

NON-STATUTORY FILTERS IN GOVERNMENT DECISION-MAKING: COMPATIBLE WITH ADMINISTRATIVE JUSTICE?

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Non-statutory, preliminary assessments by departmental staff or independent contractors may well be administratively efficient. They may even be necessary, considering the large administrative workloads now inherent in government decision-making. Such processes, however, can have a negative impact upon administrative justice when the formal decision is non-compellable. When that is so, an applicant rejected by a negative preliminary assessment can be left in limbo with no subsequent avenue to the formal, proper decision-maker. The result is the filtering of important administrative decisions away from the proper decision-makers. Here, the ultimate question is whether such non-statutory filters are compatible with administrative justice and, if not, whether the law can be reformed to make them compatible.

I INTRODUCTION

Governments have developed processes for filtering important administrative decisions away from the proper decision-makers. The proper decision-makers are those who are authorised, usually by statute, to make their decisions. The authority to make certain decisions is usually bestowed upon a specific office or entity, such as a particular minister. In such a case, that office or entity is the proper, formal decision-maker. To accord with administrative justice, ‘a philosophy that in administrative decision-making the rights and interests of individuals should be properly safeguarded’,¹ administrative decisions should only be made when authorised, and they should only be authorised when subject to accountability. However, in order to deal with large administrative workloads, formal decisions are often preceded by non-statutory, preliminary assessments by departmental staff or independent contractors, who are hereby termed the ‘informal decision-makers’.

These non-statutory, preliminary assessments can provide invaluable advice to the formal decision-maker, and so informal decision-makers are not necessarily improper. Further, whilst non-statutory, preliminary assessments are not ordinarily subject to judicial review themselves, they can still be scrutinised when the final, formal decision is reviewed. As noted by Mason CJ in *Australian Broadcasting Tribunal v Bond*, where the preliminary decision-maker commits legal or factual error and the formal decision-maker relies upon it, those antecedent findings will be exposed through judicial review of the ultimate or operative decision.² Thus, a government’s use of informal decision-makers does not necessarily offend administrative justice, especially as non-statutory, preliminary assessments can still be scrutinised by a court during the judicial review of the ultimate or operative decision.

However, issues of administrative justice arise when the formal decision is non-compellable. This is where the formal decision-maker has a decision-making power, but applicants cannot compel a decision either way, or any decision at all. This situation is problematic because an applicant rejected by a negative preliminary assessment can be left in limbo with no subsequent avenue to the formal decision-

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¹ Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (LexisNexis Butterworths, 4th ed, 2015) 24; See also John McMillan, ‘Ten Challenges for Administrative Justice’ (2010) 61 *Australian Institute of Administrative Law Forum* 23, 26-7.

² *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 338.

maker.³ Such non-statutory, preliminary assessments to non-compellable decision-making powers shall be referred to as ‘non-statutory filters’ for convenience. There has not been much commentary on the issue of non-statutory filters.⁴ This might be because non-statutory decisions, in general, are hidden from view.⁵ However, new non-compellable powers and their corresponding non-statutory filters are being created. Take, for example, the controversial *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).⁶ It allows for dual nationals to be stripped of their Australian citizenship when they have been connected in some way with terrorism.⁷ One of the mechanisms by which citizenship can be stripped is by ‘automatic lapsing’:⁸ citizenship will be deemed to have ceased immediately upon certain circumstances.⁹ Thereafter, if the Minister becomes aware of the matters that caused the automatic lapsing, the Minister must give written notice to that effect.¹⁰ However, the Minister then has the non-compellable power to rescind that notice and to nullify the effect of the automatic lapsing.¹¹ As for the non-statutory filter of the regime, that role has been taken up by a newly created ‘Citizenship Loss Board’.¹²

Fortunately, although information on the Citizenship Loss Board’s internal processes is generally not publically available, a Freedom of Information request has caused the Department of Immigration and Border Protection to publish the draft minutes of one of the Board’s meetings.¹³ Those minutes state that the Board’s role is to support the Secretary and the Minister for Immigration and Border Protection in administering the citizenship loss provisions.¹⁴ This will include reviewing information on citizenship loss cases before it reaches the Minister, including information that may affect the Minister’s non-compellable power described above.¹⁵ This filtering of the Minister’s personal, non-compellable decision is problematic in itself. However, if that were not enough, the minutes also note that the Board considers itself to be free from legal obligation as ‘each member is participating in the Board in their professional capacity and ... the Board is an inter-departmental committee providing advice, not a decision-making body’.¹⁶

³ See, eg, Angus Francis and Sonia Caton, ‘Access to Protection for “Offshore Entry Persons”, aka Asylum Seekers’ (2011) 36 *Alternative Law Journal* 172, 174, describing a non-statutory process that was ‘intended to operate independently of judicial review of any determination, or no determination, by the Minister’.

⁴ But see Michelle Foster and Jason Pobjoy, ‘A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s “Excised” Territory’ (2011) 23 *International Journal of Refugee Law* 583, 616-7; Human Rights and Equal Opportunity Commission, *Those Who’ve Come Across the Seas: Detention of Unauthorised Arrivals* (1998) 54; A M North and Peace Decle, ‘Courts and Immigration Detention: The Australian Experience’ (2002) 10 *Australian Journal of Administrative Law* 5, 28; Savitri Taylor, ‘Sovereign Power at the Border’ (2005) 16 *Public Law Review* 55, 64; Susan Harris Rimmer, ‘Dangers of Character Tests under Australian Migration Laws’ (2010) 17 *Australian Journal of Administrative Law* 229, 239; Kevin Boreham, ‘“Wide and Unmanageable Discretions”: The Migration Amendment (Detention Arrangements) Act 2005 (Cth)’ (2006) 17 *Public Law Review* 5, 21; Mary Crock and Daniel Ghezelbash, ‘Due Process and Rule of Law as Human Rights: The High Court and the “Offshore” Processing of Asylum Seekers’ (2011) 18 *Australian Journal of Administrative Law* 101, 112.

⁵ See Administrative Review Council, ‘Federal Judicial Review in Australia’ (Report No 50, September 2012) 79 [5.5]; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 161; McMillan, above n 1, 27.

⁶ See, eg, Department of Parliamentary Services (Cth), *Bills Digest*, No 15 of 2015-16, 2 September 2015.

⁷ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) sch 1 items 3-4; *Australian Citizenship Act 2007* (Cth) ss 33AA, 35.

⁸ See Julie Doyle, Matthew Doran and Dan Conifer, *Terror Citizenship Laws: Lawyers Divided on Merits of Bill to Strip Dual Nationals of Citizenship* (24 June 2015) *ABC News* <<http://www.abc.net.au/news/2015-06-24/lawyers-respond-to-changes-to-citizenship-act/6568652>>.

⁹ *Australian Citizenship Act 2007* (Cth) ss 33AA(9), 35(2).

¹⁰ *Ibid* ss 33AA(10), 35(5).

¹¹ *Ibid* ss 33AA(14)-(15), 35(9)-(10).

¹² See Peter Dutton, ‘Press Conference’ (8 April 2016) <<http://www.minister.border.gov.au/peterdutton/2016/Pages/press-conference-8-april.aspx>>; Paul Maley, ‘Citizenship Strike on 100 Jihadis Fighting with Islamic State’, *The Australian* (online), 8 April 2016 <<http://www.theaustralian.com.au/national-affairs/immigration/citizenship-strike-on-100-jihadis-fighting-with-islamic-state/news-story/4771cdcd940f250895565c07aa69757>>; Australian Associated Press, *Citizen Board to Decide Dual-National Fate* (8 April 2016) *SBS News* <<http://www.sbs.com.au/news/article/2016/04/08/citizen-board-decide-dual-national-fate>>.

¹³ Department of Immigration and Border Protection (Cth), *2016 FOI Disclosure Logs* (5 August 2016) <<https://www.border.gov.au/about/access-accountability/freedom-of-information-foi/log/2016>>; Department of Immigration and Border Protection (Cth), *FA16/04/01379 Request for all Meeting Minutes from the Citizenship Loss Board Decision Record* (20 May 2016) <https://www.border.gov.au/AccessandAccountability/Documents/FOI/20160520_FA160401379_Decision_Record.pdf>.

¹⁴ Department of Immigration and Border Protection (Cth), *Citizenship Loss Board IDC Draft Minutes of Meeting Held on Tuesday, 23 February 2016 at DIBP, 2 Constitution Avenue Canberra* (20 May 2016) <https://www.border.gov.au/AccessandAccountability/Documents/FOI/20160520_FA160401379_Documents_Released.pdf>.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

What effect the Citizenship Loss Board will have upon administrative justice for dual nationals is yet to be seen.¹⁷ However, guidance can be sought from the judicial treatments of non-statutory filters related to the *Migration Act 1958* (Cth) (*'Migration Act'*). Part II will examine such judicial treatments to determine whether judicial review is available against non-statutory filters in general. Here, the ultimate question is whether non-statutory filters are compatible with administrative justice and, if not, whether the law can be reformed to make them compatible. This is because administrative justice was one of the principles that administrative law was designed to uphold.¹⁸ Part III will, therefore, discuss the need for reform and make a proposal for reform.

II WHETHER JUDICIAL REVIEW IS AVAILABLE

An applicant rejected by a non-statutory filter will be left in limbo as there will be no legal right to demand a formal decision from the proper, formal decision-maker. In effect, informal decision-makers become final decision-makers. Where such is the case, it is not unreasonable to propose that informal decision-makers be subject to the same scrutiny and accountability as formal decision-makers. In short, if non-statutory filters are to be compatible with administrative justice, the principle of good government that the rights and interests of individuals be properly safeguarded in administrative decision-making,¹⁹ judicial review needs to be available.

The starting point is acknowledging the difficulty of seeking judicial review when the decision to be challenged is both non-statutory and preliminary. For instance there will, ordinarily, be neither a 'decision of an administrative character made under an enactment', as required by *ADJR* jurisdiction,²⁰ nor a constitutional 'matter', as required by federal common law jurisdiction.²¹ However, there have been cases where courts have allowed for judicial review of non-statutory filters. The most ground-breaking of these cases was *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319 (*'Offshore Processing Case'*). There, a major theoretical distinction was made between those non-statutory filters that have a 'statutory foundation' and those that are purely non-statutory, being exercised under a 'non-statutory executive power to inquire'.

First, the *Offshore Processing Case* and the new term 'statutory foundation' will be explored. The applicability of jurisdictional prerequisites when such a statutory foundation does exist will also be discussed. Second, this part will explore the idea of the non-statutory filter made under the 'non-statutory executive power to inquire'.

A The 'Statutory Foundation'

1 The Offshore Processing Case

In the *Offshore Processing Case*, a unanimous High Court held that a non-statutory filter was subject to judicial review.²² This was because the non-statutory filter in question consisted of steps taken under and for the purposes of the *Migration Act*.²³ In effect, the non-statutory filter had a 'statutory foundation', and so was subject to judicial review upon ordinary principles.²⁴

The case concerned two asylum-seekers who were statutorily barred from making a valid visa application per s 46A(1) of the *Migration Act*. Their only respite was the Minister's power to 'lift-the-bar' under s 46A(2), relaxing the restriction set by sub-s (1).²⁵ The High Court also discussed the power to grant

¹⁷ See, eg, George Williams, *Government Officials of Secretive Citizenship Loss Board Named* (22 July 2016) UNSW Law <<http://www.law.unsw.edu.au/news/2016/07/government-officials-secretive-citizenship-loss-board-named>>; Santilla Chingaipe, *What is the Citizenship Loss Board and How Will it Work?* (14 April 2016) SBS News <<http://www.sbs.com.au/news/article/2016/04/14/what-citizenship-loss-board-and-how-will-it-work>>.

¹⁸ Creyke, McMillan and Smyth, above n 1, 24.

¹⁹ Ibid.

²⁰ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) (definition of 'decision to which this Act applies') (*'ADJR Act'*).

²¹ See Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 15-16.

²² (2010) 243 CLR 319, 334.

²³ Ibid.

²⁴ Ibid 351-2.

²⁵ Ibid 333.

a visa under s 195A(2) due to the similarities between the two powers, both being personal, non-compellable powers. Here, the non-compellability of the powers was clear as the relevant statutory provisions expressly stated that the Minister did not have a duty to consider the exercise of power.

At the time, a two-stage non-statutory filter operated before the Minister would personally consider lifting-the-bar.²⁶ The first stage was a ‘Refugee Status Assessment’ (‘RSA’), which considered whether an applicant was owed protection obligations.²⁷ The RSA was conducted by a Departmental Officer.²⁸ The second stage was an ‘Independent Merits Review’ (‘IMR’), which was a review of the RSA by an independent contractor if requested by the applicant.²⁹ The two plaintiffs’ protection claims were rejected by both the RSA and IMR, and so, since the Minister was not willing to lift-the-bar, they sought judicial review.³⁰

2 *The Statutory Foundation vs the Non-Statutory Executive Power to Inquire*

The *Offshore Processing Case* made an important distinction between the non-statutory filters that have a ‘statutory foundation’ and those that are made under the ‘non-statutory executive power to inquire’.³¹ The Commonwealth and the Minister argued that the RSA and IMR processes were the latter, being processes undertaken in exercise of a non-statutory executive power to inquire pursuant to s 61 of the *Constitution*.³² It followed, according to the Commonwealth and the Minister, that the RSA and IMR processes were not bound by procedural fairness, nor were they required to address the legally correct questions.³³ However, without either accepting or rejecting the proposition that a non-statutory executive power to inquire would not be subject to such requirements, the High Court found that a statutory foundation did exist.

Although the RSA and IMR were non-statutory processes, they had a statutory foundation.³⁴ The High Court considered their adoption to be an implementation of certain ministerial announcements: that the 2001 ‘Pacific Strategy’ would no longer be followed and that other steps would be taken to meet Australia’s international refugee obligations instead.³⁵ Therefore, the processes were not a mere direction to provide the Minister advice about whether the non-compellable powers should be exercised.³⁶ Rather, the processes implemented a ministerial decision to consider exercise of power for *every* such protection claim.³⁷

The ss 46A(2) and 195A(2) powers had two distinct steps: the decision *to consider* exercise of power and the decision *to exercise* power.³⁸ Although the Minister was not obliged to take either step, the first step had in fact already been made and it had been made with respect to *every* protection claim.³⁹

As the statutory foundation could be established, ordinary principles applied as to the limits of the non-statutory filter and how it was to be conducted.⁴⁰ Applying the ordinary principles, the RSA officer and IMR reviewer were bound by obligations of procedural fairness, as well as the need to act according to law by applying the relevant provisions of the *Migration Act* and decided cases.⁴¹

The *Offshore Processing Case* established that a non-statutory filter could have a statutory foundation. Further, it established that the consequence of finding a statutory foundation could be a burden of obligations similar to that of a statutory, formal decision-maker.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid 348.

³² Ibid 336-7, 345.

³³ Ibid 336-7.

³⁴ Ibid 349.

³⁵ Ibid 342.

³⁶ Ibid 349.

³⁷ Ibid.

³⁸ Ibid 350.

³⁹ Ibid 350-1.

⁴⁰ Ibid 351-2.

⁴¹ Ibid 334; 351-2.

3 Room for Legal Development: Defining the Obligations

However, what obligations exactly must a non-statutory filter with a statutory foundation comply with are still unclear. This was apparent in *Minister for Immigration and Border Protection v SZSNW*,⁴² where the Federal Court discussed whether the principle of legal reasonableness, as expounded in *Minister for Immigration and Citizenship v Li*,⁴³ could be imposed on the decision, or the reasons for decision, of an IMR.

Mansfield J noted that the *Offshore Processing Case* held that IMRs were to abide by the correct legal principles, including the relevant statutory provisions and the decided cases, in making recommendations.⁴⁴ He then noted that *Li* explained the principle of legal reasonableness as having its foundations in the relevant statutory provisions and the decided cases.⁴⁵ The conclusion that followed was that IMRs must then be bound by the principle of legal reasonableness, being also bound by the relevant statutory provisions and the decided cases.⁴⁶

Buchanan J, however, disagreed, stating that the challenge to the IMR decision could not fit within the particular rubric of legal reasonableness.⁴⁷ For example, unlike the situation in *Li*, it could not be said that there was a manner of exercise of a procedural discretion that was foreign to the proper performance of a statutory task or function.⁴⁸ Although the IMR had a statutory *foundation*, it had not itself been given a statutory *function*.⁴⁹ The IMR decision could be characterised as legally unreasonable in the sense that there was a failure of procedural fairness, but such a failure would normally not need any such further characterisation, being a ground of judicial review in itself.⁵⁰

Perram J held that the IMR reviewer did have to abide by legal reasonableness. In the *Offshore Processing Case*, the High Court made declarations that the IMR reviewers had committed breaches of procedural fairness and errors of law. Though these declarations were couched in the language of what the IMR reviewers had done, Perram J reasoned that they were actually directed towards the Minister in the event of the Minister relying upon the IMR recommendations.⁵¹ These were proleptic declarations.⁵² Consequently, Perram J stated that declaratory relief is available for *any* ground of review *if* it would have been theoretically available against the Minister.⁵³ The ground of legal unreasonableness per *Li* is, therefore, available as the statutory, discretionary power required by *Li* exists in the Minister, and declaratory relief can be framed accordingly.⁵⁴

The judges' differing opinions indicate the inherent ambiguity in the term 'statutory foundation'. Establishing a statutory foundation will, first, lead to judicial review. However, the consequences thereafter are still unclear. The concept is tied to the formal decision-maker's statutory function, but a 'statutory foundation' is still not itself a 'statutory function'. A statutory foundation will impose obligations upon an informal decision-maker, but there is ambiguity as to what these obligations entail.

⁴² (2014) 229 FCR 197 ('SZSNW').

⁴³ (2013) 249 CLR 332 ('Li').

⁴⁴ SZSNW (2014) 229 FCR 197, 200-1.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid 216.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid 219-20.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

4 Satisfying the Jurisdictional Prerequisites

The ambiguity continues when one considers the extent to which non-statutory filters with statutory foundations can satisfy, or not, the jurisdictional prerequisites for judicial review. *ADJR* judicial review requires ‘a decision of an administrative character made under an enactment’.⁵⁵ Per *Tang*, a decision is not ‘made under an enactment’ unless:

- the decision is expressly or impliedly required or authorised by the enactment; and
- the decision itself confers, alters or otherwise affects legal rights or obligations.⁵⁶

It appears that a statutory foundation, without anything more, would be insufficient to satisfy the *Tang* criteria, or at least not the second criterion. Despite the existence of a statutory foundation, the full Federal Court in *SZQDZ v Minister for Immigration and Citizenship* found that an IMR reviewer’s assessment and recommendation were not ‘decision[s] of an administrative character made or proposed to be made’ under the *Migration Act*.⁵⁷ This was because the assessment and recommendation had ‘no statutory or other legal force’.⁵⁸ The Minister was not bound to act on the IMR in any way.⁵⁹ The Minister did not have to take the IMR into account at any stage of his consideration, nor make a favourable decision even if the IMR had been favourable to the applicants.⁶⁰ Thus, the IMR’s statutory foundation was insufficient to satisfy *Tang*’s second criterion. Despite any statutory foundations, a non-statutory filter will be found inappropriate for *ADJR* judicial review.⁶¹

As for federal common law judicial review, the jurisdictional prerequisites were assumed to be satisfied in the *Offshore Processing Case*. There, the High Court stated that their jurisdiction to review the RSA and IMR was sourced in at least the following constitutional provisions:

- s 75(iii), matters in which the Commonwealth, or a person being sued on behalf of the Commonwealth, is a party;
- s 75(v), matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, leaving aside the question of whether the independent contractors in the *Offshore Processing Case* were officers of the Commonwealth; and/or
- s 75(i), matters arising under any treaty.⁶²

It was, therefore, assumed that there existed a constitutional ‘matter’. The High Court did not delve into any detail upon this assumption.

Sections 75(iii) and 75(v) of the *Constitution* have been the more important sources of High Court original jurisdiction in the history of administrative law.⁶³ Section 75(iii) defines its jurisdiction by referring to the Commonwealth as a party, whilst s 75(v) primarily refers to the remedies of mandamus, prohibition and injunction.⁶⁴ However, both require a constitutional ‘matter’. What can constitute such a ‘matter’ is not

⁵⁵ *ADJR Act* s 3(1) (definition of ‘decision to which this Act applies’). The judicial review statutes in Queensland, Tasmania and the Australian Capital Territory also require ‘a decision of an administrative character made under an enactment’: *Judicial Review Act 1991* (Qld) s 4(a); *Judicial Review Act 2000* (Tas) s 4(1); *Administrative Decisions (Judicial Review) Act 1989* (ACT) Dictionary (definition of ‘decision to which this Act applies’). The Queensland statute also has an alternative basis for review, but that will be discussed in Part III – see *Judicial Review Act 1991* (Qld) s 4(b).

⁵⁶ *Griffith University v Tang* (2005) 221 CLR 99, 130-1.

⁵⁷ (2012) 200 FCR 207, 218 (*SZQDZ*).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Arguably, another consequence of *SZQDZ* is that non-statutory filters will also be considered inappropriate for Victoria’s statutory judicial review. Unlike the statutory jurisdictions of Queensland, Tasmania and the Australian Capital Territory, Victoria did not copy the *ADJR Act*’s ‘made under an enactment’ requirement. However, the Victorian statute requires a ‘decision’ and defines it as a ‘decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence’: *Administrative Law Act 1978* (Vic) s 2 (definition of ‘decision’). Non-statutory filters have no statutory or other legal force, using the words of *SZQDZ*, and so they cannot constitute a ‘decision operating in law to determine a question affecting the rights of any person’, and no privilege or licence is directly concerned. Thus, non-statutory filters, despite any statutory foundations, will not satisfy Victoria’s statutory jurisdictional prerequisites either.

⁶² *Offshore Processing Case* (2010) 243 CLR 319, 345.

⁶³ Creyke, McMillan and Smyth, above n 1, 66.

⁶⁴ *Ibid* 67-8.

limited to the pleaded cause-of-action or claim.⁶⁵ It can include ‘any one or more of: the subject matter for determination in a legal proceeding; the right, duty or liability to be established; and the controversy between the parties’.⁶⁶

Given that expansive definition, it is proposed that other non-statutory filters would likewise be assumed to satisfy the constitutional ‘matter’ requirement,⁶⁷ and so the law is currently in an ambiguous state. The current state of the law allows a non-statutory filter to attract common law judicial review when a statutory foundation can be established. However, at the same time, the statutory foundation may not be considered statutory enough to attract *ADJR* judicial review, being insufficient to satisfy the ‘made under an enactment’ requirement.

B *The Non-Statutory Executive Power to Inquire*

As noted earlier, the *Offshore Processing Case* differentiated between the non-statutory inquiries that have statutory foundations from those that are made under the non-statutory executive power to inquire. The latter will now be explored.⁶⁸

1 *An Undefined Area of Law*

There is yet to be an authoritative case that defines what such a non-statutory executive power to inquire would entail and whether, and to what extent, it would be subject to judicial review. Aronson and Groves assert that it is a reasonable assumption that judicial review is not automatically rendered unavailable when the challenged power is non-statutory.⁶⁹ However, it may be rendered ineffectual anyway by the judiciary’s deference on certain topics to the political branches and the award of ‘virtually useless relief’.⁷⁰ This is primarily due to the fact that the legal limits of non-statutory powers are not well-defined, making a court’s task of defining the scope of review difficult and causing an ‘acute circumspection’ in awarding remedies.⁷¹ Recently, the High Court did have the opportunity to determine the limits of a non-statutory executive power, but the judges ultimately found it an issue unnecessary to resolve for the case-at-hand.⁷²

In *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,⁷³ there were, however, at least a few suggestions as to how a non-statutory executive power to inquire might be treated in the future. *Plaintiff S10* concerned several of the Minister’s non-compellable powers under the *Migration Act* and the departmental guidelines as to when, and in what circumstances, the Minister might consider exercising those powers.⁷⁴ French CJ and Kiefel J, in a joint judgment, found that the work of the departmental officers in the acquisition of information and the categorisation of requests per those guidelines was, in this case, a non-statutory exercise of executive power.⁷⁵

French CJ and Kiefel J determined that the Minister did not take any statutory step equivalent to that which was taken in the *Offshore Processing Case*, and so distinguished that case.⁷⁶ That is, the Minister in *Plaintiff S10* did not make an announcement that effected a decision to consider the exercise of power in every case.⁷⁷ Departmental guidelines were issued, but they existed merely to facilitate the provision of advice

⁶⁵ Aronson and Groves, above n 5, 56.

⁶⁶ Ibid. See also *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265; *Ruhani v Director of Police* (2005) 222 CLR 489, 513, 574-8.

⁶⁷ If the other elements of s 75(v) of the *Constitution* can also be satisfied, the Federal Court may also have jurisdiction. The Federal Court may rely upon s 39B(1) of the *Judiciary Act 1903* (Cth), which is a Federal Court equivalent to the High Court’s s 75(v) but with some exceptions.

⁶⁸ See Kathleen E Foley, ‘What is the Relevance of *Williams* and *Plaintiff M61* for the Exercise of State Executive Power?’ (2013) 36 *University of Western Australia Law Review* 168, 178, as to whether the justification for the executive power to undertake inquiries may need to be reconsidered because the ‘executive as a natural person’ analogy has been found to be an unsound analogy.

⁶⁹ Aronson and Groves, above n 5, 116-7.

⁷⁰ Ibid.

⁷¹ Ibid 117.

⁷² See *CPCF v Minister for Immigration and Border Protection* (2015) 143 ALD 443.

⁷³ (2012) 246 CLR 636 (*‘Plaintiff S10’*).

⁷⁴ Ibid 641.

⁷⁵ Ibid 655.

⁷⁶ Ibid 653.

⁷⁷ Ibid.

to the Minister on particular categories of requests, as well as to screen against other categories that the Minister had decided should not be brought to his or her attention.⁷⁸ Issuing guidelines is not itself a decision to consider the exercise of power.⁷⁹ Consequently, the non-statutory filter, being the work done by the departmental officers acting under the guidelines, was an executive function within s 61 of the *Constitution*.⁸⁰ It was incidental to the administration of the *Migration Act* such that it existed within the s 61 executive power that ‘extends to the execution and maintenance ... of the laws of the Commonwealth’.⁸¹ Thus, French CJ and Kiefel J found that the departmental officers were not bound by obligations of procedural fairness.⁸² It is proposed that their judgment was referring to a ‘non-statutory executive power to inquire’, though those words were never explicitly used, as the departmental officers were essentially undertaking inquiries for the Minister.

Unfortunately, the other judges in *Plaintiff S10* did not consider any non-statutory executive powers to inquire. Gummow, Hayne, Crennan and Bell JJ, in a joint judgment, found the issue unnecessary to decide because they did not consider the work of the departmental officers to be divorced from the exercise of authority conferred by the statute.⁸³ Heydon J also found it unnecessary to decide, stating that even if the source of the departmental officers’ powers lay outside the *Migration Act*, procedural fairness was not required by the particular statutory provisions concerned, and procedural fairness could not apply to the departmental officers when it did not even apply to the Minister.⁸⁴

A unanimous High Court recently provided some clarification in *Minister for Immigration and Border Protection v SZSSJ*.⁸⁵ There, the High Court reaffirmed the *Offshore Processing Case*’s split of non-compellable powers into decisions *to consider* exercise of power and decisions *to exercise* power, calling them the ‘procedural decision’ and the ‘substantive decision’, respectively.⁸⁶ The High Court then stated that if the Minister, who was the formal, statutory decision-maker, has not made a procedural decision, ‘a process undertaken by the Department on the Minister’s instructions to assist the Minister to make the procedural decision has no statutory basis and does not attract a requirement to afford procedural fairness’.⁸⁷ This would appear to support French CJ and Kiefel J in *Plaintiff S10* and the notion that non-statutory executive powers to inquire would not be bound by obligations of procedural fairness.

However, the High Court in *SZSSJ* was only concerned with certain non-compellable powers under the *Migration Act* when making the above comment, and so there is limited applicability. The law as to non-statutory executive powers is still unclear, and it is even more so for any proposed non-statutory executive powers to inquire.

C Conclusion to Part II

The High Court allowed for judicial review of a non-statutory filter in the *Offshore Processing Case*. This was achieved by establishing a ‘statutory foundation’. A statutory foundation was created by splitting a statutory power into a prior decision to consider exercise of power and a subsequent decision to exercise power. The result was that a non-statutory filter could be made to have obligations akin to that of a proper statutory decision-maker.

However, it is still unclear as to what extent a non-statutory filter with a statutory foundation is subject to judicial review. The confusion is in the term ‘statutory foundation’. Is an informal, preliminary and non-statutory decision with a statutory foundation identical to a statutory decision? Presumably not because it appears, for example, that the *ADJR Act* would not apply to the former, but it would apply to the latter. However, it is still unclear as to the extent the two differ.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid 655.

⁸¹ Ibid. For other powers within s 61 of the *Constitution*, see *Williams v Commonwealth* (2012) 248 CLR 156, 184-5 (French CJ).

⁸² *Plaintiff S10* (2012) 246 CLR 636, 655.

⁸³ Ibid 665.

⁸⁴ Ibid 673.

⁸⁵ (2016) 333 ALR 653 (*SZSSJ*).

⁸⁶ Ibid 665.

⁸⁷ Ibid.

To compound the situation, the law is even less clear when there is no statutory foundation. The law as to non-statutory executive powers, in general, is yet to be defined, and that remains the case for the non-statutory executive power to inquire. It is unclear to what extent such powers are subject to judicial review.

Judicial review has been made available in surprising situations. A decision by an informal decision-maker in a preliminary, non-statutory process of inquiries would not ordinarily be subject to obligations of procedural fairness, or other obligations for that matter. However, it is still a burgeoning area of law with many issues yet to be resolved.

III THE NEED FOR REFORM

Although common law judicial review is now available against the non-statutory filters that have statutory foundations, the situation is still far from being compatible with administrative justice. There is still a need for reform. Reform is required to make judicial review available against the non-statutory executive power to inquire if it is the case that it is unavailable. In addition, it will be seen that reform is required as to the available remedies against non-statutory filters.⁸⁸

This part will first, explore the available judicial review remedies against non-statutory filters. It will be seen that the hurdle of establishing a right to judicial review is succeeded by an even greater hurdle: access to remedies, or remedies with any practical effect upon the formal decision. Reform by amendment of the *ADJR Act* will then be considered. Such a reform would allow for *ADJR* judicial review against non-statutory filters. Applicants would then be able to access other and further remedies under s 16 of the act. Lastly, this part will explore the judicial disquiet with regards to non-statutory filters and some judges' attempts at judicial reform.

A *The Remedies against Non-Statutory Filters*

As explained in Part II, judicial review is available against the non-statutory filters that have statutory foundations but not under *ADJR* jurisdiction. In addition, non-statutory filters without statutory foundations will certainly not be subject to *ADJR* jurisdiction as they will never be considered to be 'made under an enactment'.⁸⁹ The current state of the law, therefore, leaves applicants to seek common law judicial review remedies.

1 *The Preferred Remedies at Common Law are Unavailable*

The preferred remedy at common law for those affected by preliminary decisions is mandamus to compel a correctly-made final decision. Certiorari may also be sought to quash the infected preliminary decision. However, neither are available when the final and formal decision is non-compellable.

In the *Offshore Processing Case*, the High Court noted that mandamus will not issue to compel a formal decision when there is no duty to consider an exercise of power.⁹⁰ Nor will mandamus issue to compel a reconsideration.⁹¹ Further, the unavailability of mandamus entails that there is no utility in granting certiorari.⁹² It is of no use to quash a tainted decision when a correct decision cannot then be compelled by mandamus.⁹³ A court, therefore, would not grant certiorari either.⁹⁴

⁸⁸ Note that remedies is also an issue for non-statutory processes and decisions more generally. See, eg, Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42 *Federal Law Review* 181, 181-2.

⁸⁹ *ADJR Act* s 3(1) (definition of 'decision to which this Act applies').

⁹⁰ (2010) 243 CLR 319, 358.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, 461 [48], 474 [100]. Tran refers to these passages to state that mandamus cannot issue against a formal decision-maker who had no duty to consider whether to exercise their decision-making power, and so 'prohibition and certiorari would be futile, with the result that prohibition and certiorari cannot issue either': Christopher Tran, 'The "Fatal Conundrum" of "No-Consideration" Clauses after *Plaintiff M61*' (2011) 39 *Federal Law Review* 303, 307. It is yet to be seen whether prohibition would also be considered futile, and so be unavailable, against a non-statutory filter.

There was nothing revolutionary in these statements. Compare the seminal case of *Ainsworth v Criminal Justice Commission*, which concerned the making and release of a Commission's report.⁹⁵ The High Court held that the making of the report had to abide by procedural fairness and that there was a breach of said procedural fairness.⁹⁶ Nevertheless, mandamus could not issue as the Commission had not been under any duty to create the report.⁹⁷ An absence of a duty also precluded the issue of mandamus in the *Offshore Processing Case*.⁹⁸

Further, the High Court in *Ainsworth* disallowed certiorari because it was deemed that the report had no legal effect or consequences to quash, though it did have an effect on the plaintiffs' business reputations.⁹⁹ The *Offshore Processing Case* did not apply this requisite legal effect test, but it is proposed that, had it applied that test, a non-statutory filter would be found not to have a requisite legal effect anyway, and so certiorari would still not issue. It may be that, regardless of the outcome of any preliminary assessment, a formal decision-maker can be completely non-compellable at all stages of the decision, and so a non-statutory filter would be considered to have no legal effect or consequences to quash.

One may also make a comparison with *Hot Holdings Pty Ltd v Creasy*.¹⁰⁰ There, the final decision was to be the granting or refusal of a mining tenement by the Minister.¹⁰¹ This final decision would clearly affect legal rights.¹⁰² The question for the court, however, was whether a decision prior to that final decision could also sufficiently affect legal rights so as to warrant certiorari.¹⁰³ It was held that if a preliminary decision or recommendation was 'one to which regard must be paid by the final decision-maker', it would have the requisite legal effect upon rights to attract certiorari, given that the final decision would later affect legal rights.¹⁰⁴ It is proposed that non-statutory filters would not meet this mandatory relevant consideration test, if one accepts that a decision-maker need not even regard or consider its own administrative processes when the decision is non-compellable.

2 The Consolation Prize: Limited Equitable Remedies

An applicant who succeeds in establishing a right to judicial review will not be sufficiently rewarded. Due to the non-compellability factor, the most useful common law remedies of certiorari and mandamus are unavailable. Instead, declarations are awarded and, in some instances, an injunction. These declarations and injunctions will, however, be limited, and so will constitute mere consolation prizes. Any declaration would merely state that a particular preliminary decision was wrongly made.¹⁰⁵ Likewise, any injunction would also be 'virtually useless';¹⁰⁶ cases show that courts can issue injunctions, but they will not cause a favourable final decision for the applicant.

Declarations and injunctions have been awarded against non-statutory filters in several cases. However, their effect has been more symbolic, rather than useful, for applicants. In the *Offshore Processing Case*, declarations were awarded, but they merely declared that the IMR reviewer in each matter made an error of law and failed to observe the requirements of procedural fairness.¹⁰⁷ There would be no legal impact upon the Minister's final decision.

In *MZYPW v Minister for Immigration and Citizenship*,¹⁰⁸ even though it was held that the IMR reviewer had committed jurisdictional error,¹⁰⁹ the only relief was costs; a declaration that the particular IMR recommendation in question was not made in accordance with law; and an order that the Minister,

⁹⁵ (1992) 175 CLR 564 ('*Ainsworth*').

⁹⁶ Ibid 576-9.

⁹⁷ Ibid 579.

⁹⁸ (2010) 243 CLR 319, 358.

⁹⁹ (1992) 175 CLR 564, 580.

¹⁰⁰ (1996) 185 CLR 149 ('*Hot Holdings*').

¹⁰¹ Ibid 162.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid 165.

¹⁰⁵ See Chris Horan, 'Judicial Review of Non-Statutory Executive Powers' (2003) 31 *Federal Law Review* 551, 571.

¹⁰⁶ See Aronson and Groves, above n 5, 116-7.

¹⁰⁷ (2010) 243 CLR 319, 360.

¹⁰⁸ (2012) 128 ALD 520.

¹⁰⁹ Ibid 527, 530.

his department, his officers, and his delegates be restrained from relying upon the particular IMR recommendation.¹¹⁰ Regardless, the Minister could still make a like-decision. The Minister could even still rely on IMR recommendations, just not upon the particular recommendation concerned.

In *Minister for Immigration and Citizenship v SZQRB*, it was held that the applicant was entitled to a declaration that a preliminary assessment was not made according to law.¹¹¹ The applicant was also entitled to an injunction to restrain any removal from Australia that would be contrary to the *Migration Act*.¹¹² It would be contrary if, upon removal, the applicant's protection claims had not been assessed according to law.¹¹³ Pertinently, however, this would still not entitle the applicant to any particular result in the protection claim assessments. The injunction would not prevent any future protection claim assessments from being unfavourable to the applicant, nor would it prevent the applicant's removal from Australia if any future protection claims were assessed according to law.

The Federal Court in *SZQDZ* took a hopeful view, valuing the symbolic effect of the issuing of declarations and injunctions in such circumstances. The Court stated that declarations and injunctions would ensure the understanding that a recommendation was affected by demonstrable error, and so a Minister would not be minded to act upon it.¹¹⁴ However, it is proposed that, in practical terms, an applicant with such remedies would still be left in the same uncertain position as if proceedings were never commenced. A declaration and an injunction may be awarded against a particular recommendation, but the formal decision-maker would still be free to make any decision, or no decision.¹¹⁵ It is, therefore, necessary to seek reform by amendment of the *ADJR Act* as this would allow applicants access to other and further remedies.¹¹⁶

B Amending the *ADJR Act*

The *ADJR Act* should be amended such that non-statutory filters are caught by its jurisdiction. Such an amendment would allow for judicial review of non-statutory filters sans the ambiguous statutory foundation requirement of the common law, making the law more coherent. It would also make judicial review more available and with greater effect, allowing applicants access to other and further remedies under the *ADJR Act*. Such remedies include 'an order quashing or setting aside the decision',¹¹⁷ 'an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit',¹¹⁸ and 'an order directing any of the parties to do ... any act or thing ... of which the court considers necessary to do justice between the parties'.¹¹⁹ Presumably, these remedies could not of themselves, force a favourable formal decision,¹²⁰ but they would still provide significant and additional benefit to applicants who are able to establish a ground of review.¹²¹

¹¹⁰ Ibid 530.

¹¹¹ (2013) 210 FCR 505, 553-5 ('*SZQRB*').

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ *SZQDZ* (2012) 200 FCR 207, 219.

¹¹⁵ See, eg, Savitri Taylor, 'Sovereign Power at the Border' (2005) 16 *Public Law Review* 55, 64.

¹¹⁶ See, eg, Kevin Boreham, '“Wide and Unmanageable Discretions”: The *Migration Amendment (Detention Arrangements) Act 2005* (Cth)' (2006) 17 *Public Law Review* 5, 21.

¹¹⁷ *ADJR Act* s 16(1)(a).

¹¹⁸ Ibid s 16(1)(b).

¹¹⁹ Ibid s 16(1)(d).

¹²⁰ But see *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528, 536-7 (Sheppard J). Sheppard J, with whom the other judges agreed, would give s 16(1)(d) of the *ADJR Act* a flexible and liberal construction such that a decision-maker could even be ordered to decide a matter in a particular way. However, such an order was not made in that case, and so it remains a theoretical possibility.

¹²¹ See, eg, Administrative Review Council, *Federal Judicial Review in Australia*, above n 5, 76.

1 *The Administrative Review Council's Recommendation*

In 2012, the Administrative Review Council ('ARC') argued against drastic reform of the *ADJR Act*.¹²² Whilst acknowledging the difficulties in the *ADJR Act*'s current jurisdictional tests, the ARC rejected the idea of making any all-encompassing change, such as omitting the words 'made under an enactment' altogether or replacing the current tests with a public power threshold.¹²³ The ARC argued that the current *ADJR* jurisdictional tests have been interpreted and applied for over 30 years, and so new replacement tests would usher in unnecessary uncertainty.¹²⁴ Instead, the ARC recommended that an additional head of *ADJR* jurisdiction be created to mirror the scope of s 75(v) of the *Constitution*.¹²⁵ This would allow the *ADJR Act* to catch the cases that would be caught by s 75(v) but might not otherwise be subject to *ADJR* jurisdiction.

It is proposed that a better reform would not be restricted to s 75(v) but would instead widen *ADJR* jurisdiction to all of s 75.¹²⁶ All non-statutory filters that are subject to common law judicial review would then be caught. This would include the non-statutory filters that have statutory foundations, as discussed in Part II. However, this would still not assist those affected by the non-statutory filters that are purely non-statutory inquiries as this class of filter might not be challengeable.

2 *A Reform to Catch All Non-Statutory Filters*

As common law jurisdiction might only catch those non-statutory filters that have statutory foundations, reform of the *ADJR Act* should not merely mirror the common law. In 1989, the ARC recommended an expansion of the *ADJR Act*'s jurisdiction to include decisions 'of an administrative character made, or proposed to be made, by an officer of the Commonwealth under a non-statutory scheme or program the funds for which are authorised by an appropriation made by the Parliament for the purpose of that scheme or program'.¹²⁷ The *ADJR Act* was never amended in such a manner.¹²⁸ However, that 1989 recommendation did lead to the creation of s 4(b) of the *Judicial Review Act 1991* (Qld).¹²⁹ Section 4(b) provides a useful example of how similarly worded reforms may be received. Section 4 is as follows:

4 *Meaning of decision to which this Act applies*

In this Act—

decision to which this Act applies means—

- (a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion); or
- (b) a decision of an administrative character made, or proposed to be 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.¹³⁰

¹²² Note that the ARC is no longer a separate advisory body. Its functions are now consolidated into the Attorney General's Department: Administrative Review Council, *Welcome to the Administrative Review Council* (11 May 2015) <<http://www.arc.ag.gov.au/Pages/default.aspx>>.

¹²³ Administrative Review Council, *Federal Judicial Review in Australia*, above n 5, 74-5.

¹²⁴ *Ibid* 75 [4.12].

¹²⁵ *Ibid* 75 [4.13].

¹²⁶ For other criticisms of the said recommendation, see Alan Robertson, 'Nothing Like the Curate's Egg' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 165, 167-75.

¹²⁷ Administrative Review Council, 'Review of the *Administrative Decisions (Judicial Review) Act*: The Ambit of the Act' (Report No 32, 1989) 43.

¹²⁸ Note that the authority for any such scheme or program to spend appropriated monies must be sourced in the *Constitution* or in statutes made under it, and it is now recognised that the parliamentary appropriation of monies in accordance with ss 81 and 83 of the *Constitution* cannot itself be such a source – *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 55 (French CJ), 73 (Gummow, Crennan and Bell JJ), 113 (Hayne and Kiefel JJ), 211-3 (Heydon J); *Williams v Commonwealth* (2012) 248 CLR 156, 179 (French CJ), 233 (Gummow and Bell JJ), 281 (Hayne J), 359 (Crennan J), 374 (Kiefel J); *Williams v Commonwealth* [No 2] (2014) 252 CLR 416, 455 (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹²⁹ Anthony E Cassimatis and Peter Billings, 'Statutory Judicial Review in Australia: A Comparative Analysis of the Australian Capital Territory, Queensland and Tasmanian Schemes' (2013) 23 *Journal of Judicial Administration* 73, 83-4.

¹³⁰ *Judicial Review Act 1991* (Qld) s 4.

Commentators have not considered s 4(b) a success. The criticism is largely because s 4(b) was intended to broaden the scope of judicial review, but it has not succeeded in this aim. According to Cassimatis and Billings, courts have construed the words of s 4(b) so narrowly so as to strip it of its intended utility.¹³¹ A narrow construction of the words ‘scheme’ and ‘program’ has limited the intended remedial application of the provision.¹³² Further, Groves has stated that ‘there is no doubt that s 4(b) has not created a significant extension to the scope of the federal model upon which the Queensland statute is based. For that reason alone it should not be replicated’.¹³³ For similar reasons, the ARC in 2012 backtracked upon its 1989 recommendation, stating that it no longer supports such an amendment to the *ADJR Act*.¹³⁴ It appears that potential applicants, or their lawyers, also do not appreciate s 4(b);¹³⁵ there has been little case law upon the provision.¹³⁶

Bituminous Products is the current authority as to the provision’s narrow construction. There, Holmes J acknowledged the remedial intent of the *Judicial Review Act 1991* (Qld).¹³⁷ However, she also stated that one must keep in mind an important policy consideration – administrative processes are not to be fragmented into inefficiency.¹³⁸ For example, in a desperate attempt to grant judicial review, a court should not dissect a program into miniature ‘programs’ merely because the miniature appears to be structured or organised.¹³⁹ That is not to say that s 4(b) does not apply to single units. ‘Program’ refers to a planned *series* of activities or events, but a ‘scheme’ is a single unit, being *a plan, a design, a project*, or something else of a similar vein.¹⁴⁰ Nevertheless, there must be a discrete plan, and the existence of an orderly structure does not, of itself, constitute a scheme or program.¹⁴¹

Holmes J then held that the purported program in the present case, the development of specifications and product lists for the carrying out of road works, could not be a program or scheme so as to satisfy s 4(b). It itself was not a program but a development of criteria for application to a program.¹⁴²

Despite the criticisms made against s 4(b), it is proposed that a similarly-worded reform of the *ADJR Act* would still have benefit, at least in regards to the problem of non-statutory filters.¹⁴³ A non-statutory filter could constitute a ‘scheme or program’, even with a narrow construction of those words. It would not be so difficult to identify a discrete plan in most non-statutory filters if they were set up as decision-making processes in themselves. Therefore, a similar provision in the *ADJR Act* could still be beneficial, and it would not be based upon the common law’s artificial statutory foundation distinction.

Further, adding such a provision would not be too drastic of a reform. Despite the remedial intent of the *ADJR Act*, the courts have adopted a narrow interpretation of the *ADJR* jurisdictional prerequisites.¹⁴⁴ The concern has been that a wide interpretation might allow the *ADJR Act* to overreach itself, opening the floodgates to litigation.¹⁴⁵ However, an amendment akin to s 4(b) of the *Judicial Review Act 1991* (Qld) would

¹³¹ Cassimatis and Billings, ‘Statutory Judicial Review in Australia’, above n 129, 84.

¹³² Ibid 85.

¹³³ Matthew Groves, ‘Should we Follow the Gospel of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?’ (2010) 34 *Melbourne University Law Review* 736, 756.

¹³⁴ Administrative Review Council, *Federal Judicial Review in Australia*, above n 5, 89 [5.49].

¹³⁵ Cassimatis and Billings, ‘Statutory Judicial Review in Australia’, above n 129, 85.

¹³⁶ But see *Bituminous Products Pty Ltd v Department of Main Roads* [2005] 2 Qd R 344 (‘*Bituminous Products*’); *Wide Bay Helicopter Rescue Service Inc v Minister for Emergency Services* (1999) 5 QAR 1; *Mikitis v Director-General Department of Justice* (1999) 5 QAR 123; *Anghel v Minister for Transport* [No. 1] [1995] 1 Qd R 465.

¹³⁷ *Bituminous Products* [2005] 2 Qd R 344, 351.

¹³⁸ Ibid 351-2.

¹³⁹ Ibid 352.

¹⁴⁰ Ibid 351.

¹⁴¹ Ibid.

¹⁴² Ibid 352.

¹⁴³ The question of whether an independent contractor’s decision can, or should, be included in any such reform, and so be subject to *ADJR* judicial review, shall be left for another day.

¹⁴⁴ Anthony E Cassimatis, ‘Statutory Judicial Review and the Requirement of a Statutory Effect on Rights or Obligations: “Decisions Under an Enactment”’ (2006) 13 *Australian Journal of Administrative Law* 169, 169, 184; Christos Mantziaris and Leighton McDonald, ‘Federal Judicial Review Jurisdiction after *Griffith University v Tang*’ (2006) 17 *Public Law Review* 22, 23; Peter Billings and Anthony E Cassimatis, ‘Twenty-One Years of the *Judicial Review Act 1991*: Enhancing Access to Justice and Promoting Legal Accountability?’ (2013) 32 *University of Queensland Law Journal* 65, 68.

¹⁴⁵ Cassimatis, above n 144, 169, 184; Cassimatis and Billings, ‘Statutory Judicial Review in Australia’, above n 129, 79.

be too narrow to allow the *ADJR Act* to overreach itself.¹⁴⁶ Thus, adding a provision akin to s 4(b) would not amount to a reform too drastic to manage.

C The Judicial Disquiet

It may be argued that any *ADJR* judicial review would still be fruitless. Even if the court were to have the power to award *ADJR* remedies, it may nevertheless exercise its discretion to withhold such remedies when confronted with a decision-maker's clear non-compellability.¹⁴⁷ However, some judges have made attempts at judicial reform that would confine the scope of non-compellability, suggesting a judicial disquiet with regards to non-compellability and non-statutory filters.

1 Attempts at Judicial Reform

In *SZQRB*, the applicant received unfavourable decisions from an IMR, an International Treaties Obligation Assessment ('ITOA'), and a Pre-removal clearance.¹⁴⁸ The Minister then made a formal decision in writing.¹⁴⁹ The decision stated that the Minister viewed the applicant's removal to be consistent with Australia's international obligations and that this view was *on the basis of* the IMR, the ITOA, and the Pre-removal clearance.¹⁵⁰ However, this decision also had a controversial second limb. The second limb was that the Minister would not consider, or further consider, the exercise of any of his non-compellable powers for the applicant irrespective of:

- whether or not the aforementioned view was correct;
- any legal or factual error in the IMR, the ITOA, or the Pre-removal clearance; or
- any other circumstance.¹⁵¹

Flick J was very critical of this second limb, proposing that it was vitiated by jurisdictional error.¹⁵² Parliament may pass a law to restrict or exclude judicial review, and the courts will apply that law if it abides by the *Constitution*.¹⁵³ However, according to Flick J, it is an entirely different thing for a Minister to administer powers in a manner that further attempts to exclude judicial review.¹⁵⁴ Further, he stated that it could hardly be anticipated that Parliament intended a power to be exercised without regard to relevant matters which had in fact been expressly brought to attention and considered.¹⁵⁵ Thus, once the Minister has in fact considered the merits of an application and formed a view as to those merits, the Minister cannot then ignore the merits of the case.¹⁵⁶ Whilst the Minister is not bound to act upon the departmental processes, the Minister cannot simply ignore the view already formed.¹⁵⁷

In addition, Flick J argued that the Minister could not make a decision irrespective of any other circumstance, which the Minister purported to do.¹⁵⁸ All exercises of statutory power are to be by reference to the objects and purposes of the legislation.¹⁵⁹ Here, this required a consideration of the merits of the particular case, the 'public interest', and Australia's international obligations.¹⁶⁰

¹⁴⁶ See also *JJ Richards & Sons Pty Ltd v Bowen Shire Council* [2008] 2 Qd R 342, 347 [23].

¹⁴⁷ As to the judicial discretion to withhold relief, see generally *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 400; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185, 193-4; *Soh v Commonwealth* (2008) 101 ALD 310, 330-1; *Zin Mon Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, 473; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 338; *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, 53.

¹⁴⁸ *SZQRB* (2013) 210 FCR 505, 513-4.

¹⁴⁹ *Ibid* 514.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid*.

¹⁵² *Ibid* 565-6.

¹⁵³ *Ibid* 570.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid* 574.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid* 573.

¹⁵⁹ *Ibid* 577.

¹⁶⁰ *Ibid*.

Therefore, Flick J attempted judicial reform by restricting non-compellability to the initial decision to consider and by imposing obligations upon the consideration once begun. In *SZQRB*, he was alone in doing so. Lander and Gordon JJ stated that although one would expect the Minister to regard the departmental processes,¹⁶¹ the Minister can choose not to, and an applicant would have no recourse.¹⁶² Further, whilst the second limb was made with the foresight of a possible challenge against the departmental processes,¹⁶³ and so was intended to pre-empt judicial review, it was nevertheless a decision for the Minister.¹⁶⁴ Besanko and Jagot JJ added that, in the same way the Minister cannot be required to enter into a consideration of the exercise of power, the Minister cannot be required to complete his consideration and is free to terminate it at any time.¹⁶⁵

Although none of the other judges in *SZQRB* agreed with Flick J, similar attempts at judicial reform have been made by French CJ and Hayne J in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*.¹⁶⁶ There, the applicant received a favourable RSA, but the Minister issued new guidelines as to which cases were to be referred to him.¹⁶⁷ Cases were not to be referred if the applicant did not satisfy certain public interest criteria, including a 'PIC 4002'.¹⁶⁸ As the plaintiff did not satisfy PIC 4002, her case was not referred.¹⁶⁹ It was later held that PIC 4002 was invalid,¹⁷⁰ and so the applicant sought judicial review.¹⁷¹

The Minister submitted that he could terminate his consideration at any time but French CJ disagreed.¹⁷² According to French CJ, once the decision to consider is made, the latter decision of whether or not to actually exercise power must follow.¹⁷³

Hayne J made like comments, but his judgment was highly influenced by the factual circumstance of immigration detention, which would not exist in other situations. He stated that, having already decided to consider, the Minister must make a final decision.¹⁷⁴ Non-compellability is to be confined to the decision to consider such that it is exhausted as soon as the RSA is engaged.¹⁷⁵ Further, the Minister could not consider PIC 4002 or any other consideration that was separate to the RSA.¹⁷⁶ The RSA was set up to determine the sole issue of whether Australia owed the plaintiff protection obligations, and the Minister could not then decide on other issues.¹⁷⁷

Unfortunately, the other judges in *Plaintiff M76* did not consider whether non-compellability could be so confined,¹⁷⁸ and so the attempts at judicial reform remain just attempts. However, the dicta has been successful in showing the judicial view that non-compellability *should* be confined. Further, the judicial disquiet allays the fear that a court, when faced with a clearly non-compellable decision, might exercise its discretion to withhold *ADJR* relief anyway.

¹⁶¹ Ibid 546.

¹⁶² Ibid 546-7.

¹⁶³ Ibid 548.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 564.

¹⁶⁶ (2013) 251 CLR 322 (*'Plaintiff M76'*).

¹⁶⁷ Ibid 336.

¹⁶⁸ Ibid 336-7.

¹⁶⁹ Ibid 337.

¹⁷⁰ *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1.

¹⁷¹ *Plaintiff M76* (2013) 251 CLR 322, 339.

¹⁷² Ibid 340.

¹⁷³ Ibid.

¹⁷⁴ Ibid 345.

¹⁷⁵ Ibid 349-50.

¹⁷⁶ Ibid 357.

¹⁷⁷ Ibid.

¹⁷⁸ See also *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 235. There, the High Court expressly avoided the question, stating that it was unnecessary to determine in the case before it.

D Conclusion to Part III

The law needs to be reformed by amendment of the *ADJR Act* such that non-statutory filters are no longer shielded from its reach. This reform is necessary even though the common law already allows for judicial review in some instances. This is because common law judicial review remedies will either be unavailable or ineffective, and so applicants require other and further remedies.

A provision similar to s 4(b) of the *Judicial Review Act 1991* (Qld) should be adopted. Section 4(b) has been construed narrowly. It has, therefore, been criticised. However, a non-statutory filter could still be caught by its narrow construction. Such a reform would also lead to coherence in the law because judicial review of non-statutory filters would then not solely depend upon the common law's ambiguous statutory foundation distinction.

IV CONCLUSION

Non-statutory, preliminary processes may well be essential to government decision-making, but the question remains: are non-statutory filters compatible with administrative justice and, if not, can reform make them compatible? The question needs answering because informal decision-makers are given unwarranted control over important public decisions whenever the formal decision is non-compellable.

Part II found that judicial review is now available against non-statutory filters but only under common law jurisdiction and, it is presumed, only when a 'statutory foundation', whatever that term is to mean, can be established. This progress in the common law would be beneficial to some, but it is based upon an artificial divide between those non-statutory filters that supposedly have statutory foundations and those that are considered to be purely non-statutory.

In addition, the said progress in the common law is limited when it comes to the award of remedies. As discussed in Part III, the current state of the law will not award judicial review remedies that have any practical effect upon the formal decision. Only declarations and injunctions are available, and they would be framed in a way that does not have any great impact upon the formal decision. Repercussions upon formal decisions are required if applicants are to have any benefits from judicial review proceedings.

Part III also discussed how such benefits may be effected. They may be effected by a reform that allows for *ADJR* judicial review of non-statutory filters. Applicants would then have access to other and further remedies under s 16 of the *ADJR Act*. Such a reform should not depend upon the common law's artificial statutory foundation distinction, and so a provision akin to s 4(b) of the *Judicial Review Act 1991* (Qld) should be adopted into the *ADJR Act*. Section 4(b) has been criticised for its narrow construction. However, such a provision still has the potential to deliver administrative justice as non-statutory filters would be caught by its scope, though it be a narrow scope.

In short, one might recommend that all non-compellable powers be abolished or that all non-statutory processes be codified, but such drastic measures are unlikely to occur in the near future. For the present, one must settle with the assurance that non-statutory filters are currently compatible with administrative justice to a limited extent, and they could be made more compatible if *ADJR* judicial review were made available against them.