JUDICIAL REVIEW OF ENVIRONMENTAL DECISION MAKING IN QUEENSLAND

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1. Introduction

Many pieces of resource development, planning and environmental protection legislation in Queensland confer a number of decision making powers upon the Governor, Ministers and various government authorities, whether it be to grant a licence, approve a development or to grant some form of access to the environment. Although such powers may be conferred in wide terms, it has been consistently held by the courts that those powers must be exercised for the purpose or objects of the legislation which confers them. Thus, a decision will be reviewable by the courts if made in want of jurisdiction or power given by the legislation, if made in breach of the rules of procedural fairness or if made as a result of an improper exercise of the power. Such errors of law may result in the invalidity of that decision.

Judicial review will not always provide a satisfactory solution because if the power has been exercised within the scope and purpose of the legislation, the Court will not consider the merits of the decision in order to determine what, in its opinion, the best decision might have been in the circumstances.[1] Nor will the Court substitute its own decision for that of the decision maker, even if the decision is unlawful. However, any form of review of decisions made by government bodies is better than no review at all and having the

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1 Contrast this with the type of merits review undertaken by the commonwealth Administrative Appeals Tribunal and the Victorian Administrative Appeals Tribunal. These bodies can also substitute their own decision for that of the decision maker.

Court overturn a decision will not only provide a measure of satisfaction to individual applicants but may facilitate an improvement in future decision making and behaviour.

At the federal level, many decisions made under Commonwealth legislation are susceptible to review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ('the *ADJR Act*'). *The Judicial Review Act* 1991 (Qld) ('the *JR Act*')[2] enables persons to approach the Supreme Court to seek review of decisions made by Queensland government bodies. The *JR Act* is closely modelled on the *ADJR Act* and incorporates some unique innovations of its own.

The provisions which are directly modelled on the *ADJR Act* are those setting out a statutory procedure for seeking judicial review, codifying the various grounds of review, simplifying and modifying the remedies that the Court may grant, adopting a liberal test of standing and imposing upon a decision maker a statutory obligation to provide reasons for a decision.[3]

The innovations adopted by the *JR Act* attempt to overcome some of the difficulties that have emerged during the 15 years of the operation of the *ADJR Act*. These measures include a broader definition of the type of decisions which will be susceptible to statutory review, the power of the Supreme Court to make special costs orders and the introduction of a uniform test of standing.[4]

The aim of this paper is to demonstrate the means by which the *JR Act* may facilitate not only the reviewability of, but also an improvement in, decision making pursuant to resource development, planning and environmental protection legislation ('environmental legislation'). The recent trend towards incorporating in such legislation an express statement of objects and objectives according to which the relevant enactment is to be administered will further enhance the review process. Thus, it is possible that a failure to give appropriate attention to, or a failure to act in accordance with, those objects in making a decision under the particular enactment will give rise to a

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2 Commenced on 1 June 1992.

3 See Parts 3 and 4.

4 See Parts 5 and 6.

number of grounds of review, with the possible result that the decision will be held to be invalid.

2. Situation prior to the *Judicial Review Act*

Prior to the introduction of the *JR Act*, challenge to government decision making in Queensland was by way of prerogative writ or equitable relief. The prerogative writs were sought by way of a cumbersome two step procedure involving special rules. In determining if the case was one in which a prerogative writ was appropriate, the courts had developed a number of technical distinctions. Similar complexities were apparent in actions seeking equitable relief by way of injunction or declaration.

The complicated technical rules which surrounded these traditional remedies were undoubtedly a major reason for the significantly few judicial review actions that were brought prior to the commencement of the *JR Act*.[5] Few litigants could afford the time and expense involved in challenging the decision of a governmental body and finding that an otherwise meritorious cause of action floundered on the choice of an inappropriate remedy.

In addition, many environmental groups with a strong interest in a decision were prevented from challenging it on the ground of insufficient standing.[6] The rules of standing were complicated and varied in stringency according to the particular remedy being sought.[7]

A major impediment to review was the fact that, at common law, there was no obligation on a decision maker to provide reasons for his or her decision.[8] This meant that many unlawful decisions went unchallenged due to the virtual impossibility, in the absence of reasons, of establishing the grounds upon

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5 The statistical table to the Electoral and Administrative Review Commission's ('EARC's') *Issues Paper No. 4* shows that the number of applications for prerogative writs against Queensland executive government decision makers averaged only 8.5 *per* year from 1978 to 1990. There were even fewer applications for a declaration.

6 Eg. *Central Queensland Speleological Society Incorporated v Central Queensland Cement Pty Ltd* [1989] 2 Qd R 512.

7 The rules of standing were particularly stringent for seeking equitable relief.

8 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 662.

which the decision was unlawful. Sorensen[9] notes that there had been, even prior to the *JR Act*, many more actions for judicial review against decisions of inferior courts and tribunals as opposed to executive decision makers[10] because those courts and tribunals publish reasons for their decisions.

3. Overview of the *Judicial Review Act*

The *JR Act* provides a unique structure of judicial review. It takes a dual approach.

Part 3 of the Act adopts, with some important modifications, the Commonwealth model encompassed in the *ADJR Act,* enabling a person who is aggrieved by a decision to seek reasons for that decision and to then seek a 'statutory order of review' without having first to identify the appropriate remedy to obtain it. The applicant need only identify the decision or conduct sought to be reviewed, the reasons why the applicant is aggrieved by the decision, the grounds upon which that decision or conduct is unlawful[11] and the relief sought[12] by way of statutory order.[13] However, to seek review under Part 3 the applicant must show that the 'decision is one to which the Act applies.' This jurisdictional limitation is explored below.

The Court has the power to make a number of discretionary orders[14] which include quashing or setting aside a decision, referring the matter to the decision maker for further consideration subject to directions,[15] declaring the rights of

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9 G. Sorensen, "The New Administrative Law in Queensland", 15 April 1992 *Queensland University of Technology CLE Seminar* at 6.4.

10 Eg. Ministers, statutory office holders, departmental officers, statutory authorities and boards.

11 *JR Act* 1991 (Qld) ss.20-24 inclusive set out the various grounds of review.

12 *Id* s 30.

13 *Id* s.25; see also *JR Act* Schedule 2. Equivalent in *ADJR Act* 1977 (Cth) is s 11.

14 Section 30.

15 Paragraph 30(1)(b) enables the Court to remit a matter for reconsideration with directions as to time limits for that further consideration. This attempts to overcome the frustration caused by decision makers delaying their reconsideration of a decision.

the parties and directing a party to do or refrain from doing anything that the Court considers necessary to do justice between the parties. The range is more limited for review of conduct for the purpose of making a decision and failure to make a decision.[16]

In recognition of the fact that there will be some actions and decisions which fall beyond even the expansive jurisdiction covered by Part 3, the *JR Act* has retained the traditional forms of relief in Part 5. This Part preserves the common law and equitable remedies but simplifies the procedure for seeking them. Review is sought by way of an 'application for review' in which any one or more of the five major remedies may be granted in the Court's discretion. The Court is given considerable flexibility in providing the various remedies[17], but some of the technicalities surrounding the availability of these traditional remedies remain. For example, where the decision maker is the Governor in Council, the Court has been reluctant to issue a prerogative writ and has tended to favour the granting of declarations.[18] Because of the various complications that might arise in seeking equitable or prerogative relief, Part 5 could be regarded as a type of 'catch all' for matters which cannot be dealt with under Part 3.

No significant disadvantage would appear to flow from a necessity to seek review pursuant to Part 5 of the *JR Act* rather than under Part 3 with the important exception that unless the decision is one to which Part 3 applies, there is no obligation on the decision maker to provide reasons for that decision.

4. The *Judicial Review Act* and environmental decision making[19]

4.1 Expanded Jurisdiction of the Court to Provide Statutory Orders of Review

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16 See ss.30(2), (3).

17 *JR Act* s.47.

18 See eg. *FAI Insurance v Winneke* (1982) 151 CLR 342.

19 The term 'environmental decision making' is being used as a shorthand to refer to those decisions made pursuant to resource development, planning and environmental protection and management legislation.

To apply for a statutory order of review under Part 3 and to be entitled to obtain reasons for decision,[20] there must be a 'decision to which this Act applies' which is defined in s 4 to mean a decision:[21]

(a)...of an administrative character made...under an enactment...; or

(b)...of an administrative character made...by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part)-

(i) out of amounts appropriated by Parliament; or (ii) from a tax, charge, fee or levy authorised by or under an enactment.

(a) 'Administrative Character'

It is important to closely examine the actual decision or action in order to determine whether it effects a new rule or an amendment of a rule having general application (legislative) or whether the action or decision is applying a general rule to a particular case (administrative).[22]

A resolution by a local council to amend a particular Planning Scheme, pursuant to its functions under s 2.19 of the *Local Government (Planning and Environment) Act* 1990 (Qld) ('the *Local Government Planning and Environment Act*'), is a decision which is administrative in character because the resolution does not, of itself, effect any amendment to the Plan but is

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20 Reasons are only required to be given under the *JR Act* in respect of decisions susceptible to a statutory order of review under Part 3.

21 Which must be something which is final, operative and determinative rather than a conclusion reached as a step along the way to a final decision unless the step is provided for by the relevant enactment: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

22 *Minister for Industry and Commerce v Tooheys Ltd* (1981) 60 FLR 325 at 331-332; *Aerolineas Argentinas and Ors v Federal Airports Corporation* (1994) 118 ALR 635 at 645.

merely part of the council's administering function.[23] Such a resolution will be reviewable under Part 3 of the *JR Act*.

Similarly, in the context of the *Environmental Protection Act* 1994 (Qld) ('the *EPA*'), Environmental Protection Policies are given the status of subordinate legislation.[24] Thus, any procedural errors which occur in their drafting, such as failing to take into account submissions properly made to the Minister under the *EPA*, may well be regarded as errors involved in the making of a legislative decision.

Review of the validity of council by-laws will also fall outside the scope of Part 3 and it will be necessary to seek a traditional remedy under Part 5.[25] However, those remedies may be limited to declarations and injunctions.[26] A decision made by a local council pursuant to such by-laws may be reviewable by statutory order as that decision would be under an 'enactment'.[27]

(b) 'Under an Enactment...'

The requirement in s 3 of the *ADJR Act*[28] that a decision be 'under an enactment' (ie directly traceable to an enactment[29]), has created a significant

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23 *Resort Management Services Limited v Council of the Shire of Noosa* (1993) 80 LGERA 265, affirmed on appeal (1993) 81 LGERA 295. See also *H. A. Bachrach Pty Ltd v Minister for Housing & Ors* (QLD Supreme Court, unreported, 7 October 1994, No. 174 of 1994).

24 *LGEPA* s.30.

25 *Paradise Projects Pty Ltd v Council of the City of the Gold Coast* [1994] 1 Qd R 314.

26 The prerogative writs of certiorari and prohibition are not available for reviewing actions of a legislative nature. The writ of mandamus may not be available where the regulation etc is made by the Governor (as this remedy cannot be issued against a Crown representative) but may apply where the same is made by some other person or body. This is just one example of the technicalities that continue to be associated with the traditional remedies despite procedural simplification and codification.

27 The definition of 'enactment' in s 3 is expressed to mean a 'statutory instrument' which would include by-laws: see *Statutory Instruments Act* 1992 (Qld) s.7(1).

28 The equivalent of s 4(a) of the *JR Act*.

amount of litigation and it has been held that decisions made pursuant to an executive prerogative[30] or pursuant to a contract[31] are not decisions 'under an enactment.' It has also been held that a decision pursuant to a non-statutory scheme is not a decision 'under an enactment'.[32] Thus, there are many decisions at the federal level which will not be covered by the *ADJR Act*, leaving the aggrieved individual to pursue his or her remedy by way of prerogative writ or equitable relief.

Paragraph 4(b) of the *JR Act* seeks to overcome these difficulties by removing the necessity of showing proximity to an enactment. In the normal situation, where the decision is clearly one which is pursuant to an enactment, paragraph 4(a) is the relevant provision. However, paragraph 4(b) enables a statutory order of review to be made in respect of decisions made under publicly funded non-statutory schemes or programs.

(i) Decisions made under Publicly Funded Non-statutory Scheme or Program

The rationale behind this innovation seems to be that the public funding of such schemes and programs gives them the same public interest character that they would have if they were made under legislation enacted in the public interest.[33]

The scope of paragraph 4(b) was considered by Derrington J. in *Re South East Brisbane Progress Association & Ors v Minister for Transport & Anor.*[34] His Honour was inclined to give a liberal interpretation to the phrase

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29 The cases have referred to this requirement as the necessity for proximity to an enactment: *Post Office Agents' Association Ltd v Australian Postal Commission* (1988) 84 ALR 563.

30 Eg. *Hawker Pacific Pty Ltd v Freeland Commonwealth and Civil Flying Services Pty Ltd* (1983) 51 ALR 185.

31 Eg. *Australian National University v Burns* (1982) 43 ALR 25.

32 *Toranto Pty Ltd v Madigan* (1988) 81 ALR 208.

33 Commonwealth Administrative Review Council, *The Ambit of the ADJR Act - Report No. 32* , 1989 at 38.

34 (1994) 1 QAR 196.

'non-statutory scheme or program' and said that while the concept of 'program' appeared to connote a repetition of events, a 'scheme' could embrace a single project or an enterprise. The facts in this case concerned the decision of the Minister to give approval for the construction of a standard gauge railway line to Fisherman Islands Port of Brisbane via a corridor in south-east Brisbane where a railway line already existed. The project was not backed by legislation but was partly funded by Commonwealth and State funds appropriated by Parliament. Thus, Derrington J. found that all the elements of the definition in paragraph 4(b) were met.

There are a number of other examples of such schemes where, prior to the *JR Act*, the scope for reviewing decisions made under them was limited to common law or equitable remedies. For instance, a Ministerial inquiry into the environmental implications of a certain development proposal may fall under paragraph 4(b), allowing statutory review of decisions made by that inquiry. Failure to afford procedural fairness during the inquiry process to persons affected by the development or to the developers themselves is an example of the type of reviewable error that might occur.[35]

Another example of a non-statutory program where there may be potential for review is the Land Care program and the implementation of the Land Care Plan for Queensland.[36] It is funded, in part, by the Queensland government and is, substantially, a community based scheme which relies upon the involvement of land-holders and other stakeholders and the adoption by them of appropriate property management plans. It does not seek to impose compulsory measures on land-holders, yet the success of the program depends significantly upon land-holders having the technical and financial capacity to

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35 The grounds of review upon which a decision can be challenged are found in ss. 20-24 of the *JR Act* and will be discussed in greater detail below.

36 There will be a Plan developed for each State which aims to provide a framework for community involvement in Land Care as part of a national program. The Queensland Plan was developed by the Queensland Land Care Council in consultation with local Land Care groups, land-holders, local authorities, rural industry organisations, community conservation groups, government departments and educational bodies with the aim of providing a broad framework of strategies to be implemented and actions to be taken by these same bodies in order that land resources are used within their capability and that there will be minimal adverse impacts on natural resources through land use.

adopt sustainable land practices and to engage in land recovery programs to restore past degradation. This in turn requires adequate provision of financial and technical support by the government.[37]

A land-holder may wish to seek review of a government decision relating to the provision of financial or other assistance where that decision contains reviewable errors of law, for example, through a failure to afford procedural fairness to a land-holder who wishes to seek financial assistance to implement a part of the Land Care strategy.[38] Another example of a reviewable error might be where there is a refusal to grant financial assistance to a Land Care group strategy on the basis that it has very little prospect of success, despite substantial evidence to the contrary provided by the Land Care Council.[39] It should be noted that it will be difficult to apply all of the statutory grounds of review, particularly whether a matter is relevant or irrelevant to the exercise of the power,[40]and whether the decision was made for an improper purpose[41] as these grounds rely upon the existence of a statute from where the scope or objects of the particular power can be determined. However, it would be possible to apply other grounds where the existence of a statute is not vital such as denial of procedural fairness, unreasonableness[42] and acting on the basis of no evidence.[43]

(ii) Decisions made under Contract

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37 Queensland Department of Primary Industries , *Decade of Land Care Plan*, 1992 at vii-viii, 37-38.

38 See *JR Act* s.20(2)(a) - that a breach in the rules of natural justice happened in relation to the making of the decision.

39 Possibly on the 'no evidence' ground: *JR* Act s 23(f) or s 20(2)(h), s 21(2)(h) and s 24.

40 *JR Act* ss.23(a) and (b).

41 *JR Act* s.23(c).

42 *JR Act* s.23(g).

43 For a contrary argument see P.Bayne, "The Common Law Basis of Judicial Review" (1993) *ALJ* 781.

Many contracts or joint agreements for resource development and public works are entered into between the State government and developers. The availability of a remedy for unlawful termination of those agreements is important to developers who may invest significant capital into such a project. The hazards of entering into government contracts because of the peculiar position of the Crown as a party to such contracts have been dealt with elsewhere.[44]

The main source of controversy occurs where 'executive necessity' may dictate that it is not in the public interest for the government to continue to be bound by the terms of an agreement. An example of this is where an area in which the agreed development is to, or has, commenced is then declared to be a World Heritage Management Area[45] and a conservation plan is prepared for that area[46] with which the development is incompatible[47], or if a new government is elected which has a commitment to facilitate protection of the environment in the particular area in which the agreement operates. Generally, unless a statutory right to compensation is given,[48] there may be no common

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44 Eg. E.Campbell, "Commonwealth Contracts" (1970) 44 *ALJ* 14; C.D.Gilbert, "Government Contracts: Now You See Them, Now You Don't" (1991) *QLSJ* 435; S.Rigney, "The Resource Development Contract - How Secure is It?" in A.Gardner, (ed.) *The Challenge of Resource Security*, Sydney, Federation Press, 1993, 89; and L.Warnick, "State Agreements" (1988) 62 *ALJ* 878.

45 Pursuant to *Nature Conservation Act* 1992 (Qld) s.48.

46 See *Nature Conservation Act* 1992 (Qld) s.49.

47 Section 61 of the *Nature Conservation Act* 1992 (Qld) provides that if a licence or any other authority allows a person to do an act which would contravene the regulation giving effect to a management plan for that area, that licence or other authority is cancelled by force of that section.

48 See s 62 *Nature Conservation Act* 1992 (Qld) which, in the event of a declaration of a Nature Refuge or a regulation giving effect to a management plan for a World Heritage Management areas or International Agreement Area, enables 'land-holders' to seek compensation in respect of any injurious effect upon the land-holder's interest in land caused by the restriction or prohibition imposed under the declaration or regulation on a land-holder's existing use of the land. 'Land-holder' includes a person having an interest in land: s 58. This would presumably include a developer.

law right to damages or specific performance of the contract.[49] The question then becomes whether the decision by the government to terminate the contract can be the subject of judicial review.[50]

Decisions to terminate a contract have been held not to be 'under an enactment' within the requirements of the *ADJR Act* because of a lack of proximity to the enactment which provides the general power to enter into the contract.[51] If, however, there exists an Act which contains detailed provisions for the appointment and dismissal of persons and lays down procedural requirements and establishes appellate bodies in relation thereto,[52] decisions by the appellate bodies to dismiss might be reviewable under the *ADJR Act.* Similarly, if the contract incorporated such statutory provisions relating to dismissal or repeated them in the same terms, it might be that the decision to terminate the contract will be under that statute.[53] In the absence of these circumstances, it is likely that the decision to terminate will be referable to the contract rather than to any enactment that might have empowered the entry into that contract. The difficulty would not seem to be overcome by paragraph 4(b) which provides for review of decisions pursuant to non-statutory schemes or programs.[54] It would appear, therefore, that a decision to terminate a

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49 This is discussed in a number of articles eg. E.Campbell, "Commonwealth Contracts" (1970) 44 *ALJ* 14; C.D.Gilbert, "Government Contracts: Now You See Them, Now You Don't" (1991) *QLSJ* 435; S.Rigney, "The Resource Development Contract - How Secure is It?" in A.Gardner, (ed.) *The Challenge of Resource Security*, Sydney, Federation Press, 1993, 89; and L.Warnick, "State Agreements" (1988) 62 *ALJ* 878.

50 Eg. for acting beyond power conferred by a statute or according to an improper procedure such as denial of procedural fairness or failure to advertise when required.

51 *Australian National University v Burns* (1982) 43 ALR 25.

52 Such as the case with public servants where the *Public Service Act* 1902 (Qld) provides some protection.

53 *ANU v Burns* (1982) 43 ALR 25.

54 This point is, of course, arguable. See C.D.Gilbert and W.Lane, *Queensland Administrative Law* (Looseleaf Service), Sydney, Law Book Company Limited, 1994 at paragraph. 1.710 where the commentator suggests that there is an argument for a contract being regarded as a publicly funded non-statutory scheme

contract would not be one which is either 'under an enactment' or one which is pursuant to such a scheme or program and Part 3 of the *JR Act* would not apply. The remedies for a developer would be purely contractual.[55] As seen above, these remedies may not be satisfactory.

Thus, where the Water Resources Commission enters into a contract with a person for construction of works and later terminates that agreement, there is no recourse under Part 3 of the *JR Act* even though the making of such contracts is authorised by s 3.21 of the *Water Resources Act* 1989 (Qld). Similarly, in the context of public works or infrastructure, if the Minister for Transport enters into a contract with a developer pursuant to powers s 6 of the *Transport Infrastructure (Railways) Act* 1991 (Qld), little recourse is given to the latter in the event of a change of policy and consequential termination of the contract.

The position may be different where the agreement with the developer is given statutory effect, which has been the case in some agreements relating to mining ventures or public works.[56] On other occasions, the contract has been ratified by statute.

While there is no protection against the agreement being terminated by a later Act repealing the enactment giving statutory effect to the agreement,[57] if that statute has the effect of transforming contractual rights into statutory duties, it may prevent the government from exercising its executive powers inconsistently with that agreement.[58] In circumstances where a government seeks to terminate an agreement on the basis of 'executive necessity' it may be in breach of its statutory duties.

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or program but notes the difficulty presented by the situations where those contracts are themselves made pursuant to statutory powers.

55 Even pursuant to Part 5, the Court would be very unlikely to grant relief and might use its discretionary power pursuant to s 42 to order that the action be brought by way of an ordinary civil action given that the matter involves contractual issues.

56 Eg. *Aurukun Associates Agreement Act* 1975 (Qld) s.3.

57 *McCawley v The King* [1920] AC 691.

58 See on this point L.Warnick, *above* n.49 at 892, 894; E.Campbell, "Legislative Approval of Government Contracts" (1970) 46 *ALJ* 217 at 218; S.Rigney, *above* n.49 at 105.

Furthermore, where a contract is given statutory effect, a decision to terminate the contract may now be regarded as a decision 'under an enactment'. Whether the contract takes effect as part of an enactment will depend upon the language which the statute uses to ratify the contract. Mere ratification may not be sufficient and it may be necessary for the enactment to contain a provision which provides that the 'agreement shall take effect as if enacted in this Act...'. This argument is merely speculative but one which appears to be tenable.

(c) Decisions of the Governor in Council

The *JR Act* does not exclude decisions of the Governor in Council from its ambit[59] and the Court may make a statutory order of review in respect of such a decision.[60] Given that decisions can also be reviewed if made pursuant to a non-statutory scheme, it appears that the *JR Act* has gone further than the common law.[61] A further important consequence is that the liability to provide written reasons for decision will now apply to such decisions.[62] No longer can decisions be insulated from judicial review by the vesting of the final decision making power in the Governor.[63] Sorensen notes that, in Queensland, by

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59 Contrast with section 3 of the *ADJR Act* which expressly excludes decisions of the Governor General from the ambit of judicial review, thus reflecting the accepted view at the time of drafting of that Act that such decisions were non-justiciable.

60 Section 53 provides that where review of a decision of the Governor in Council is sought, the applicant should name the Minister responsible for the administration of the enactment, scheme or program as the respondent.

61 There has been some hesitation in the cases concerning reviewability of non-statutory powers of Crown representatives: eg. *R v Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council* (1981) 151 CLR 170; *South Australia v O'Shea* (1987) 163 CLR 378.

62 Section 32(2) indicates that the responsibility falls upon the Minister responsible for the administration of the enactment, or the scheme or program, under which the decision was made.

63 Compare with *NSW Mining Co Pty Ltd v Attorney-General for NSW* (1967) 67 SR (NSW) 341 where the NSW Court of Appeal found that, particularly in cases where public policy is involved and an unfettered discretion is given to the Governor, the Governor's decision was not reviewable.

virtue of long constitutional habit, the formal responsibility for a vast range of routine administrative decision making is vested in the Governor in Council.[64] However, this is also true of many important decisions.

Examples of the latter may be seen in a number of pieces of resource development legislation, such as the *Mineral Resources Act* 1989 (Qld), where the Governor in Council has the final power to grant a mining lease[65], whereas decisions to grant rights which have less significant implications for the environment rest with other administrative bodies.[66] Under the *Petroleum Act* 1923 (Qld), the Governor in Council has power, among other things, to grant a petroleum lease[67] and to give permission to construct and operate an oil refinery[68] or a pipeline.[69] The *Nature Conservation Act* 1992 (Qld) authorises the Governor in Council to dedicate and declare certain protected areas,[70] prescribe wildlife as vulnerable, rare, common, international or prohibited wildlife,[71] approve final management or conservation plans in respect of protected areas or wildlife and to amend such plans in certain circumstances.[72] The Minister also has a number of important powers.[73] It seems clear that the exercise of those discretionary powers by the Governor in

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64 G.Sorensen, *above* n.9 at 15.

65 Section 7.3.

66 For example, prospecting permits are granted by the Mining Registrar and mineral development licences are granted by the Minister.

67 Section 9. See also s 29A re grant to persons other than permittee.

68 Section 45(1).

69 Section 45(3).

70 See ss.29, 42, 50, 54.

71 See Division 2 of Part 5.

72 Sections 108, 113.

73 Eg. the preparation of management plans (s.102), cancellation of licences, permits or authorities issued under other Acts which conflict with a regulation giving effect to a management plan in certain protected areas and with interim conservation orders (ss.61and 99), entering into conservation agreements with land-holders in respect of a protected area for the management of such areas (s.41) and the making of interim conservation orders (s.94).

Council will be reviewable and reasons may be sought in respect of such decisions.

The Governor in Council's powers under the *Local Government Planning and Environment Act* extend to matters such as the approval of planning schemes[74] and the rezoning of land.[75] While these appear to be formal powers, the Governor in Council may give that approval despite any procedural defects in terms of the public notice provisions if satisfied that the non-compliance has not adversely affected the awareness of the public of the existence and nature of the proposal or application and that it has not restricted the opportunity of the public to exercise rights of inspection and submission or objection, as the case may be. This power reinforces the fact that, while the Governor in Council may have a number of formal powers, where it will be unlikely that any decision made will vary from that of the Minister, there may occasionally be a clear grant of discretionary powers to override statutory rights of public involvement. Thus, the ability to review those decisions is important.

Similarly, the *EPA* confers upon the Governor in Council a number of regulation making powers for important matters such as prescribing 'environmentally relevant activities' if the Governor in Council is satisfied that a contaminant will or may be released into the environment when the activity is carried out and that it will or may cause environmental harm.[76] Although a degree of parliamentary scrutiny of those regulations ensures a measure of publicity,[77] considerable power is given to the Executive make laws upon the achievement of satisfaction about quite sensitive and, arguably, subjective matters without any provision made for public involvement in that process. Again, ability to review such a decision will be important even if the action may have to be brought under Part 5 of the *JR Act* as it concerns a 'legislative' decision.

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74 Section 2.20. Also amendments: s.4.5.

75 Sections 4.8, 4.10

76 *LGEPA* s.38. Such activities can be carried on only with an authorisation: ss.39 and 40.

77 See s.43 (tabling before the Legislative Assembly and s 44 (disallowance by the Legislative Assembly) of the *Legislative Standards Act* 1992 (Qld).

(d) Specific Exclusions from Review

The *ADJR Act* provides that decisions specified in Schedule 1 of that Act are not reviewable under the Act thus creating a blanket exclusion of a number of decisions. This framework has not been adopted by the *JR Act*. Schedule 1 of the *JR Act* sets out seven Acts whose privative clauses[78] continue to operate despite s 18(1) which seeks to override all existing privative clauses in Queensland legislation at the commencement of the *JR Act*. However, whether these clauses in Schedule 1 will actually restrict or prevent review will depend upon the Court's construction of their effect. At present, there are no clauses preserved by Schedule 1 which are contained in any environmental legislation. However, s 18 will not override any privative clauses contained in enactments passed subsequent to the commencement of the *JR Act*.[79]

However, a recent amendment has been made to the *JR Act* whereby Schedule 6 has been inserted into the Act to preclude review by the Court of commercial decisions and decisions relating to the community service obligations prescribed by regulation that are made by certain Government Owned Corporations ('GOCs').[80] The currently listed GOCs include the various port authorities which have been corporatised, the Queensland Investment Corporation and the Queensland Industry Development Corporation. Each of these bodies have the potential to make decisions having significant environmental effects, particularly in relation to large infrastructure projects. As more GOCs are added to Schedule 6, as is likely to be the case,

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78 A privative clause is a provision in an Act which attempts to prevent or limit the courts from reviewing a decision. The courts will generally adopt a very restrictive approach in interpreting such clauses so as to preserve their ability to review various decisions eg. *Hockey v Yelland* (1985) 59 ALJR 66, at 69; *R v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, *R v Heiner; ex parte Williams* (1980) Qd R 115.

79 That is after 1 June 1992. For an example of a very strong privative clause which has been the subject of considerable controversy, see ss.5-7 of the *Brisbane Casino Agreement Act* 1992 (Qld).

80 As defined by s.16 of the *Government Owned Corporations Act* 1993 (Qld) whereby the Government may corporatise various government entities so as to enable them to perform their commercial functions in a competitive environment.

the greater the potential for many important commercial decisions that have environmental impact to be excluded from review. While GOCs are bound by the *EPA*,[81] it appears that there will be little scope for judicial review of commercial decisions of such entities that fail to comply with procedures and duties set out by that Act.

4.2 Reasons for Decision

If a person is able to establish that they are entitled to seek a statutory order of review pursuant to Part 3 of the *JR Act*, they are entitled to seek reasons for that decision.[82] This right is not dependent upon an applicant actually seeking a statutory order of review. The ability to obtain reasons enables a potential applicant to have some confidence in the grounds upon which they are proposing to attack the decision or, on the other hand, to abort the proceedings if no error of law is revealed or it is a matter which can be dealt with by way of internal review.

Schedule 2 contains some exclusions to a decision maker's obligation to provide reasons.[83] Possibly the most relevant exclusion in the context of environmental decision making is that no reasons need be provided for decisions relating to the selection of a tender or the awarding of a contract and for decisions of specified State authorities in relation to their competitive commercial activities.[84] Thus, in the former instance, a developer would not be able to compel a government agency to provide a statement of reasons for deciding to accept a rival tender to engage in various public works.

An important innovation introduced by s 50 of the *JR Act* is that where a person applies to the Court for an application for an order that the decision maker comply with a request for reasons,[85] if that person is successful, in whole or part, they may be awarded costs. Thus, a person who is aggrieved by

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81 See s.19 and the Dictionary in Schedule 4 of the *LGEPA*.

82 Section 32.

83 See s.31.

84 See clauses 13 and 14 of Schedule 2.

85 Section 38.

a decision which is unaccompanied by reasons will not be discouraged at the 'first post' by prohibitive court costs.

4.3 Uniform Standing Requirements

An applicant must be a 'person aggrieved' ie. a 'person whose interests are adversely affected' by the decision.[86] This is so whether applying for review under Part 3 (statutory order) or under Part 5 (traditional relief). The uniform test of standing is unique to the *JR Act*. In order to obtain judicial review by way of traditional relief in other jurisdictions[87] it is necessary to satisfy the arguably more stringent common test of standing.[88]

An applicant will generally have no difficulty in showing that they are directly affected by a decision, for example, where a developer is refused a mining lease or an area in which a developer is operating is nominated for World Heritage Listing.[89] The difficulties emerge where there is a person or group, such as an environmental interest group, that is not directly affected in the material or pecuniary sense but, nevertheless, has a significant degree of concern with the subject matter of the decision.

The courts have taken a fairly strict view of the standing requirements of environmental groups seeking traditional equitable relief rather than a remedy under the *ADJR Act*. In *Australian Conservation Foundation v The Commonwealth ('the ACF case')*[90] the High Court held that the ACF, an incorporated body whose objects included the conservation of the environment, did not have a sufficient interest in the Minister's decision allowing a tourist resort proposal to proceed. It had only an intellectual or

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86 Section 7.

87 Eg. pursuant to s 39B *Judiciary Act* 1903 (Cth).

88 See, for example, *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

89 As in *Minister for Arts Heritage and the Environment v Peko-Wallsend (No 1)* (1987) 15 FCR 274.

90 (1980) 146 CLR 493.

emotional concern.[91] Neither the fact that the ACF had particular objects of conserving the environment nor the fact that it had participated in the environmental impact procedure through written comments was sufficient to amount to a special interest in the subject matter of the decision which was greater than a mere intellectual or emotional concern.

This approach has been reflected in a number of Queensland Supreme Court decisions prior to the *JR Act.*[92] In *Central Queensland Speleological Society Incorporated v Central Queensland Cement Pty Ltd*[93] the Queensland Supreme Court, by majority, held that the Society had only an emotional or intellectual interest in the protection of ghost bats in certain limestone caves and had no standing to seek an injunction to restrain Central Queensland Cement's activities in respect of those caves. The majority relied directly upon the *ACF case* where, the Court said, the ACF was in much the same position as the Society was in the case at hand.

This difficulty has sought to be overcome by the *JR Act's* uniform requirement that the applicant be a 'person aggrieved' whether applying for statutory or for traditional remedies.[94] The same test for both types of relief is an endeavour to simplify the procedural requirements for seeking judicial review and, it is submitted, to introduce a liberal approach to the concept of standing which will have consistent application under the *JR Act,* whatever the remedy being sought.

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91 However, the Aboriginal applicants who were custodians of particular relics in danger of destruction were found to have a sufficient interest in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27. Stephen J. at 42 found that the concern, in terms of proximity to the subject matter was greater in these circumstances from the concern of a 'body of conservationists, however sincere, feels for the environment and its protection.'

92 Eg. *Central Queensland Speleological Society Incorporated v Central Queensland Cement Pty Ltd* [1989] 2 Qd R 512, *Fraser Island Defence Organisation Ltd v Hervey Bay Town Council* [1983] 2 Qd R 72. However, this strict approach has been adopted in a recent decision of Dowsett J. in *Friends of Castle Hill Association Inc. v Queensland Heritage Council and Others* (1993) 81 LGERA 346, which will be considered below.

93 [1989] 2 Qd R 512.

94 See ss.20, 21, 22 (statutory), s.44 (traditional) and the definition of 'a person aggrieved' in s.7.

The definition of 'person aggrieved' in the *ADJR Act*[95] has been given a liberal interpretation by the Federal Court. However, the applicant must be able to demonstrate an interest which is greater than that of any other member of the public.[96] A legal or pecuniary interest is not necessary.[97] What is of importance is the degree of concern that the person or group has with the subject matter of the decision.[98] The Court tends to examine the proximity of this relationship by taking into account factors such as the capacity of the applicant to represent the public interest and the degree of any prior participation in the decision making process.[99]

In terms of proximity of concern to the subject of the decision, there have been a few promising decisions by the Federal Court which indicate a willingness to look favourably upon the capacity of some environmental organisations to effectively challenge a decision which impacts upon its interest in the environment. In *Australian Conservation Foundation v Minister of Resources*[100], Davies J. held that the ACF had standing under the *ADJR Act* to challenge a decision of the Minister for Resources to grant a licence to a company to export woodchips from the south-eastern forests of Australia. The decision was alleged to be in contravention of the requirements of the *Australian Heritage Commission Act* 1975 (Cth).

Justice Davies regarded a number of factors as indicating the importance of the concern which the ACF had with the subject matter of the decision. These included the fact that the matter was one of national interest as the area was part of the National Estate; that public perception of the need for

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95 See ss.5 and 3.

96 *Ogle v Strickland* (1987) 13 FCR 306.

97 See *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64.

98 See M.Allars, *Introduction to Australian Administrative Law*, Sydney, Butterworths, 1990, at 296.

99 *Tooheys Limited v Minister for Business and Consumer Affairs* (1981) 36 ALR 64, *Ogle v Strickland* (1987) 71 ALR 41, *US Tobacco Co v Minister for Consumer Affairs and Ors* (1988) 83 ALR 79, *Australian Conservation Foundation v Minister for Resources* (1989-90) 19 ALD 70.

100 (1989-90) 19 ALD 70.

conservation and protection of the natural environment had increased since the *ACF case*; that the public perceived that there was a need for bodies such as the ACF to act in the public interest; that the objects of the ACF were to achieve a balance between development and conservation and ecological sustainability; that the ACF received federal and State funding and was a large enterprise with a substantial net income; and, finally, that the ACF had an involvement with various government and industry groups in relation to development and conservation strategies.

The evidence of these factors caused Davies J. to conclude that, while the ACF may not have standing to challenge any decision which might affect the environment, the group did have a special interest in relation to the South East forests and was not merely a busybody. His Honour then reiterated two features which appeared to be determinative of the ACF's standing - that it was established and functioned with governmental financial support to concern itself with such an issue and was 'pre-eminently the body concerned with that issue',[101] and that the community, at the present time, expected that there would be a body such as the ACF to concern itself with such a matter and to act in the public interest in putting forward a conservation viewpoint.[102]

Clearly, similar bodies to the ACF which are organised on a national scale and in receipt of government funding will be likely to satisfy the statutory test of standing. Possibly smaller environmental organisations or groups whose objects are expressly involved in the conservation or preservation of a particular area of Queensland may also satisfy the similar test of standing under the *JR Act*, whether seeking statutory or traditional relief. However, the decision of Dowsett J. in *Friends of Castle Hill Association Inc. v Queensland Heritage Council and Others ('Friends of Castle Hill')*[103] may present difficulties for locally based environmental groups seeking review under the *JR Act*. Although it is a decision in Chambers, it may be indicative of a more restrictive approach to the statutory test than that favoured by the Federal Court in cases such as *ACF v Minister for Resources*.

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101 (1989-90) 19 ALD 70 at 74.

102 *Ibid.*

103 (1993) 81 LGERA 346.

In *Friends of Castle Hill*, the Association was a body corporate with approximately 367 members resident in Townsville with the objectives, *inter alia*, to safeguard Castle Hill and other natural environments around the Townsville region against inappropriate development; to contribute to the development of management plans for those areas; to inform and educate the public about those areas; to provide a forum for public discussion on the management thereof; and to establish a 'gift fund' pursuant to s 78AB of the *Income Tax Assessment Act* 1936 (Cth).

The Association sought review under the *JR Act* of two decisions of the Queensland Heritage Council ('the Council'), the material one for present purposes being the decision of the Council to approve an application by AIS Investments Pty Ltd for development, including the rezoning, of part of the Castle Hill area for use as a tourist attraction. The area had been listed in the Heritage Register pursuant to Part IV of the *Queensland Heritage Act* 1992 (Qld). The Association had made representations in relation to the application pursuant to provisions under the *Queensland Heritage Act* which permitted interested members of the public to do so.[104] The matter came before Dowsett J. in Chambers on an application for an order under s 48 of the *JR Act* to dispose of the matter on the basis that the Association did not have standing to seek review of the decision of the Council.

Justice Dowsett held that the Association was not 'a person whose interests are adversely affected by the decision' and therefore, did not have standing to seek a statutory order of review pursuant to s 20 of the *JR Act*. This decision was reached through significant reliance upon the decision of the High Court in the *ACF case* with Dowsett J. asserting that this decision disposed of the Association's argument that its objectives gave it an interest in the matter. This approach does appear to be inconsistent with the current liberal attitude of the Federal Court in its approach to the equivalent standing provisions in the *ADJR Act* and represents a reversion to the strict approach adopted in relation to seeking traditional injunctive or declaratory relief. His Honour made no mention of recent Federal Court decisions regarding the *ADJR Act* statutory standing provisions, such as that of Davies J. in *ACF v Minister for Resources*. Passing reference, by way of distinction, was made to the Full Federal Court decision in *United States Tobacco Company v Minister for*

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[104] Section 4(3)(b).

Consumer Affairs.[105] It is submitted that, in light of the broader approach adopted in relation to the statutory definition of 'person aggrieved', Dowsett J's judgment places inappropriate reliance upon the authorities which concern injunctive and declaratory relief.[106]

The judgment of Dowsett J. goes against the trend of recent Federal Court decisions in this area which appear to focus upon the proximity of the applicant's concern with the subject matter, which is reflected in another feature which has recently been considered as relevant - community perception of the closeness of the relationship between the applicant and the subject matter and the ability of the applicant to adequately represent the public interest in that regard. An examination of the objects of the applicant provides some indication of the degree of concern. In both *Ogle v Strickland*[107] and *ACF v Minister for Resources*[108] the proximity or degree of the applicant's concern was important. It would have been worthwhile for Dowsett J. to consider the degree of concern which the Association had with the protection of Castle Hill by a consideration of matters such as its objects and the community perception of its ability to represent that interest which the Townsville residents had in the matter. His Honour may have held that the Association was not organised on a similar scale with substantial government funding as was the ACF and did not have the same degree of involvement with Castle Hill as the ACF had with the National Estate. It might have been concluded that it was a "mere association of individuals having like views."[109]

The fact of government funding, an important consideration in *ACF v Minister for Resources*,[110] may be indicative of community perception of the group's suitability to represent the public interest in matters affecting the particular environment with which its objects are concerned. Thus, community

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105 (1988) 83 ALR 7. The relevant point upon which this case was distinguished will be considered below.

106 ie. the *ACF case, Onus and Anor v Alcoa of Australia Limited* (1982) 149 CLR 27.

107 (1987) 13 FCR 306.

108 (1989) 19 ALD 70.

109 (1989) 19 ALD 70 at 73.

110 *Ibid.*

based groups not in receipt of such assistance may have more difficulty qualifying for standing under the *JR Act*.[111] It would be regrettable, however, if an environmental group must be organised on a similar grand scale to the ACF and receive substantial government funding before it can be regarded as having the function of concerning itself with a particular environmental matter. There seems to be no reason why a smaller locally based group with the objectives of safeguarding the very subject matter involved in the decision which it seeks to challenge should be denied standing on the basis of financial considerations alone. Undoubtedly, where Commonwealth decisions are being challenged under the *ADJR Act*, the fact that an environmental group is nationally based will be important in considering its concern with the subject of the decision and community perceptions of its role in protecting that subject matter. However, the *JR Act* should enable the court to find that a local or community based group with considerable local support for its objectives has an interest which is greater than that of an ordinary member of the public.

Despite the criticisms that can be made of the decision in *Friends of Castle Hill*, the judgment offers little comfort to local environmental groups.

A second basis upon which the Association in *Friends of Castle Hill* sought to rely to establish an interest in the decision was the fact of it having made representations regarding the application for development. The Federal Court has found that an organisation has standing in situations where the organisation has participated in earlier proceedings, for example, through making submissions before, or objections at, a hearing prior to the decision being made.[112] In *United States Tobacco Company v Minister for Consumer Affairs*[113] the applicant sought to be joined in proceedings to challenge the validity of the conference in which it had participated. As a participant in the conference, the Full Federal Court found that the applicant was entitled to insist that it be conducted fairly and to challenge any notice given rises to the conference. In *Friends of Castle Hill*, Dowsett J. distinguished *United States*

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111 However, s.3 of the *JR Act* provides that a "person" includes an unincorporated body which opens up the possibility of small groups of interested citizens challenging decisions concerning the environment.

112 Eg. *Mineral Resources Act* 1989 (Qld) s.7.25. See the High Court decision in *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473.

113 (1988) 83 ALR 79.

Tobacco on the basis that, there, the applicant sought to challenge matters relating to the validity of the conference itself rather than any decision which was ultimately made after the conference had been held. In the present case, the Association was relying upon its participation under the *Queensland Heritage Act* as giving it a sufficient interest in the ultimate decision to grant approval. Given that there were no defects in the participation procedure, Dowsett J. believed that the mere fact of participation could not provide a basis for establishing an interest in the ultimate decision of the Council. On this point, Dowsett J. may be consistent with the Full Federal Court in *United States Tobacco* as it does not appear that there has been any definitive decision which enables prior participation in conferences or proceedings to provide a basis for challenging the ultimate decision as opposed to the conduct of those proceedings themselves.[114]

4.4 Discretion to Refuse Relief

Even though an applicant may be able to successfully make out a ground of review, the Court may, nevertheless, exercise its discretion to refuse relief.[115] The Court must dismiss an application under the *JR Act* where the law provides an alternative review procedure to the applicant,[116] or where it is likely that determining the matter under the *JR Act* may interfere with the due and orderly conduct of review proceedings before another review body. However, in both cases, the Court must be satisfied that it is in the interests of justice to do so.[117] Similarly, the Court may dismiss the application where adequate provision is made for alternative review.[118]

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114 See also *Queensland Newsagents Federation v Trade Practices Commission* (1993) 118 ALR 527.

115 See ss.15 and 48. It is envisaged that the power will be exercised as early as possible in the proceedings. The Court can dismiss actions in other circumstances eg. where the action is frivolous, vexatious, discloses no reasonable basis or it is inappropriate for the Court to grant relief. This aspect will not be explored here.

116 Section 13.

117 Section 14.

118 Section 12.

These powers are particularly relevant in the environmental law context where some environmental legislation makes provision for internal review or appeal to various courts or tribunals. For example, the Planning and Environment Court has jurisdiction to hear appeals against decisions of local authorities pursuant to the *Local Government Planning and Environment Act*[119] and against notices given by the Director or the Minister pursuant to the *Contaminated Land Act* 1991 (Qld).[120] The *EPA* also provides an appeal mechanism for persons who are dissatisfied with decisions about environmental licences or approvals or about an Environmental Management Program; the requirement to carry out an environmental evaluation; the issuing of a protection order; or a requirement to take certain action under the Act. A procedure for internal review is provided[121], followed by an appeal to the Land and Environment Court.[122] It should be noted that this mechanism is available only to the applicant for an authority or the approval of an Environmental Management Program; the recipient of a protection order, request to do an evaluation or to carry out a particular action; or a person required to submit an Environmental Management Program.[123] However, certain other persons may appeal against a limited range of decisions if they are an 'interested party'.[124]

Compensation claims pursuant to the *Water Resources Act* are within the jurisdiction of the Land Court[125] from which there is appeal to the Land Appeal Court.[126]

In relation to any review action brought under the *JR Act* in respect of decisions in which these appeal provisions would operate, the Court might

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119 See Part 7.

120 See Part 6.

121 See *LGEPA* s.202.

122 *LGEPA* ss.204-212.

123 *LGEPA* s.200.

124 *LGEPA* s.200(2).

125 Sections 10.25 and 10.26.

126 Section 10.27. See also the *Nature Conservation Act* 1992 (Qld), ss.62, 100, 115 which provide an appeal to the Land Court.

well decline to grant relief, particularly where an appeal to the Land and Environment Court will enable a review on the merits and this avenue is available to the applicant. There has been an instance of the Court exercising its discretion to refuse to hear a matter in such a situation.[127]

However, in much environmental legislation, there are significant gaps in the range of persons who may seek review and the decisions which may be the subject of review. The *Water Resources Act* allows appeal to the Minister from certain decisions of the Water Resources Commission and no second stage appeal is provided.[128] It may be that judicial review can be sought under the *JR Act* in respect of any defective decision that may be made by the Minister. Presumably s 10.22(5) will not be effective to preclude judicial review of the Minister's decision despite its attempt to make such decision 'final and conclusive'.[129]

The capacity for public involvement in decision making and in the enforcement process has not been a prominent feature of environmental legislation in Queensland. This is in contrast to jurisdictions such as Victoria, especially given the presence of the Victorian Administrative Appeals Tribunal which enables review on the merits of a decision,[130] and New South

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127 See *Sutton v Rosalie Shire Council* (1993) 80 LGERA 363.

128 In relation to the distribution of bore water (s.4.5), approval of subdivision of freehold on irrigation areas (s.8.10) and allocation of water (ss.8.11, 8.12).

129 Section 18 overrides all privative clauses in Acts passed before 1 June 1992 except for those specifically preserved by Schedule 1. The *Water Resources Act* is not one of them.

130 There, many enactments allow for submissions on various applications with rights to seek review of decisions by to bodies such as the Administrative Appeals Tribunal ('the AAT'). An example of such is provided by the *Water Act* 1989 (Vic). Other legislation of this type include the *Flora and Fauna Guarantee Act* 1988 (Vic) (which enables substantial public involvement at most levels of decision making with provision for review by the AAT where a person's rights are directly affected) and the *Local Government Planning and Environment Act* 1987 (Vic) (which enables extensive participation in relation to amendment of planning schemes and grants of approval with an avenue of review to the AAT open in respect of decisions relating to permits and, in addition, makes provision for persons and responsible authorities to apply to the AAT for an enforcement order against various contraventions regarding use or development of land). See also the *Environment Protection Act* 1970 (Vic) (public involvement in State environment

Wales, which has the most extensive provisions for public involvement at all stages.[131]

The most extensive provision for public participation in actions and decisions under Queensland environmental legislation is in the context of planning. The *Local Government Planning and Environment Act* provides opportunity for public involvement in planning policies[132] and planning schemes[133] of local authorities and enables 'any person' to bring proceedings in the Planning and Environment Court for declarations in respect of matters, acts or things to be undertaken in respect of a planning scheme and in respect of offences under the scheme.[134] There is provision for objections to various types of applications including applications for amendment of a planning scheme,[135] rezoning of land in stages,[136] and to applications for town planning consent.[137] An appeal may be brought against any subsequent decision.[138] These provisions are to be contrasted with the substantially limited role of the public in participation in decision making and enforcement in resource development legislation such as the *Mineral Resources Act* 1989 (Qld) and

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policy, applications for works approvals and licences with ability, with some limitations, to apply for review by the AAT).

131 D.E.Fisher, *Environmental Law - Text and Materials*, Sydney, Law Book Company Limited, 1993, 652. See, for instance, the *Environmental Planning and Assessment Act* 1979 (NSW) and the *Protection of the Environment Administration Act* 1991 (NSW). Provisions for seeking enforcement by the Land and Environment Court is provided by the former legislation and also pursuant to the *National Parks and Wildlife Act* 1974 (NSW), the *Heritage Act* 1977 (NSW), the *Environmentally Hazardous Chemicals Act* 1985 (NSW) and the *Wilderness Act* 1987 (NSW).

132 Sections 1A.4, 2.8.

133 Sections 2.9, 2.14, 2.17 (amendment of a planning scheme).

134 Section 2.24.

135 Section 4.3(8), (9), (10); s 4.4(7), (8).

136 Section 4.7 (8).

137 Section 4.12(7), 4.13(8).

138 Section 7.1(1).

environmental management legislation such as the *Nature Conservation Act* 1992 (Qld).

Under the *Water Resources Act* there are limited rights for objection to applications for certain works[139] with limited appeal rights to the Land Court in relation to decisions concerning such licences, amendments, variations, suspensions and cancellations of licences and objections to applications.[140] Possibly because of its more recent origin, the *Mineral Resources Act* is a little more generous in respect of applications for mining claims and mining leases in that it allows members of the public to lodge an objection[141] which will then entitle the objector to have standing before the Warden's Court which hears the application for a mining lease before making a recommendation to the Minister.[142] However, no second stage review mechanism is provided[143], which means that the only effective means of reviewing decisions in relation to mining applications is by way of judicial review to the Supreme Court. This would also appear to be the position under the *Water Resources Act* in respect of decisions where there is no appeal to the Land Court.

The *Nature Conservation Act* provides that public submissions may be made in respect of proposals for the declaration of some protected areas[144] but, in respect of other protected areas,[145] the right of submission is restricted to land-holders and to persons with an interest in that land. However, the ability to make public submissions in relation to the preparation of conservation plans in respect of protected areas or wildlife appears to be the most extensive public participation provision under that Act.[146] The public has

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139 See s 4.17(3).

140 See s 4.26.

141 Section 7.20.

142 See ss.7.25 and 7.26.

143 Pursuant to s.10.40, an appeal can be brought to the District Court from a determination of a Warden's Court. This would not appear to cover a 'recommendation' to the Minister.

144 World Heritage Management Areas: ss.48, 49 and International Agreement Areas: ss.52, 53.

145 Nature Refuges, Coordinated Conservation Areas, Wilderness Areas: ss.40, 45.

146 See ss.104 -108 inclusive.

no input into the making of interim conservation orders, these being left to Ministerial discretion.[147] There is no provision for internal review of, or appeal against, a decision to issue a conservation order or to declare an area to be a protected area. Any review must be by way of judicial review.

The latest piece of environmental legislation, the *EPA,* will allow for a considerable degree of public participation in relation to making submissions regarding the granting and amendment of licences to carry out an environmentally relevant activity,[148] the preparation of Environmental Protection Policies[149] and the approval of certain Environmental Management Programs.[150] The persons and bodies entitled to make submissions appear to be unlimited. There is also provision made for the administering authority to call a conference to help it to determine an application for a licence or whether to approve an Environmental Management Program.[151] While the calling of such a conference would not appear to be mandatory, it allows those persons who have made submissions in relation to these matters to be heard by an independent mediator in relation to the possible issues that might arise in conducting the activity for which the approval is sought. This is indeed a welcome innovation and one which will, hopefully, work well. In addition, if a person has properly made a submission in relation to the issue or amendment of a licence or the approval of an Environmental Management Program of greater than three years duration, that person becomes an 'interested party' for the purposes of an internal review and a second stage appeal to the Land and Environment Court in relation to those decisions.[152] Although there appears to be a wide range of persons and bodies who may become 'interested parties' by properly making a submission, it should be noted that the type of decisions in relation to which review can be sought by such a party is limited to licences and to lengthy Environmental Management Programs. Thus, a challenge to an Environmental Protection Policy or an approval of an Environmental

147 See Part 6.

148 See ss.42 and 49.

149 Sections 26, 28 and 29.

150 Section 85.

151 Sections 63 and 87.

152 See *LGEPA* s.200(2).

Management Program of less than three years duration or to a decision to exempt a person from having to provide a financial assurance will not be possible under the *EPA*. Similarly, if a person or body has failed to make a submission within the required time or at all but is later affected by the decision, they will not be an 'interested party' in order to utilise the appeal mechanisms provided by the *EPA*.

In contrast to the provision in the *Local Government Planning and Environment Act* allowing 'any person' to bring an enforcement action, the enforcement provision in the *EPA* is not as generous. It restricts the right to bring such action, insofar as third parties are concerned, to persons whose interests are affected or 'someone else with the leave of the Court...'[153] The leave requirements are, when analysed, quite strict and do not lean towards the much desired 'open-standing' that environmental groups had hoped for.

It would appear that where application is made under the *JR Act* for judicial review of decisions made pursuant to those enactments where no appeal mechanism is provided, there will be less room for the exercise of the Court's discretion to dismiss the action as there will be no alternative review provided for persons who are aggrieved by decisions made under those Acts.

4.5 Beneficial Costs Orders

Section 49 of the *JR Act* enables a party to the proceedings (other than the decision maker) to move the Court for a special costs order either that another party indemnify it for its costs on a party and party basis, or that each party is to bear its own costs regardless of outcome. The Court has a discretion as to the type of beneficial costs order that should be made, if at all, having regard to a number of factors.

The advantage to an applicant in making such application is the ability to assess the strength of the claim at an early stage before significant costs are incurred. Failure to secure a costs order may prompt an applicant to reconsider his or her position. For example, an environmental organisation may be able to test its standing to seek review at this early stage rather than have the matter dealt with at the hearing.

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[153] See *LGEPA* s.194.

5. Grounds of Review and Environmental Legislation

A significant innovation introduced by the *ADJR Act*, and adopted by Part 3 of the *JR Act*, is the codified grounds of review.[154] This measure overcame the complexities of the need, at common law, to frame the grounds in terms of the remedy sought. However, if seeking review pursuant to Part 5,[155] the grounds are largely the same because the statutory grounds largely codify and duplicate the common law grounds. Potential for overlap between the grounds exists.

As noted at the outset, the limitation of judicial review is that the Court cannot review the merits of the particular decision, nor can it substitute its own decision for that of the impugned one. The inquiry is limited to whether the decision maker has acted within the scope of his or her power in making the relevant decision. This will generally be a matter of construing the empowering legislation.

The discretionary remedies that the Court may grant have been discussed above. Under Part 3 of the *JR Act* it will rarely be relevant whether the decision is invalid from its inception or only from the time the Court so orders. The Court is given a number of discretionary remedies[156] and may employ any one of them, including an order that a decision is quashed or set aside from a date which the Court may specify.[157] Under Part 5 the distinction may continue to have some relevance, but may be of decreasing significance owing to the Court's wide powers under s 47.

The grounds which arise most commonly when considering environmental decision making include the following:

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154 See *ADJR Act* ss.5 and 6; and *JR Act* ss.20-24

155 Eg. to review council by-laws (not caught by Part 3 as not 'administrative in character').

156 In *JR Act* s.30.

157 *JR Act* s.30(1)(a)(ii).

5.1 Failure to accord procedural fairness where there is a duty to do so [158]

A duty to accord procedural fairness will exist where an applicant is able to show that the decision affects 'rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention'.[159] The effect on the interest, right or expectation must be direct and immediate rather than affecting the person or company simply as a member of the public, as, for example, in the case of a political or policy decision.[160]

An example of the latter is found in *Minister for Arts, Heritage and the Environment v Peko-Wallsend Ltd ('Peko-Wallsend (No 1)')*[161] where Cabinet decided to nominate an area of the Kakadu National Park for inclusion on the World Heritage List. Although the possibility of Cabinet decisions being susceptible to judicial review was recognised,[162] it was held that the nature of the decision was a political one which did not have any direct impact upon personal interests and circumstances and that it involved complex issues of policy.

However, in other cases, the duty will be more easily established. For example, in *Merman Pty Ltd v Parker, Minister for Minerals and Energy*[163] the Minister was held to have breached his duty to accord procedural fairness to an applicant for a mining lease. The applicant had a legitimate expectation, arising from the fact of previous consent by the Minister and approval from the Warden, that the lease would not be refused until it had a reasonable opportunity to submit an environmental impact report to the Minister.[164]

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158 See *JR Act* s.20(2)(a).

159 *Kioa v West* (1985) 159 CLR 550 at 584.

160 Eg. *South Australia v O'Shea* (1987) 163 CLR 378.

161 (1987) 15 FCR 274.

162 (1987) 15 FCR 274 at 279 *per* Bowen CJ., 305-307 *per* Wilcox J.

163 [1987] WAR 159.

164 A similar situation could arise in Queensland pursuant to s.7.21 of the *Mineral Resources Act* 1989 (Qld).

Similarly, the principles of procedural fairness were not observed where a person's trapper and fauna dealer licences were cancelled without notice and without allowing him a hearing.[165]

It may be more difficult to establish a duty to accord procedural fairness where an applicant is applying for a licence for the first time where the discretion of the decision maker is completely unfettered and there is nothing in the circumstances to give rise to a legitimate expectation on the part of the applicant.[166] However, it would appear to be expected that the decision maker should allow the applicant an opportunity to indicate in their application how they meet any relevant criteria or, alternatively, an opportunity to respond to any rejection of the application. An example where this is legislatively provided for is in relation to the refusal to grant an authority under the *EPA*.[167]

5.2 Where the enactment under which the decision is proposed to be made does not authorise the making of the proposed decision.[168]

Very occasionally, an error in decision making may arise where the decision conflicts with the empowering statute or where the empowering statute does not provide authority for the making of the particular decision. This may arise, for example, where a Council empowered to operate tramways sets up an additional bus service.[169] This ground will rarely arise when considering environmental decision making as the relevant statute usually gives the decision maker a broad discretion, particularly where the decision maker is a Minister or other Crown representative.[170]

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165 *Ackroyd v Whitehouse* [1985] 1 NSWLR 239. See also *Hodgens v Gunn* (1989) 68 LGRA 395.

166 For further discussion of the procedural fairness issue, see S.Rigney, "The Role of Procedural Fairness and Ultra Vires in the Judicial Review of Environmental Disputes" (June 1993) *EPLJ* 136.

167 See *LGEPA* s.48.

168 *JR Act* s.20(2)(d).

169 *London County Council v Attorney-General* [1902] AC 165.

170 See for example s.7.24 *Mineral Resources Act* 1989 (Qld) but see more circumscribed discretion in s 7.28 requiring the consideration of various matters in

5.3 Where mandatory procedural requirements are not complied with.[171]

A decision may be vitiated where it has been made without complying with mandatory statutory procedures such as failure to obtain the approval of the Governor in Council to a disposal of Crown land contrary to the requirements of the *Land Act* 1962 (Qld)[172] Another example might be a failure by the administering authority under the *EPA* to comply with the public notification requirements that apply in relation to a number of its decisions under the Act.

5.4 Where the making of a decision is an improper exercise of the power conferred by the enactment under which it was purported to be made.[173]

In this situation, an error in the decision making will not be as readily discernible, firstly because the decision maker *does not lack the power* to make the decision but, rather, commits some error in exercising the discretionary power. Secondly, as the determination of whether an error is committed depends largely upon the construction of the purpose and scope of the empowering statute, many environmental statutes in Queensland have inhibited that process by their obscurity as to their purpose and scope. More recently there has been a trend towards including a statement of objects in environmental legislation which will surely assist the Court in determining whether an 'improper exercise of power' has occurred in the decision making process.

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s.7.26(3); s.16 *Petroleum Act* 1923 (Qld); the Governor-in-Council has several wide discretionary powers under the *Nature Conservation Act* 1992 (Qld) eg. ss. 29, 32, 33, 42, 45(3), 55 re protected areas and ss.71, 72, 73, 74, 75, 76, 77 re: classification of wildlife. The Minister also has a number of discretionary powers under the *Nature Conservation Act* eg. s.99 suspension of licences, ss.102(3), 103 re: conservation plans.

171 *JR Act* s.20(2)(b).

172 As occurred in *Walsteam Pty Ltd v Queensland* (Supreme Court of Queensland, unreported, 29 May 1990, No. 362 of 1990).

173 *JR Act* s.20(2)(e) which is further defined in s.23.

Before considering the implications of objects provisions on the judicial review process, an outline of the particular types of errors of law that may constitute an improper exercise of power should be given. Only those of most relevance to environmental decision making will be considered.[174]

(a) Taking irrelevant considerations into account[175] or failure to take relevant considerations into account[176]

A decision maker must not take into account extraneous considerations nor fail to consider matters which he or she is bound to take into account.[177] The consequence may be the invalidity of the subsequent decision. Whether environmental considerations will be irrelevant to the exercise of a discretion or will be a matter to which the decision maker is bound to have regard will depend upon the subject matter, purpose and scope of the empowering statute and the impact of that consideration upon the decision as a whole.[178]

Clearly, if there are enumerated factors which must be taken into account,[179] a failure to consider any of those matters may amount to an improper exercise of power and result in the invalidity of the consequential decision.

Where the discretion is unstructured and there is no enumeration of relevant matters, what matters are relevant must be discerned from the subject matter, scope and purpose of the statute. A construction of the statute may give rise to the implication that the decision maker failed to consider a matter which, in the circumstances, he or she was bound to take into account.

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174 See also S.Rigney, *above* n.166.

175 *JR Act* s.23(a).

176 *JR Act* s.23(b).

177 *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375; *Peko-Wallsend (No.2)* (1986) 162 CLR 24 at 40.

178 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39, 41.

179 For example in *Mineral Resources Act* 1989 (Qld) s.7.28 the Minister must take into account the matters specified in s.7.26(3), which include consideration of the environmental effects of the proposed operations, before exercising his or her discretion to recommend that a mining lease be granted.

However, if the factor is one which is so insignificant that failure to take it into account could not have materially affected the decision, the decision will not be vitiated.[180]

In *Minister for Aboriginal Affairs v Peko-Wallsend ('Peko-Wallsend (No 2)')*[181] it was held that the Minister was bound to take into account the comments on detriment which had been submitted by the mining company because such a requirement could be implied from the empowering statute.[182] The Minister was the 'sole forum' where an important matter such as detriment could be considered before deciding whether or not to make a grant of land to an Aboriginal group.

In Queensland, regard must be had to s 29(2) of the *State Development and Public Works Organisation Act* 1971 (Qld) *('the State Development Act')* which requires a Department, Crown corporation, instrumentality or local body to take environmental effects into account when considering an application for approval of *a development* and when considering the undertaking of works on its own behalf. Thus, even where approval may be sought under other pieces of legislation, s 29(2) will apply if the application is in respect of a 'development'. In considering environmental effects due regard must be had to any policies or administrative arrangements that may be applicable. In order to adequately perform that task, an impact assessment study[183] may need to be prepared to enable an appropriate assessment of the effects that may result from the development. Failure to comply with s 29(2) would expose the decision to judicial review and may have the result that any decision to undertake the public works or to approve the private development is invalid for failure to consider environmental factors that the decision maker was bound by the *State Development Act* to take into account. This question arose in the judgment of Derrington J. in *Re South East Brisbane Progress*

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180 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40.

181 (1986) 162 CLR 24.

182 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

183 Impact Assessment Studies appear to form part of the policies and administrative arrangements that have been approved pursuant to s.29(2). See the publication *Impact Assessment in Queensland: Policies and Administrative Arrangements*, The Co-ordinator-General, Premier's Department, January 1987.

Association & Ors v Minister for Transport & Anor [184] where the Minister had, prior to making his decision, taken an impact assessment study into consideration.

However, much will turn upon the types of activities that fall within the definition of 'development' which means:

> the use of land or water within the State or over which the State claims jurisdiction and includes the construction, undertaking, carrying out, establishment, maintenance, operation, management and control of any works or private works on or in land or water.[185]

The inclusive portion appears to contemplate a development undertaken by a private developer pursuant to an agreement with the government or by the government authority itself. In those cases, s 29(2) will require that environmental effects be taken into account. However, private developers will also be caught. Wherever a private development application is one which involves 'the use of land or water...' s 29(2) will apply.[186]

The ground that a matter is an irrelevant consideration, having regard to the subject matter, scope and purpose of the statute,[187] is difficult to establish, particularly where a discretionary power is reposed in a Minister. Due allowance may have to be made for the taking into account of broader policy considerations which may be relevant to the exercise of a ministerial discretion.[188] This appears to be a realistic approach in the context of ministerial responsibility where Ministers, and even lower level administrators, are politically compelled to take account of government policy, even when exercising a broad statutory discretion.

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184 (1994) 1 QAR 196.

185 Section 5.

186 Examples of this may be application for a mining lease under the *Mineral Resources Act*, application for an authority to prospect or a prospecting permit under the *Petroleum Act* and various applications pursuant to the *Water Resources Act*.

187 ie. *JR Act* s.23(a).

188 *Peko-Wallsend (No 2)* (1986) 162 CLR 24.

In *Murphyores Inc. Pty Ltd v Commonwealth ('Murphyores')*[189] Stephen J. said that where a statute does not expressly confine the matters which the Minister may refer to, it will be a matter of drawing implications from the statute as a whole as to what restraints may be imposed and if there are no such limitations, only 'corrupt or entirely personal and whimsical considerations' will be regarded as irrelevant.[190]

Here, the *Customs (Prohibited Export) Regulations*, made pursuant to the *Customs Act* 1901 (Cth), prohibited the export of minerals from Australia unless written approval of the relevant Minister[191] was obtained. A very wide, unconfined discretion was conferred upon the Minister. The Minister indicated to the applicant that before making a decision whether to grant approval to export minerals extracted from Fraser Island, he would await the outcome of a report made pursuant to the *Environmental Protection (Impact of Proposals) Act* 1974 (Cth) ('the *EPIP Act*') as to the environmental impact of sand mining on Fraser Island. The *EPIP Act* applies to decisions and activities of Commonwealth decision makers which affect the environment to a significant extent.[192] The applicant argued that, in exercising his discretion under the Regulations, the Minister could not consider the environmental aspects of exporting minerals as such matters were irrelevant to the exercise of ministerial discretion under the *Customs* legislation.

The High Court denied that environmental considerations were extraneous to the purpose and scope of the *Customs Act* and, consequently, the Regulations made thereunder. The fact that the *Customs* legislation dealt with prohibitions of the export of a wide range of goods indicated that a wide spectrum of matters may be considered.[193] There was nothing in that legislation which impliedly limited the range of matters which the Minister could take into account as he had a very wide discretion, nor was there any suggestion of lack of bona fides.

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189 (1976) 136 CLR 1.

190 *Id* 12.

191 In the case of minerals, the Minister for Minerals and Energy.

192 Section 5(1).

193 (1976) 136 CLR 1 at 14 *per* Stephen J.

When the Court is considering whether an ordinary decision maker, apart from a Minister, eg... a local authority or government official, has taken account of an extraneous matter, it appears that a similarly liberal approach has been taken, particularly regarding lawful[194], high level, government policy.[195] Again, the Court must have regard to the subject matter, scope and purpose of the statute so as to discern some implied limitation on what matters are relevant.[196]

Certainly, the fact that the *EPIP Act* applies to Commonwealth decisions and activities lends support to the finding that decisions pursuant to a Commonwealth enactment which significantly affect the environment rightly take account of environmental effects of that decision.

Queensland has no equivalent to the Commonwealth *EPIP Act* which applies to all government decisions which will significantly affect the environment. However, a number of enactments specifically provide for the undertaking of an environmental impact study in relation to various activities authorised by that enactment or activities which are authorised under other enactments.[197] In these cases, it may be readily concluded that the scope and purpose of the legislation authorising the activity embraces environmental concerns as relevant considerations. Certainly, the failure to take into account

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194 Obviously, the policy itself must be lawful ie. it must not be inconsistent with the relevant statute nor override the statutory discretion which is conferred by that statute as occurred in *Green v Daniels* (1977) 51 ALJR 463. Moreover, it must allow other matters to be considered apart from the policy itself eg. *Re Findlay* [1985] 1 AC 318; *Paradise Projects Ltd v Gold Coast City Council* [1994] 1 Qd R 314.

195 *Peko-Wallsend (No 2)* (1986) 162 CLR 24 at 39-40; Ansett *Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

196 *Peko-Wallsend (No 2)* (1986) 162 CLR 24 at 40 *per* Mason J.

197 The legislation which expressly incorporates a requirement for an impact assessment in respect of particular activities authorised by that legislation or for activities which are authorised by other legislation are the *Local Government Planning and Environment Act* 1991 s.8.2; *Mineral Resources Act* 1989 s.7.21; *State Development and Public Works Organisation Act* 1971 s.29; *Electricity Act* 1976 ss.36(h)(ii), 254; *Clean Waters Act* 1971 s.24(1)(d), *Integrated Resort Development Act* 1987 s.5(2), Schedule Part A paragraph 12 and the *Canals Regulations* 1992 Reg. 6(3)(i).

the environmental effects of a particular activity to which the study applies would almost certainly constitute a failure to consider relevant matters.[198]

The *Local Government Planning and Environment Act* provides an example of a resource development law that itself provides for an environmental impact statement ('EIS'). The Chief Executive may, if it appears necessary, require an applicant seeking approval, consent, permission or authority in relation to a planning scheme or interim development control provision for a designated development,[199] to submit an EIS.[200] Section 8.2(1) further requires that where a Local Authority is considering whether to grant approval etc. for the implementation of a proposal under the *Local Government Planning and Environment Act* or any other Act, it must take into account whether any deleterious effect on the environment will be occasioned by the implementation of a proposal.

While the Chief Executive appears to have a discretion as to whether to request the undertaking of an EIS, that discretion is arguably structured by the requirement of needing to take into consideration any 'deleterious effect on the environment' and by the objective of the Act which is to enable the facilitation of orderly development *and* the protection of the environment.[201] Thus, if any deleterious effect is likely, a failure to request an EIS may render any subsequent decision to grant approval to a designated development invalid due to a failure to adequately take into account a matter of great importance.[202] However, the Court might decide to suspend the operation of that grant[203] and

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198 In breach of *JR Act* s.23(b).

199 'Designated development' may include a number of proposals set out in reg.16 and Schedule 1 of the *Local Government (Planning and Environment) Regulations* 1991 (Qld) eg. abattoirs, breweries, canneries, chemical processing, major shopping development, oil refinery, tannery, waste treatment plant and development in relation to certain areas referred to in Schedule 2 eg. Fishery reserve, sanctuary or grounds; National Park, Tidal wetlands.

200 See s.8.2 as amended by s.10 of the *Local Government (Planning and Environment) Amendment Act (No 2)* 1991 (Qld).

201 Section 1.3. See D.E.Fisher, *above* n.131 at 424-25.

202 *Peko-Wallsend (No 2)* (1986) 162 CLR 24 at 41 *per* Mason J.

203 Pursuant to *JR Act* ss.29 or 47(4).

to make an order to remit the matter to the Chief Executive[204] directing him or her to request that an EIS be carried out.[205]

Similarly, the *Mineral Resources Act* enables the Minister to require an applicant for a mining lease to undertake an EIS.[206] Further, the Minister is required to consider environmental effects of mining operations before recommending that a lease be granted by virtue of the combined operation of ss 7.28 and 7.26(3). Again, it is submitted that this latter requirement places some limits on the Minister's discretion to request an EIS, particularly when reference is made to the objectives of the Act[207] which indicate that encouraging environmental responsibility in prospecting, exploring and mining is as equally important as encouraging and facilitating prospecting and exploring for, and mining of, minerals. Failure by the Minister to obtain an EIS in circumstances where the Warden has indicated that adverse environmental effects will be caused by the proposed operations may render invalid any decision to recommend that a lease be granted. Under this Act, environmental considerations could hardly be irrelevant.

The previous two enactments facilitate the judicial review process, not merely by inclusion of a requirement of an EIS for certain developments, but by also including a statement of objects that clearly show that environmental considerations are relevant to decision making under the Acts. As indicated above, many early pieces of resource development legislation failed to provide any such guidance and a construction of those Acts tended to reveal that environmental concerns were extraneous to the implied object of the Act.

A pertinent example is provided by the *Petroleum Act* where the Minister has a discretionary power to grant an authority to prospect.[208] Prospecting

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204 Pursuant to *JR Act* ss.30(1)(b) or 47.

205 See *Bailey v Forestry Commission of New South Wales* (1989) 67 LGRA 200 where the Land and Environment Court declined to grant an injunction after finding a failure by the Commission to comply with the requirements under the *Environmental Planning and Assessment Act* 1979 (NSW) upon the Commission undertaking that it would obtain an environmental impact statement within a certain time frame.

206 Section 7.21.

207 In s.1.3.

208 Section 9A.

permits and petroleum leases may be issued by the Minister and the Governor in Council respectively to 'qualified persons'[209]. The only real limitation on that discretion is the area in respect of which the grant extends.[210]

An application for a permit need only provide formal particulars, including a plan and description of the land and references as to the applicant's business and good financial standing.[211] The Minister thereupon has a very wide discretion to 'refuse any application' or approve the same on such terms and conditions as the facts warrant.[212]

There is no indication that can be gleaned from the Act that environmental considerations should ever be part of the Minister's decision in relation to granting an authority to prospect[213] or a prospecting permit.[214] It is difficult to determine what considerations are, in fact, relevant to the decision making process. There are no express objects to indicate what the legislation desires to achieve. It could be contended that, given the Minister's wide discretion in relation to authorities to prospect and prospecting permits and as to the terms and conditions upon which the authority or permit is to be subject, environmental considerations will not be irrelevant. It has been noted[215] that due allowance must be made for Ministers to take into account broader policy considerations.[216] In addition, the High Court has, in obiter remarks,[217] indicated that government policy will not be an irrelevant consideration and have recognised that political reality may dictate that Ministers will act in

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209 Section 10 provides that this means a natural person, company or lawful associations of the same.

210 Section 9(1).

211 Section 14.

212 Section 16.

213 Section 9A.

214 Section 16.

215 *Peko-Wallsend (No 2)* (1986) 162 CLR 24 at 42 *per* Mason J; *Murphyores* (1976) 136 CLR 1 at 12, 14.

216 Which may include environmental considerations.

217 Eg. *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

conformity with that policy.[218] Thus, a relevant government policy on the environment may be taken into account.

On the other hand, it could be argued that if the Minister were to consider the impact of prospecting operations on the environment, such a consideration may be regarded as irrelevant, having regard to the scope, purpose and subject matter of the Act, the long title to which provides that it is an 'Act to Make Better Provision for Encouraging and Regulating the Mining for Petroleum...'. It appears that resource development is the paramount concern of the Act, any 'regulation' relating only to the number of permits and extent of the land to be exploited. Thus, the situation may be different from that in *Murphyores* where the discretion was totally unfettered and there was nothing that could be implied from the empowering statute which confined that discretion in any way. The pro-developmental nature of the *Petroleum Act* may, arguably, confine the Minister's discretion.

The solution, however, appears to be provided by s 29(2) of the *State Development Act* which requires that a decision maker take environmental effects of a proposed development into account when considering an application for approval, and to have due regard to relevant policies and administrative arrangements. There is no express indication in the *State Development Act* that the activities that may be authorised pursuant to the *Petroleum Act* such as prospecting, exploring, surveying, drilling, constructing a pipeline etc. constitute a 'development' to which s 29(2) will apply.[219] However, it would appear likely that a Court would find that these activities would amount to a 'use of land or water' so as to trigger the provisions of s 29(2) and the requirement of a consideration of environmental effects. It seems that the Court has never had to consider this issue.[220]

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218 *Id* at 61-62, 87 *per* Barwick CJ. and Murphy J. (there is a duty to follow lawful government policy); at 62, 114-116 *per* Gibbs and Aickin JJ. (sometimes appropriate to give a government policy conclusive weight) *cp*. Mason J. at 82-83 (while policy is a relevant consideration, the decision maker should exercise own independent discretion unless statute indicates otherwise).

219 The meaning of 'development' was considered above.

220 This speculation may be avoided by the imminent amendment of the *Petroleum Act* so as to require that environmental effects be taken into account in relation to decisions under that Act.

The same arguments apply in relation to the *Water Resources Act.* Despite it being a recent enactment, it appears to follow the traditional approach of resource development legislation of not containing any references to wider environmental matters. The Act appears only to be concerned with water conservation, to which there are many references, yet there are many activities contemplated by the Act which would appear to have broader environmental implications eg.. referable dams, special works and drilling for bore water which require approval or licence to undertake. Again, while the *Water Resources Act* does not bind a decision maker to take wider environmental effects into account, and, indeed, it appears that the Act is limited to concerns that affect water conservation itself, s 29(2) of the *State Development Act* may apply so as make wider environmental effects a relevant consideration to which the decision maker is bound to have regard.

In addition, the *EPA* requires government bodies of all types to comply with that Act and any environmental protection policies made thereunder if they will be carrying out an 'environmentally relevant activity' or otherwise may cause environmental harm as those terms are defined in the *EPA.*[221] There is also a general environmental duty imposed upon all persons, which includes the State,[222] requiring that all reasonable and practicable measures be taken to prevent or minimise any environmental harm that is or is likely to be caused by an activity.[223] Therefore, whenever the Government or a government body decides to carry out an activity that is likely to cause environmental harm, the provisions of the *EPA* will always need to be considered.

(b) An exercise of power for an unauthorised purpose[224]

A decision will be invalid where it is made for a purpose which is not authorised by the empowering statute. Even a wide discretion must be

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221 See *LGEPA* ss.14 -17, 38.

222 See *LGEPA* s.19.

223 *LGEPA* s.36. A breach of the duty does not, however, give rise to a civil right or remedy - see s.21.

224 *JR Act* s.23(d).

exercised in accordance with the policy and objects of the Act.[225] Evidence of the 'improper' purpose may be difficult to establish.[226] Determining whether the decision was made for an unauthorised purpose will generally be a matter of construing the empowering statute.

Even where the purpose is a noble one, if the statute does not expressly or impliedly contemplate that purpose, any decision to achieve that unauthorised object will be unlawful. The case of *Petrocorp Exploration Ltd v Minister of Energy*[227] provides an example of attempting to achieve a quite ignoble object. A Minister, who was empowered to grant a mineral lease to himself or jointly with others, entered into a joint venture arrangement. Upon the joint venture making a significant oil discovery it made a subsequent application for an extension of the area of the licence. The Minister refused the application but granted a licence to himself. The New Zealand Court of Appeal held that while he clearly had the power to grant a licence to himself, the Minister had done so for the purpose of the financial interests of the Crown rather than any overriding national interest. Further, the Minister had failed to take into account the fact that Parliament must have intended that he have significant regard to any pre-existing commercial obligations which he had formed and which he had the power to form.[228]

An example of an unauthorised purpose, but not one tainted in the same way as in *Petrocorp*, is provided by *Woollahra Municipal Council v Minister for the Environment.*[229] The question was whether development approval granted by the Director of the National Parks and Wildlife Service pursuant to

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225 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030 *per* Lord Reid; *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] QB 554 at 572 *per* Denning LJ.

226 *R v Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council* (1981) 151 CLR 170.

227 [1991] 1 NZLR 1.

228 See also *R v Brisbane City Council; ex parte Read* [1986] 2 Qd R 22 at 36 which involved the Council using planning powers entrusted to it under the *City of Brisbane Town Planning Act* 1964 (Qld) for the improper purpose of pecuniary or commercial gain. Thomas J. accordingly granted a prerogative remedy in respect of the void decision.

229 (1991) 23 NSWLR 710.

an Environmental Planning Policy[230] was valid. The Policy permitted development approval 'for any purpose authorised by the *National Parks and Wildlife Act* 1974 (NSW)'. Accordingly, the Director gave approval to a private university to occupy a building in a National Park and granted licences pursuant to ss 151(1)(f) and 152 of the *National Parks and Wildlife Act* to allow the University to occupy the land and to conduct its business. The power in ss 151(1)(f) and 152 to grant licences in relation to various uses in national parks was very broad, unlike other provisions in subsection 151(1), which contained specific purposes. The question was whether the use by the University was one for a purpose authorised by the *National Parks and Wildlife Act* and could therefore be approved under the Environmental Planning Policy.

The New South Wales Court of Appeal stated that the power to grant licences pursuant to those sections was impliedly limited by the scope and nature and purpose of the Act as a whole. Both Kirby P and Samuels JA asserted that the power could not be used for any purpose other than for the objects for which that power is conferred.[231] The purpose and object of the Act, as inferred from an examination of a number of provisions therein, appeared to be to protect and preserve national parks and their special features and to provide public recreational facilities thereon. The use of land in a National Park for a private university for teaching business administration was for a different purpose altogether and was not one contemplated by the Act.[232] Thus, the power to grant a licence was being exercised for an unauthorised, and therefore, improper purpose. Moreover, the approval to that development under the *Environmental Planning and Assessment Act* 1979 (NSW) *('the EPA Act')* was not 'for a purpose authorised by the *National Parks and Wildlife Act...*'

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230 The Policy was authorised by the *Environmental Planning and Assessment Act* 1979 (NSW).

231 *Woollahra Municipal Council v Minister for the* Environment (1991) 23 NSWLR 710 at 726 *per* Kirby P., at 732 *per* Samuels JA. The latter said that 'the Minister could not enjoy a power to grant a licence for some purpose wholly inimical to the objects of a national park as defined by...the Act...'

232 *Id* at 725-26 *per* Kirby P., at 732 *per* Samuels JA.

What is somewhat confusing in the judgments, is that their Honours expressed the case as one of a want of power rather than an improper exercise of power.[233] However, it is submitted that, in relation to the grant of licences, the Director clearly had a broad power given by sections 151(1)(f) and 152. However, he exercised the power unlawfully, that is, for an improper purpose. The authorisation of the development under the *EPA Act* may, however, have been in want of power because the authorisation could only be given if the development was one 'authorised by the *National Parks and Wildlife Act*' In any event, the distinction is not crucial as both errors are reviewable to the same extent and both will produce the same consequence of invalidity. One rare exception[234] may be that where the case is one of want of power, a Court will be more inclined to exercise its discretionary power to grant relief than to refuse to do so.

Where, as was the situation in *Woollahra*, the statute does not contain any express statement of object, it will be a matter of considering the subject matter, scope and purpose of the enactment to determine whether the decision accords with the objects of the Act.[235] Where a decision maker, particularly a Minister, makes a decision in accordance with a government policy, it raises a difficult question as to whether the decision is made for an unauthorised purpose where a construction of the legislation would not appear to contemplate the purpose revealed in the policy.

In *Murphyores*, the High Court found that it was a legitimate purpose of the *Customs Act* to allow consideration of environmental effects of sand mining. This may have been because that Act gave a virtually unfettered discretion to the Minister in relation to a wide variety of goods and the *EPIP Act* expressly applied to all government decisions which affected the environment to a significant extent.[236]

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233 *Id* at 715 *per* Gleeson CJ.; 726 *per* Kirby P.; and 733 *per* Samuels JA.

234 *Id* at 730 *per* Kirby P.

235 *R v Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council* (1981) 151 CLR 170 at 186 *per* Gibbs CJ.

236 Section 5(1).

On the other hand, it is unclear whether the Minister, in exercising his or her discretion to grant an authority to prospect under the *Petroleum Act*,[237] would be able to refuse an application which may have severe environmental effects. As noted above, the *Petroleum Act* does not appear to envisage the object of environmental protection, but rather, appears to contemplate resource development. Thus, a refusal based on environmental objects may be unauthorised by the Act. There are no express objects to assist. However, as the *State Development Act* requires that environmental effects be taken into account in considering such an application, it could be argued that the object of resource development should be read in the context of 'ecologically sustainable development' such that the purpose of environmental protection is not inconsistent with the object of development.

Consequently, it can be seen that the Court will be assisted in its determination of whether the decision maker has acted for an unauthorised purpose if the empowering statute contains a legislative statement of objects. This will give an indication of what Parliament intended to achieve by passing the legislation. If it can be proved that the decision maker has acted or made a decision[238] inconsistently with those express objects, the ground of improper purpose is more readily established.

(c) An exercise of discretionary power in accordance with a rule or policy without regard to the merits of the particular case[239]

It has long been accepted that it is not wrong for a decision maker to adopt a lawful policy to guide him or her in the exercise of an unstructured discretion to deal with a multitude of applications.[240] To do so will generally ensure consistency and efficiency. However, the policy must not be applied in such a way as to prevent proper consideration of the merits of the individual

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237 Section 9A.

238 The onus is on the person alleging that the decision maker has acted for an improper purpose.

239 *JR Act* s.23(f).

240 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 625.

case. What appears to be required[241] is that the decision maker give 'proper, genuine and realistic consideration' to the merits of the case and to be prepared to depart from the policy if the circumstances of the case warrant.[242]

Thus, it would be quite appropriate for a local authority, in exercising its power with respect to town planning consent,[243] to adopt a policy of not approving consent to uses which are likely to cause significant adverse environmental effects, unless there were exceptional circumstances. Such a policy is lawful in that it is consistent with the objectives of the Act[244] to 'facilitate orderly development and the protection of the environment' and still enables the authority to have regard to exceptional circumstances. Provided that the Council always has due consideration to any such circumstances raised by an application for consent, it is unlikely that a decision made consistently with such a policy could be found to be invalid.

6. STATEMENT OF OBJECTS IN ENVIRONMENTAL STATUTES

Before 1989, most resource development legislation provided little guidance as to the relevance of environmental considerations in decisions concerning grants of leases and licences. Similarly, environmental protection legislation gave little indication as to whether any other considerations apart from environmental factors were relevant to decisions relating to the control and management of a particular environment. In the absence of express direction to consider environmental impact of a proposal, it is necessary to seek assistance from a consideration of the scope and purpose of the legislation.

As noted above, the Courts have adopted a liberal approach to Ministers and higher level decision makers acting in conformity with broad government

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241 By *ADJR Act* s.5(2)(f), and arguably, its equivalent in *JR Act* s.23(f).

242 See for example, *Khan v minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291.

243 Section 4.13 of the *Local Government Planning and Environment Act*.

244 In section 1.3.

policy.[245] However, the difficulty arises where a construction of the scope and purpose of the relevant Act appears to confine the Minister's discretion to the matters and objects revealed in that particular enactment. In the case of early resource development legislation, these objects appeared to embrace purely exploitation matters with no real notion of conservation or sustainable development.[246]

More recently, there has been a tendency for environmental legislation to specify deliberative obligations and a statement of objects. It is hoped that this will assist the Court in determining whether a decision maker has made an unlawful decision, for example, in having regard to matters which the express statement of objects readily indicates are extraneous to the purposes of the Act or through a failure to take account of matters which the objects indicate expressly or by implication as being relevant.[247] Express objects would also aid the Court in determining whether the purpose for which a decision maker has acted is one which facilitates those objects.[248]

6.1 Statements of Object and Specific Provisions

A difficulty that remains in environmental legislation in Queensland, as opposed to other jurisdictions, is that the legislation usually does not indicate the relationship between the statement of objects and specific provisions contained therein. In some other jurisdictions, the relevant legislation may state that decisions in relation to the authorisation of various activities are required to be made in accordance with, or for the purpose of, attaining the objects of

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245 *Peko-Wallsend (No 2)* (1986) 162 CLR 24 at 42.

246 Eg. *Petroleum Act* 1923 (Qld).

247 See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030 where Lord Reid said that if a Minister uses his discretion as to thwart or run counter to the policy an object of the Act, persons aggrieved thereby may seek the protection of the court. The decision concerned objects ascertainable only by construing the Act. The task is easier where the objects are expressly stated.

248 Contrast this with the exertions of the Court in *Woollahra Municipal Council v Minister* (1991) 23 NSWLR 710.

the legislation.[249] A question which arises in this context is whether a failure to actually achieve each of the specified objects will render a decision invalid.[250] What if the decision maker does not do anything which would make the decision unlawful[251] but, nevertheless, fails to achieve the objects of the Act? It would be very rare that the situation would arise. The legislation to be considered below appears to have a framework whereby decisions which comply with specific requirements and provisions contained therein incidentally give effect to the objects of the Act. Ultimately, the answer may depend upon the wording of the particular Act and the attitude of the Court as to whether it considers an inquiry of this type as one which goes to the merits of the decision in question.

Under the recent Queensland enactments containing express object provisions, it is unlikely that there would be a conflict between a specific provision of a statute and the general statement of objects. For example the principal objectives of the *Mineral Resources Act* indicate that while mineral development is to be encouraged and facilitated with appropriate financial return to the State, environmental responsibility and land care management is also to be encouraged.[252] It would seem that each of these objectives are to govern the administration of the Act, and hence, decision making thereunder. Where applications for leases and licences are being considered, the objectives would require that the only type of development that should be approved is that which not only would give the State financial prosperity but will also be sustainable in terms of environmental implications and land use management. These guidelines are reinforced throughout, particularly in the requirement that the Minister, in deciding whether or not to recommend that a mining lease

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249 Eg. *Environmental Planning and Assessment Act* 1979 (NSW) especially ss.90 and 111 and the objects provision in s.5; *Local Government Planning and Environment Act* 1987 (Vic.) s.60 and the purpose provision in s.1 and the statement of objectives in s.4. See also *Shaw v City of St Kilda* (1989) 38 APA 286. A detailed examination of this issue is provided by D.E.Fisher, *above* n.131 at 361-378.

250 See D.E.Fisher, *above* n.131 at 360.

251 Eg. failure to consider a relevant matter: s.23(b); taking into account an irrelevant consideration: s.23(a); acting for an unauthorised purpose: s.23(c).

252 Section 1.3.

be granted,[253] must take into account the matters set out in s 7.26 (3). The latter considerations coincide with each of the objectives of the Act. All of the objectives are thereby taken into account although those provisions do not specifically relate back to those objectives.

Another example where the relationship is somewhat obscure, but nevertheless, ascertainable is provided by the *Queensland Heritage Act* 1992 (Qld). Once a place is entered in the Heritage Register as being of cultural heritage significance,[254] development in relation to that place is prohibited unless the Queensland Heritage Council approves the development application.[255] The purpose of the Act is spelt out in s 3(2) which obliges the decision makers exercising powers in relation to places and objects covered by the Act to seek to achieve the retention of their cultural heritage significance and the greatest sustainable benefit to the community consistent with the preservation of their cultural heritage significance. An approval which is inconsistent with, or which does not achieve, that purpose may be seen as being for an unauthorised purpose and reviewable under the *JR Act*.

Where the effect of a development would be to destroy or substantially reduce the cultural heritage significance of the place an application may only be granted if there is no 'prudent and feasible alternative to carrying out the development'.[256] Section 38 then requires that regard must be had to the two specified considerations in deciding whether there is such a prudent and feasible alternative. Thus, a failure to do so will constitute a reviewable error of law under the *JR Act*. The first relevant matters are safety, health and economic considerations.[257] The second is 'any other considerations that may be relevant'. While this is fairly broad, it is presumably hedged in by the purpose of the Act, aided by the statement in s 3, so that there will be some considerations that are clearly irrelevant; for example, tourism implications of a large resort development in an area entered on the Register may well be

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253 Pursuant to s.7.28.

254 See s.23.

255 Section 35(1).

256 Section 35(2).

257 Section 38(a).

incompatible with the need to achieve sustainable benefit to the community consistent with preservation of the cultural heritage of that area.

There may be occasions where tourism implications are relevant matters to which to have regard but it would depend upon the particular type of development contemplated. Consideration of an application to conduct small tour parties through a cave which is entered on the Register and to build a tiny souvenir shop adjacent thereto may involve taking account of the desirability of enabling small sections of the public at any one time to observe a place of such cultural significance. The type of development contemplated would not appear to be inconsistent with the objective of sustainable benefit to the community from those places consistent with the preservation of their cultural heritage significance.

Note that s 3(2) of the *Queensland Heritage Act* does not require that the objects of the Act actually be achieved, only that the decision maker *seek to achieve* them. It is submitted if the decision maker has acted for a purpose which can be regarded as consistent with the attainment of the objects of the legislation and has not failed to take into account those enumerated objects, the decision will not be invalid merely because a specified object is *not* achieved. There is no actual duty imposed[258] and it is unlikely that a Court would find the presence of a duty where one is not expressed. However, it appears that it will be a very rare situation where a decision maker will fail to achieve the objects of a statute if he or she arrives at a decision without committing any of these reviewable errors.

The *EPA* also sets out the objects of the Act in s 3. It then goes on in s 4 to describe how the object is to be achieved which is through a cyclical management program. Again, any powers which are conferred by the Act will be confined to pursuing environmental protection while allowing for ecologically sustainable development, leaving open to challenge decisions which undermine that object. A concrete example of where review might be sought is of a decision to grant an environmental authority in the face of contrary evidence[259] of serious environmental harm to be caused by that activity with no requirement that the applicant take steps to abate or minimise

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258 Contrast, for example, with *Local Government Act* 1962 (Tas) s.734A.

259 The 'no evidence' ground in *JR Act* s.20(2)(h) and s.24.

the harm. This would also amount to a failure to consider the matters set down in s 44 for determining a licence application.

What is more unusual in this Act is that s 5 appears to be cast in the language of a duty in that it states that where the Act confers a function or power upon a person, the person must perform the function or exercise the power in the way that best achieves the object of the Act. While this seems to be a more mandatory provision than that in s 3(2) of the *Queensland Heritage Act*, considered above, it is still very likely that the Court will be reluctant to interfere with the exercise of particular discretions under the *EPA* to ensure that they are used in a way that the Court thinks is the way that best achieves the object of the Act as to do so would be akin to entering upon the merits of the decision itself rather than reviewing the processes by which it was made. In a case where a duty was cast upon the Minister and relevant authorities not to take any action 'that adversely affects ... a place contained in the Heritage Register unless there is no feasible and prudent alternative ...'[260] it was pointed out that the question of 'adverse effect' was subjective and that it was unlikely to have been intended that if the Minister has done his or her best to comply with the provision but his or her efforts are insufficient, the Minister's action would be invalid.[261] It would be a courageous Court to overcome the view that s 5 introduces a subjective element and invites it to consider the merits of the decision rather than ensuring that the process by which the decision is made is the way that best achieves the object of the Act.

Finally, the *Local Government Planning and Environment Act* states that the two objectives of planning[262] are to facilitate orderly development and to protect the environment. It is readily discernible that environmental objectives are fundamental to the planning regime, reinforced by various provisions throughout the Act, particularly those requiring a local authority to consider any deleterious effect on the environment of any proposals[263] and the power of

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260 Section 30 *Australian Heritage Commission Act* 1975 (Cth).

261 See Pincus J. in *Yates Security Services Pty Ltd v Keating* (1991) 98 ALR 68 at 93-94.

262 Section 1.3.

263 Section 8.2(1).

the Chief Executive to request an EIS in respect of a designated development.[264]

In most cases, such as with the *Local Government Planning and Environment Act*, the objects provision will state that the specified objectives are those which *the Act* is to achieve.[265] In these circumstances the obligation does not appear to be imposed upon any persons and appears more as a policy statement. The enactment will sometimes proceed to set out the relevant criteria by which these objectives are to be achieved. More rarely will the objectives be directed towards the decision makers under the Act.[266]

The *Flora and Fauna Guarantee Act* 1988 (Vic) is quite unique in its direct requirement in s 4(2) that a public authority, defined very widely so as to include all government instrumentalities in Victoria, must have regard to the objectives of the Act in discharging its administrative responsibilities. However, while it appears to place a strong onus on a public authority, it still requires no more than that flora and fauna conservation and management objectives be taken into account when carrying out its duties and only makes explicit what the Court might otherwise imply from a construction of the Act itself. Again, the Act does not appear to impose a duty requiring that the objectives actually be achieved.

While the situations considered above could be strengthened by an express link being made between specific provisions and the objects of the Act, the mere presence of the latter provides a significant contribution to the review process, enabling the Court to draw a strong implication that the decision must facilitate the objects and, thereby, the purposes of the Act. The situation in *Bevestar Pty Ltd v North Sydney Municipal Council,*[267] where the Land and Environment Court appeared to prefer the specific environmental planning

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264 Section 8.2(3),(4) and (5). However, note two recent decisions of the Planning and Environment Court which have stated that the objectives in s 1.3 are important but while environmental objectives are material, they are not overriding: *Hilcorp v Council of the City of Logan* [1993] QPLR 199 at 202; *GTW Gelatine International Ltd v Beaudesert Shire Council* [1993] QPLR 342.

265 For example, s.1.3 of the *Mineral Resources Act* 1989 (Qld).

266 See s.8A of the *Forestry Act* 1916 (NSW).

267 (1985) 19 APA 175.

instrument over an object of the relevant Act, appears to be one that would rarely arise. In addition, the decision appeared to turn on its own specific facts.

6.2 The Importance of Each Objective

Where a statute expressly states the relevant objectives or objects of the Act, it may be difficult to determine which are the most important and whether a failure to achieve each and every object will be fatal to the validity of the eventual decision. Where there is nothing in the Act to indicate what weight is to be given to the various considerations, it is generally for the decision maker to determine the appropriate weight to be given to the matters to be taken into account.[268] However, if a factor is of great importance and it has not been given adequate weight, it might be regarded as giving rise to a decision which is 'manifestly unreasonable'.[269] In recent legislation, such as the *Mineral Resources Act,* the objects are expressed in such a way that all appear to be of equal importance.[270]

It may be possible to challenge a Minister's decision under the *Mineral Resources Act* which attaches more weight to the objective of encouraging and facilitating prospecting and exploring for and mining of minerals[271] than to the objective of encouraging environmental responsibility in those activities.[272] This is because, while each objective is relevant, they are interrelated and it would appear that no objective is to be achieved at the expense of another. While mining related activities are to be encouraged and facilitated, they must be done in an environmentally responsible manner. Other sections of the Act seem to support this conclusion. For example, the long title of the Act[273]

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268 *Peko-Wallsend (No 2)* (1986) 162 CLR 24 at 41.

269 *Ibid.* This ground is very difficult to establish. See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

270 See *Mineral Resources Act* 1989 (Qld) s.1.3.

271 See s.1.3(a). See also s 7.26(3)(b),(c) and (d) which contain some of the factors to which the Minister must have regard in exercising power under s.7.28.

272 Section 1.3(d). See also s.7.26(3)(i).

273 The long title states that the Act is 'to provide for the assessment, development and utilisation of mineral resources to the maximum extent practicable consistent with sound economic and land use management.'

makes reference to 'land use management', there is provision for the Minister to require an EIS in certain circumstances and a requirement for a plan of operations to include provisions for adequate protection of the environment and for rehabilitation.[274]

The object of the *Nature Conservation Act* is 'the conservation of nature'.[275] Section 5 then sets out the objectives for achieving that object, chiefly through a series of management principles and other mechanisms. The remainder of the Act sets out these principles and mechanisms, each provision appearing to be linked to the object and objectives. Moreover, many of the management principles which control the implementation of these management and control mechanisms specifically state what matters are to be paramount.[276]

It seems clear that conservation, protection and management are the only considerations when the Minister is considering the issue of an interim conservation order under the Act.[277] This may be contrasted with the position under s 59 of the *Endangered Species Protection Act* 1992 (Cth) which requires consideration of economic and social effects. It is submitted that economic and social effects are irrelevant to the issue of an interim conservation order under the *Nature Conservation Act*, even taking account of the liberal attitude taken of Minister's discretions by the Courts.[278] The scope and purpose of the Act, identified by the objects, appears to confine that discretion. Indeed, the provision for compensation to be paid to an affected land-holder[279] appears to override any consideration of the land-holder's economic position in making that order itself.[280]

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274 Sections 7.21, 7.48(2)(b),(c).

275 Section 4.

276 For example, s.17(2) which expressly provides that preservation, protection and preservation of the natural and cultural resources of a National Park are 'cardinal principles' for the management of such an area. This would appear to tie in with s.5 and, indeed, s.4.

277 See s.94.

278 Eg. *Peko-Wallsend (No 2)* (1986) 162 CLR 24 at 42.

279 'Land-holder' includes a person having an interest in the land: s.93.

280 Section 100.

The position may be different in respect of the preparation of conservation plans which involves the Minister in considering submissions from the public, land-holders and local authorities before making the draft plan and final plan.[281] It may be appropriate for the Minister to take into account considerations other than environmental ones. However, the objects of the Act would appear to require that conservation considerations be paramount so that the Minister should not give more weight to economic and social matters than to environmental ones. It is clear from s 5 that any use of protected areas and wildlife be ecologically sustainable. Excessive weight to matters of social and economic effect may invalidate the decision on the grounds of unreasonableness.[282]

More complex is the object of the *EPA* which is :

> to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends ("ecologically sustainable development").[283]

This statement of object may appear to be ambiguous. Does it have one element ie. to protect Queensland's environment or must this be done as well as having ecologically sustainable development?[284] The answer is not clear and may cause some difficulty when determining whether a person has exercised a power within the confines of the Act or has acted for an ulterior purpose. However, it appears that environmental protection permeates the powers and functions conferred by the Act and the regulatory mechanisms and sanctions for which it provides. In making decisions involving environmental authorities, Environmental Management Programs and Environmental Protection Orders the authority has to consider the 'standard criteria' in

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281 See ss.105 and 107(1).

282 *Peko-Wallsend (No 2)* (1986) 162 CLR 24 at 41.

283 Section 3.

284 This point was discussed by Prof. D.E. Fisher in his paper "The Structure and Direction of the *Environmental Protection Act* 1994 (Qld)" presented at a public seminar held at the Queensland University of Technology on 2 November 1994 and published in a series of Conference Papers *The Environmental Protection Act 1994* (Qld) - *A Contemporary Critique and Analysis* December 1994.

making that decision. 'Standard criteria' is defined very widely[285] to include a whole range of matters which include not just any applicable Environmental Protection Policy or environmental impact study but also matters such as the best practice environmental management for the activity, financial implications and the public interest. However, because the writer maintains that environmental protection is the paramount object of the Act, the grant of a licence to carry on an environmentally relevant activity which would have a serious and irreversible environmental impact without requiring the submission of an Environmental Management Program because of the financial implications for the industry conducting the activity might be regarded as undermining this object. It might also be regarded as giving excessive weight to a factor that must be considered but, in light of the object of the Act, is not to be overriding. Even if the object of environmental protection is conditional upon allowing for ecologically sustainable development, the latter also has an environmental protection element. Thus, while financial considerations are important, they should not be the most significant.

7. CONCLUSION

The recent changes to the process of judicial review in Queensland may have a significant impact upon the way in which decisions pursuant to resource development, planning and environmental management legislation are made. Decision makers will become increasingly aware that unlawful decisions are readily reviewable pursuant to the *JR Act* by virtue of the flexibility it has introduced into the judicial review process. In addition, there is potential for many environmental groups to have standing to challenge a number of decisions relating to the environment and to seek reasons for such decisions. No longer will government decision making enjoy the insulation of there being few persons or bodies that have standing to review it.

The review process itself is aided by the recent trend in environmental legislation to include specific statements of object. Despite some of the problems indicated in the latter part of this paper, the overall benefit of this development is that it facilitates the review process by allowing the Court to

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285 See Dictionary in Schedule 4.

readily determine whether the decision under challenge conforms with the scope and purpose of the legislation.

Obviously, judicial review has its limitations in that the Court can only review the lawfulness of the decision rather than the merits and it cannot substitute its own decision for that of the decision maker. This is where administrative review as provided by the Administrative Appeals Tribunal in jurisdictions such as Victoria and the Commonwealth can be of significant advantage. However, it is hoped that whether or not such a Tribunal is established in Queensland, environmental decision making will be improved through the accountability fostered by review under the *JR Act*.