THE RISE AND RISE OF MERITS REVIEW: IMPLICATIONS FOR JUDICIAL REVIEW AND FOR ADMINISTRATIVE LAW

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Much of the focus of the teaching of administrative law in universities, and of the academic discussion of administrative law, is on judicial review and its importance in the review of administrative action. In the past decade there has been a resurgence of interest in judicial review, and significant judicial development of some key principles concerning judicial review. In contrast, merits review has, for the most part, escaped much of that attention. Yet there is a strong argument that merits review is no less significant than judicial review as a means for obtaining the review of an administrative decision. My aim in this paper is to explore some of the reasons why that is so. I do so by considering the extent to which, and the areas in which, judicial review and merits review are being pursued in courts and tribunals, to examine the similarities between the judicial method at the heart of judicial review and merits review, and to consider the implications of these issues for the future development of administrative law. As we are approaching the 10 year anniversary of the establishment of the Western Australian State Administrative Tribunal (SAT) in January 2015, it is an opportune time to reflect on the place of merits review within administrative law.

In this paper, I will explore three issues:

1. the practical significance of merits review in achieving the objectives of administrative law;
2. the judicial method at the heart of judicial review and merits review; and
3. the implications of these issues for the role of judicial review and merits review as avenues for the review of administrative decisions, and for future policy development.

I should say at the outset that some of these issues have previously been discussed by others, and in preparing this paper I have been particularly assisted by a paper prepared by the Hon Justice Duncan Kerr, President of the Administrative Appeals Tribunal (the AAT), in 2012,[1] and by a paper written by Professor Peter Cane in in 2000.[2]

The context for the discussion in this paper is primarily the position in the Western Australian Supreme Court and SAT. However, I have also endeavoured to draw some comparisons with the position in the Federal Court and the High Court, and in the AAT. Those comparisons suggest that the position in Western Australian is not markedly different from those other Australian jurisdictions.

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The practical significance of merits review in achieving the objectives of administrative law

The objectives of the review of administrative decisions

Before we can begin to assess what significance merits review might have in achieving the objectives of administrative law, we need to bear in mind the objectives of administrative law remedies which permit the review of administrative decisions.

In a broad sense, the underlying objective of all administrative law remedies can be summarised as being to promote observance of the rule of law. But a number of forms of relief falling under the administrative law umbrella are directed to the even broader objective of promoting good governance. These broad objectives may be achieved in a number of ways: through the availability of remedies to restrain the unlawful exercise of administrative power, including administrative decisions and subsidiary legislation; the availability of remedies to enable the correction of decisions which do not represent the correct or preferable exercise of discretionary decision making power; and the grant of rights the exercise of which tends to increase accountability for, and the transparency of, administrative action (such as rights to the provision of reasons for decisions, or rights of access to documents under freedom of information legislation) and which tend to produce more consistent administrative decision making at first instance.

Judicial review and merits review in Western Australia – the facts

In Western Australia, judicial review of the decisions of inferior courts, tribunals and other administrative decision-makers is available through the grant of the prerogative writs, or injunctive or declaratory relief, in the Western Australian Supreme Court.[3] Merits review for a wide range of administrative decisions is available in the SAT.

The statistics below reveal that the number of applications for judicial review which are brought each year in the Supreme Court of Western Australia is very small, particularly when compared with the number of applications for merits review which are brought in the SAT each year.

The number of applications for prerogative relief commenced each year in the Western Australian Supreme Court, compared with the total number of civil actions commenced by writ, and compared with the total number of civil actions commenced in the Court, are set out in Table 1 below.[4]

Table 1 – Supreme Court Judicial Review Applications and Civil Lodgments: 1998 - 2013

Year	No of Judicial Review Applications	Total Writs	Total Civil Applications	Judicial Review as % of Total Actions
2013	32	1,954	2,893	1.1%
2012	26	2,073	2,980	0.87%
2011	23	2,447	3,330	0.69%
2010	29	2,076	2,972	0.97%
2009	14	2,167	3,242	0.43%
2008	13	1,832	2,884	0.45%
2007	8	1,364	2,195	0.36%
2006	17	1,391	2,201	0.77%
2005	15	1,513	2,487	0.60%
2004	36	1,656	2,656	1.35%

Year	No of Judicial Review Applications	Total Writs	Total Civil Applications	Judicial Review as % of Total Actions
2003	43	1,575	2,633	1.63%
2002	75	1,767	2,789	2.68%
2001	177	1,984	3,328	5.31%
2000	184	1,745	2,953	6.23%
1999	43	1,452	2,466	1.73%
1998	52	1,419	2,303	2.25%
TOTAL	**807**			

(The significant difference in the number of judicial review applications in 2000 and 2001 appears to be an anomaly which resulted from amendments to workers' compensation legislation in this State.)

Each initiating application in the table above is counted equally, whether it be a writ which commences an extremely large and complex piece of commercial litigation, or an application by a mortgagee to repossess in the event of a mortgagor's default on loan repayments. I immediately acknowledge that any comparison of raw figures is therefore highly flawed because those raw figures say nothing about the substance of each matter. The point of starting with the raw figures, however, is simply to provide an overall impression. That impression could not be clearer: judicial review applications constitute a very small proportion of the civil applications brought in the Supreme Court of Western Australia.

Of course, not all applications which are filed result in the delivery of a judgment. Table 2 below sets out the number of 'final' judgments delivered by the Court since 2000 in judicial review applications (that is, excluding reasons delivered in respect of applications for orders nisi).

Table 2 - Number of Final Judicial Review Judgments Delivered 2000 – 2014

Year	Number of Judgments
2014 (to July 2014)	6
2013	14
2012	10
2011	20
2010	4
2009	4
2008	2
2007	8
2006	8
2005	10
2004	5
2003	7
2002	9
2001	2
2000	3
Total	**112**

The next line of inquiry is to identify the factual context for the applications. Table 3 attempts to broadly categorise the 112 judgments the subject of Table 2 above.

Table 3 - Judicial Review Judgments 2000 – 2014

Subject	Number
Applications by prisoners relating to their conditions of imprisonment	14
Applications related to worker's compensation	20
Applications related to grant of mining licences	10
Applications to quash adjudications under the *Construction Contracts Act 2004* (WA)	7
Applications related to planning decisions (whether by Minister, local council or Western Australian Planning Commission)	21
Applications related to Ministerial decisions on environmental matters (including issue of notices under the *Contaminated Sites Act 2003* (WA))	7
Applications related to Ministerial decisions about heritage matters	3
Applications relating to decisions of lower courts	5
Applications relating to decisions of SAT, other tribunals, and the Liquor Commission	6
Applications relating to decisions of Corruption and Crime Commission	3
Other	16
Total	**112**

There is some overlap in the categories in the table above – for instance, 'applications related to planning decisions' would include some decisions of the SAT, which overlap with 'applications relating to decisions of SAT'. However, no application has been counted twice.

The judicial review decisions published by the Court since 2000 have been focused in certain areas – prisons, workers' compensation, mining, planning, and ministerial decision making, particularly in the environmental context. With the possible exception of planning matters, there are few applications for judicial review in subject areas where there exists the alternative option of pursuing merits review.

The SAT position

The SAT has both original jurisdiction and review jurisdiction.[5] The SAT has review jurisdiction if an enabling Act provides that an application may be made to the SAT to deal with the matter concerned and that matter expressly or necessarily involves a review of a decision.[6] According to SAT's annual report for 2012/2013, SAT derives its review jurisdiction from more than 150 enabling Acts,[7] in areas as diverse as Aboriginal Heritage, Animal Welfare, Building, Child Care, Construction Contracts, Firearms, Fisheries, Local Government, Planning, Taxation, Taxis, Vocational licences, and Working with Children authorisations.

The number of applications for merits review filed in the SAT in each year since 2005 is set out in Table 4 below. To give those figures some context, I have also included a comparison of the total number of applications in the SAT's original jurisdiction and in each of the key areas of the SAT's original jurisdiction (namely applications under the *Guardianship and Administration Act 1990* (WA) and under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA)).

Table 4 - The Number of Applications for Merits Review Filed in the SAT: 2005 - 2014

Year	Review Applications (% total matters in SAT)	Original Juris'n Application (G'ship & Admin Act)	Original Juris'n (Commercial Tenancies Act)	Original Juris'n (Other)	Total Original Jurisdiction Applications (% total matters in SAT)
2014 (to July 2014)	540 (12%)				3,876 (88%)
2013	1,010 (14%)	4,876	1,229	305	6,410 (86%)
2012	1,221 (16%)	4,610	1,273	317	6,200 (84%)
2011	1,125 (16%)	4,213	1,364	412	5,989 (84%)
2010	802 (13%)	3,681	1,461	366	5,508 (87%)
2009	959 (16%)	3,305	1,501	365	5,171 (84%)
2008	893 (15%)	3,015	1,627	364	5,006 (85%)
2007	865 (16%)	2,559	1,581	396	4,536 (84%)
2006	738 (13%)	2,583	1,662	484	4,729 (87%)
2005	1,034 (19%)	2,316	1,465	728	4,509 (81%)

Some federal comparisons – the Federal Court, High Court and AAT

The Federal Court

The jurisdiction of the Federal Court to deal with judicial review derives from s 39B of the *Judiciary Act 1903* (Cth) in respect of applications for judicial review of decisions by officers of the Commonwealth in respect of which an application under s 75(v) could have been made to the High Court, and from the *Administrative Decisions (Judicial Review) Act 1977* (Cth),[8] which provides for the judicial review of decisions made under Commonwealth 'enactments'.

It is not entirely clear from the Federal Court's 2012/13 Annual Report how many of the matters commenced in that financial year were judicial review applications, because the Report refers to matters by subject rather than by the nature of the application. With that rider, however, it appears that 87 Administrative Law matters, and a further 11 Migration matters, were commenced in the 2012/2013 year. In the same period, 1,564 matters were commenced.[9] If it is assumed for the moment that all 'Administrative Law' and 'Migration' matters were judicial review applications (and not all of them may have been), judicial review applications made up approximately 6.26% of the number of matters commenced in the 2012/2013 year.

A better indication of the nature and extent of the judicial review work done by the Federal Court can be gleaned from considering the published decisions of the Court. In the last three years, approximately 300 substantive judicial review decisions were delivered in the Federal Court. Those decisions can be broadly categorised as follows:

- 43% involved a review of a decision of the Immigration Minister;
- 16% involved a review of a decision of another Minister (Finance, Environment, Justice, Infrastructure and Transport, Attorney General, Home Affairs, Health);
- 12% involved a review of a decision of a regulatory board or authority (eg Australian Communications and Media Authority, Takeovers Panel, Civil Aviation Safety Authority, Information Commissioner, ASIC, Food Standards Aust-NZ);
- 9% involved a review of a decision of the Commissioner of Taxation, Police or Patents;
- 18% involved a review of a decision of the Federal Magistrates Court or of a federal tribunal (eg Superannuation Complaints Tribunal, Native Title Tribunal, Fair Work Commission, AAT, Anti-Discrimination Boards, Competition Tribunal); and
- 2% involved a review of other decisions (e.g. Australian Research Council, Australian Postal Corporation, Universities).

The High Court

For completeness within the federal context, it is appropriate to mention the judicial review jurisdiction of the High Court.

The High Court has power to issue writs of certiorari, mandamus and prohibition pursuant to s 75(v) of the *Constitution*. The High Court's 2012/2013 Annual Report indicated that the number of applications for 'constitutional writs' filed in the High Court in 2012-13 was 84, which was down from the 170 applications filed in 2011-2012.[10] There were just over 100 applications in 2010-11, of which approximately 95 were in immigration. There were only 40 applications in 2009-10 of which 30 involved immigration. There were 40 applications filed in 2008-09, of which approximately 25 involved immigration.[11]

When it comes to the number of decisions delivered by the High Court (reflecting matters that actually proceed to a hearing in the Court) the numbers are significantly lower. In each of 2013 and 2012, five of the Court's 61 decisions were decisions made in relation to matters arising under s 75 of the *Constitution*.

Merits review in the AAT

As with the SAT, the AAT's merits review jurisdiction depends upon conferral of jurisdiction upon it under another Act.[12]

The 2012/2013 Annual Report for the AAT divides its workload into the following areas: social security, veterans' affairs, workers' compensation, taxation, immigration and citizenship, and other.

6,176 applications were lodged at the AAT in 2012/13, 241 of which related to immigration and citizenship and 1,471 of which related to taxation.[13]

In the areas of immigration and taxation, in particular, there appears to be a degree of overlap with the subject matter of cases that are heard in the Federal Court.[14]

Conclusions about the significance of merits review vis-a-vis judicial review as an avenue for the review of administrative decisions

There is clearly a very significant disparity between the raw number of judicial review applications commenced in the Supreme Court or the Federal Court or High Court, on the one hand, and the number of merits review applications commenced in the SAT or the AAT on the other hand. In the absence of information as to why litigants choose a particular forum, it is impossible to do more than speculate about the possible reasons why so many more merits review applications are made. Nevertheless, a range of possible reasons come quickly to mind, including:

- cost of litigation;
- speed of litigation;
- informality / 'user friendly' tribunal setting – may be more suitable for self-represented litigants, as compared with the formality of court proceedings and the technicality of prerogative writ applications in particular;
- review based on the facts at the time of the review;[15]
- availability of reasons in respect of the decision at first instance;[16]
- tribunal rules and procedures which require the decision maker to put material before the Tribunal and to assist the Tribunal;[17]
- specialist tribunal member input in the merits review process;
- remedies - especially the possibility of substituting the original decision with the correct and/or preferable decision by a tribunal (cf referring the matter back to the original decision maker in judicial review); and
- merits review may include examination of the legal framework (and of the legality) of the decision under review.

Whatever the reason, the point remains that the figures set out above suggest that in practical terms, merits review is far more significant than judicial review as an avenue for the review of administrative decisions, because more applicants avail themselves of merits review than of judicial review when they are dissatisfied with an administrative decision.

However, despite the relatively small numbers of judicial review applications, the judicial review jurisdiction of the High Court and of State Supreme Courts remains of fundamental importance, for two reasons. First, the High Court's jurisdiction under s 75(v) of the *Constitution*, and the supervisory jurisdiction of State Supreme Courts to review the decisions of inferior courts and tribunals for jurisdictional error, cannot be excluded or eroded by legislation.[18] In contrast, a right to merits review exists only by virtue of legislation. That right could be abolished or eroded if the legislature saw fit to do so. Secondly, the importance of the independence of the Courts from the executive government should not be overlooked. In contrast, the independence of tribunal members could be undermined by legislative amendment, such as by removing or limiting the security of tenure of tribunal members, if the legislature saw fit.

The judicial method at the heart of judicial review and merits review

In this part of the paper, I explore one of the possible reasons why a litigant might prefer to pursue merits review (if that course is open), instead of judicial review, namely that in the course of a merits review, it is open to the tribunal to examine the legal framework for (and the legality of) the decision under review, as well as its merits.

The orthodox view is that judicial review and merits review are like oranges and apples – that is, that they are qualitatively different exercises[19] with little in common. Particularly in

the context of merits review,[20] however, the orthodox view does not withstand scrutiny. That is because a very similar judicial method is applied in merits review and judicial review.

A court undertaking judicial review will examine the decision under review having regard to the source of power to make the decision (ordinarily a statute) and to the parameters for the exercise of the decision making power which are set out in the statute. Leaving to one side those cases where judicial review of a decision is sought for error of law on the face of the record, or for a denial of procedural fairness, the court's role in a judicial review will be (i) to identify the decision in question, (ii) to engage in statutory construction so as to ascertain the parameters of the decision making power under the statute, and (iii) to determine whether the decision-maker fell into jurisdictional error by exercising the decision making power in such a way as to fall outside the parameters established by the statute for the exercise of that power.

In the context of a merits review, the tribunal must stand in the shoes of the original decision maker and exercise the decision making power *de novo*.[21] The tribunal will ordinarily be charged with determining the correct and/or preferable decision at the time of the review.[22] In this context, a 'correct' decision 'might be taken to be one rightly made, in the proper sense', while a 'preferable' decision is 'apt to refer to a decision which involves discretionary considerations'.[23] In determining whether the original decision was 'correct', considerations of the parameters of the power of the decision maker will arise.

Accordingly, a tribunal exercising a merits review jurisdiction must (i) identify the decision it has to make; (ii) form its own view about the parameters of the decision making power; and (iii) having regard to the evidence, determine what is the correct and/or preferable exercise of that power. In undertaking that exercise, the tribunal may form the view that the decision made at first instance was not the correct decision, because it has formed the view that that decision was not validly made.

Although a tribunal cannot make a declaration as to the invalidity of an administrative decision made by a decision maker at first instance, nor quash that decision, that limitation has little practical significance within the merits review context, for two reasons. First, administrative tribunals like the SAT and the AAT can, and do, express conclusions on points of law in relation to the legal framework for the exercise of the particular power they are called upon to exercise on the review, if it is necessary to do so in the proper conduct of the review. Secondly, those tribunals have the power to substitute their own (different) decision for that of the original decision maker if the initial decision was not the correct and/or preferable one in all of the circumstances.

Professor Cane has observed that:

> At least as practised by Australian merits-review tribunals, merits review reaches most of the types of issues that can be handled by courts exercising judicial review jurisdiction.[24]

That that is so can be illustrated by reference to a number of examples of cases dealt with by the SAT and the AAT.

In *Uniting Church Homes (Inc) and City of Stirling*[25] and *Retirees WA (Inc) and City of Belmont*[26] the SAT reviewed decisions of Councils to levy council rates on land which the rate payer claimed was used for a charitable purpose, namely for provision of aged care (retirement village). Both cases involved the construction of the rating legislation, which provided an exemption from rates for land used for a 'charitable' or 'public purpose', as well as a determination as to whether the evidence supported the conclusion that the land was being used for a charitable or public purpose.

Treby and Local Government Standards Panel[27] concerned a review by the SAT of a decision by the Local Government Standards Panel which found that two members of a Council had breached some Council standing orders and Regulations. The review involved the construction of the relevant regulations to ascertain the conduct which they prohibited, and then a determination of whether the evidence supported the conclusion that the Council members had contravened the standard of behaviour required of them. One of the issues which arose was whether the regulations should be construed in such as a way as to ensure they were not inconsistent with the implied freedom of political communication in the *Constitution.*

In *Young and Lyon and Commissioner of Taxation*[28] and *Walsh and Commissioner of Taxation*[29] the AAT reviewed decisions by the Commissioner of Taxation to disallow an objection by each of the taxpayers to a superannuation contribution surcharge assessment for various tax years. The legislation in question imposed a surcharge on the members of constitutionally protected superannuation schemes. The taxpayers' objections were based on the decision of the High Court in *Clarke v Commissioner of Taxation.*[30] The taxpayers contended that because they occupied very senior positions in the South Australian and Western Australian governments, the legislation was invalid in so far as it purported to apply the surcharge to them. Deputy President Jarvis concluded that the AAT could consider the constitutional validity of legislation in order to determine whether or not it had jurisdiction to review a decision, and could form an opinion on whether the legislation could validly apply to particular persons or circumstances even though it could not reach a conclusion having legal effect that the legislation was invalid. Deputy President Jarvis assessed the evidence as to the role of the taxpayers within the State governments and the impact of the levying of the superannuation surcharge on the States, in order to reach a conclusion as to whether the legislation could validly apply in respect of the individual taxpayers.

In each of these cases, if an application had been commenced for judicial review, it is difficult to see how a court's approach would have differed from the approach taken by the tribunal in each case, save that the court could have made a declaration about validity, but could not have gone on to substitute its own decision for that of the original decision maker.

In pursuing a merits review, an applicant is able to secure a review of the merits of the decision, and at the same time (in an appropriate case) will derive the benefit of the tribunal's analysis of the legality of the original decision, having regard to the applicable legislative provisions. For this reason, Professor Cane observed that:

> The task of merits-review bodies, such as the AAT, of reviewing the legal component of administrative decisions can be described in precisely the same way as I have just described the task of a court exercising judicial review jurisdiction. … In respect of the standard of review of administrative decisions on legal issues, there is no difference between merits review and judicial review. Moreover, once the nature of questions of law is properly understood, it can be seen that the standard of review is accurately stated in terms of making the correct or preferable decision on the point of law in issue, with the proviso that 'correct' is to be understood as referring to a judgment by the reviewing body that the question of law in issue admits of only one reasonable answer.[31]

Accordingly, Professor Cane argued that merits review can be seen as 'judicial review in disguise'.[32] He contended:

> [The AAT] operates and behaves like a court. … In this light, the AAT finds its real significance not in being a general merits-review tribunal, but rather in being the vehicle of a massive expansion of judicial review by stealth. … The establishment of the federal merits review system not only made an expansion of the grounds of judicial review undesirable. It also made such an expansion unnecessary.[33]

That brings me to a consideration of the implications of the extensive use of merits review for the future development of merits review itself, for the development of judicial review, and for the development of administrative law more generally.

The implications of these issues for the role of judicial review and merits review as avenues for the review of administrative decisions, and for future policy development

The figures set out above suggest that if litigants have a choice between judicial review and merits review, they are likely to pursue merits review in a tribunal as a means to review an administrative decision about which they are dissatisfied. In doing so, they will obtain the benefit of the tribunal making an assessment as to whether the decision at first instance was legally correct and whether that decision was preferable in all of the circumstances at the time of the review. These features of merits review, and the extent to which it is being pursued in preference to judicial review, have some interesting implications for the development of administrative law which would benefit from greater analysis and consideration by academics, practitioners and policy makers alike.

One question which arises is whether the success of merits review will result in the slow demise of judicial review. The figures cited above suggest that judicial review applications are predominantly being made in relation to decisions for which merits review is not available – in this State, the majority of judicial review applications involve applications by prisoners, applications to challenge decisions of Ministers, and applications in construction contracts cases, for example, where no, or very limited, avenues for merits review are available. Justice Basten recently made a similar observation in the context of federal judicial review applications when he observed that 'administrative law is being developed by reference to a discrete area of asylum seeker related decisions and migration decisions more generally.'[34] However, there is no doubt that the cohesive development of the law benefits from the exploration of its application in a variety of different contexts. For that reason, one potential consequence of fewer applications for judicial review, and the concentration of those applications in a confined range of subject areas, may well be a stultification of the development of the law in relation to judicial review.

In addition, if we return to the objectives of administrative law which I mentioned at the outset, the use of judicial review and merits review raises a number of questions about how those avenues of review might be enhanced in order to better fulfil the objectives of administrative law.

One of those questions concerns the range of decisions for which merits review should be available. The existence of merits review jurisdiction depends on an enabling Act granting jurisdiction to a tribunal to review a particular decision. This has resulted in a patchwork of enabling Acts, each identifying particular decisions for merits review. One of the reasons for that approach has probably been the assumption that judicial review is the 'fallback' or 'default' position for the review of an administrative decision, so that it is not necessary to facilitate the wide availability of merits review. However, the limited recourse to judicial review which can be seen in the figures set out above suggests that maintenance of the rule of law, and good governance more generally, will be facilitated by the availability of merits review for a wider range of administrative decisions than presently exists. Justice Kerr has posed the question as to whether the AAT should have universal jurisdiction, subject to express exclusion, rather than the reverse.[35] Justice Basten has made a similar point.[36]

A further question in relation to the development of merits review in tribunals concerns the composition of tribunals. The potential for issues of statutory construction, and issues relating to the legality of administrative decisions, to arise in a merits review raises questions about the qualifications and expertise of members of merits review tribunals, for the

appropriate balance on a merits review tribunal between legally qualified members and members with expertise outside law, and for the composition of multi-member panels dealing with applications for merits review.

If it is the case that litigants pursue merits review instead of judicial review where that course is open to them, the question arises as to whether judicial review, particularly at the State level, would benefit from reform. In Western Australia, some reform has been pursued through amendments to the *Rules of the Supreme Court 1971* (WA). But these reforms have been limited in scope – they focus on a more streamlined, simplified procedure for pursuing judicial review, but are necessarily limited to relief by the grant of the prerogative writs, or declaratory or injunctive relief, within the Court's existing jurisdiction. The desirability of reform has been identified in the past, but not pursued by government. The issue was the subject of recommendations in a 2002 report of the Western Australian Law Reform Commission,[37] which were accepted by the then government of the day, but which were not ultimately reflected in legislation. Some possible areas for reform include simplification of the nature of, and basis for, relief on an application for judicial review, requiring the decision maker to provide all documents relevant to the decision under review,[38] requiring the decision maker to provide reasons for the decision under review,[39] and modifying the usual approach to costs so that applicants seeking judicial review do not face the prospect of a significant costs bill if they are not successful in the review (provided that the application had some prospect of success).

Other reforms may also warrant consideration. In a paper published in 2000 Stephen Gageler SC (as he was then) suggested that rather than continuing to focus on the scope of judicial review, a better approach might be to direct greater attention to the jurisdiction being exercised.[40] In other words, more precision in the legislative prescription of the parameters of the decision making power, such as the preconditions for the exercise of jurisdiction, the factors which must be taken into account in making a decision, and the procedures required to be followed in the exercise of jurisdiction, would be of assistance to decision makers in identifying the task they are required to perform, and to courts and tribunals required to undertake a review of such decisions.

Conclusion

The significant extent to which merits review has been used as an avenue for the review of administrative decisions shows no sign of abating. For that reason alone, merits review warrants closer consideration than it has previously received, from the perspective of both principle and policy. Like judicial review, merits review has an important role to play in ensuring the observance of the rule of law, consistent, rational and transparent decision making, and thus of good governance generally. Closer consideration of the Australian model of merits review will not only enable the strengths of that model to be identified and understood, but in turn may permit some conclusions to be drawn about any limitations of the avenues for judicial review which are available in Australian courts. In turn, that analysis will assist to identify ways in which the avenues for both merits review, and judicial review, might be enhanced, so as to improve their accessibility and their utility in the review of administrative decisions.

Endnotes

1 D Kerr, 'The Intersection of Merits and Judicial Review: Looking Forward' (2013) 32 *University of Queensland Law Journal* 9.

2 P Cane, 'Merits Review and Judicial Review - The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213.

3 *Supreme Court Act 1935* (WA) s 16.

4 These figures are drawn from those applications where the remedy claimed was a 'prerogative writ'. It is likely that these figures are not an entirely accurate reflection of the number of judicial review applications, for a variety of reasons. For example, the figures will not include those cases in which a declaration was the only relief sought in what was an application for judicial review.
5 *State Administrative Tribunal Act 2004* (WA) ss 8, 14.
6 *State Administrative Tribunal Act 2004* (WA) ss 13(1), 17(1).
7 State Administrative Tribunal, *Annual Report 2012 - 2013*, Appendix 1.
8 Section 8 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) confers jurisdiction on the Federal Court to hear and determine applications under that Act.
9 Federal Court of Australia, *Annual Report 2012 - 2013*, 29.
10 High Court of Australia, *Annual Report 2012 - 2013*, 15.
11 See High Court of Australia, *Annual Report 2012 - 2013*, 16 (Table E).
12 *Administrative Appeals Tribunal Act 1975* (Cth) s 25.
13 Administrative Appeals Tribunal, *Annual Report 2012-13*, 26, 30, 189.
14 See further Federal Court of Australia, *Annual Report 2012 - 2013*, 29 (Table 3.1), specifically the statistics relating to migration and taxation.
15 *State Administrative Tribunal Act 2004* (WA) s 27(1); see also *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.
16 *State Administrative Tribunal Act 2004* (WA) s 21, s 22; cf *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; *Public Service Board of NSW v Osmond* (1986) 159 CLR 356.
17 *State Administrative Tribunal Act 2004* (WA) s 24(b), s 30.
18 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531; *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398.
19 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35 - 36 (Brennan J).
20 Even in the context of judicial review, there are signs that the orthodox approach – that courts undertaking judicial review do not engage in a consideration of the merits of the decision under review – may be eroded, especially in the context of findings as to jurisdictional facts: see, for example, *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 [116] (Edelman J).
21 *State Administrative Tribunal Act 2004* (WA) s 27(1).
22 *State Administrative Tribunal Act 2004* (WA) s 27(2); see also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338.
23 *Shi v Migration Agents Review Authority* (2008) 235 CLR 286, 327 [140] (Kiefel J).
24 P Cane, 'Merits Review and Judicial Review - The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 220.
25 *Uniting Church Homes (Inc) and City of Stirling* [2005] WASAT 191.
26 *Retirees WA (Inc) and City of Belmont* [2010] WASAT 56.
27 *Treby and Local Government Standards Panel* [2010] WASAT 81.
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32 Ibid, 243.
33 Ibid, 242.
34 J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in N Williams SC (ed) *Key Issues in Judicial Review* (2014) 3.
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