

## JUDICIAL REVIEW IS DEAD. LONG LIVE JUDICIAL REVIEW!<sup>1</sup>

On 30 August 2018 Mr Osman Faruqi, a Sydney-based writer and public commentator, tweeted:<sup>2</sup>

Judicial Review. Rich old white male Sydney Uni graduates looking out for themselves. What a joke of a system.

It may come as no surprise that Mr Faruqi presently finds himself embroiled in defamation proceedings before the Federal Court of Australia.<sup>3</sup> But lest these remarks be perfunctorily dismissed as the rantings of another social media troll, Basten JA, speaking extra-judicially, equally expressed disquiet about the efficacy of judicial review, albeit in a somewhat less inflammatory fashion, when he observed “that we do not do judicial review very well in unusual or difficult cases.”<sup>4</sup>

This caused me to reflect on the place of judicial review, with its rigid adherence to taxonomy and seemingly wilful blindness to review for substantive injustice, in the 21<sup>st</sup> Century.

More specifically, as we sprint (not canter) towards catastrophic climate change,<sup>5</sup> what role, if any, does judicial review have in environmental litigation, where the problems are increasingly wicked and the cases increasingly complex, or “difficult”?

The statistics do not bode well. A Senate Committee formed to inquire into the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (Cth) noted that from the year 2000 (the commencement of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”) to 19 August 2015, of the projects referred to the Minister, approximately 0.43% were subject to third party judicial review challenges,<sup>6</sup> of which only 0.12% were successful.<sup>7</sup> In the

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<sup>2</sup> *Faruqi v Latham* [2018] FCA 1328 at [134].

<sup>3</sup> *Faruqi v Latham* [2018] FCA 1328.

<sup>4</sup> The Hon Justice Basten, *Judicial Review – Can We Abandon Grounds?* (paper presented to the 2018 AIAL National Conference, 27 September 2018, Administrative Law in the 21<sup>st</sup> Century and Beyond, Sydney), 12.

<sup>5</sup> Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C, an IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development and efforts to eradicate poverty*, 8 October 2018 (“IPCC SR15”).

<sup>6</sup> Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 4. Noting that some of

2017-2018 financial year, of the 2028 judgments delivered in the Federal Court of Australia, only three comprised judicial review applications under the EPBC Act.<sup>8</sup> Indeed, since the inception of the EPBC Act, a total of only 53 judicial review judgments have been filed in that Court under that Act.<sup>9</sup>

These figures were consistent with an earlier study in 2017 by Andrew Macintosh, Heather Roberts and Amy Constable, who compiled 15 years of reports in order to trace the history of referred actions, subsequent decisions and judicial review proceedings under the EPBC Act.<sup>10</sup> They reported that there had been 5495 referred actions (under the environmental impact assessment and approval provisions), of which 1516 actions required formal assessment and approval.<sup>11</sup> Over this period, the Commonwealth approved 827 out of 844 applications (97.98%).<sup>12</sup> In relation to the approved decisions, there were 38 judicial review proceedings, of which six were successful, 18 were unsuccessful and 14 were undecided or discontinued.<sup>13</sup>

It was for this reason that the analysis conducted by Macintosh et al of third party environmental citizen suits (“ECSs”) under the EPBC Act resulted in the conclusion that notwithstanding that “industry and political concerns about *EPBC Act* related environmental citizen suits have focussed on judicial review proceedings...the empirical foundation for these concerns is weak.”<sup>14</sup>

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the challenges were in relation to decisions made earlier in the environmental assessment process rather than any determination whether or not to approve a project.

<sup>7</sup> Noting that the outcome in *Mackay Conservation Group v Commonwealth of Australia* (Federal Court of Australia, NSD 33/2015) (the ‘*Adani* litigation’) was not classified as successful because the proceeding settled.

<sup>8</sup> Federal Court of Australia, *Annual Report 2017-2018*.

<sup>9</sup> This figure was calculated based on a Boolean search of the total number of judicial review decisions handed down by the Federal Court of Australia, Full Federal Court of Australia and High Court of Australia up to 5 November 2018.

<sup>10</sup> Andrew Macintosh, Heather Roberts and Amy Constable, ‘An empirical evaluation of environmental citizen suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)’ (2017) 39 *Sydney Law Review* 85, 91.

<sup>11</sup> Andrew Macintosh, Heather Roberts and Amy Constable, ‘An empirical evaluation of environmental citizen suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)’ (2017) 39 *Sydney Law Review* 85, 91.

<sup>12</sup> Andrew Macintosh, Heather Roberts and Amy Constable, ‘An empirical evaluation of environmental citizen suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)’ (2017) 39 *Sydney Law Review* 85, 91.

<sup>13</sup> Andrew Macintosh, Heather Roberts and Amy Constable, ‘An empirical evaluation of environmental citizen suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)’ (2017) 39 *Sydney Law Review* 85, 91.

<sup>14</sup> Andrew Macintosh, Heather Roberts and Amy Constable, ‘An empirical evaluation of environmental citizen suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)’ (2017) 39 *Sydney Law Review* 85, 110.

Subsequent to their 2017 study, Macintosh conducted a study of ECSs in New South Wales to identify their frequency and success rate.<sup>15</sup> The results indicated that between 2008 and 2015, 10,235 cases were finalised in the Land and Environment Court.<sup>16</sup> Of these, the learned authors identified 109 ECSs, which included 58 judicial review cases determined by that Court.<sup>17</sup>

The success rates differed markedly between judicial review and merits appeals. Of the judicial review ECSs, 29% of cases were successful.<sup>18</sup> By contrast, in the 13 merits review proceedings 54% of those applications were approved.<sup>19</sup>

Figures from the Land and Environment Court of NSW are not dissimilar. For example, judicial review challenges comprised only 3.2% of the Court's finalised caseload in 2017.<sup>20</sup>

What is it therefore that makes judicial review so unattractive to environmental litigants? Are there limitations inherent in either the content or operation of judicial review proceedings that serve as insuperable impediments to its utilisation, especially in the context of environmental law?<sup>21</sup>

### **Judicial Review Today: Remedy or Last Rites?**

In 1803, in the seminal United States Supreme Court case of *Marbury v Madison* Marshall CJ pronounced that "it is emphatically the province and the duty of the

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<sup>15</sup> Andrew Macintosh, Phillip Gibbons, Judith Jones, Amy Constable, Deb Wilkinson, 'Delays, stoppages and appeals: an empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court' (2018) 69 *Environmental Impact Assessment Review* 94, 95.

<sup>16</sup> Andrew Macintosh, Phillip Gibbons, Judith Jones, Amy Constable, Deb Wilkinson, 'Delays, stoppages and appeals: an empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court' (2018) 69 *Environmental Impact Assessment Review* 94, 96.

<sup>17</sup> Andrew Macintosh, Phillip Gibbons, Judith Jones, Amy Constable, Deb Wilkinson, 'Delays, stoppages and appeals: an empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court' (2018) 69 *Environmental Impact Assessment Review* 94, 99.

<sup>18</sup> Andrew Macintosh, Phillip Gibbons, Judith Jones, Amy Constable, Deb Wilkinson, 'Delays, stoppages and appeals: an empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court' (2018) 69 *Environmental Impact Assessment Review* 94, 99.

<sup>19</sup> Andrew Macintosh, Phillip Gibbons, Judith Jones, Amy Constable, Deb Wilkinson, 'Delays, stoppages and appeals: an empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court' (2018) 69 *Environmental Impact Assessment Review* 94, 99-100.

<sup>20</sup> Land and Environment Court of New South Wales, *Class 4: judicial review and civil enforcement* (2018) <[http://www.lec.justice.nsw.gov.au/Pages/types\\_of\\_disputes/class\\_4/class\\_4.aspx](http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_4/class_4.aspx)>.

<sup>21</sup> Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324 at 330.

judicial department to say what the law is.”<sup>22</sup> Rooted as it is in the doctrine of the separation of powers, the statement is seen as a genesis of judicial review.<sup>23</sup>

In Australia, its most celebrated - and arguably most influential<sup>24</sup> - endorsement was by Brennan J in *Attorney General (NSW) v Quin*, where his Honour opined that:<sup>25</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 powers. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. 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.

But this eschewal of redress going to the merits of the case was not always considered the “pure orthodoxy”<sup>26</sup> that it is today. In the 1950s and 1960s in the United Kingdom, the proposition that judicial review would necessarily encompass an examination of whether the decision was substantively correct “was taken for granted”.<sup>27</sup> How else could conflicts between private and public interests be addressed and a burgeoning administrative state be kept in check?<sup>28</sup>

It was Lord Diplock who intervened to successfully orchestrate an extension of the availability of the process in judicial review, while simultaneously limiting its scope.<sup>29</sup> Perhaps it was for this reason that Lord Diplock famously described judicial review as “the greatest achievement of my judicial lifetime”.<sup>30</sup> For his Lordship, the spectre

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<sup>22</sup> (1803) 1 Cranch 137 at 177.

<sup>23</sup> In an administrative sense, not necessarily in a constitutional sense: James Stellios, ‘*Marbury v Madison*: Constitutional Limitations and Statutory Discretions’ (2016) 42 *Australian Bar Review* 324, 324.

<sup>24</sup> Described by the High Court in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [43] per Gleeson CJ, Gummow, Kirby and Hayne JJ, as “the fundamental consideration in this field of discourse”.

<sup>25</sup> (1990) 170 CLR 1 at 35-36.

<sup>26</sup> The Hon Justice M J Beazley AO, *Administrative Law and Statutory Interpretation: Room for the Rule of Law?*, (paper delivered to the 2018 AIAL National Administrative Law Conference, Administrative Law in the 21<sup>st</sup> Century and Beyond, Sydney, 27 September 2018), 2.

<sup>27</sup> T T Arvind and Lindsay Stirton, ‘The Curious Origins of Judicial Review’ (2017) 133 *Law Quarterly Review* 92, 91, 96.

<sup>28</sup> T T Arvind and Lindsay Stirton, ‘The Curious Origins of Judicial Review’ (2017) 133 *Law Quarterly Review* 92, 91, 96.

<sup>29</sup> T T Arvind and Lindsay Stirton, ‘The Curious Origins of Judicial Review’ (2017) 133 *Law Quarterly Review* 92, 91, 108.

<sup>30</sup> *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 at 641.

of judges routinely setting aside administrative decisions merely because they disagreed with them was not to be countenanced.

In Australia the “bright line between judicial and merits review” is anchored in our constitutional structure, notably, Chapter III of the Australian Constitution.<sup>31</sup> It is now considered self-evident that an entrenched minimum provision of judicial review exists at both the Commonwealth<sup>32</sup> and State level<sup>33</sup> with respect to jurisdictional error; “all public power has its limits”.<sup>34</sup>

This protection notwithstanding, legislative attempts to limit the courts’ availability to review government decision-making persist. While privative clauses may have been all but consigned to the dustbin of Australian constitutional history,<sup>35</sup> restrictions on standing remain<sup>36</sup> (see further below), likewise the existence of time bars. In respect of the latter, questions remain as to whether an applicant for review will be refused the ability to seek it once the time limit for commencing proceedings has expired, or does a court have residual authority to hear a case brought outside the time limit stipulated in the statute.<sup>37</sup>

Alternatives to private clauses such as no-invalidity clauses (a clause that states that an act done, or decision made, in breach of a statutory requirement or common law duty does not result in the invalidity of that act or decision),<sup>38</sup> and no-consideration clauses (where a statute provides that the decision-maker does not have a duty to

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<sup>31</sup> Stephen Gageler, ‘The Legitimate Scope of Judicial Review’ (2001) 21 *Australian Bar Review* 279, 279, Stephen Gageler, ‘The Legitimate Scope of Judicial Review: the Prequel’ (2005) 26 *Australian Bar Review* 303, 304, Stephen Gageler, ‘The Constitutional Dimension’ in Matthew Groves (ed), *Modern Administrative Law in Australia; Concepts and Context* (Cambridge University Press, 2014) 165, and Bradley Selway, ‘The Principle Behind Common Law Judicial Review of Administrative Action – the Search Continues’ (2002) 30 *Federal Law Review* 217, 229-237.

<sup>32</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

<sup>33</sup> *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* (2010) 239 CLR 531.

<sup>34</sup> Mark Aronson, Matthew Groves and Greg Weeks, *Judicial review of administrative action and government liability* (Lawbook Co, 2017), 1104

<sup>35</sup> See, however, s 8.6 (3) of the *Environment Planning and Assessment Act 1979* (NSW) which precludes appeals against decisions of the Independent Planning Commission as consent authority made after a public hearing.

<sup>36</sup> See s 12 of the *Forestry Act 2012* (NSW).

<sup>37</sup> See r 59.10 of the *Uniform Civil Procedure Rules 2005* (NSW) or ss 3.11(2), 4.59, 5.26 and 8.10, 8.10(3) of the *Environment Planning and Assessment Act 1979* (NSW). See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [56]-[59].

<sup>38</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 and *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

consider whether to exercise a specific power),<sup>39</sup> are nevertheless devices at the disposal of Parliament to judge-proof government action.<sup>40</sup>

In addition to these procedural obstacles, the invocation of public interest immunity as an evidential obstacle serves to limit or confine judicial scrutiny of government power.<sup>41</sup> Government agencies have claimed public interest immunity over Cabinet documents in the context of planning disputes.<sup>42</sup>

In *Graham v Minister for Immigration and Border Protection*, however, the High Court applied the principles in *Kirk*<sup>43</sup> to hold that:<sup>44</sup>

...even outside the context of judicial review of executive action, a court "always had in reserve the power to inquire into the nature of the document for which protection [was] sought, and to require some indication of the nature of the injury ... which would follow its production".

It has been suggested that it is unrealistic to expect that all grounds of review are constitutionally entrenched.<sup>45</sup> Arguably there are few of the more traditional grounds of review that cannot be excluded, or at the very least fettered, by Parliament. Although it is said that 'fraud unravels everything', suggesting that decisions made in bad faith will be invalid irrespective of the scope of a decision-makers' power, this is nevertheless subject to the text, context and purpose of the statute conferring that power.<sup>46</sup> Similarly, while it has been put that Ch III of the Constitution "mandates the observance of procedural fairness as an immutable characteristic of a Supreme

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<sup>39</sup> *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [11]-[12].

<sup>40</sup> Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (3rd ed) (Oxford University Press, 2018), Chapter 6.2.4, 242-251.

<sup>41</sup> Mark Aronson, 'Between Form and Substance: Minimising Judicial Scrutiny of Executive Action' (2017) 45 *Federal Law Review* 519.

<sup>42</sup> See *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2003] NSWLEC 322, *Woollahra Municipal Council v Minister for Local Government* (2016) 217 LGERA 39 and *Ku-ring-gai Council v Mr Garry West in his capacity as delegate of the Acting Director-General of the Office of Local Government* [2016] NSWLEC 62.

<sup>43</sup> *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* (2010) 239 CLR 531.

<sup>44</sup> *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* (2017) 347 ALR 275 at [60].

<sup>45</sup> Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14, 28.

<sup>46</sup> Zach Meyers, 'Revisiting the purposes of judicial review: Can there be a minimum content to jurisdictional error?' (2012) 19 *AJ Admin L* 138, 144 citing *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 157.

Court and of every other court in Australia”,<sup>47</sup> thereby entrenching the core features of natural justice (the right to be heard and the right to know the case put against you) from review by the courts,<sup>48</sup> the extent to which the legislature can limit, rather than wholly exclude, such rights remains open, as changes to the *Migration Act 1958 (Cth)* attest to.

Efforts to restrict the availability of judicial review nevertheless continue despite the very real tendency towards creativity on the part of those seeking to bring such proceedings. This has the concomitant effect of increasing uncertainty and costs.

Embedded in the notion of the Constitution as a fundamental source of judicial power to review administrative action is the rule of law,<sup>49</sup> which provides both a unifying rationale for its existence, and fixes the parameters of the legitimate scope of judicial review in Australia.<sup>50</sup>

The rule of law also assists in defining the content of judicial review insofar as statutory interpretation is at the core of judicial review and the “principles of statutory interpretation are common law principles rooted in values which include the rule of law”.<sup>51</sup> This sentiment was recently echoed by the High Court in *Hossain v Minister for Immigration and Border Protection*<sup>52</sup>. The most immediately obvious manifestation of this proposition is the principle of legality,<sup>53</sup> however, “unhelpful” that modern day label may be.<sup>54</sup>

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<sup>47</sup> *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [177] per Gageler J.

<sup>48</sup> *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [44]-[59] per French CJ and Kiefel J and *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [53]-[57] per French CJ, [91]-[97] per Gummow and Bell JJ and [140]-[146] per Heydon J.

<sup>49</sup> Bradley Selway, ‘The Principle Behind Common Law Judicial Review of Administrative Action – the Search Continues’ (2002) 30 *Federal Law Review* 217, 230 and 237, Stephen Gageler, ‘The Legitimate Scope of Judicial Review’ (2001) 21 *Australian Bar Review* 279, 279.

<sup>50</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [5] and *Argos Pty Ltd v Corbell* (2014) 254 CLR 394 at [48].

<sup>51</sup> The Hon Justice M J Beazley AO, *Administrative Law and Statutory Interpretation: Room for the Rule of Law?*, (paper delivered to the 2018 AIAL National Administrative Law Conference, Administrative Law in the 21<sup>st</sup> Century and Beyond, Sydney, 27 September 2018), 15.

<sup>52</sup> (2018) 359 ALR 22 at [27]-[28] per Kiefel CJ, Gageler and Keane JJ.

<sup>53</sup> See, for example, *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [313], *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 and more recently, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225 at [88]. See generally the excellent collection of essays in Dan Meagher and Matthew Goves (eds), *The Principle of Legality in Australia and New Zealand* (The Federation Press, 2017).

The fundamental rights, freedoms, immunities, principles and values that the principle of legality purports to protect from inadvertent legislative abrogation or curtailment rarely, however, extend to environmental rights, freedoms, principles and values. No doubt this is because, unlike the constitutions of other countries such as India<sup>55</sup>, Pakistan<sup>56</sup>, South Korea<sup>57</sup>, Indonesia<sup>58</sup> and the Philippines<sup>59</sup>, no environmental rights are enshrined in the Australian Constitution.<sup>60</sup> Such rights typically include the right to a healthy environment and the right to life, assuming that the latter is construed to include the former.<sup>61</sup> For example, Art II of the *Constitution of the Republic of the Philippines 1987* provides that:

The State shall protect and advance the right of the people in a balanced and healthy ecology in accord with the rhythm of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

In *Minors Oposa v Factoran* the Supreme Court of the Philippines applied Art II to recognise the right of one generation (who were minors) to bring a class action on behalf of “generations yet unborn” (invoking the principle of intergenerational equity) to “ensure the protection of that right [to a sound environment] for generations to come”.<sup>62</sup> In granting the petition for a writ of certiorari, the Court described the right

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<sup>54</sup> John Basten, ‘The Principle of Legality – an Unhelpful Label?’, Dan Meagher and Matthew Goves (eds), *The Principle of Legality in Australia and New Zealand* (The Federation Press, 2017), 74-92. The principle is nothing new, having been identified earlier in *Potter v Minahan* (1908) 7 CLR 277 at 304 and *Coco v The Queen* (1994) 179 CLR 427 at [10]-[11].

<sup>55</sup> Art 21 of the *Indian Constitution 1949* guarantees the right to life and liberty which has been held by the Indian Supreme Court to include the right of the people to live in a healthy environment with minimal disturbance of ecological balance. Thus in *MC Mehta v Union of India* (1985) (No 13029/1985) the Supreme Court applied art 21 and affirmed that the right to life included the right to clean air, thereby obliging the government to take measures to reduce air pollution.

<sup>56</sup> Article 9 of the *Constitution of Islamic Republic of Pakistan*. See the High Court of Lahore’s decision in *Ashgar Leghari v The Federation of Pakistan* (2015) (WP No 2551/2015).

<sup>57</sup> Art 35 of the *Constitution of the Republic of Korea 1987* (South Korea).

<sup>58</sup> Article 28H(1) of the *Constitution of the Republic of Indonesia 1945*.

<sup>59</sup> Sections 15 and 16 of Art II the *Constitution of the Republic of the Philippines 1987*.

<sup>60</sup> Section 100 of the Australian Constitution arguably protects State economic, and not environmental, interests with respect to water: The Hon Justice Rachel Pepper, ‘The Constitutionalisation of Water Rights: Solution or Levee?’, (2011) 26.2 *Australian Environment Review* 34.

<sup>61</sup> See Ben Boer, ‘Environmental Law and Human Rights in the Asia-Pacific’, Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015), 166-174 and James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2014), 17-54.

<sup>62</sup> *Juan Antonio Oposa v The Hon Fulgencio S Factoran, Jr* (1993) (GR No 101083, 224 SCRA 792) per Davide JR. See also *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (2008) (GR Nos 171947-171948).



to a “balanced and healthful ecology” afforded by Art II as a “fundamental legal right” and that:<sup>63</sup>

Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation...the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.

More recently, the concept of an environmental rule of law has emerged. In 2016, the IUCN World Congress on Environmental Law<sup>64</sup> described the concept as “the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law”,<sup>65</sup> without which “environmental governance and the enforcement of rights and obligations may be arbitrary, subjective, and unpredictable.”<sup>66</sup> An environmental rule of law encompasses fundamental principles and values such as the precautionary principle, intergenerational equity, the polluter pays principle and the principle of non-regression, none of which appear to be readily accommodated within the rubric of the principle of legality, however “protean” the concept of the rule of law may be.<sup>67</sup>

This gives rise to the question of whether the underlying function of judicial review is to restrain the exercise of administrative power, or to protect legal rights and interests. Presumably it is both.<sup>68</sup> And yet, as the statistics cited above indicate, as desirable as these twin objectives are, achieving these purposes in an environmental context remains problematic.

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<sup>63</sup> *Juan Antonio Oposa v The Hon Fulgencio S Factoran, Jr* (1993) (GR No 101083 ,224 SCRA 792) at 8. See also *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (2008) (GR Nos 171947-171948) per Davide JR.

<sup>64</sup> Available at <<http://www.unep.org/environmentalgovernance/erl/iucn-world-declaration-environmental-rule-law>>.

<sup>65</sup> IUCN, World Declaration on the Environmental Rule of Law, Rio de Janeiro, 29 April 2016.

<sup>66</sup> IUCN, World Declaration on the Environmental Rule of Law, Rio de Janeiro, 29 April 2016.

<sup>67</sup> The Hon Justice M J Beazley AO, *Administrative Law and Statutory Interpretation: Room for the Rule of Law?*, (paper delivered to the 2018 AIAL National Administrative Law Conference, Administrative Law in the 21<sup>st</sup> Century and Beyond, Sydney, 27 September 2018), 6, quoting the aptly named Laws LJ in *R (Cart) v Upper Tribunal* [2011] QB 120.

<sup>68</sup> *Argos Pty Ltd v Corbell* (2014) 254 CLR 394 at [48].

Of the usual barriers to access to justice, standing is considered to be one of the most significant.<sup>69</sup> Standing is of central importance to environmental litigation, especially public interest environmental litigation, because challenging administrative decisions affecting the environment is an exercise of the rule of law. Accordingly, access to the courts is an aspect of the rule of law.

The Hon Robert French AC captured the critical link between access to justice, the rule of law, and our system of governance, when he noted that “impaired or unequal access to justice or compromised access to justice detracts from the strength of the rule of law as part of our societal infrastructure.”<sup>70</sup>

As Dr Andrew Edgar has observed:<sup>71</sup>

...in administrative law scholarship, extending standing to allow such litigation is justified on rule of law principles. Extended standing broadens the range of persons who may bring proceedings to ensure, at the minimum, that there is compliance with particular provisions of legislation. Environmental legislation such as the EPBC Act contains provisions designed to ensure consideration by officials of various aspects of the environment. Environmental groups and like-minded individuals are likely to be the only persons with an interest in ensuring compliance with such provisions. The developer’s interest, on the other hand, will be to reduce the cost and delay of seeking the required approvals and to limit any regulatory restrictions on the scope of their development. Accordingly, their interests will focus on minimising the effectiveness of environmental legislation rather than the rule of law goal of ensuring compliance with statutory requirements.

Restricting, or attempting to restrict, the rights of environmental litigants to challenge the lawfulness of executive decision-making<sup>72</sup> is therefore an attack on the rule of law.<sup>73</sup> Denying the ability of third parties to challenge decisions affecting the

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<sup>69</sup> George Pring and Catherine Pring, *Environmental Courts & Tribunals: a Guide for Policy Makers*, United Nations Environment Programme, 2016.

<sup>70</sup> The Hon Robert French AC, ‘Rights and Freedoms and the Rule of Law’ (2017) 28 *Public Law Review* 109, 112.

<sup>71</sup> Andrew Edgar, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, attachment to submission 55.

<sup>72</sup> Such as the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (Cth), the principle aim of which was to repeal or replace s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to limit standing to persons with a direct economic interest at stake.

<sup>73</sup> See, for example, Law Council of Australia, submission 61 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*; EDOs of Australia, submission 114 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*; Nature Conservation Council of NSW, submission 43 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*; Environmental Justice Australia, submission 93 to the *Inquiry into the*

environment not only erodes the rule of law, it also diminishes effective governmental decision-making and leads to a loss of faith in public institutions of governance.<sup>74</sup>

In *Argos Pty Ltd v Corbell* the High Court expressly recognised that “the availability of judicial review serves to promote the rule of law”.<sup>75</sup> *Argos* was a standing case which endorsed and applied the more generous approach to standing articulated by that Court in *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund*, namely, that the “reason of history and the exigencies of present times indicate that” the criterion of a person whose interests are adversely affected by the decision “is to be construed as an enabling, not a restrictive, procedural stipulation.”<sup>76</sup> Would the Australian Conservation Foundation,<sup>77</sup> an organisation with a specific charter to protect the environment, be found to have the requisite “special interest” needed to bring its challenge today? It just might.<sup>78</sup>

Irrespective of the primacy of statutory interpretation within judicial review<sup>79</sup> (discussed in greater detail below), the grounds of judicial review maintain their currency. This is so notwithstanding that they are expressed in imprecise language, have indeterminate content, often have considerable overlap, and increasingly trespass into the territory of merits review.

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*Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*; Lock the Gate Alliance, submission 109 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*. In finding in favour of the applicant in *Onus v Alcoa*, Murphy J noted that “restrictive rules of standing deny access to justice” (1981) 149 CLR 27 at [7].

<sup>74</sup> The Edelman trust barometer, an annual study of trust in key governance institutions of Western democracies has found that trust in those institutions is “in crisis” globally. Australia has seen one of the sharpest declines, with trust in the government now at 37%, a decrease of 10% since 2012, and falling 8% alone in 2016: David Donaldson, ‘Trust in government in sharp decline, survey shows’, *The Mandarin*, 22 February 2017, <<http://www.themandarin.com.au/75831-trust-in-government-in-sharp-decline-edelman-trust-barometer/>>.

<sup>75</sup> (2014) 254 CLR 394 at [48].

<sup>76</sup> (1998) 194 CLR 247 at [50] per Gaudron, Gummow and Kirby JJ.

<sup>77</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493. Compare that case to the subsequent decision in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 where the High Court held that Ms Onus, as a traditional owner and elder of the affected land had a spiritual interest in the preservation of her cultural heritage sufficient to constitute a special interest to confer standing.

<sup>78</sup> For example, *Minister Administering the Mineral Resources Development Act 1995 v Tarkine National Coalition Inc* (2016) 214 LGERA 327. See the discussion in Jess Feeheley, ‘Standing up for Standing’ (2016) 31(4) *Australian Environment Review* 106, 108.

<sup>79</sup> Will Bateman and Leighton McDonald, ‘The Normative Structure of Australian Administrative Law’ (2017) 45 *Federal Law Review* 153.

Take, for example, a failure to have regard to a mandatory relevant consideration.<sup>80</sup> As has been pointed out, not all mandatory considerations are alike.<sup>81</sup> Some plainly involve evaluative judgments and an examination of the merits of the matter before the court. Basten JA gives by way of illustration the requirements in what was formerly s 79C of the *Environmental Planning and Assessment Act 1979* (NSW)<sup>82</sup> that a consent authority “is to take into consideration”, amongst other things, “the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality”, the “suitability of the site for development” and “the public interest”. These will undoubtedly, as his Honour notes, “depend on the circumstances of the case and may involve highly contestable judgments”.<sup>83</sup>

Thus in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*, the High Court said that when used in a statute, the expression “public interest” imported a discretionary value judgment to be made by reference to undefined factual matters which is “unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view”.<sup>84</sup>

Even an assessment of whether the decision-maker has engaged in ‘proper, genuine and realistic consideration’ of any mandatory matters involves engagement with the substance of the decision.<sup>85</sup>

The determination of jurisdictional facts (for example, whether an activity “is likely to significantly affect the environment” thereby requiring an environmental impact statement to be prepared<sup>86</sup>) and unlawful unreasonableness,<sup>87</sup> provide two further

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<sup>80</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J. Richard Lancaster and Stephen Free, ‘The Relevancy Ground in Environmental and Administrative Law’ in Neil Williams (ed) *Key Issues in Judicial Review* (The Federation Press, 2014), 241.

<sup>81</sup> The Hon Justice Basten, *Judicial Review – Can We Abandon Grounds?* (paper presented to the 2018 AIAL National Conference, 27 September 2018, Administrative Law in the 21<sup>st</sup> Century and Beyond, Sydney), 7.

<sup>82</sup> Now s 4.15.

<sup>83</sup> The Hon Justice Basten, *Judicial Review – Can We Abandon Grounds?* (paper presented to the 2018 AIAL National Conference, 27 September 2018, Administrative Law in the 21<sup>st</sup> Century and Beyond, Sydney), 7.

<sup>84</sup> (2012) 246 CLR 379 at [42].

<sup>85</sup> *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [26]-[33].

<sup>86</sup> Section 5.7(1) *Environmental Planning and Assessment Act 1979* (NSW).

examples of where the judiciary does not just flirt with, but actively embraces, the merits of an administrative decision. In the former, the court effectively assumes the role of the fact finder<sup>88</sup>; in the latter controversial opinions are formed. In both, a curial analysis of the facts is undertaken – all under the mantle of judicial review.

Not dissimilar, is the ability to review for uncertainty. Determining the extent to which conditions attaching to a development consent might enable development to be carried out that is substantially different to that for which approval was sought, invites “substantive review”.<sup>89</sup> And because courts strive for retention of practical flexibility, questions of degree will always be involved.<sup>90</sup>

If “pure orthodoxy” mandates that errors of fact remain beyond the purview of judicial review, then the “bright line” between judicial review and merits review has become increasingly blurry and fragmented.

More problematic is the lack of transparency inherent in concepts such as ‘jurisdictional error’ and ‘the intention of Parliament’, which have become judicial catch-alls as courts rally around unifying principles to describe, if not justify, in ever increasing levels of generality, the exercise of review that they are undertaking.

Would it be, therefore, preferable to abandon the traditional grounds of review, as has been suggested by Basten JA, and adopt a simpler and intellectually more honest approach that unequivocally recognises the centrality of statutory interpretation in judicial review and focuses instead on the real purpose of the power

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<sup>87</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 and *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408 notwithstanding statements to the contrary in that case at [11] per Kiefel CJ, [52]-[53] per Gageler J, [82] per Nettle and Gordon JJ and [134]-[135] per Edelman J. Leighton McDonald argues that the application of unreasonableness review may involve a consideration of the merits of decisions, including the weight attributed to relevant matters, and that this has been accepted in *Li*: Leighton McDonald, ‘Rethinking unreasonable review’ (2014) 25 *Public Law Review* 117.

<sup>88</sup> A jurisdictional fact is a criterion, the satisfaction of which enlivens the exercise of a statutory power or discretion: see *Timbarra Protection Coalition Inc v Ross Mining NL* (1996) 46 NSWLR 55, *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 and *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120.

<sup>89</sup> Jonathan Lee, ‘Substantiating Substantive Review’ (2018) 4 *Public Review* 632.

<sup>90</sup> *Ulan Coal Mines Ltd v Minister for Planning and Moorlaben Coals Mines Pty Ltd* (2008) 160 LGERA 20 at [77]-[78].

conferred, its impact on individual rights, and whether that impact is proportionate to the purpose?<sup>91</sup>

Again this draws the court into an examination of the merits of a decision, but in circumstances where the court does not engage in the process of remaking the decision, but merely sets it aside, is this so heretical? The power can be re-exercised, this time lawfully and, if necessary, subsequent to legislative clarification.

Similarly, what is the vice, other than doctrinal, in the ability of an Australian court to review for errors of fact, or to apply a legal standard of correctness to questions of fact, mixed law and fact, and decisions involving the application of policy or the exercise of discretion, as occurs elsewhere?<sup>92</sup>

In Australia in 2018, judicial review for unreasonableness in the exercise of discretionary power has been described as concerning “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.<sup>93</sup> A majority of judges in the High Court have additionally sought to import the disproportionate exercise of an administrative discretion as an element of the ground of review.<sup>94</sup>

*Li*, and the most recent decision of *SZVFW*,<sup>95</sup> have unquestionably broadened the concept of unreasonableness so that it is no longer necessary for a decision “to be self-evidently outrageous” in the *Wednesbury* sense.<sup>96</sup> But whether this “unattainable ground of review has been made more available” is, however, debatable. Very real constraints on judicial intervention remain given “the stringency of the test” and “the practical difficulty of a court being satisfied that the test is met where the repository is an administrator and the exercise of the power is legitimately informed by

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<sup>91</sup> The Hon Justice Basten, *Judicial Review – Can We Abandon Grounds?* (paper presented to the 2018 AIAL National Conference, 27 September 2018, Administrative Law in the 21<sup>st</sup> Century and Beyond, Sydney), 13.

<sup>92</sup> *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

<sup>93</sup> *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [105] per Gageler J.

<sup>94</sup> *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [30] per French CJ and [72]-[74] per Hayne, Kiefel and Bell JJ.

<sup>95</sup> *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408.

<sup>96</sup> Theresa Baw, ‘Illogicality, Irrationality and Unreasonableness in Judicial Review’ in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014), 66, 73 and Kristen Walker QC, ‘Judicial Review for Unreasonableness or Irrationality: The Role of Proportionality’ in Debra Mortimer (ed) *Administrative Justice and its Availability* (The Federation Press, 2015), 45, 46.

considerations of policy”.<sup>97</sup> The Land and Environment Court has not set aside decisions on the ground of unreasonableness in all but the rarest of circumstances,<sup>98</sup> and no decisions made under the EPBC Act have been overturned in the Federal Court of Australia for legal unreasonableness.<sup>99</sup>

Challenges to jurisdictional facts on the grounds of irrationality and illogicality are no less fraught.<sup>100</sup>

Decision-making involving complex questions of policy are also less likely to be amenable to judicial review.<sup>101</sup> In particular, decisions mediating the competing interests of environmental protection as opposed to the development of natural resources, are unlikely to be reviewable. Administrative decisions about whether or not a faunal species should be listed as endangered or threatened,<sup>102</sup> or the creation of a national park,<sup>103</sup> are instances where the courts have declined involvement. In *Ilic v City of Adelaide*<sup>104</sup> the South Australian Supreme Court held that a ministerial decision that the heritage criteria specified in the *Development Act 1993 (SA)* were satisfied, thereby designating a residence as a place of local heritage under the Adelaide Control Plan, could not be challenged pursuant to judicial review proceedings. The Court opined that:<sup>105</sup>

The heritage criteria specified by...the Act necessarily involve an evaluative judgment which reflects a community consensus about the balance between the preservation of the built environment of the past and the undertaking of sustainable development which is adapted to contemporary residential requirements and expectations. The criteria also require judgment to be passed about the parts of the community’s heritage which are worthy of preservation and those which are not. It is not impossible for courts, assisted by expert evidence, to apply the judicial method to the making of evaluative judgments of this sort. ...

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<sup>97</sup> *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [108] per Gageler J.

<sup>98</sup> See *Manning v Bathurst Regional Council (No 2)* (2013) 199 LGERA 147.

<sup>99</sup> See, for example, *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 214 FCR 233 and *Kemppi v Adani Mining Pty Ltd (No 4)* [2018] FCA 1245.

<sup>100</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [135] per Crennan and Bell JJ and *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1.

<sup>101</sup> Gerry Bates, *Environmental Law in Australia* (9<sup>th</sup> ed) (LexisNexis Butterworths, 2016), 958.

<sup>102</sup> *Re Minister of State for Conservation and Land Management and the Environment; Ex parte West Australian Field and Game Association Inc* (1992) 78 LGERA 81.

<sup>103</sup> *Haggarty and Morrison Pty Ltd v New South Wales* (1995) 98 LGERA 226.

<sup>104</sup> [2010] SASC 139.

<sup>105</sup> [2010] SASC 139 at [61].

Furthermore, in the United Kingdom, private bodies exercising non-statutory power have been held to be amenable to judicial review if they exercise an administrative function with administrative consequences. In *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* the Court of Appeal held that decisions of the Take-overs and Mergers Panel, an unincorporated body with powers of investigation and reprimand, was subject to judicial review.<sup>106</sup>

Australian courts, however, “have long displayed scepticism towards that decision, while nonetheless remaining reluctant to remove its weaponry from their potential armoury”<sup>107</sup> and have generally been at pains to “avoid making a decision about the application of *Datafin* unless and until it is necessary to do so”.<sup>108</sup> In *NEAT Domestic Trading Pty Ltd v AWB Ltd*,<sup>109</sup> the High Court therefore refrained “from answering the general question of when public law remedies may be granted against private bodies”.<sup>110</sup> It rejected the availability of public law remedies because “it is not possible to impose public law obligations on AWB while at the same time accommodating pursuit of its private interests”.<sup>111</sup> Whether judicial review is viewed through a prism of the restraint of government power, or the protection of legal rights and interests, its expansion to encompass “de facto public power” ought to be accommodated.<sup>112</sup>

In addition to the difficulties associated with access to, and the content of, judicial review, even if a court is satisfied that the ground of review has been successfully argued, it has a discretion as to whether or not to grant a remedy. The Court will exercise its discretion in relation to “whether the act or order under attack should be allowed to stand or not”.<sup>113</sup>

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<sup>106</sup> [1987] QB 815 at 847.

<sup>107</sup> Joe McIntyre, ‘What is Administrative Law About? Power, Rights, and Judicial Culture in Australia’, *AUSPUBLAW* (23 April 2018), 7. See, for example, *Austar Plumbing Services Pty Ltd v Sydney Water Corporation* [2018] NSWSC 864 and *DEF v Trappett* [2017] NSWCA 163.

<sup>108</sup> *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456 at [32].

<sup>109</sup> Andrew Buckland and Jayne Higgisson, ‘Judicial review of decisions by private bodies’ (2004) 42 *AIAL Forum* 37.

<sup>110</sup> Andrew Buckland and Jayne Higgisson, ‘Judicial review of decisions by private bodies’ (2004) 42 *AIAL Forum* 37.

<sup>111</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [51].

<sup>112</sup> Joe McIntyre, ‘What is Administrative Law About? Power, Rights, and Judicial Culture in Australia’, *AUSPUBLAW* (23 April 2018), 7.

<sup>113</sup> William Wade and Christopher Forsyth, *Administrative Law* (11<sup>th</sup> ed) (Oxford University Press, 2014), 26.



By virtue of the common law, constitutional design, and the statute, judicial intervention requires a balancing of competing factors. Factors such as inconvenience to third parties, or delay, are relevant to the exercise of the discretion. Most critically, the error must be material to the decision-making process. A court will not remedy minor or immaterial breaches.<sup>114</sup> Accordingly, it has been held that an environmental licence will not automatically be declared invalid where there has been a failure to comply with statutory consultation requirements.<sup>115</sup>

And even if set aside, a remade decision will not necessarily improve environmental outcomes.<sup>116</sup> The decision-maker can subsequently make the same decision again, albeit lawfully, resulting in the same substantive outcome as the original decision and a somewhat pyrrhic victory.<sup>117</sup> Chris McGrath has accordingly described judicial review proceedings as follows:<sup>118</sup>

Judicial review is seldom a cause of action that addresses the main complaint made against approval of a poor development. Most public interest litigants concerned about approval of a development wish to challenge the merits of the decision – that a decision was wrong and the proposed development should have been refused because of its environmental impacts. Judicial review may, however, be the only avenue to challenge the decision. For such cases judicial review is like trying to fight the development in a straight-jacket – the public interest litigant wants to say, ‘the development is a bad idea and shouldn’t be allowed’, but the judicial review process prevents this issue being raised. Instead, litigants are forced to try to find some procedural error in the decision-making process to challenge or simply concede that they cannot challenge the decision at all.

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<sup>114</sup> *Buzzacot v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* (2012) 291 ALR 314 and *Tasmanian Heritage Council v Cita Property Group Pty Ltd* (2010) 181 LGERA 429.

<sup>115</sup> *Mineralogy Pty Ltd v Chief Executive Officer, Department of Environment Regulation* [2014] WASC 468.

<sup>116</sup> Rosemary Lyster, Zada Lipman, Linda Pearson, Nicola Franklin and Graeme Wiffen, *Environment and Planning Law in New South Wales* (4<sup>th</sup> ed) (The Federation Press, 2016), 39.

<sup>117</sup> *Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 2)* (2016) 215 LGERA 157 at [237].

<sup>118</sup> Chris McGrath, ‘Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest’ (2008) 25 *Environmental and Planning Law Journal* 324, 330. See also Sarah Wright, ‘Holding Regulators to Account in New South Wales Pollution Law: Part 2 – The Limits of Judicial Review and Civil Enforcement’ (2016) 87 *AIAL Forum* 46, 49 and Andrew Edgar, ‘Judicial review of public consultation processes: a safeguard against tokenism?’ (2013) 24 *Public Law Review* 209, 209-210.

In these circumstances, and given the financial and emotional cost involved, litigants may legitimately ask the question, ‘is it worth it?’ This is significant in environmental law given the limited availability of third party merit appeals, particularly for matters arising under Commonwealth legislation.<sup>119</sup>

### “Bring Out Yer Dead!”

The questions raised in this article concern the ability of judicial review to provide environmental protection in the Anthropocene age.

The Australian Law Reform Commission has characterised courts as a part of our democratic “culture of justification”, insofar as “every exercise of public power is expected to be justified by reference to reasons which are publicly available to be independently scrutinised for compatibility with society’s fundamental commitments”.<sup>120</sup> The democratic benefits of judicial review are realised through its enhancement of “transparency” and public participation in “decision-making processes”.<sup>121</sup>

In theory, judicial review functions, amongst other things, to improve decision-making processes, including those in an environmental law and policy context.<sup>122</sup> But if for litigants it is a “straight-jacket”, and if for repositories of governmental power the principles are “overly complex”,<sup>123</sup> its utility and efficacy in this regard must be in doubt.

The foundational binary choice between merits and process; facts and legality, that is central to established judicial review orthodoxy is arguably increasingly untenable

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<sup>119</sup> Rosemary Lyster, Zada Lipman, Linda Pearson, Nicola Franklin and Graeme Wiffen, *Environment and Planning Law in New South Wales* (4<sup>th</sup> ed) (The Federation Press, 2016), 39.

<sup>120</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Interim Report No 127 (2015), quoting Murray Hunt, ‘Introduction’ in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 1, 15–16. See also commentary on the “culture of justification” in The Hon T F Bathurst AC, ‘The nature of the profession; the state of the law’ (speech delivered at the Opening of Law Term, Sydney, 4 February 2016) at [19].

<sup>121</sup> Andrew Macintosh, Phillip Gibbons, Judith Jones, Amy Constable, Deb Wilkinson, ‘Delays, stoppages and appeals: An empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court’ (2018) 69 *Environmental Impact Assessment Review* 94, 102.

<sup>122</sup> Andrew Macintosh, Phillip Gibbons, Judith Jones, Amy Constable, Deb Wilkinson, ‘Delays, stoppages and appeals: An empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court’ (2018) 69 *Environmental Impact Assessment Review* 94, 102.

<sup>123</sup> Andrew Macintosh, Phillip Gibbons, Judith Jones, Amy Constable, Deb Wilkinson, ‘Delays, stoppages and appeals: An empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court’ (2018) 69 *Environmental Impact Assessment Review* 94, 172.

given the modern sophistication and reach of governmental action. Increasingly courts must grapple with issues of substance “but lack the doctrinal tools to approach such questions in a principled and methodical way”.<sup>124</sup> Repetition of traditional statements of principle for the appearance of consistency by courts is disingenuous and is apt to mislead.

While the Constitution has, on the one hand, preserved the role of the courts by enshrining a minimum standard of judicial review, on the other hand, it has acted as a brake on the judiciary reviewing for and intervening in decisions infected by substantive administrative error.

Having said all this, although innovation in judicial review is subject to significant doctrinal constraint in Australia,<sup>125</sup> innovation has nonetheless occurred and is continuing to occur. As recent case law demonstrates and as commentators have noted, “change is one of the few constant features of Australian Administrative law”.<sup>126</sup> Irrespective of the limitations discussed above, by reason of its enduring but malleable character, judges are afforded considerable latitude to correct for administrative error. Judicial review remains an useful tool for recognising that mistakes are made in the exercise of power and, at the very least, it “allows for a dignified means for their correction and a spur for their avoidance”.<sup>127</sup>

The following is a scene in the film *Monty Python and the Holy Grail*:

**Dead Collector:** Bring out yer dead!

**Large Man:** Here's one.

**Dead Collector:** Nine pence.

**Dead Man:** I'm not dead.

**Dead Collector:** What?

**Large Man:** Nothing. There's your nine pence.

**Dead Man:** I'm not dead!

**Dead Collector:** 'Ere, he says he's not dead.

**Large Man:** Yes he is.

**Dead Man:** I'm not.

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<sup>124</sup> T T Arvind and Lindsay Stirton, ‘The Curious Origins of Judicial Review’ (2017) 133 *Law Quarterly Review* 92, 91, 115.

<sup>125</sup> Matthew Groves, ‘Reforming Judicial Review at the State Level’ (2010) 64 *AIAL Forum* 30, 42.

<sup>126</sup> Matthew Groves, ‘Reforming Judicial Review at the State Level’ (2010) 64 *AIAL Forum* 30, 30.

<sup>127</sup> Joe McIntyre, ‘What is Administrative Law About? Power, Rights and Judicial Culture in Australia’, *AUSPUBLAW* (23 April 2018).

**Dead Collector:** He isn't.

**Large Man:** Well, he will be soon, he's very ill.

**Dead Man:** I'm getting better.

**Large Man:** No you're not, you'll be stone dead in a moment.

To resolve the dilemma, the dead collector pauses, clubs the man over the head and loads him onto the cart.

The extent to which judicial review is “getting better” will continue to be the subject of robust debate well into the future, but the fact remains that, despite various attempts by Parliament to outright kill, or at the very least mortally maim, judicial review, it is not dead.