Administrative Review Council—Judicial Review in Australia—
Consultation Paper

Submission by the Australian Crime Commission

Comments on individual questions

The current system of judicial review

1. How are applicants making use of review rights under s 39B(1A)(c) of the Judiciary Act 1903, s 75(iii) and/or s 75(i) of the Constitution. In what way, if any, do these avenues offer a broader scope for judicial review than the other avenues of judicial review? (page 46)

In the ACC’s experience, applicants have always been able to seek review of decisions under the ACC Act within the scope of s 39B(1) of the Judiciary Act or the ADJR Act or a combination of the two. Accordingly, the ACC has no experience of the use of review rights under s 39B(1A)(c) of the Judiciary Act. We note for completeness that if s16 (in the nature of a privative clause) of the ACC Act applies to limit a particular challenge to a ACC Board determination then, it appears, that jurisdictional error would have to be established by an applicant (whether the challenge is under s39B (1A)(c) of the Judiciary Act or the ADJR Act) to succeed. While there is some mention of s16 in two Federal Court judgments, there is no authoritative discussion about the precise scope of it.

2. What are other examples of statutory judicial review? What are the appropriate policy reasons for having a statutory appeal or review mechanism as opposed to relying on general judicial review mechanisms? What characteristics should such a scheme have? (page 52)

Section 57 of the ACC Act requires expedited lodgement of applications for ADJR Act judicial review of decisions made under the ACC Act. The ACC is not otherwise subject to any special statutory appeal or review mechanism.

However, the ACC’s experience suggests that policy reasons that might justify establishing such a mechanism for the ACC would include:

- the need for challenges to be dealt with rapidly in a context where the plaintiff may see advantage in delay;
- the related need to avoid any requirement for detailed argument on obviously unmeritorious issues; and
- the need to deal with cases where operational considerations preclude disclosure to the plaintiff of much evidence relevant to the making of the decision under review.
With respect to the first two reasons (minimisation of delay and early elimination of bogus issues) the ACC notes that, in its 2006 Report (No 47) on *The Scope of Judicial Review*, the ARC considered arguments for limiting judicial review of ‘decisions that are subject to unmeritorious challenge or where delay is an end in itself’. The Council decided, despite acknowledging ‘strong public policy grounds’ in favour of limitation, that limits were not justified because ‘blanket removal [of judicial review rights] would affect all applicants, including those with meritorious claims’. However, the Council noted that ‘in some areas it is possible, legislatively, to remove the incentive to use judicial review as a deferral mechanism—as, for instance, under the *Income Tax Assessment Act 1936*’ (ie by establishing a review process that does not postpone the requirement to pay tax as initially assessed), while ‘in other situations this argument can be resolved by enabling the courts to dispose of unmeritorious applications at an early stage in the proceedings, as is provided for in the *Migration Litigation Reform Act 2005*’ (p 58). These examples of special arrangements to address potential abuse of judicial review rights illustrate one policy reason for a specialised statutory review mechanism that reflects the experience of the ACC.

With respect to the third suggested reason (evidence subject to public interest immunity) the Federal Court is accustomed to deal with such claims by ruling whether a party should be compelled to produce particular evidence, but it does not have the power to receive such evidence and take it into account in decision making without it being disclosed to the applicant. The provisions of the *Administrative Appeals Tribunal Act 1975* relating to the procedure of the Security Appeals Division (ss 39A and 39B), although directed only to the procedure of the Tribunal, provide one example of how this issue might be addressed. The validity of some particularly relevant examples of State legislation has been considered and upheld by the High Court: s 28A of the *Liquor Licensing Act 1997* (SA) in *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4 and s 76 of the *Corruption and Crime Commission Act 2003* (WA) in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4. In both cases the legislation provides for a decision to be made taking account of criminal intelligence and for the State Supreme Court, in reviewing the decision, to take account of the criminal intelligence without (provided it is satisfied that the material is properly immune from disclosure) disclosing it to the applicant, or possibly even the appellant’s legal representatives. On our reading, there is nothing in the High Court’s decision in *Wainohu v New South Wales* [2011] HCA 24 (announced on 23 June 2011) that casts doubt on the reasoning of these cases, although it does give further guidance on the types of restrictions directed to preventing publication of criminal intelligence that can lawfully be imposed.

In this regard we note that an amendment to the ACC Act adapting a statutory confidentiality regime present in some Commonwealth legislation (see for example sections 503A, 503B, 503C and 503D of the *Migration Act 1958* (Cth)) may work well for the ACC. This type of regime, if set in place in the ACC Act, with heed to the special operational needs of a law enforcement agency like ACC, will go some way towards obviating the need in select cases for cumbersome PII claims, and, permit full use of sensitive material involved in decision making in courts without unnecessary disclosure.
In light of these considerations, the ACC submits that, if a specialised statutory mechanism for review of decisions under the ACC Act were established, its characteristics ought to include:

- an expedited procedure with statutory timelines subject to extension only in genuinely special circumstances;
- a requirement for summary dismissal of unmeritorious cases or components of cases; and
- provision for the court to access and take account of criminal intelligence material that is subject to public interest immunity, or, protection under the statutory regime in the ACC Act, without making it available to the applicant.

We recognise that the third of these proposed characteristics, in particular, would tend to detract from the natural justice rights of the applicant but we submit that given the sensitivity of the ACC’s operations it may be appropriate to permit a limited inroad into natural justice rights in select circumstances.

The ambit or scope of review

3. How should statutory judicial review cover subordinate legislation, particularly where an instrument can be characterised as an administrative decision? (page 60)

Subordinate legislation made under the ACC Act can only take the form of regulations. Existing regulations establish forms and procedures in relation to the exercise of coercive powers, confer special investigative powers on the ACC by reference to State and Territory statutory provisions and specify Commonwealth, State and Territory agencies to which the CEO may disclose ACC information under s 59(7) of the ACC Act. The ACC has not experienced challenges to the validity of regulations, perhaps because operational considerations generally preclude early disclosure to a person of interest that information relevant to the person was gathered under applied State and Territory statutory investigative powers or disseminated to another agency under s 59(7). Given that the regulations are disallowable instruments and that there is little practical opportunity to challenge them, the ACC would query whether any additional provision for judicial review is necessary or appropriate. Conversely, some decisions under the Act have a quasi-legislative effect in that they alter the powers of examiners (making of a determination by the Board under s 7C) or the obligations of particular individuals (issue of a summons under s 28 or a notice under s 29), but these are well recognised to be administrative decisions.

4. Should judicial review extend to reports and recommendations by bodies other than the final decision maker, as previously recommended by the Council, or should review extend more broadly? If so, by what means should review be extended? (page 61)

It would be counterproductive to the work of a law enforcement agency such as the ACC to extend the scope of judicial review currently available.
We note however that in the ACC context this issue is not relevant to decisions to issue summonses or notices, as the addressee of a summons or notice will not (and should not) become aware of the decision until after it is made and the summons or notice is served on him or her. To the extent that an examiner’s reasons for decision rely on the content of an internal ACC application document, the content of that document may be relevant to judicial review of the examiner’s decision. However, it is difficult to see how any practical benefit would accrue by giving the addressee of a summons or notice a distinct right to seek judicial review of the application documents in the absence of a right to be notified of steps in the application process. In the context of an investigative process where requirements for examinations may arise at short notice the ACC considers any such right to notification would not be practicable. It is also arguable that such a right would be inappropriate in the context of a Parliamentary intention that examinations be held in private, and be held for the purposes of special investigations and special operations relating to serious and organised crime.

A witness at an ACC examination may be aware in advance that the presiding examiner is considering making a decision about a specific matter such as whether to require an answer to a particular question or to permit a particular line of questioning. In most cases it will be more practicable to challenge the decision once made than to seek an anticipatory remedy. In some cases (eg Watt v Australian Crime Commission [2004] FCA 1669; Mansfield v Australian Crime Commission [2003] FCA 1059) ACC witnesses have applied in advance for declarations and/or injunctions preventing an examiner from requiring answers to questions of a particular character. In these cases the courts have in practice limited themselves to indicating their view as to the applicable legal principles restricting the questions that a witness can be required to answer, on the basis that injunctive relief should be granted only where there is reason to anticipate that the examiner will knowingly act contrary to law.

5. Should the ADJR Act be amended to include a statutory right to review decisions made under executive schemes for which financial or other assistance is provided to individuals? What examples are there of such schemes which are currently not subject to a statutory right of review? What are the reasons for making them or not making them subject to statutory review? (page 63)

The ACC does not administer any schemes of this type. However, we note that many ACC witnesses apply to the Attorney-General for legal and financial assistance under s 26 of the ACC Act. The relevant scheme is administered by the Attorney-General’s department as an adjunct of its general legal aid program and is therefore of primary concern to the Department. However, it is worth noting that some ACC witnesses have in the past sought delay in their examination on grounds of difficulty in obtaining legal representation and there is reason to suspect that this difficulty may in some cases have been manufactured as an excuse for delay. The possibility of seeking judicial review of a legal aid decision could potentially open up a new avenue for delaying examinations. The ACC would not want to see genuine claims to legal aid wrongly rejected but would want to be assured that the timeline for such assistance would not be extended significantly by any review process.
6. What is the preferable focus of a test for judicial review jurisdiction — focus on the decision maker, the decision or another criteria — and why? (page 65)

From the ACC's viewpoint, the choice of criterion could produce some curious practical consequences. The decisions that are commonly challenged are those made by the Board, whose members operate ex officio as Commonwealth statutory officers, and examiners, who are appointed as Commonwealth statutory officers. Their decisions may be made either under Commonwealth law or under State law. The State laws in question are not listed in Schedule 3 to the ADJR Act, although the ACC Act consents to the conferral of duties, functions and powers on the ACC and associated persons and entities by State laws.

A natural justice test, if it replaced the existing tests, might reduce the current potential for judicial review of decisions under the ACC Act. Challenges to the validity of determinations made by the ACC Board would presumably be largely precluded, because these are typically of a broad quasi-legislative character and affect the interests of identifiable individuals only through the issue of summonses and notices. Decisions by examiners to issue summonses and notices could also be largely excluded if the test focused on the actual requirement to accord natural justice in practice, rather than on a theoretical obligation. Operational considerations generally preclude any notional obligation that might exist in this context to provide natural justice. This would effectively limit judicial review to decisions made in the course of examinations.

These considerations suggest there may be advantages in applying multiple overlapping tests rather than a single criterion.

7. In what circumstances should judicial review apply to private bodies exercising public power? What is the best method of extending review? What are other accountability mechanisms which might more effectively ensure accountability of private bodies? (page 68)

The ACC is not in a position to shed light on this issue. None of the powers conferred by the ACC Act may be exercised by a private body.

8. In 1989, the Council recommended including the concept of justiciability in the ADJR Act. Would this improve accessibility under a general statutory review scheme? What guidance on the concept of justiciability could be given in a general statutory judicial review scheme? (page 70)

The ACC has no comment on this issue.

9. In 1989, the Council recommended that limited categories of decision should be excluded from the ADJR Act, and that any exclusions should be listed in the ADJR Act. When and for what categories of decision are exclusions from general statutory review schemes justified? What is the relationship between general review schemes and specific statutory exclusions, and what restrictions should there be on including exclusions in other statutes? (page 72)
We are not in a position to address these questions generally but can offer some thoughts based on the experience of the ACC. We note the views of the Council, expressed in section 5.2.1 (pp 38 – 39) of its Report No 47 on The scope of judicial review, on fragmentation of criminal justice proceedings and its views, expressed in section 5.2.6 (pp 42 – 44) of the same report, on decisions subject to unmeritorious challenge or where the delay inherent in judicial review proceedings (and related appeals) constitutes an end in itself. We understand these views to be:

- that challenges to decisions made in relation to a prosecution, after a person has been charged, should be heard by the court dealing with the prosecution; and
- that, where challenging the validity of an administrative decision provides a collateral advantage (typically delay in the implementation of the decision), it may be appropriate to substitute a specialised mechanism to eliminate or minimise the collateral advantage without substantive diminution in the upholding of core public law values.

We submit that both of these are appropriate categories of decision for exclusion from general statutory provisions for judicial review of administrative decisions to the extent that review rights are not eliminated. We note however, for what it is worth, that the experience of ACC has been that the Federal Court has been the more suitable jurisdiction to handle fine points of statutory construction involving Commonwealth legislation.

In the case of the ACC the decisions that are commonly challenged are decisions by examiners to issue a summons or notice and, in the context of an examination, to require an answer to a particular question or class of questions. There have also been challenges to the validity of decisions by the ACC Board in relation to the establishment and extension of special ACC operations/investigations. Generally speaking, these challenges are highly speculative and of little merit (for example, in GG v Australian Crime Commission [2010] FCAFC 15 Jessup and Tracey JJ remarked, at para 5: ‘The proceeding before the primary Judge was complicated by the existence of a great many more issues than are necessary to determine on appeal (and, if we may so observe with respect to those involved, than had any realistic prospect of producing a positive outcome for the appellant’).

Almost all such challenges are ultimately unsuccessful in legal terms but they may be very effective as a delaying tactic. In some cases the Federal Court has been able to dispose of a matter quite quickly, but in others multiple issues and appeals prolong the process significantly. For example, the Full Court of the Federal Court, in JJ v Board of the Australian Crime Commission [2011] FCAFC 73 dismissed the appeal and awarded costs to the ACC, but its judgment was announced on 2 June 2011, over two years after the challenged summonses were issued in May 2009. This case, which at first instance involved 14 applications by 12 individuals, related to so-called outlaw motor cycle gangs. Even greater delays have occurred in the context of Operation Wickenby, which relates to organised tax evasion using offshore havens. The decision in Egglishaw v Australian Crime Commission [2010] FCAFC 82, announced on 8 July 2010, dismissed the appeal and awarded costs against the appellant. The appellant had challenged the validity of a summons issued on 27 January 2004 and a notice issued on 19 February 2004, both of which he complied with at the time.
Dunn v Australian Crime Commission [2009] FCAFC 16, a judgment brought down on 24 February 2009, concerned a mutual assistance in criminal matters request made to Switzerland in March 2005 and supplementary communications until June 2006. Again the appeal was dismissed with costs. In both of these cases use of information that had already been obtained was delayed for a significant period.

Defence of these actions also almost invariably raises a need to seek the court’s agreement to exclusion of material from evidence that would otherwise need to be adduced by the ACC, or subpoenaed by the applicant, on grounds of public interest immunity. In some cases we have the impression that subpoenas issued ostensibly to assist the applicant in arguing its case are in fact being used as a counter-intelligence tactic to attempt to gauge the ACC’s information holdings on the applicant. In either case significant resources must be devoted to ensuring that the ACC’s defence of administrative decisions does not inadvertently compromise ongoing operations.

The ACC would be interested in any mechanism that could be devised to reduce these delays and other concerns. Exclusion from the general statutory review scheme provided by the ADJR Act could be an appropriate part of such a mechanism but consideration might also be given to additional modifications (ie in addition to the ACC’s exemption from the requirement to give reasons and the expedited procedure for making an ADJR application under s 57 of the ACC Act) of the application of the ADJR Act to review of decisions under the ACC Act.

In respect of the question whether provisions excluding application of the ADJR Act should be included in the ADJR Act or the legislation governing the exempted agency or type of decision, we note that one of the modifications to the application of the ADJR Act to decisions under the ACC Act (the exemption from giving reasons) appears in the ADJR Act, while the other (the expedited application procedure) appears in the ACC Act. Perhaps the use of notes in legislation, which has now become commonplace, provides a means of dealing more effectively with this perennial problem.

10. What decisions of the Governor-General — statutory and non-statutory — should be subject to judicial review? (page 73)

Under the ACC Act the CEO and examiners are all statutory officers appointed by the Governor-General. Policy in relation to such appointments is, in principle, a matter for the Attorney-Generals Department. However, the ACC would not want the validity of such an appointment to become a matter open to challenge in an attempt to demonstrate the invalidity of a decision made under the ACC Act. For example, it would be a matter of concern if a person summoned by an examiner could challenge the decision to issue the summons on the ground that the examiner concerned was not validly appointed. This would open a new field (although perhaps a fairly limited one after the first flurry of challenges) for attempts to delay investigations on irrelevant grounds.
11. What commercial decisions of government should lie outside the scope of judicial review and how is this best achieved? (page 73)

The ACC offers no comment on this question. As a comparatively minor player in government purchasing, it is unlikely to be able to offer any significant insights.

Grounds of review

12. What are the advantages and disadvantages of different approaches to the grounds of judicial review—common law or codification of grounds and/or general principles? Which approach is to be preferred and why? What grounds should be included in a codified list? (page 79)

The ACC is not particularly qualified to comment on the broad issue of what grounds should be included in a codified list. However, from the viewpoint of an administrator it would be preferable to be able to rely on a codified list of grounds for review against which the proposed reasons for a decision could be assessed. Given the nature of the grounds developed by the courts it is unlikely that a codified list based on those grounds would have a marked tendency to foster a ‘tick-a-box’ mentality but it would provide a structured approach to the assessment process. Conversely, if a codified list is not exhaustive it would perhaps be useful to supplement it with a set of principles so as to alert decision-makers to the need to consider whether any other factors might be relevant in a particular case. In the absence of any indication to the contrary, it is likely that decision-makers would tend to assume that their task was complete once they had considered the codified list. Even if they were aware that the list was not necessarily exhaustive, their further considerations would benefit from statutory guidance.

13. What is the role, if any, for statutory codes of procedure given that they may not provide certainty about what will amount to procedural fairness in a particular case? (page 81)

We make the following comments against the background that most decisions under the ACC Act that are challenged, for example, the decision to issue the summons and the determinations made by the Board ordinarily do not attract the obligation to give procedural fairness. In so far as the duty to accord procedural fairness applies under the ACC Act we note, in relation to codified grounds, that a code of procedure may assist in structuring the decision-making process. The key point is that it should be made clear to those who use the code that there is a broader objective to be served and that compliance with the code alone is not necessarily enough to guarantee achievement of that objective.

Right to seek judicial review

14. What is the appropriate test for standing in judicial review proceedings? What are the arguments for making standing in judicial review consistent with standing under s 27(2) of the AAT Act, which gives organisations standing if a decision relates to a matter included in the objects or purposes of
the organisation? What are other ways to achieve greater recognition of the public interest in judicial review proceedings? (page 85)

In the experience of the ACC, the standing of an applicant has rarely, if ever, been in issue. Accordingly, our particular experience sheds no light on difficult cases in this area.

**Judicial review and reasons for decisions**

15. Should we have a generalised right to reasons, or is it more appropriate for the right to be included only in specific pieces of legislation? Where should the right be located? At what stage of the decision-making process should a right to reasons for administrative decisions be available and in relation to what range of decisions? (page 90)

From the viewpoint of the ACC, there is an important distinction between a right to be given reasons for a decision and an obligation to record such reasons.

It was recognised by the courts early in the history of the ACC that the requirement under s 28(1A) and s 29(1A) of the ACC Act that an examiner record reasons (for being satisfied that it is reasonable in all the circumstances to issue a summons or a notice to produce) did not imply that a recipient of such a summons or notice was not bound to comply with it unless provided with a copy of the reasons (*Barnes v Boulton* [2004] FCA 1219). The court identified the function of the recording of reasons as facilitating good decision making and effective oversight. It also noted the sound policy reasons for the legislature not imposing the obligation to give these reasons to the person served with a s28 summons.

In subsequent cases it has been held that reasons for the decision to issue a summons or notice can properly be subpoenaed (subject to redactions on public interest immunity grounds) to test whether the summons or notice was lawfully issued. Argument in such cases is essentially limited to process issues rather than the rationality of a decision.

Moreover, the ACC is expressly exempted from the requirement under s 13 of the ADJR Act to provide reasons on request. The reasons for this exemption are clear. A summons or notice may only be issued for the purposes of an ACC special operation or special investigation. Each such operation/ investigation must be an inquiry in relation to specified ‘relevant criminal activity’. In deciding whether to issue a summons or notice, an examiner will invariably need to take account of information that indicates a link between the person to whom the summons or notice would be directed and relevant criminal activity that is the subject of a special operation or investigation. Disclosure of that information would in many cases risk compromising ongoing ACC inquiries by disclosing elements of ACC intelligence about the relevant criminal activity that would assist the criminal group concerned to take counter-measures.

For these reasons, if the ACC were required to provide a copy of reasons to the addressee of every summons or notice issued it would necessarily have to redact every reasons
document. This would impose a significant additional administrative burden and the result would be a document that indicated compliance with legal requirements but shed little, if any, light on the merits of the decision.

In light of these considerations, the ACC submits that, if a general right to reasons were established, and particularly if that right took the form of a requirement to give reasons at the time of the decision, decisions by examiners acting under the ACC Act to issue summonses and notices, and to require answers to particular questions, should be exempted from that requirement. The existing requirement to record reasons for issue of summonses and notices should, however, be retained, together with the right, subject to the supervision of the court, to subpoena redacted copies of such reasons when seeking judicial review of such decisions.

16. One of the objectives of this examination of judicial review is to identify all examples of legislation or subordinate legislation that include a specific right to reasons. Are there examples of provisions giving a right to reasons which provide useful illustrations of effective content, timing and form of reasons? (page 90)

The ACC is not in a position to point to any examples of legislation of this type. However, it notes that a concomitant, recognised by the courts, of the distinction noted above between an obligation to give reasons and an obligation to record reasons is that reasons that are merely recorded are not required to comply with the terms of s 25D of the Acts Interpretation Act 1901. This is appropriate because a decision to require a person to give information in support of a special investigation or a special operation is essentially an investigative exercise that may reasonably, indeed must often necessarily, be founded on suspicion or informed speculation rather than a concluded view of the relevant facts. Such suspicion and speculation must, of course, be reasonable, but to require the examiner to reach definite conclusions at this stage would in effect be to require that he or she prejudge aspects of the inquiry, a requirement that would be conducive neither to justice nor to effectiveness.

17. What, if any, exemptions should there be from any obligation to provide reasons? (page 90)

We note the Council’s view (at paragraph 4.124) that the exemptions in ss 13A and 14 of the ADJR Act provide adequate protection from disclosure. It is certainly true that the broad public interest grounds that s 14 allows for are in principle sufficient to cover all cases where information could reasonably be withheld. The mechanism of an Attorney-General’s certificate (which raises no presumption when a court considers the same question) may perhaps be well adapted to discouraging ill-considered withholding of reasons on asserted public interest grounds in a context where such grounds will not commonly exist. However, the ACC submits that, where it is to be expected that disclosure of the reasons for a significant proportion of decisions made by an agency or under particular legislation will raise public interest concerns, such a burdensome requirement is more apt to reduce efficiency than to discourage bad decisions. It would be more appropriate to rely on procedures similar to those under the FOI Act to decide what material should be disclosed.
The ACC submits that, where it can reasonably be foreseen that reasons for decisions will almost invariably need to be withheld on public interest grounds it is preferable to indicate frankly that reasons will not be given rather than to confer an illusory right which will impose a significant administrative burden on the agency without changing the substantive position of the vast majority of persons affected by its decisions.

18. What form should a statement of reasons take when provided on request under general statutory scheme? What other forms do statements of reasons take? (page 91)

The ACC is not aware of any reason why the fairly standard formulation of ‘give reasons for decision, set out findings on material questions of fact and refer to evidence or other material on which the findings are based’ (eg s 13(1), ADJR Act; s 25D, Acts Interpretation Act 1901) would not be appropriate for the requirements of a general statutory scheme. There might, however, be value in expressly requiring, as part of the reasons for the decision, an indication that the decision maker is satisfied that any legal preconditions for the exercise of the power have been satisfied.

In the case of issue of a summons or a notice to produce under the ACC Act, the current standard structure for a statement of reasons states that the examiner has considered relevant documents (including at least the Board Determination establishing the relevant special ACC operation/investigation, a statement of facts and circumstances, a legal submission and a draft summons or notice) and sets out findings that the summons or notice is issued for the purposes of the specified special ACC operation/investigation, that the relevant Determination remains operative and that the examiner is satisfied that it is reasonable to issue the summons or notice in all the circumstances, because of relevant information (specified by the examiner) about the witness and the broader context and because the time, date and location of the examination are reasonable.

19. What other consequences, if any, should there be for of a failure to provide adequate reasons, particularly if there was a general obligation to provide reasons? (page 92)

The ACC submits that it may be appropriate to establish a rebuttable presumption that a decision maker who failed to provide reasons when required to do so by law had no sufficient reasons for the decision made. If a decision is challenged but ultimately upheld, the failure to provide reasons could be a reason for nevertheless awarding costs against the decision maker.

However, the ACC does not consider that a failure to give reasons, as opposed to making a decision for inadequate or legally wrong reasons, should make a decision invalid. If the decision is validly made at the time when it is made, it should not subsequently become invalid because of a subsequent omission.

It might be appropriate, if there were a requirement to provide reasons when notifying the decision, to provide that a decision would be without force pending provision of reasons.
Accordingly, a failure to comply with a decision, where some form of compliance was required, would not be punishable. However, this would potentially raise difficulties if some of the reasons for a decision were claimed to be subject to public interest immunity and the claim was disputed.

These comments are not intended to detract from the ACC’s view that not every type of decision ought to be covered by a general statutory obligation to provided reasons. Indeed, the potential difficulties around public interest immunity emphasise the need for some exceptions to, or at least modifications of, the application of such a general obligation.

**Availability of remedies in judicial review proceedings**

20. What are the potential restrictions on the availability of remedies under the *Constitution* and the *Judiciary Act*? Do these restrictions, if any, mean a statutory remedial scheme is desirable, and why? (page 93)

The experience of the ACC has been that a substantial proportion of applicants for judicial review rely wholly or partly on the ADJR Act, although some rely solely on the Judiciary Act. The ACC has not seen evidence that any of these litigants felt the remedies potentially available to them were inadequate, or that the court would have refused a requested remedy if persuaded that it was appropriate in the circumstances. Accordingly, the ACC does not see a need for change in this area.

**Court procedures**

21. What would be the benefits, if any, from extending the various streamlining measures relating to courts—such as time limits and discouraging unmeritorious litigation that apply to judicial review of migration decisions to all avenues for judicial review? (page 98)

From the viewpoint of the ACC there would be some value in extending these streamlining measures to judicial review under the ADJR Act, although not all would necessarily benefit all respondent agencies. Redirecting cases to the Federal Magistrates Court might result in the faster completion of initial hearings (we note from recent annual reports that in the FMC in 2009–10, 85.2 per cent of all applications (and in general federal law, 88 per cent of applications) were completed within six months, whereas in the Federal Court in the period from 2005–06 to 2009–10 only 71.3 per cent of matters dealt with by the Court at first instance were completed within six months), but judicial review of decisions under the ACC Act is frequently complex, involving multiple issues and evidentiary disputes about public interest immunity and legal professional privilege.

Measures to discourage unmeritorious litigation would be welcome. The ACC has increasingly been faced with challenges on multiple grounds which systematically attack every step in the decision making processes, often on trivial or highly speculative grounds.
Should this pattern continue despite the rejection of these challenges (e.g. in *SS v Australian Crime Commission* [2009] FCA 580; *GG v Australian Crime Commission* [2009] FCA 759 (overturned on appeal on a single issue in *GG v Australian Crime Commission* [2010] FCAFC 15 but note the criticism by Jessup and Tracey JJ at paragraph 5 of the multiplicity of issues raised at first instance); *AA v Board of the Australian Crime Commission* [2009] FCA 642; and *AA v Board of the Australian Crime Commission & Ors* [2010] FCA 553 (a decision in 14 actions brought by 12 applicants, confirmed in *JJ v Australian Crime Commission* [2011] FCAFC 73)) there may be a need from the ACC’s viewpoint for measures to discourage the bringing of actions on such unmeritorious grounds or at least to dismiss them summarily. It would be useful to know whether it has been possible to identify the effects of the Migration Act provisions enacted for this purpose.

22. What further requirements, if any, should be placed on the courts to consider whether they should exercise discretion to dismiss applications at the earliest opportunity? (page 100)

From the ACC’s viewpoint there is limited scope for such requirements, as there are no alternative review mechanisms available. However, the ACC submits that introduction of a permission stage, as in the UK, could be a useful way of weeding out the types of unmeritorious arguments mentioned above and at least limiting cases to argument about points that have real prospects of success.

**Additional statutory review mechanisms**

23. What are the benefits of specific statutory appeals as compared to general judicial review? (page 101)

The ACC has no direct experience to rely on, but in principle a specific statutory appeal mechanism should have the advantage of being tailored to fit the characteristics of a particular agency’s responsibilities and of those who seek review of its decisions. It would also promote the development of expertise among members of the appeal body in relation to the legislative regime under which the decisions are made. However, the ACC’s experience is that there is a degree of specialisation among Federal Court judges in handling particular types of judicial review cases such as those arising from decisions under the ACC Act.

24. What benefits do government agencies responsible for statutory review schemes find that those statutory schemes give? Do agencies believe these benefits could also be achieved through a general statutory review scheme and why or why not? (page 101)

The ACC is not responsible for a statutory review scheme and accordingly offers no comment.

25. Section 44 of the *AAT Act* establishes a statutory appeal right which applies to decisions in many jurisdictions. Are there any examples of cases where an applicant has been unsuccessful in an
application for review because of discrepancies between the jurisdiction of the Federal Court under s 44 of the AAT Act and under the ADJR Act? (page 102)

There is no right of review under the AAT Act for decisions made under the ACC Act, so the ACC is not in a position to comment.

26. The Council has previously recommended that s 44 be retained. What reasons are there for retaining or removing s 44 of the AAT Act? (page 102)

In view of the response to the previous question, it is not appropriate for the ACC to comment.

Options for Australia

27. Since judicial review is available via constitutional review, what role, if any, should a statutory review scheme play in the future? (page 109)

It emerges clearly from the Consultation paper that the function, if any, of a statutory review scheme must be to make judicial review available in circumstances where constitutional judicial review is not available or to enhance the accessibility or outcomes of judicial review by comparison with constitutional judicial review. The ACC is not in a position to comment usefully on the extent of any deficiencies in constitutional judicial review that might raise such a need.

28. What are the reasons for or against relying solely on constitutional judicial review as a general judicial review mechanism for federal judicial review? (page 110)

See previous comment.

29. What information should be provided to applicants about constitutional judicial review in the Australian federal jurisdiction if there is no general statutory review scheme? Which bodies are most appropriate to provide this information? (page 110)

In the ACC’s experience in relation to the service of summonses and notices, it is important that an agency limits itself to pointing out the existence of particular statutory provisions and avoids providing legal advice as such. Providing any advice on constitutional judicial review, beyond indicating that particular provisions of the Constitution and the Judiciary Act may be relevant should the recipient wish to challenge a decision, would risk straying into the area of legal advice.

It might be appropriate for a central body with legal functions, such as the Attorney-General’s Department or the Australian Government Solicitor, to draft a short document setting out some basic information about constitutional judicial review, and expressly disclaiming any intent to provide legal advice in relation to any particular case, which could
be attached to notifications of decisions by Commonwealth agencies. This would enable provision of some information while minimising potential risks.

30. Given the proliferation of statutory appeals and the declining use of general judicial review mechanisms, what are the advantages, if any, of the Council preparing policy principles to guide a variety of statutory judicial review mechanism, rather than attempting to streamline the range of existing judicial review mechanisms? (page 112)

The ACC does not administer a statutory judicial review mechanism and therefore has no comment to offer on this question.