken by parliaments and the courts to extend standing to plaintiffs seeking access to the courts on a public interest basis. However, it should be recognised at the outset that the extension of standing is a necessary but not sufficient condition of the public interest model. The public interest

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- 39 *R v Brent London Borough Council; Ex parte Gunning* (1986) 84 LGR 168, quoted in *R v Devon County Council, Ex parte Baker* [1995] 1 All ER 73, 91. See also *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 258 [108]; *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, [8]–[14], [87]–[93] (Arden LJ); *R (Evans) v Lord Chancellor and Secretary of State for Justice* [2012] 1 WLR 838, 851 [32]–[33] (Laws LJ).
- 40 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 258 [108]. See also *R (Robin Murray & Co) v Lord Chancellor* [2011] EWHC 1528, [37] (Beatson J); *R (on the application of Medway Council) v Secretary of State for Transport* [2002] EWHC 2516, [28] (Maurice Kay J).
- 41 *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311, [54], [116]–[117] (Sullivan J). See also *R (On the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [23], [37]–[40] (Sedley LJ).
- 42 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 356 [90] ('M61'); *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, 1092 [24] (Gummow and Callinan JJ) ('Dranichnikov').



model requires extension of the grounds of review as well as the extension of standing rules. The purpose of this section is to examine ways in which standing has been extended to public interest-based applicants. Such steps have been limited and are insufficient for a general public interest model of judicial review.

The primary case-law principles of Australian standing law are firmly within the private rights and interests model. This is made clear in the leading cases, *Australian Conservation Foundation Inc v Commonwealth* (the ‘ACF case’)<sup>43</sup> and *Onus v Alcoa of Australia Ltd* (‘*Onus v Alcoa*’).<sup>44</sup> In these cases, each relating to aspects of environmental law, the High Court explained and set the primary parameters for the ‘special interest’ test. The *ACF case* established this test<sup>45</sup> and explained that it requires the applicant to gain personal advantage if successful in the proceedings or disadvantage if unsuccessful<sup>46</sup> – they have to have been personally harmed by the governmental action being challenged.<sup>47</sup> The environmental group in the particular proceedings had not been harmed in such manner. Justice Gibbs suggested that they had a ‘mere intellectual or emotional concern’ or just a strongly felt belief that the law should be observed.<sup>48</sup> The applicants in *Onus v Alcoa* did satisfy the special interest test in their proceedings challenging an aluminium smelter to be located on a site that included Aboriginal relics. Since they were the custodians of the relics, they had personal, spiritual and cultural connections to the development that singled them out from the public generally.<sup>49</sup>

The significance of these cases is that the special interest test enables beneficiaries of legislation to be granted standing only if the harm to them is sufficiently personal. In this way, a personal right or interest must be affected in order for them to be granted standing and the test is aligned with the parameters of the private rights and interests model.

The primary question for Australian standing rules relates to the possibilities for extending beyond the private rights and interests model. One option is for legislation to extend standing. Justices Gibbs and Stephen in the *ACF case* indicated that parliaments could legislate to extend standing<sup>50</sup> and the High Court in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* determined that an open standing statutory provision does not necessarily breach Chapter III of the *Constitution*.<sup>51</sup> There is legislation at

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43 (1980) 146 CLR 493.

44 (1981) 149 CLR 27.

45 (1980) 146 CLR 493, 527 (Gibbs J), with whom Mason J agreed: at 547.

46 *Ibid* 530 (Gibbs J).

47 *Ibid* 537–9 (Stephen J), 547 (Mason J).

48 *Ibid* 530 (Gibbs J).

49 (1981) 149 CLR 27, 36 (Gibbs CJ), 42 (Stephen J), 43 (Mason J), 45 (Murphy J), 57 (Aickin J), 62–3 (Wilson J), 77–8 (Brennan J). See also *Edwards v Santos Ltd* (2011) 242 CLR 421, 436 [37] (Heydon J).

50 (1980) 146 CLR 493, 528–29 (Gibbs J), 540 (Stephen J), cf 551–2 (Mason J).

51 (2000) 200 CLR 591, 603 [20] (Gleeson CJ and McHugh J), 611 [44]–[45] (Gaudron J), 631 [104], 637 [120]–[122] (Gummow J), 659–60 [176]–[180] (Kirby J), 660 [183] (Hayne J), 670 [212]–[214] (Callinan J).

Commonwealth and state levels that extends standing to any person<sup>52</sup> and to individuals and groups that meet criteria that establishes them as proper representatives of the public interest.<sup>53</sup> It is therefore possible in Australia for legislation to extend standing to public interest-based applicants. There is as yet however no general extension – such provisions have so far been included only in sector-specific legislation.

The other possibility is to extend standing by case law. There have been developments towards a public interest-based form of standing here as well; however, it is controversial as it seems to cut across the boundaries established by the High Court in the *ACF case* and *Onus v Alcoa*. The relevant development is best represented by Justice Sackville's decision in *North Coast Environment Council Inc v Minister for Resources* ('*North Coast Environmental Council*')<sup>54</sup> where his Honour determined that the applicant had standing due to it satisfying a number of factors, such as being a 'peak' organisation representing other environmental groups, having received government grants and participated on governmental committees, having conducted projects relating to environmental matters, and having made submissions on related environmental issues to the relevant government agency.<sup>55</sup> It was therefore granted standing not because of any private right or interest that was harmed by the relevant decision but because it was regarded as a suitable representative of environmental interests.<sup>56</sup> *North Coast Environment Council* therefore involves an apparent extension towards public interest-based standing. The factors focus on the applicant's appropriateness for representing the public interest. The case is however limited as it only seems to be applied in environmental litigation.<sup>57</sup> Moreover, and as mentioned earlier, it is controversial as it is apparently inconsistent with the leading High Court cases.

It may be thought that the High Court is developing a more liberal approach to standing due to comments made by Gaudron, Gummow and Kirby JJ in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*.<sup>58</sup> Their Honours suggested that it may be better to deal with standing according to other principles, such as whether 'the right or interest of

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52 *Competition and Consumer Act 2010* (Cth) s 80; *Environmental Planning and Assessment Act 1979* (NSW) s 123.

53 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487.

54 (1994) 55 FCR 492 (Sackville J).

55 *Ibid* 512–13.

56 *Ibid* 514.

57 See *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516, 552–3 (Sackville J); *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1, 26–28 [80]–[88] (Osborn J); *Friends of Elliston – Environment & Conservation Inc v State of South Australia* (2007) 96 SASR 246; *Save Bell Park Group v Kennedy* [2002] QSC 174, [9]–[14] (Dutney J); *North Queensland Conservation Council Inc v The Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172, [18]–[20], [33] (Chesterman J); *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 205–7 (Davies J).

58 (1998) 194 CLR 247.

the plaintiff was insufficient to support a justiciable controversy'.<sup>59</sup> It is highly unlikely however that this approach would extend to granting access to the courts to public interest-based applicants. The judges' reference to the 'right or interest of the plaintiff' is likely to limit justiciable controversies to those in which the plaintiff is personally affected in relation to their liberty, reputation, livelihood, property, or immigration or welfare eligibility – as is usually the case in public law proceedings.<sup>60</sup> According to this approach therefore the private rights and interests restrictions seem to be merely relocated from the label of standing to the label of non-justiciability.

The general principles of Australian standing law are therefore primarily focused on private rights and interests. While it is accepted that parliaments can push beyond these confines, and this has occurred for sector-specific legislation, the general principles are either problematic due to their conflict with High Court authority, or do not move beyond the private interest model. This results in there being a limited basis in Australian administrative law to develop from the private rights and interests model towards either the enforcement model or the public interest model.

## **B Procedural Fairness and Statutory Public Consultation Requirements**

The laws relating to participation in administrative proceedings include both the weakest and strongest legal bases for enabling and supervising participation of members of the public in public interest-related decisions. The weakest is procedural fairness since, as we will see, it is based entirely on the private rights and interest model. The strongest is public participation requirements established by legislation in the form of public consultation provisions. Their strength in terms of the public interest model is due to the court's relatively intensive approach to their enforcement.

The leading Australian case, *Kioa v West*,<sup>61</sup> makes very clear that procedural fairness is limited to the private rights and interests model. While the case laid the modern foundation for the strong presumption that procedural fairness is to be applied by administrators,<sup>62</sup> it also limited procedural fairness to actions that deprive a person of their private rights and interests.<sup>63</sup> The judges expressly limited procedural fairness to exclude interests in public matters.<sup>64</sup> While some of the judges would have extended the threshold to situations in which legitimate expectations are affected,<sup>65</sup> that was not recognised to be an extension beyond

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59 (1998) 194 CLR 247, 263 [39] (Gaudron, Gummow and Kirby JJ). See also *Edwards v Santos Ltd* (2011) 242 CLR 421, 435–7 [36]–[39] (Heydon J).

60 *Kioa v West* (1985) 159 CLR 550, 582 (Mason J); see also *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ), 384 (Isaacs J).

61 (1985) 159 CLR 550.

62 *Ibid* 585 (Mason J), 609 (Brennan J), 632 (Deane J); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *M61* (2010) 243 CLR 319, 352 [74] (The Court).

63 *Kioa v West* (1985) 159 CLR 550, 582 (Mason J), 619–21 (Brennan J), 632 (Deane J).

64 *Ibid* 584 (Mason J), 620, 622–3 (Brennan J), 632 (Deane J).

65 *Ibid* 582, 584 (Mason J), 632 (Deane J), Cf 617–18, 622 (Brennan J).

private rights and interests into matters of public interest. For the judges who accepted legitimate expectations in *Kioa v West*, the individual–public distinction remained as an overall limitation on the implication of procedural fairness.<sup>66</sup> The threshold requirements therefore disable the use of procedural fairness for public interest-based participation in administrative decisions and for this reason it has been regarded as too narrow to support democracy-enhancing forms of participation.<sup>67</sup>

This approach to procedural fairness is clearly linked to the traditional approach to standing. Both require a person to be singled out from the public – in other words harmed as an individual rather than as member of the general community.<sup>68</sup> What happens then when standing is extended by legislation to allow plaintiffs access to the courts on a public interest basis? Does procedural fairness expand in a commensurate manner in order to protect public interest-based participation in administrative decision-making processes? If so, there would be a sign of movement towards the public interest model.<sup>69</sup> The answer given in numerous cases however is that a plaintiff's standing does not necessarily equate to their having a right or interest harmed for the purpose of procedural fairness.<sup>70</sup> In such contexts, standing and procedural fairness are treated as separate principles with different lines of case law. It is therefore accepted that standing rules may enable access to the courts for public interest actors while procedural fairness is limited to protecting private rights and interests. The cases that make this point tend to confirm the courts' general opposition to imposing procedural fairness obligations on administrators in relation to individuals and groups who seek to participate on public interest grounds.

The result is that procedural fairness is located entirely within the private rights and interests model.<sup>71</sup> Individuals and groups seeking to participate on public interest grounds will not have their interests protected by the courts according to this ground of judicial review, as it does not extend to duties regarding public consultation.<sup>72</sup> Public interest-based actors are therefore left to

66 Ibid 584 (Mason J), 632 (Deane J).

67 David Feldman, 'Democracy, the Rule of Law and Judicial Review' (1990) 19 *Federal Law Review* 1, 24.

68 *Kioa v West* (1985) 159 CLR 550, 621 (Brennan J), 632 (Deane J).

69 Stewart, 'The Reformation of American Administrative Law', above n 2, 1750.

70 See, eg, *Rivers SOS Inc v Minister for Planning* (2009) 178 LGERA 347, 385 [162] (Preston J); *Idonz Pty Ltd v National Capital Development Commission* (1986) 13 FCR 70, 76 (Fox J), 81–2 (Woodward J), 83–4 (Everett J); *State of Western Australia v Bropho* (1991) 5 WAR 75, 77–9 (Malcolm CJ), 171 (Anderson J). See also *Griffith University v Tang* (2005) 221 CLR 99, 118 [45] (Gummow, Callinan and Heydon JJ), quoting *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537, 568 (Lehane J); *Wilderness Society v Turnbull* (2007) 166 FCR 154, 177–8 [88] (Branson and Finn JJ).

71 See also Craig, above n 33, 161–2; Peter Cane, 'Participation and Constitutionalism' (2010) 38 *Federal Law Review* 319, 327–8.

72 Aronson and Groves, above n 1, 436, 450; Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 105.

rely on enforcing statutory public consultation provisions if they have been included with statutory powers that grant decision-making and regulation-making powers. The primary question when it comes to enforcing statutory public consultation provisions concerns the degree of scrutiny that is to be employed by the courts.<sup>73</sup> Such provisions are typically general and brief, and their enforcement often raises questions as to whether the court will interpret and apply them according to their substance rather than their form. Enforcement of these provisions is also likely to raise the question of whether breach of statutory consultation provisions will require the decision or regulation that is made following the consultation process to be invalidated.<sup>74</sup>

The Australian cases involving challenges to notices used in public consultation processes can be understood as employing a relatively intensive form of review. The leading case is the decision of the High Court in *Scurr v Brisbane City Council* ('*Scurr*').<sup>75</sup> In that case the High Court determined that a local council provided an inadequate public notice of a development application. The Court also held that the requirement to provide a public notice was mandatory, which meant that the consent granted by the particular council was invalid.<sup>76</sup> The leading judgment in *Scurr* was given by Stephen J, with whom the other justices agreed.<sup>77</sup> His Honour came to these conclusions on the basis of a purposive interpretation of the notice provision in the relevant legislation. The provision had the purpose of enhancing public participation – adequate information in the notice was required for members of the public to determine whether they should object and for the content of their objection to be meaningful.<sup>78</sup> Justice Stephen also stated that inadequate notice in a public consultation process could lead to the decision-maker being deprived of the benefit of 'worthwhile' objections when coming to its decision.<sup>79</sup> This purposive reasoning seems to adapt procedural fairness concepts to a public consultation process, by protecting the ability of a member of the public to provide the decision-maker with an alternative view of the proposal, thus enabling the objector to participate in a meaningful manner and helping the decision-maker make an informed decision.<sup>80</sup>

Justice Stephen's reasoning in *Scurr* has been highly influential for the interpretation and application of public consultation processes.<sup>81</sup> Many cases

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73 See Margaret Allars, 'Law as Form and Theory as Substance' (1996) 79 *Canberra Bulletin of Public Administration* 20, 27; Cass Sunstein, 'Interest Groups in American Public Law' (1985) 38 *Stanford Law Review* 29, 85–6.

74 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 388–9 [91] (McHugh, Gummow, Kirby and Hayne JJ).

75 (1973) 133 CLR 242.

76 *Ibid* 255–6 (Stephen J).

77 *Ibid* 245 (Barwick CJ, McTiernan and Menzies JJ), 246 (Gibbs J).

78 *Ibid* 252 (Stephen J).

79 *Ibid*.

80 *John v Rees* [1970] 1 Ch 345, 402 (Megarry J).

81 *Tickner v Chapman* (1995) 57 FCR 451, 456–7 (Black CJ), 491–2 (Kiefel J); *Helman v Byron Shire Council* (1995) 87 LGERA 349, 358 (Handley JA); *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, 90 [37] (Spigelman CJ).

have relied on it to support a conclusion that breach of notice requirements leads to the decision or rule being invalid.<sup>82</sup> It has also been the starting point for the development of more particular principles for interpreting and applying public consultation provisions, such as that public notices must be specific enough to convey to the public the proposed action,<sup>83</sup> notices must not be misleading,<sup>84</sup> and if substantial changes are made to a proposal after the public notice has been published, the notice must be re-advertised.<sup>85</sup>

The *Scurr* case and the subsequently developed principles just referred to are the high point of any public interest model that exists in Australia. The enforcement of these provisions commonly occurs in a purposive manner – a manner that protects the ability of members of the public to participate in public interest-based administrative decisions.

It is in this way that Australian laws regarding participation provide both the weakest and strongest legal bases for the public interest model. The express linking of procedural fairness to private rights and interests disables its use by public interest-based plaintiffs. The statutory basis of public consultation provisions, on the other hand, has enabled courts to consider their purpose and develop principles for their application.

### C Rationality

Rationality grounds of review also play an important role in the public interest model. We saw in Part IIB that the consultation principles in the United Kingdom require comments provided by members of the public to be ‘conscientiously taken into account’.<sup>86</sup> The United States has gone much further and developed a form of ‘hard look’ review by which the court reviews the decision-maker’s responsiveness to issues, arguments and possible alternatives raised in submitted comments. The question is whether the Australian equivalents, the failure to consider relevant matters ground of review and *Wednesbury* unreasonableness,<sup>87</sup> extend to such matters. The short answer is that

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82 See, eg, *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 184 LGERA 104, 113 [27] (Basten JA) (‘Such requirements will generally be a precondition to the exercise of power’); *Brighton Council v Compost Tasmania Pty Ltd* (2000) 109 LGERA 190, 201 [42] (Underwood J); *Goulburn-Murray Rural Water Authority v Rawalpindi Nominees Pty Ltd* [2010] VSC 166, [251] (Ross J).

83 *Tickner v Chapman* (1995) 57 FCR 451, 459 (Black CJ), 481 (Burchett J), 492 (Kiefel J).

84 *Homeworld Ballina Pty Ltd v Ballina Shire Council* (2010) 172 LGERA 211; *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* (2006) 69 NSWLR 156, 178 [110] (Tobias JA); *Litevale Pty Ltd v Lismore City Council* (1997) 96 LGERA 91, 102 (Rolfe AJA), 112 (Sheppard AJA); cf *Gene Ethics Pty Ltd v Food Standards Australia New Zealand* (2012) 207 FCR 563, 590–1 [130]–[136] (Kenny J).

85 See *Leichhardt Council v Minister for Planning [No 2]* (1995) 87 LGERA 78, 84, 88–9 (Priestley JA); *R v City of Salisbury*; *Ex parte Burns Philp Trustee Co Ltd* (1986) 42 SASR 557, 563 (Jacobs J); *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265, 281 (Finn J).

86 *R v Brent London Borough Council*; *Ex parte Gunning* (1986) 84 LGR 168, quoted in *R v Devon County Council*, *Ex parte Baker* [1995] 1 All ER 73, 91 (Simon Brown LJ).

87 Which are often regarded as closely related: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40–1 (Mason J).

they do not. They support participation of public interest actors to an extent but the orthodox statements highlight that they are designed to achieve the objectives of the enforcement model rather than the public interest model. The courts enforce statutory requirements to ‘consider submissions’ but such enforcement has significant limitations.

The orthodox statement of the failure to consider relevant matters ground is Justice Mason’s judgment in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (*‘Peko Wallsend’*).<sup>88</sup> Justice Mason insisted that the ground relates to factors that the decision-maker is bound to consider due to the express or implied requirements of the statute.<sup>89</sup> In this way, considerations enforced by the courts are linked to the express provisions of legislation or through implications sourced in the subject matter, scope and purpose of the Act.<sup>90</sup> This orthodox statement of the failure to consider relevant matters ground of review therefore associates the ground with statutory interpretation. Rather than judges deciding on what is a relevant consideration according to their own view of what is relevant to the decision or not,<sup>91</sup> Mason J located relevant matters in the statute and the court’s interpretation of it. The administrator is then effectively required to provide evidence that the relevant matter has been considered.<sup>92</sup>

The other theme of Justice Mason’s judgment relates to what is beyond the scope of the relevant considerations ground. The court is to set boundaries around the administrator’s discretion but matters within those boundaries are for the administrator rather than the court.<sup>93</sup> Justice Mason emphasised that the failure to consider relevant matters ground is not to be generally used to review the weight given to such matters by the administrator<sup>94</sup> and the High Court has insisted in subsequent cases that it is not to be used for review of findings of fact.<sup>95</sup> The point is that when there is evidence of some consideration of a relevant matter, the orthodox approach to the ground indicates that the limits of review have been reached<sup>96</sup> – concerns relating to fact-finding or discretionary judgments are beyond the scope of review.

The relevant considerations ground of review reflects a particularly formal understanding of rationality. Its focus is on ensuring proper interpretation and

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88 (1986) 162 CLR 24.

89 Ibid 39–40.

90 Ibid.

91 An accusation that has been levelled at the courts in the past: see, eg, Harry Whitmore, *Principles of Australian Administrative Law* (Lawbook Company, 5<sup>th</sup> ed, 1980) 145.

92 Aronson and Groves, above n 1, 280–1.

93 (1986) 162 CLR 24, 40–1.

94 Ibid 41. See also *Kioa v West* (1985) 159 CLR 550,604 (Wilson J); *Re Moore; Ex parte Co-Operative Bulk Handling Ltd* (1982) 41 ALR 221; *Re Minister for Immigration and Multicultural Affairs; Ex parte Eshetu* (1999) 197 CLR 611, 627–8 [44]–[45] (Gleeson CJ and McHugh J); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 176–7 [33]–[36] (The Court).

95 *Re Minister for Immigration and Multicultural Affairs; Ex parte Yusuf* (2001) 206 CLR 323, 348 [74] (McHugh, Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe* (1999) 197 CLR 510, 579 [195] (Gummow and Hayne JJ).

96 Aronson and Groves, above n 1, 283.

application of the relevant statute.<sup>97</sup> This is consistent with Justice Brennan's paragraph in *Attorney-General (NSW) v Quin*, referred to in Part IIA as a classical statement of the enforcement model, that judicial review of administrative action does 'not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power'.<sup>98</sup> The relevant considerations ground is designed to support enforcement of the relevant legislation, rather than enhancing participation in public interest decision-making.<sup>99</sup>

This is not to say that the relevant considerations ground of review provides no support for public participation. In particular, courts have applied the relevant considerations ground in a way that ensures that the decision-maker has actually considered submissions in statutory public consultation processes. There must be evidence that the decision-maker has been provided with, or has access to, submissions and that they personally consider them rather than rely entirely on an official's consideration.<sup>100</sup>

However the question raised by the public interest model, as reflected in the developments in the United Kingdom and the United States examined in Part IIB, is whether the administrator takes the submissions into account in a 'conscientious' or 'adequate' manner, and whether courts can review decisions made according to public consultation processes for whether the administrator has responded to the issues raised by the public comments.

Australian courts have used language similar to 'adequate' consideration of submissions,<sup>101</sup> but they have not required the decision-maker to respond directly to issues raised in submissions in their reasons for decision. For example, in *Tobacco Institute of Australia v National Health and Medical Research Council* the Federal Court required that submissions be given 'genuine consideration',<sup>102</sup> however in that case this meant that the agency could not exclude submissions that included material from non-peer reviewed sources.<sup>103</sup> The submissions could not have been considered if they were excluded. In *Tickner v Chapman*, Black CJ

97 *Re Minister for Immigration and Multicultural Affairs; Ex parte Yusuf* (2001) 206 CLR 323, 348 [74] (McHugh, Gummow and Hayne JJ); John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335, 357.

98 (1990) 170 CLR 1, 36.

99 Craig, above n 33, 162.

100 *Tickner v Chapman* (1995) 57 FCR 451, 463 (Black CJ), 476–7 (Burchett J); *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381, 426 [211] (Mason P); *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 67 FCR 40, 63. See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 30–1 (Gibbs CJ).

101 It is well known that while the language of adequate consideration is used by Australian courts – in particular the 'genuine, proper and realistic' terminology – such language is controversial but has not been rejected: see *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 175–7 [29]–[36]. See also John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335, 361–4; Cane and McDonald, above n 1, 141–2.

102 (1996) 71 FCR 265, 281, 284 (Finn J).

103 *Ibid* 281 (Finn J). See also Robin Creyke, 'The Tobacco Institute Case: Implications for the NH&MRC, for Public Inquiries and for Judicial Review' (1997) 14 *Australian Institute of Administrative Law Forum* 1, 8.



stated that a legislative requirement to consider submissions requires ‘an active intellectual process directed at [the] representation [or submission]’.<sup>104</sup> This looks like it could mean ‘conscientious’ or ‘adequate’ consideration but in the particular case required the decision-maker to consider the submissions rather than rely entirely on the consideration undertaken by officials.<sup>105</sup> Therefore, while the language of adequate consideration is at times employed, these cases are better understood as being within the parameters of the orthodox approach in *Peko-Wallsend*. They require some consideration to be given to submissions rather than adequate consideration.

The rationality grounds of judicial review also do not hold out much possibility of a requirement for decision-makers to show how they have responded to the issues raised in submissions from members of the public. This form of review requires the decision-maker to give reasons for their decision – a requirement that will be operative for some but not all public interest-related decisions.<sup>106</sup> When Australian courts have required decision-makers to respond in their reasons for decision to particular claims and arguments in submissions, the source of the obligation has been procedural fairness<sup>107</sup> or the requirement has been expressly limited to issues raised by parties participating in adversarial processes.<sup>108</sup> However, these are contexts which generally relate to decisions involving the government and a particular individual. They are therefore very different contexts to consultation processes in which submissions are made by members of the public participating in public interest-based decisions. The result is that the methods within Australian administrative law for requiring responsiveness to issues, arguments and alternatives are unlikely to extend to judicial review within the framework of the public interest model.

It needs to be only briefly added that the *Wednesbury* unreasonableness<sup>109</sup> ground of judicial review does not support public participation in decision-making. It is directed towards a different kind of problem. In the *Wednesbury* case, Lord Greene stated that the court will require the administrator’s decision to be ‘absurd’ or include ‘something overwhelming’ to invalidate a decision on the basis of unreasonableness.<sup>110</sup> It is recognised in Australia as applying only in rare circumstances. Justice Brennan referred to it in *Attorney-General (NSW) v Quin*

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104 (1995) 57 FCR 451, 464.

105 Ibid 463–4.

106 For example, pursuant to s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), decisions made under that Act are subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) including its requirement under s 13 to provide reasons. See also *Legislative Instruments Act 2003* (Cth) s 26 for its requirement for an ‘explanatory statement’ to be provided.

107 *Dranichnikov* (2003) 77 ALJR 1088, 1092 [24] (Gummow and Callinan JJ); *M61* (2010) 243 CLR 319, 356 [90] (The Court).

108 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518, 526 [18] (Gleeson CJ), 531 [37] (McHugh J), 540–1 [71] (Gummow and Hayne JJ); *L&B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15, [58] (Basten JA); *Segal v Waverley Council* (2005) 64 NSWLR 177, 188–9 [37]–[43] (Tobias JA).

109 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (‘*Wednesbury*’).

110 Ibid 229–30 (Lord Greene MR).

as being ‘extremely confined’,<sup>111</sup> and Gleeson CJ and McHugh J indicated in *Re Minister for Immigration and Multicultural Affairs; Ex parte Eshetu* that it requires more than emphatic disagreement with an administrator’s reasoning process.<sup>112</sup> *Wednesbury* unreasonableness should therefore be associated with the narrow scope of review that occurs according to the private rights and interests model or the enforcement model<sup>113</sup> rather than the public interest model in which the grounds of review are extended to support public participation.

In summary, while there is some scope in the orthodox principles of Australian rationality review for the courts to support participation by public interest actors, this is primarily as a result of enforcing relevant statutory provisions. The relevant considerations ground is therefore best understood within the framework of the enforcement model. The extension of that ground to requiring responsiveness to claims and submissions made by participants in decision-making processes have limitations usually associated with the classical, private rights and interests model rather than the democracy-enhancing objectives of the public interest model.

#### IV TOWARDS A PUBLIC INTEREST MODEL: POSSIBILITIES AND PROBLEMS

The primary aim of this article has so far been to explain the judicial review models and to highlight the ways in which they operate within Australian administrative law. We have seen that Australian administrative law is primarily based on the private rights and interest model (such as general standing rules and procedural fairness), and the enforcement model (such as the relevant considerations ground of review) but has aspects that are consistent with the public interest model of judicial review (such as the relatively intensive approach to enforcing public consultation provisions). The public interest model is therefore less developed in Australia than it is in the United States and United Kingdom – the two most relevant countries in terms of our public law heritage.<sup>114</sup>

These conclusions raise some obvious questions: what steps would enable the further development of a public interest model, and what problems would such steps raise? These are interesting questions but cannot be fully answered in the remaining space. The following is intended to suggest possible steps and raise likely problems.

My suggestion regarding possible steps has the starting point that such reforms are more suited to legislative rather than judicial reform. This is based on the recognition that courts may uphold statutory public participation

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111 (1990) 170 CLR 1, 36.

112 (1999) 197 CLR 611, 626 [40]. See also *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 647 [129] (Crennan and Bell JJ).

113 Rawlings, ‘Modelling Judicial Review’, above n 3, 98–102; Taggart, above n 9, 312–13, 322–3.

114 See Cane and McDonald, above n 1, ch 2.

requirements but are unlikely to impose such requirements themselves.<sup>115</sup> We have seen in Part III that the primary steps towards the public interest model have related to access to the courts by statutory extensions to standing and by the notice requirements of public consultation provisions that have been enforced in a relatively intensive manner. The missing piece of the puzzle is judicial review of the decision-maker's response to submissions made in consultation processes. As we have seen in Part IIIC, the approaches to rationality review in Australian law make it unlikely that courts would take that step without it being included in legislation.

Moreover, the question of whether the scope of legal accountability should be expanded involves policy questions suited to parliaments. The rationale for such an expansion would be that the grant of decision-making powers requiring reference to broad, public interest-based considerations should be conditioned by effective and enforceable public consultation provisions. Public consultation provisions requiring reasons to be provided that include how the decision-maker has responded to public submissions should deter tokenistic practices,<sup>116</sup> whereby members of the public contribute by making submissions but their input has little influence on the actual decision.

It is not particularly difficult to include in legislation a requirement for an administrator to respond to issues raised in submissions. There are currently operative provisions that set out such obligations as part of public consultation requirements. For example, section 63(3) of the *Food Standards Australia New Zealand Act 1991* (Cth) requires the relevant authority, Food Standards Australia New Zealand, to prepare a report that includes a summary of the submissions received and the authority's response to the issues raised in those submissions. Similarly, section 43(11) of the *Water Act 2007* (Cth) requires the Murray Darling Basin Authority to prepare a document that summarises any submissions it received and sets out 'how it addressed those submissions'. The significance of such provisions is that they add detail to the traditionally sparse legislative provisions that establish public consultation requirements in a way that is consistent with the doctrinal developments associated with the public interest model.

There are however some possible problems in relation to enforcement of such provisions. The first relates to whether the courts would enforce them in a manner that requires the related decision to be invalid. While we have seen that courts commonly enforce public consultation provisions as mandatory statutory

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115 Catherine Donnelly, 'Participation and Expertise: Judicial Attitudes in Comparative Perspective' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar, 2010) 357, 370. See also Cane, above n 71, 327–8.

116 For the literature on tokenistic practices, see Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *Journal of the American Institute of Planners* 216, 216; Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press, 2009) 139; Lyn Carson and Ron Lubensky, 'Raising Expectations of Democratic Participation: An Analysis of the National Human Rights Consultation' (2010) 33 *University of New South Wales Law Journal* 34, 41; Stephen Dovers, *Environment and Sustainability Policy: Creation, Implementation, Evaluation* (The Federation Press, 2005) 145–6.

procedures in line with the approach in *Scurr*,<sup>117</sup> the suggested provisions are likely to be treated as related to requirements to provide reasons. If that is the case different considerations would arise. The courts could treat a claimed breach of the requirement to respond to submissions in the reasons as not affecting the validity of the particular decision.<sup>118</sup> Therefore in order to make sure that such requirements are enforceable the legislation would need to make it clear that breach of the responsiveness requirements does affect the validity of the decision.

The second is a more general problem with enforcing provisions that are relevant to public interest decisions affecting many different people. It is that the courts may consider the ‘inconvenience’ of invalidating a particular decision due to reliance on the decision by others.<sup>119</sup> This can lead courts to determine that a breach of a statutory requirement does not make the decision invalid<sup>120</sup> or to use their discretion to refuse relief.<sup>121</sup> The significance of these two problems is that difficulties could arise when attempts are made to enforce the suggested responsiveness provisions.

This leads to the next question – would the development of public consultation provisions in a manner intended to move towards the public interest model be regarded as a legitimate step? Strong doubts have been expressed in the academic literature on the ground that the public interest model blurs the distinction between law and politics. Professor Stewart referred to the public interest model in the passage quoted in Part IIA as being a ‘surrogate political process’ and he also doubted the model’s effectiveness.<sup>122</sup> Professor Harlow effectively agrees, emphasising that politics should remain separated from judicial review of administrative decisions.<sup>123</sup> The academics that initially developed and utilised these judicial review models therefore ended up opposing the public interest model. There are however some factors that cast some doubt on their views.

The first is that the other models are also susceptible to being used for political purposes. This is especially the case under the enforcement model in which standing has been extended to enable access to the courts for public interest-based actors. The public interest plaintiff who gains access to the court

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117 See discussion in Part IIIB above; *Scurr* (1973) 133 CLR 242, 255 (Stephen J).

118 See Aronson and Groves, above n 1, 605. See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 225–6 [44]–[48] (Gleeson CJ, Gummow and Heydon JJ), 227–8 [55]–[58] (McHugh J).

119 See, eg, Aronson and Groves, above n 1, 708; Enid Campbell, ‘The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts’ (2003) 29 *Monash University Law Review* 49; Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2012) 172.

120 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392–3 [97]–[99] (McHugh, Gummow, Kirby and Hayne JJ); *Yallingup Residents Association (Inc) v State Administrative Tribunal* (2006) 148 LGERA 132, 180–1 [175]–[177] (Johnson J).

121 *Liverpool City Council v Roads and Traffic Authority and Interlink Roads Pty Ltd* (1991) 74 LGRA 265, 280–1 (Cripps J).

122 Stewart, ‘The Reformation of American Administrative Law’, above n 2, 1670, 1802–3.

123 Harlow, ‘Public Law and Popular Justice’ above n 3, 16–18; Harlow, ‘A Special Relationship?: American Influences on Judicial Review in England’ above n 3, 87–8, 96–7.

may have little chance of winning the case due to the restrictions in the grounds of judicial review but nevertheless achieve their objective of drawing attention to their political goals.<sup>124</sup> Moreover, the narrow standing rules in the private rights and interests model do not necessarily deny resort to the courts for political purposes as there are ways of outflanking such restrictions. For example, a leading barrister, currently a judge of the Federal Court, has explained that in the years after the High Court's decision in the *ACF* case that effectively denied access to the courts for environmental groups, such groups continued to bring proceedings but made sure to join a co-plaintiff with financial or property interests that were affected.<sup>125</sup> The courts are therefore susceptible to being used as a surrogate political process under each of the models, albeit more susceptible under the public interest model.

The second reason for doubting that the public interest model enables a surrogate political process is that these reforms are not intended to establish the courts as a substitute for political decision-making – they are designed to control the processes used for public interest decisions while leaving the necessary judgments and choices to be made by administrators. This view has been expressed by leading academic commentators in the United States,<sup>126</sup> and it seems to be the reason that the doctrinal developments for the public interest model are often referred to as related to 'procedure'.<sup>127</sup> Such views suggest that public consultation provisions designed to implement the public interest model may not automatically, or necessarily, establish the courts as a surrogate political process.

However, labelling public consultation and responsiveness requirements as 'procedural' is likely to lack persuasiveness in Australia. This is because the equivalent existing grounds of review – those that concern 'proper consideration' of relevant matters and responsiveness to submissions lodged by participants – are commonly understood to have substantive, or qualitative, characteristics.<sup>128</sup> This form of review is likely only to be regarded as acceptable for decisions that have serious impacts on individual rights and interests.<sup>129</sup> It is a different, larger, step to regard them as legitimate for public interest decisions.

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124 See, eg, Kirsty Ruddock, 'The Bowen Basin Coal Mines Case: Climate Law in the Federal Court' in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (The Federation Press, 2007) 173, 182–4. See also Sir Anthony Mason, 'Lecture 2: The Scope of Judicial Review' (2001) 31 *Australian Institute of Administrative Law Forum* 22, 26.

125 Michael L Barker, 'Standing to Sue in Public Interest Environmental Litigation: From *ACF v Commonwealth to Tasmanian Conservation Trust v Minister for Resources*' (1996) 13 *Environmental and Planning Law Journal* 186, 196.

126 Breyer et al, above n 34, 348–9.

127 Miles and Sunstein, above n 33, 761; Mashaw, above n 22, 578; Peter L Strauss, 'Revisiting *Overton Park*: Political and Judicial Controls over Administrative Actions Affecting the Community' (1992) 39 *University of California Los Angeles Law Review* 1251, 1323, 1329.

128 Mark Aronson, 'Process, Quality, and Variable Standards: Responding to an Agent Provocateur' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5, 9–11, 16–18; Greg Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *Australian Journal of Administrative Law* 100, 109–10.

129 Aronson, above n 128, 32.

There are therefore some possibilities for further development of the public interest model but they come with significant difficulties. It may be the case that such difficulties are overstated or that measures can be taken to reduce their impact. A developed analysis of such matters is however beyond the scope of this paper.

## V CONCLUSION

It therefore helps to understand judicial review of administrative action in terms of private interest, enforcement and public interest models. While Australian administrative law has elements of all three models, the steps towards the public interest model are relatively small and primarily supported by statutory provisions that extend standing and establish public consultation processes. The appropriate conclusion then is that further development of the public interest model is dependent on statutory developments, and their application by the courts, which support the participation of individuals and groups in public interest-based administrative decisions. Such steps however raise large questions for the relationship between law and politics.