

CHAPTER 2

Scope of the Act

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The AJA's definition of administrative action: introduction

The key to determining the scope of application of the Act (just as it is for the constitutional right in s 33) is the concept of 'administrative action'. The definition of 'administrative action' in s 1 draws the boundary of the Act's justiciability: the Act applies only to 'administrative action' as defined. Anything outside the boundary is not justiciable under the AJA.¹ [2.1]

In the Constitution the term 'administrative action' is repeated in both s 33(1) and s 33(2). While it is probably constitutionally competent for Parliament to have defined administrative action more extensively than the Constitution's administrative justice clause, it has not done so in the AJA. The Act's definition of 'administrative action' is narrower than the Constitution's conception of administrative action. The definition therefore indicates Parliament's choice of a narrower field of application of the procedures, duties and rights in the AJA, to avoid overburdening the administrative process.

Administrative action in the Constitution

Section 24 of the interim Constitution (in operation between 1994 and 2000) was a right to lawful, procedurally fair and reasonable administrative action. There is therefore a body of jurisprudence dealing with this provision that indicates what administrative action is under the Constitution. [2.2]

In its handful of decisions on the subject the Constitutional Court principally dealt negatively with the meaning of 'administrative action' in s 24. That is to say that most of its pronouncements on the subject indicate what is *not* administrative action, rather than what it is. The court's jurisprudence on the subject can be summarised as follows:

- Budgetary resolutions made by a municipality were legislative and not administrative action for purposes of s 24 of the interim Constitution. The reason is that the resolutions were taken by an elected, deliberative legislative body established by the Constitution. The resolutions therefore had to be regarded as original and not delegated legislation, while the municipality's conduct was an exercise of its legislative

¹ That is not, however, to say that conduct not justiciable under the AJA is not subject to legal control. As outlined in para 1.30 above, exercises of public power that are not administrative action under the Constitution or the AJA are subject to the Constitution in general (with the exception of s 33) and to the constitutional principle of legality in particular. Particular administrative law governs the particular administrative action to which it applies. Exercises of private power may be subject to the common law.

[2.2]

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authority and not administrative action.² However, the making of delegated and subordinate legislation is administrative action.³

- An exercise of the power in s 84(2)(f) of the 1996 Constitution, which permits the President to appoint commissions of inquiry, is not administrative action. The power is exercised by the President acting as head of state rather than as head of the executive. It is closely related to policy and is not concerned with the implementation of legislation (which would be justiciable administrative action).⁴
- The President's decision to bring an Act of Parliament into force is not administrative action. The decision requires the making of a political judgment and lies between the law-making power (the legislative function, which is not administrative action) and the administrative process (the implementation of legislation, which is administrative action).⁵
- Decisions made by judicial officers in the exercise of judicial functions are not administrative action.⁶

² *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC). See also *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 48 (challenge to vague parliamentary legislation should be based on provisions of the Constitution other than the administrative justice clause); *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para 12 (allocation of budgets to provincial departments by provincial legislature in appropriation legislation is legislative and not administrative action). Subparagraph (dd) of the definition of 'administrative action' excludes legislative functions of Parliament, provincial legislatures and municipal councils from the AJA. See further para 2.20 below.

³ *Fedsure* (n 2 above) para 27: 'Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be "legislation", the process by which the legislation is made is in substance "administrative" '.

⁴ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

⁵ *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). This corresponds to the general exclusion of the 'executive powers and functions of the National Executive' in subpara (aa) of the definition of 'administrative action'. See further paras 2.16–2.17 below.

⁶ *Nel v Le Roux NO* 1996 (3) SA 562 (CC) para 24 (summary sentencing procedure in terms of s 205 of the Criminal Procedure Act 51 of 1977 is 'judicial' rather than 'administrative' in nature because the procedure is conducted by a judicial officer and is subject to the ordinary rules for criminal appeals). This corresponds to the exclusion of 'the judicial functions of a judicial officer' from the AJA in subpara (ee) of the definition of 'administrative action'. See further para 2.21 below.

- On the positive side, a decision to withdraw payment of bursaries by a provincial MEC for Education and approved by the provincial executive council is administrative action.⁷
- The powers granted to the Minister of Trade and Industry by s 8(5)(a) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 must comply with the requirements of the right to just administrative action.⁸ The provision allows the Minister to issue a notice with the effect of compelling a business to cease a practice that is under investigation as a 'harmful business practice' and attach or freeze its assets. It follows that the exercise of the powers by the Minister is administrative action.
- The decision of a provincial MEC determining a formula for the allocation of a subsidy to private schools is administrative action. According to the court: 'The determination of which schools should be afforded subsidies and the allocation of such subsidies are primarily administrative tasks. The determination of the precise criteria or formulae for the grant of subsidies does contain an aspect of policy formulation but it is policy formulation in a narrow rather than a broad sense. The decision apparently constitutes a broad policy decision because it purports to determine how the allocated budget is to be distributed and not the amount to be given to each school. However, on closer scrutiny it is in fact not so broad because the MEC determines not only the formula but also in effect the specific allocations to each school.'⁹

⁷ *Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC). The power to grant and withdraw the bursaries was given by s 32 of the Education Affairs Act (House of Assembly), which provided that the MEC could 'grant a subsidy to a State-aided school on such basis and subject to such conditions as he may determine'. Arguably, the MEC's decision had the characteristics of what used to be known in the common law as a 'purely administrative' decision, a decision made in terms of powers conferring 'absolute discretion' and without a legislative character (i e, not incorporated in delegated legislation).

⁸ *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC) para 24.

⁹ *Ed-U-College* (n 2 above) para 21.

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Besides the Constitutional Court judgments, there is a considerable body of Supreme Court of Appeal and High Court decisions dealing with the meaning of 'administrative action' under s 24 of the interim Constitution.¹⁰

- [2.3]** A useful summary of the Constitutional Court's approach to the concept of 'administrative action' can be found in the following extract from the *SARFU* decision:

In section 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.¹¹

¹⁰ See, inter alia, *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE) (commission of inquiry authorised by the Master of the Supreme Court and conducted under the machinery of the Companies Act is administrative action); *Podlas v Cohen and Bryden NNO* 1994 (4) SA 662 (T) (decision by the Master of the Supreme Court to issue subpoenas to attend an inquiry in terms of s 152 of the Insolvency Act not administrative action); *Claude Neon Ltd v City Council of Germiston* 1995 (3) SA 710 (W) (giving of an undertaking by the council to notify the applicant when tender documents were available a 'purely administrative function' constituting administrative action); *Kynoch Feeds (Pty) Ltd v CCMA* 1998 (4) BCLR 384 (LC) (arbitration proceedings conducted under the auspices of the Commission for Conciliation, Mediation and Arbitration are administrative action); *Beinash v Ernst & Young* 1999 (1) SA 1114 (W) (neither the Vexatious Proceedings Act 3 of 1956 — a product of legislative conduct — nor the exercise of the powers it granted to the judiciary are administrative action). A considerable number of administrative justice cases have dealt with state and parastatal tendering procedures: *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA) (calling for and adjudication of tenders by Transnet is administrative action because part of the provision of a public service as required by statute); *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) (call for tenders for the publication of an in-flight magazine by Transnet and subsequent consideration of tenders is administrative action); *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 546 (SCA) (constitutional administrative justice right applies to award of tenders by the State Tender Board, requiring the Board to act reasonably and use fair procedures); *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) (provincial tender board obliged by s 24 IC to consider tenders fairly and by s 23 IC to provide information to allow tenderer to determine whether s 24 was complied with); *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 (8) BCLR 908 (T) (award by organ of state of a licence to exploit mineral resources to one of several competing applicants is analogous to consideration of a tender and therefore constitutes administrative action); *National and Overseas Modular Construction Ltd v Tender Board* 1999 (1) SA 701 (O) (decision of provincial tender board to award a contract to a tenderer and not to another is administrative action).

¹¹ Note 4 above, para 141.

Administrative action under the Constitution is therefore a subset of the broad field of what the *Pharmaceutical Manufacturers* decision¹² referred to as ‘exercises of public power’. It is, put at its simplest and widest, conduct of an administrative nature by organs of state. The identity of the organ of state is less important than the nature of the conduct. Generally, conduct involving the implementation of legislation is administrative action, whereas conduct involving the constitutionally mandated formulation of policy (‘policy formulation in the broad sense’)¹³ is not. There are a number of clear cases of conduct by organs of state that is *not* administrative action. Conduct of the legislatures (national, provincial, local) when exercising their legislative functions is not administrative action. Neither is conduct of the judiciary when exercising judicial functions, of the President when exercising the constitutional powers of the head of state (and, similarly the Premiers of Provinces exercising their constitutionally enumerated powers), and of the Cabinet and provincial Cabinets when making political decisions. The reason for the head of state and Cabinet partial exception is that the President and the Cabinet are authorised by the Constitution to make political (‘policy’) decisions. For example, the President’s decision to sign a Bill, appoint an ambassador, confer an honour or appoint a commission of inquiry is a political (‘executive’) and not an administrative decision. The same goes for Cabinet decisions. If, however, the President acts in terms of powers delegated to him by legislation, then he acts as the delegate of Parliament and as an administrative official.¹⁴ All of the above will also apply to the exercise of the political executive powers of a provincial premier and executive council as listed in the Constitution.

¹² Note 5 above.

¹³ In *Ed-U-College* (n 2 above) para 18 the Constitutional Court distinguished policy formulation in a broad and a narrow sense, the latter and not the former being administrative action: ‘Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.’

¹⁴ See *SARFU* (n 4 above) paras 138–48 (executive does not perform administrative action when formulating policy, but does when implementing legislation) and *Ed-U-College* (n 2 above) para 18: ‘[W]hen . . . a senior member of the executive is engaged upon the implementation of legislation, that will ordinarily constitute administrative action. However, senior members of the executive also have constitutional responsibilities to develop policy and initiate legislation and the performance of these tasks will generally not constitute administrative action.’

Structure of the AJA's definition of administrative action

[2.4] The definition of 'administrative action' in the AJA is extremely complicated. The interpretive difficulties this creates will inevitably result in a disproportionate focus on the technical issue of justiciability rather than on the substantive aspects of the Act. While this unfortunate result of the Act's drafting cannot be ignored, a purposive interpretation can provide a solution to some of the Act's definitional puzzles and redirect attention to the Act's substance.

In addition to its own considerable internal complexities the definition incorporates, by reference and subreference, several other definitions. Because 'administrative action' as defined is confined to 'decisions', one must therefore also consider the definition of 'decision' in s 1. In turn, because the definition of 'decision' confines decisions to conduct 'of an administrative nature' in terms of an 'empowering provision', it must be read with the definition of 'empowering provision'. Because 'decision' includes failure to take a decision, the definition must be read with the definition of 'failure' (which defines failure to include a refusal to take a decision).

- (i) '**administrative action**' means any decision taken, or any failure to take a decision, by —
 - (a) an organ of state, when —
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include —
 - (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
 - (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
 - (cc) the executive powers or functions of a municipal council;
 - (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
 - (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

- (ff) a decision to institute or continue a prosecution;
- (gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
- (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
- (ii) any decision taken, or failure to take a decision, in terms of section 4(1). . . .

For purposes of analysis, seven elements of the AJA's definition of administrative action can be identified. Administrative action is: (1) a decision, or a proposed decision (2) of an administrative nature; (3) that is made in terms of an empowering provision; (4) that is not specifically excluded; (5) that is made by an organ of state or by a private person exercising public power; (6) that adversely affects rights and (7) that has a direct external legal effect.

Before examining each of the seven elements in detail, two general [2.5] observations can be made. The first relates to the structure of the definition and the second to the applicability of the jurisprudence on administrative action under the Constitution.

The second, third and fourth elements of the definition relate to the subject-matter of the administrative action, the fifth relates to the person or institution performing the administrative action, and the first, sixth and seventh relate to the effects or consequences of that administrative action and should be read together. The second and third elements can be understood essentially as establishing the subject-matter of administrative action. The first and the last two elements — 'decision', 'adversely affecting rights' and 'direct external legal effect' — must also be read together since they all deal with the consequences of administrative action and largely overlap.

Secondly, in interpreting the definition of administrative action one can draw on the body of jurisprudence described in paras 2.2 and 2.3 above, dealing with administrative action in terms of s 24 of the interim Constitution (in operation between 1994 and 2000) and that dealing with s 33 (directly applicable between 4 February 2000 and 30 November 2000). The AJA is intended to give effect to the constitutional rights and can therefore, as a starting point of interpretation, be taken to define the scope of administrative action at least as widely as is provided for in the Constitution. A more narrow definition is a limitation of the constitutional right and, where possible, such an interpretation should be avoided.¹⁵

¹⁵ See para 1.16 above.

Decisions

'Decisions' not 'conduct'

[2.6] The Law Commission's draft Bill defined administrative action broadly, along the lines of the s 24 jurisprudence described in paras 2.2–2.3 above, as any conduct of the administration: any 'act performed, decision taken or rule or standard made, or which should have been performed, taken or made . . . by an organ of state', followed by a list of specific exceptions. These exceptions mostly followed the common-law understanding of the scope of administrative law: administrative action did not include policy-making executive functions, original legislation and judicial functions of the independent judiciary.

As we saw in para 1.9 above, the Parliamentary Committee substituted a substantially more complex and restrictive definition, confining administrative action in the first place to 'decisions' rather than, broadly, 'conduct' or 'action'. Moreover, it is only decisions 'of an administrative nature' that qualify.

The Act's use of the term 'decision' and its definition of that term is modelled on the Australian Administrative Decisions (Judicial Review) Act 1977 (the ADJR).¹⁶ In the following paragraph, we provide a brief description of the ADJR and the borrowed provisions and outline the jurisprudence of the Australian courts interpreting those provisions. We argue in paras 2.9, 2.10 and 2.13 below that the Australian provenance of certain provisions of the AJA should not decide the question of their interpretation. There are important differences between the AJA and the ADJR and a wholesale adoption of the interpretive jurisprudence of the Australian Act should be avoided.

Administrative Decisions (Judicial Review) Act (ADJR)

[2.7] As the ADJR's name indicates, it provides a legislative basis for judicial review by the Federal Court of Australia of decisions of Commonwealth (i e, Federal-level) administrators and agencies. Unlike the AJA, the ADJR does not specify administrative decision-making procedures. Moreover, state courts continue to exercise common-law powers of judicial review.

The ADJR grants judicial review jurisdiction to the Federal Court over any 'decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment . . .' (s 3(1)). Section 3 defines 'decision' as follows:

¹⁶ For an overview of the Act and its associated jurisprudence, see Mark Aronson & Bruce Dyer *Judicial Review of Administrative Action* (1996) 49–84.

- (2) In this Act, a reference to the making of a decision includes a reference to:
- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - (d) imposing a condition or restriction;
 - (e) making a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article; or
 - (g) doing or refusing to do any other act or thing;
- and a reference to a failure to make a decision shall be construed accordingly.

(3) Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.

...

(5) A reference in this Act to conduct engaged in for the purpose of making a decision includes a reference to the doing of any act or thing preparatory to the making of the decision, including the taking of evidence or the holding of an inquiry or investigation.

Section 5 of the ADJR provides a list of grounds for the review of 'decisions', s 6 for the review of actual or proposed 'conduct for the purposes of making a decision', and s 7 for the failure or refusal to make a decision.

The leading case on the interpretation of the definition is the High Court decision in *Australian Broadcasting Tribunal v Bond*.¹⁷ The court held that, subject to one exception, only the final conclusion of an administrative or decisional process qualifies as a 'decision': 'a reviewable "decision" . . . will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact calling for consideration'.¹⁸ The exception to the rule of finality is intermediate steps which are substantive and which the empowering legislation specifically requires the body or official to take.¹⁹ A challenge

¹⁷ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

¹⁸ *Bond* (n 17 above) at 337. See the discussion of the case in Aronson & Dyer (op cit n 16) 55–68 and Robin Creyke & Graeme Hill 'A Wavy Line in the Sand: *Bond* and Jurisdictional Issues in Judicial and Administrative Review' (1998) 26 *Federal LR* 15.

¹⁹ An example is provided by the facts of *Bond* itself (n 17 above). The Broadcasting Tribunal had, after protracted hearings, made a finding that certain holders of television broadcasting licences were not 'fit and proper persons' to be licensees. This finding gave the Tribunal three possible subsequent courses of action: it could revoke the licences, decide not to renew them, or impose conditions. The Tribunal had not decided what to do next. Since no final, determinative decision had been reached, the findings did not qualify as decisions in the ordinary sense. However, the findings could be accommodated under the exception: they were intermediate decisions on a matter of substance required by the broadcasting statute as an essential preliminary to the making of a final decision.

can, of course, be grounded on pre-decisional errors if they have been incorporated into the ultimate decision, but only once the decision has been made. A decision must also be a substantive (as opposed to procedural) determination — it must affect rights and interests. The reason for reading ‘decision’ narrowly in this way is to avoid overlap with s 3(3) and (5) of the ADJR and the corresponding distinction between s 5 (judicial review of decisions) and s 6 (judicial review of conduct related to the making of decisions).²⁰

AJA definition of ‘decision’

[2.8] Like its Australian model, the AJA contains an elaborate definition of ‘decision’. However elaborate, the definition is not particularly helpful. In fact much of it is circular — a ‘decision’, the definition tells us, ‘means any decision . . .’. Importantly, however, the definition includes decisions ‘proposed to be made’.

(v) ‘**decision**’ means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to —

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly. . . .

When compared to the Australian provision, the AJA’s definition omits conduct preparatory to the taking of a decision (s 3(5) of the ADJR) and the making of reports and recommendations prior to decisions (s 3(3) of the ADJR). The omission is significant. Read with the later parts of the

²⁰ *Bond* (n 17 above) at 341. Aronson & Dyer (n 16 above) 66 suggest that the principal motivation for the High Court’s narrow interpretation was to prevent abuse of the ADJR system by applicants making repeated challenges to the administrative process before it had come to a final decision. A narrow reading of ‘decision’ would prevent premature challenges from retarding the administrative process. To find otherwise, the court held, would ‘lead to a fragmentation of the process of administrative decision-making and set at risk the efficiency of the administrative process’ (*Bond* at 337).

AJA's definition, it could indicate an intention that only determinations that are final and operative and that have substantive effect should be subject to judicial review under the Act.²¹

If interpreted as a restriction of administrative action to final determinations with substantive effect, the use of the term 'decision' does much of the same work as other parts of the definition, namely 'adversely affecting rights' and 'direct external legal effect'. The use of three terms with similar effect can certainly be seen as emphatic — emphasising the intention of the legislature to exclude preliminary determinations and intermediate steps from the ambit of the Act in order to avoid AJA review challenges to every step of the administrative process.

Comparability of the ADJR

Unlike its Australian model, the AJA is both judicial review legislation [2.9] and administrative procedure legislation. It seeks to provide rights to review administrative decisions after the fact and to impose duties to follow fair procedures *before decisions are made*. The AJA also lacks the ADJR's distinction between 'decisions' and the 'conduct' of proceedings preceding the making of a decision and the differentiated grounds of review available for each. One of the principal motivations of the *Bond* decision, as we have seen, was to keep decisions and conduct conceptually separate so as to ensure that s 5 of the ADJR was used for the review of the former and s 6 for the review of the latter.

Considerable difficulty has therefore been created by the use of a term and a definition of that term borrowed from Australian judicial review legislation in South African legislation aimed at giving effect to the right to administrative justice at all stages of the decision-making process. It is recommended that the interpretation of the term in the South African legislation does not follow the reasoning in *Bond*, but instead follows an earlier decision of the Federal Court of Australia (overturned by *Bond*) on the meaning of decision — *Lamb v Moss*.²² The case concerned committal

²¹ C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 515 ('[T]he reference to a "decision" may have the effect of excluding advisory or investigative action from the definition of "administrative action"; for a common characteristic of such proceedings is that they result in reports or recommendations — however damning — rather than actual decisions. Such an interpretation would be reinforced by the reference to the "direct, external legal effect" of German administrative law.') We submit that the question of the inclusion of advisory or investigative action is better determined in terms of the 'adversely affecting rights' and direct external legal effect' elements of the administrative action definition.

²² *Lamb v Moss* (1983) 76 FLR 296.

proceedings of an administrative nature. A magistrate had statutory powers to hear evidence of an informant and of a defendant before deciding whether or not the defendant should be committed to stand trial. In *Lamb* the magistrate had decided that the informant had made out a prima facie case at the close of its evidence. It had not yet been decided to commit the defendant to stand trial since the magistrate had not yet heard the defence evidence. At this clearly interim stage of the committal proceedings the defendant applied for review under the ADJR. Was the reaching of an opinion by the magistrate that a prima facie case had been made out a 'decision' under the Act? According the Federal Court, though there are clear difficulties with allowing review at an interim stage of proceedings such as those in question, the solution did not lie in reading 'decision' restrictively to include only determinations which effectively dispose of the matter in hand.²³ Instead, according to the court, the attribution of a wide meaning to 'decision' to include any decision of an administrative character, including intermediate determinations that do not dispose of the matter, accorded with the language of the Act, including the broad list of activities in the non-exhaustive statutory definition of the word in s 3(2).

The meaning of decision in the AJA should be interpreted as widely as possible, so as to accord with the constitutional rights and so as to fit into an Act intended to prescribe fair procedures to be followed *prior* to the final determination of a matter as well as to provide access to judicial review of decisions and the procedures followed in making decisions. After all, unlike the Australian definition, decisions in terms of the AJA expressly include decisions that are merely proposed. Nonetheless, we submit that to qualify as a decision, conduct should have a decisive or determinative character. Such a determinative character would be lacking in, for example, internal administrative proceedings that merely discuss the options available for a future course of conduct. It would be present in, for example, a decision to suspend a child from school prior to making a final decision whether to expel him or her.

Of an administrative nature

Australian interpretation

[2.10] Again following the model of the Australian ADJR, the AJA confines administrative action to decisions 'of an administrative nature'. The interpretation of the equivalent phrase in the ADJR turns on the conceptual

²³ See the discussion of the case by Aronson & Dyer (n 16 above) 54. The court stressed that problems of the timing of a judicial review application could be dealt with by use of the judicial discretion inherent in the ADJR to refuse jurisdiction where an application was premature or where alternative remedies existed. In the AJA a similar power to refuse jurisdiction so as to avoid premature challenges could be implicit, or could inhere in the exhaustion of internal remedies clause (s 7(2)). See further paras 7.3 and 7.9 below.

distinction in the common law of judicial review between government functions of a legislative, executive and judicial character. The classification of functions doctrine had been discarded by the House of Lords in *Ridge v Baldwin*,²⁴ a decision followed by the Australian courts ever since.²⁵ The inclusion of the phrase 'of an administrative character' in the ADJR was therefore seen as a matter of some irony.²⁶ In response, the Australian courts have interpreted the requirement as providing for judicial review powers that differ as little as possible from those under the common law:

[The term] is at least apt to describe all those decisions, neither judicial nor legislative in character, which Ministers, public servants, government agencies and others make in the exercise of statutory power . . . In other words it at least covers the decisions made in executing or carrying into effect the laws of the Commonwealth.²⁷

So interpreted, the phrase does prevent ADJR review of two significant types of exercise of public power: court decisions and delegated legislation.²⁸ There is a lengthy list of court decisions grappling with the distinction between decisions of an 'administrative', 'judicial' and 'legislative' nature. In our view it is important not to make too much of the Australian provenance of the definition of 'decision of an administrative nature' and its associated jurisprudence. As noted in para 2.9 above, there are some important structural differences between the Australian legislation and the South African AJA.

Administrative powers and functions described

Like much else in the definition of 'administrative action' there is considerable overlap between the phrase 'decision of an administrative nature' and other parts of the definition, notably the phrase 'exercising a public power or performing a public function in terms of any legislation' and the exclusions listed in subparagraphs (aa)–(ee). The effect of the phrase is that only decisions made in the course of exercising administrative powers and functions will qualify as administrative action subject to the AJA. [2.11]

What is a decision of 'an administrative nature'? The first point to note is that there is a necessary public character to the phrase 'decision of an administrative nature'. Decisions of a private nature that do not entail the exercise of public power are not subject to the constitutional

²⁴ *Ridge v Baldwin* [1964] AC 40 (HL).

²⁵ See *R v Toohy; Ex parte Northern Land Council* (1981) 151 CLR 170 at 225.

²⁶ Aronson & Dyer (n 16 above) 73.

²⁷ *Burns v Australian National University* (1982) 40 ALR 707 at 714.

²⁸ On delegated legislation see *Hamblin v Duffy* (1981) 50 FLR 308 at 313 and *Evans v Friemann* (1981) 53 FLR 229.

administrative justice right or to the AJA.²⁹ The exercise of private power is not administrative action for the purposes of the AJA. The line between public and private action may at times be difficult to draw, but it does certainly exist.³⁰

A second observation is that the use of the phrase excludes from the definition of administrative action decisions made in the exercise of legislative and judicial power. In this regard the phrase does the same work as the specific exclusions of ‘the legislative functions of Parliament, a provincial legislature or a municipal council’ and ‘the judicial functions of a judicial officer of a court’ in subparas (*dd*) and (*ee*) of the definition of ‘administrative action’. The rationale for this exclusion stems from the separation of powers doctrine: the law-making and administrative processes of government are constitutionally distinct, and subject to different mechanisms and standards of control. The right to just administrative action, designed as it is to control the power of administrative officials and institutions, therefore has no bearing on the deliberative legislative process of democratically elected bodies or on the exercise of the judicial authority of the Republic by an independent judiciary.

It would be unfortunate if the phrase ‘decision of an administrative nature’ was interpreted as requiring the complex and not particularly coherent body of South African jurisprudence on the classification of functions to be revisited.³¹ The difficulties of determining whether administrative action is ‘purely administrative’, ‘judicial’ or ‘quasi-judicial’ are notorious. This is not to say that there is no meaning to the notion of ‘decision of an administrative nature’. One clear aspect of the core content of administrative action is the implementation of legislation. As we have seen, this is the core content of administrative action as identified in Constitutional Court jurisprudence.³² Furthermore, the AJA itself in several places implies that the implementation of legislation is a core aspect of the meaning of administrative action. For instance, the only aspect of the exercise of executive authority by Cabinet members that is not excluded from the definition of administrative action in s 1(i)(b)(aa) is s 85(2)(a) of the Constitution, which refers to ‘implementing national legislation except where the Constitution or an Act of Parliament provides otherwise’.

²⁹ Note that the exercise of public power by private persons is included in the definition of administrative action. See the discussion in paras 2.27–2.28 below.

³⁰ See the observation by Olivier JA in *Transnet Ltd v Goodman Bros* (n 10 above) para 31: ‘The identification of an administrative action in contrast to an act regulated by private law, has become more difficult with the increasing use by the state of private law institutions, notably contract, to perform its duties. This takes place by privatisation, delegation, outsourcing, etc. . . .’

³¹ See the criticism of the doctrine of classification of functions in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 763.

³² See paras 2.2–2.3 above.

It would, however, be unduly limiting to regard the implementation of legislation as exhaustive of the content of administrative action. Take for instance s 85(2)(b) of the Constitution. This identifies one form of the exercise of executive authority as ‘developing and implementing national policy’. This form of exercise of executive authority can be vitally important. Much governmental authority is exercised through policy development and implementation in a number of areas, including for instance the privatisation of state assets, a process often governed by policy statements rather than by specific empowering legislation. Moreover, as noted by the Constitutional Court, the argument for considering policy formulation ‘in a narrower sense’ (for example, through the exercise of discretion) as administrative action is extremely strong in some cases.³³ This demonstrates that the implementation of legislation can only be the core of the category of administrative action, not its complete expression. [2.12]

One might be tempted to take the distinction between executive action and administrative action and turn it into a definition of administrative action. This is particularly appealing since the distinction between executive action and administrative action is the distinction between formulation of policy and the implementation of legislation (which is understood to be based on policy). However, to make this distinction into a definition of administrative action would be to commit an error of formalism, and should be avoided.

To sketch out this temptation, a description of administrative action could proceed as follows. Once established as provided for in the Constitution, the executive *formulates policy*. The legislature then gives effect to that policy by *legislating policy* following the procedures prescribed by the Constitution. After legislation has been enacted the process of *implementing policy* set out in the legislation begins. This is the function of the public administration. The judiciary has the job of *monitoring the policy, the legislation, and its implementation* for consistency with the Constitution and legislation. Though compellingly simple, this story is too formalistic and does not accord with reality. In several ways, these lines are blurred.

First, the very distinction between the formulation of policy and the implementation of legislation is at times a difficult one to identify. Officials responsible for implementing legislation often make policy decisions themselves. This occurs in two ways. First, officials formulate policy through exercising discretionary powers on a daily basis and in order to exercise that discretion. This type of formulation of policy —

³³ *Ed-U-College* (n 2 above) para 18.

policy formulation ‘in a narrower sense’ — was specifically recognised by the Constitutional Court in the *Ed-U-College* case.³⁴ Secondly, the court also recognised, policy may be formulated by officials outside of a legislative framework. While the Constitutional Court did not explicitly say so, such formulation of policy may happen at a relatively low level as well as at a more politically accountable level.

In both these senses administrative officials often perform a function (policy formulation) like the executive. Administrators do this simply to give effect to the legislation and governmental programmes. The idea that the ‘administrative’ officials mechanically implement the policies formulated by members of ‘the executive’ is not tenable. It is difficult to justify the distinction between implementation and policy formulation and thus between executive officials and administrative officials.

The distinction between the law-making and the administrative processes also becomes blurred upon examination. The implementation process involves a vast range of public authorities, some at the national level of government and others at regional and local levels. In the course of implementing policy these bodies and officials often make subsidiary rules and guidelines. Often these regulations have the force of and play the same role as primary legislation. The idea that policy in the form of enacted rules comes only from Parliament is no longer tenable. It is thus difficult to justify the distinction between administration and giving effect to governmental policy through legislation.

Finally, even the distinction between judicial and administrative functions breaks down. Administrative officials often settle disputes — that is, they adjudicate — through institutions such as appeals boards and tribunals as well as through the daily exercise of their powers. In so doing, the administration makes determinations regarding the consistency of policy and its implementation with the Constitution and legislation. In this sense the distinction between the administration and the judiciary is blurred.

In all of these senses, then, the formalistic picture of the administration as implementer is one that is insufficient to capture the full range of functions administrators actually perform. In terms of a functional view of the public administration there can be no essential definition of administrative action.

³⁴ *Ed-U-College* (n 2 above) para 18: ‘Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.’

In addition to the above criticism of a formalist definition of administrative action there is a classificatory criticism. To take, for instance, the distinction between the executive's formulation of policy and the administration's implementation of policy and to turn it into an essentialist definition of administrative action would be committing an error of classification. It would be taking a distinction that is meant to apply to the business of classifying what is executive and what is administrative and using it instead to determine globally what is administrative. This is not the purpose of the constitutional distinction between formulation and implementation. This distinction is useful only, it is submitted, in matters where the classification of action as executive or administrative is in issue. There is no justification to read this distinction (or the distinction between legislative action and administrative action or the distinction between judicial action and administrative action) more broadly.

In any case, it is submitted that the concept of administrative action must be understood to be broader than the conduct of the 'public administration'.³⁵ Chapter 10 of the Constitution, which deals with the public administration, does not assist greatly in the definition of administrative action. The chapter establishes the Public Service Commission, sets down rules of competence between the national and provincial sphere with respect to the structuring of the public service, and identifies the basic values and principles governing public administration (in s 195). While the basic values and principles will be of assistance in interpreting the duties placed on administrators, they are unlikely to be of help in identifying what is administrative action. In any event, there is no clear definition of what the 'public administration' is.

With this more complete and realistic picture of the actual functioning of government and the use of the Constitutional Court's distinctions in mind, we propose the following definition of decisions of an administrative nature. One can say that decisions of an administrative nature are decisions connected with the daily or ordinary business of government. This is an extremely broad definition, however. It is so broad that it does not serve any real classificatory purpose. It is of little use in ascertaining what the scope of administrative action is for the purposes of the AJA. This is precisely the point. It is more useful from our point of view to start with a broad definition and then to narrow that definition down through the constitutional distinctions than to begin with a limited essentialist and overly formalistic definition.

³⁵ See s 197(1): 'Within public administration there is a public service for the Republic . . . which must loyally execute the lawful policies of the government of the day.'

In summary, the phrase ‘decision of an administrative nature’ does not contribute much to the definition of ‘administrative action’ beyond the identification of the core content of implementation of legislation, the inclusion of failures to make a decision and the exclusion of private action.

Made in terms of an empowering provision

[2.13] To qualify as administrative action decisions must be made ‘under an empowering provision’. Section 1(vi) provides a definition of ‘empowering provision’: ‘a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken’. This element of the definition of administrative action refers to the subject-matter of administrative action rather than to the person performing it or the consequences or effects of the action.

We have seen that the Parliamentary Committee borrowed the definition of ‘decision’ from Australian legislation. There is an important difference between the AJA and the ADJR with regard to the phrase ‘under an empowering provision’. The Australian Act uses the phrase ‘under an enactment’ and provides the following definition of ‘enactment’: ‘(a) an Act . . . , (b) an Ordinance of a Territory . . . , (c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance [including] a part of an enactment’. The ADJR has been interpreted as not conferring jurisdiction to judicially review decisions made in the exercise of prerogative powers or powers conferred under non-statutory schemes³⁶ or decisions made in the exercise of a capacity to enter into contracts and decisions made in the exercise of powers conferred by contract.³⁷

The AJA’s choice of the wider term ‘empowering provision’ in addition to its express definition of the term makes it clear that administrative action includes the implementation of forms of law other than legislation. Moreover, empowering provisions are not confined to law and are specifically defined to include agreements, instruments and documents.

³⁶ See, for example, *Thurgood v Australian Legal Aid Office* (1984) 56 ALR 565 (decision by legal aid office to refuse legal aid not a decision ‘under an enactment’ because legal aid scheme created by directive of the Attorney-General and not by statute).

³⁷ *General Newspapers Pty Ltd v Telstra Corporation* (1993) 117 ALR 629; *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 122 ALR 724 (decisions made by the Civil Aviation Authority to enter into contracts were not decisions made under an enactment even where legislation gave Authority general powers to enter into contracts); *Giorgas v Federal Airports Corporation* (1995) 37 ALD 623 (refusal of proposal for commercial tenancies at airport by Federal Airports Corporation not made under an enactment; a general statutory power to enter into contracts merely confers a capacity to contract, and does not give force and effect to the decision to enter the contract).

The purpose of this exceptionally wide definition of ‘empowering provision’ is again to cast the initial net of definition of administrative action as widely as possible over the daily business of governmental action and to include the conduct of private individuals and entities when exercising public power. Authority is distributed in government through a variety of legal forms, and to make the definition of administrative action turn on the specific type of legal authority at issue would itself be formalistic.³⁸

Although there is no explicit mention in the AJA definition, it would appear that policy statements could fall under the category of ‘other document’.

Failure to decide

In s 1(v) of the Act ‘decision’ is defined to include a failure to take a decision.³⁹ Furthermore, according to s 1(vii) ‘failure’ ‘in relation to the taking of a decision includes a refusal to take the decision.’ Thus the clear intention of the AJA is to include action by omission as well as commission.⁴⁰ [2.14]

Specific exclusions

Section 1(i)(b)(aa)–(ii) specifically exclude nine types of decisions from the definition of administrative action and from the scope of the Act. The exclusions are identified by reference to their subject-matter rather than by reference to the person performing the administrative action or by reference to the consequences or effects of the administrative action.⁴¹ [2.15]

³⁸ Note, however, the difficulties created by the wide definition of ‘empowering provision’ in the context of the requirement that governmental power is authorised by law. This is discussed further in paras 6.8–6.9 below. Given the clear intention that the ‘empowering provision’ requirement should not have a restrictive effect, the Australian jurisprudence on the requirement that a decision be made ‘under’ an enactment is also distinguishable and of little comparative value. According to Aronson & Dyer (n 16 above) 82, this jurisprudence is explained by the reluctance of the Australian courts to engage in judicial review of pre-contractual and contractual behaviour. See, for example, *Burns v Australian National University* (n 27 above). Burns was a university professor dismissed on grounds of incapacity due to ill-health. He sought reasons for the dismissal under the Judicial Review Act, but the University argued that the decision was not one that was subject to the ADJR. The Federal Court held that the decision was one of an administrative character, but was not made under an empowering enactment. The Australian National University Act gave the university powers to enter into contracts of employment, but the particular rights and duties of the parties in this case (the power to dismiss on grounds of ill-health) were governed by contract and not by the legislation.

See further the discussion of the *Cape Metropolitan Council* decision in para 2.28 below.

³⁹ A specific ground of review in s 6(2)(g) would make no sense unless administrative action was defined to include a failure to decide: ‘the action concerned consists of a failure to take a decision’.

⁴⁰ The effect of treating refusals as decisions is illustrated by *Right to Life Assoc (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238.

⁴¹ To some extent, some of the specific exclusions do refer not only to the subject-matter of administrative action but also to the category of person performing the administrative action.

The exclusions fall into two groups. The first five exclusions (*aa*)–(*ee*) track the Constitution’s division between, on the one hand, administrative action and, on the other, executive action, legislative action and judicial action.⁴² The remaining exclusions (*ff*)–(*ii*) represent four specific legislative policy choices made during the parliamentary process to exclude certain types of decisions from the Act. The first set of exclusions can be termed the constitutional exclusions and the second the policy-choice exclusions. The distinction between the two types of exclusions has important consequences for their interpretation. As far as the constitutional exclusions are concerned, there is no requirement to read the Act broadly or restrictively. The exclusions simply reflect the broad conceptual division of public power made by the Constitution itself. The legality, rationality and accountability of legislative, judicial and executive action are ensured by provisions of the Constitution other than the administrative justice right.⁴³ As far as the policy-choice exclusions are concerned, it is appropriate that they are interpreted restrictively. The reason for this approach is that where the administrative justice right is constitutionally applicable, the Act should be interpreted to give effect to the right. As far as possible, the Act’s under-inclusiveness when compared to the constitutional right should be reduced.

Executive powers or functions of the national executive

- [2.16] This exclusion (and the related provincial and municipal executive exclusions provided for in paras (*bb*) and (*cc*)) follows the traditional application of administrative law to the administrative functions of government and not to the high policy-making (‘political’) powers and functions that the Constitution distributes to elected executive officials. At common law, judicial review of administrative action was not concerned with monitoring the political and policy-making activities of government, but rather with protecting rights when those policies were implemented in an individual case. Under the 1996 Constitution the exercise of executive powers and functions is an exercise of public power. Although not subject to the administrative justice clause, the Constitution

⁴² See the summary of the Constitutional Court’s jurisprudence on the meaning of ‘administrative action’ in the Constitution in paras 2.2–2.3 above.

⁴³ *Pharmaceutical Manufacturers* (n 5 above) para 79: ‘[I]t would be wrong to characterise the President’s decision to bring the law into operation as administrative action . . . It was, however, the exercise of public power which had to be carried out lawfully and consistently with the provisions of the Constitution insofar as they may be applicable to the exercise of such power.’

contains mechanisms for ensuring their legality (including their rationality) and the responsiveness and accountability of the officials who perform them.⁴⁴

A conceptual difficulty posed by this exclusion is that it is based on a distinction between two types of powers and functions *exercised by the same officials*. Besides political decision-making, elected executive officials also routinely act in an administrative capacity. When they do so their decisions are ‘of an administrative nature’, are not exercises of ‘executive powers or functions’, and are therefore subject to the AJA. For example, the President’s decision to appoint an ambassador, confer an honour or appoint a commission of inquiry is a political and not an administrative decision. The same goes for Cabinet decisions. If however, the President or a Minister acts in terms of powers delegated by legislation, then they act as the delegate of Parliament and as an administrative official.⁴⁵

The exclusion was recommended by the Law Commission in its draft Bill and was retained in the final version of the definition enacted by Parliament. Subparagraph (aa) excludes ‘the executive powers and functions of the National Executive’, followed by a non-exhaustive list identifying specific powers and functions. In its *Report* on the draft Bill, the Law Commission explained its choice of this structure:

Earlier drafts of the Bill excluded certain of the functions of the National and Provincial Executives. Litigation relating to appointments made by the President has pointed up the difficulty of a precise definition of the executive functions of the President and provincial Premiers, which may either fall short of or extend beyond the listed subsections. Consequently, it was not considered feasible to provide a closed list of executive functions. The SALC was however concerned about uncertainty as regards the distinction between executive and administrative actions, and the consequences of a general exclusion of executive functions.⁴⁶

⁴⁴ See *Pharmaceutical Manufacturers* (n 5 above). See also the instructive decision of the Federal Court of Australia in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, holding that a Cabinet decision to nominate part of a national park for inclusion on the UN World Heritage List was a ‘political decision’ not subject to a duty of procedural fairness. See particularly the remarks of Bowen CJ at 278: ‘This is not to say that Cabinet should decide matters without considering all relevant material. But there are recognised channels for communicating arguments or submissions. Each Minister has the support and advice of a department of State. Representations may be made to the relevant department or in appropriate cases to the Minister. Every citizen has access to a local Member of Parliament or a Senator in the particular State, who can assist in the advancement of the individual citizen’s point of view.’

⁴⁵ See *Ed-U-College* (n 2 above) para 18: ‘[W]hen . . . a senior member of the executive is engaged upon the implementation of legislation, that will ordinarily constitute administrative action. However, senior members of the executive also have constitutional responsibilities to develop policy and initiate legislation and the performance of these tasks will generally not constitute administrative action.’

⁴⁶ SA Law Commission *Report on Administrative Justice* (August 1999) 16n4.

Arguably, the exclusion is no longer necessary since the same work is done by the phrase 'of an administrative nature' in the definition of 'decision' added to the Act as one of the Parliamentary Committee's changes. Decisions made in the exercise of executive powers and functions will not qualify as decisions of an administrative nature. Be that as it may, the cumulative effect of subpara (*aa*) and the phrase 'of an administrative nature' is to exclude political decision-making by the President and Cabinet from the ambit of the Act.

The lists of constitutional powers and functions in subpara (*aa*) are an identification by Parliament of clear cases of executive action. The list is not closed and it will be necessary to decide whether the exercise by members of the national executive of powers and functions that are not listed constitutes executive or administrative action. As we have seen, the principal criterion for distinguishing executive and administrative action is that between broad policy formulation and implementation of legislation. Nonetheless, this is not always an easy line to draw, as the Constitutional Court itself has recognised:

Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.⁴⁷

Merely because a decision has been taken or approved subsequently by high political authority does not mean that that decision is not administrative action. For instance, a decision to withdraw payment of bursaries taken by a provincial MEC for Education and approved by the provincial

⁴⁷ SARFU (n 4 above) para 143.

executive council is administrative action.⁴⁸ In the *Ed-U-College* case the Constitutional Court stated: '[T]he fact that a decision has political implications does not necessarily mean that it is not an administrative decision within the meaning of section 33. . . .'⁴⁹ The court held that the decision with respect to a funding allocation formula by a provincial MEC was administrative action.

It is thus only in a specialised sense that one can say that these exceptions consist of political and not administrative decisions. It is not the character of a decision as political (in the ordinary sense of being a decision on a controversial issue or an issue that is the subject of party-political debate that excludes it from being administrative action. It is the fact that the safeguards that the Constitution decrees for such decisions are political (accountability to the institutions of the representative democracy) rather than legal. In this sense, the President's decision to sign a Bill, appoint an ambassador, confer an honour or appoint a commission of inquiry can be termed a 'political' and not an administrative decision.

Most of the executive powers and functions specifically excluded from [2.17] the definition of administrative action can only be exercised by the President. There are, however, several exceptions. Section 85(2) allows for the exercise of the executive authority by the President 'together with the other members of the Cabinet'. This exercise occurs through several forms including (b) 'developing and implementing national policy', (c) 'co-ordinating the functions of state departments and administrations', (d) 'preparing and initiating legislation', and (e) 'performing any other executive function provided for in the Constitution or in national legislation'. Section 92(3) also refers to members of the national executive other than the President. It provides that 'Members of the Cabinet must (a) act in accordance with the Constitution; and (b) provide Parliament with full and regular reports concerning matters under their control'. Section 99 provides for the assignment by a Cabinet member of any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial executive council or to a municipal

⁴⁸ *Premier, Mpumalanga* (n 7 above). The power to grant and withdraw the bursaries was given by s 32 of the Education Affairs Act (House of Assembly), which provided that the MEC could 'grant a subsidy to a State-aided school on such basis and subject to such conditions as he may determine'. Arguably, the MEC's decision had the characteristics of what used to be known in the common law as a 'purely administrative' decision, a decision made in terms of powers conferring 'absolute discretion' and without a legislative character (i.e. not incorporated in delegated legislation).

⁴⁹ *Ed-U-College* (n 2 above) para 17.

council. Section 100 provides for national supervision by ‘the national executive’ of provincial administration.

Some of these specific exclusions may be vulnerable to constitutional challenge as unjustifiable limitations on the right to administrative justice. Such challenges have the greatest chance of success where members of the national executive other than the President are concerned. The ‘national executive’ is not a term specifically defined in the Constitution. Nonetheless, ss 83 and 84 make it clear that the President is the head of the national executive. The term ‘national executive’ does seem to differ from and appear to be broader than the term ‘Cabinet’, used elsewhere in the Constitution. Other than in relation to the President, the Constitution mentions the national executive in s 100 (providing for intervention in provincial government by the national executive) and in s 231 (involving the national executive in the negotiating and signing of international agreements).

In particular, the AJA’s exclusion of the executive powers and functions of s 85(2) will need, at the very least, to be read down in harmony with the Constitution. In particular, two interpretations should be avoided. The exclusion could be interpreted as excluding from the definition of administrative action the exercise of executive authority through the forms of s 85(2)(b)–(e) of the Constitution by all members of the national executive. Though supported by the reference to the national executive rather than to Cabinet in subpara (aa), such an interpretation should be avoided. It is not mandated by s 85(2) itself, since that subsection only refers to Cabinet and not the national executive. Furthermore, it would be contrary to the purposes of the AJA to exclude from its coverage precisely those lower-level and unelected officials of the national executive who should be covered by the duty to promote administrative justice.

Another interpretation of subpara (aa) should also be avoided. Read literally, the exclusion seems to indicate that it is only the form of exercise of executive authority referred to in s 85(2)(a) of the Constitution that is covered by the AJA: the exercise of executive authority through ‘implementing national legislation’. This interpretation would exclude all other exercises of executive authority from the ambit of administrative action. In particular, it would exclude the implementation of national policy. The power to develop and implement national policy may be quite extensive and infringe the rights of administrative justice. The implementation of national policy is frequently used as a form of government action in areas where procedural fairness is crucial, such as licensing and privatisation. In any case, the implementation of national policy is often nearly indistinguishable from the implementation of national legislation. Apart from all but the most formal and deliberative instances of policy formulation (such as formal Cabinet deliberations), policy development and implementation may constitute administrative action

in appropriate cases.⁵⁰ Interpreting the Act otherwise may well be an unjustifiable limitation on the constitutional right to administrative justice.⁵¹

The extent of the immunity afforded to Cabinet members by the exclusion from the definition of administrative action of the powers and functions referred to in s 92(3) will also need careful interpretation.⁵² Section 92(3) provides that 'Members of Cabinet must (a) act in accordance with the Constitution; and (b) provide Parliament with full and regular reports concerning matters under their control.' This exclusion could be read broadly to suggest that any exercise of executive authority by Cabinet members (which must be in accordance with the Constitution) cannot be challenged as administrative action under the AJA. This would have the practical advantage of providing immunity for Cabinet members from review proceedings under the AJA, even though there is always the option of seeking direct constitutional review of their conduct on the basis of the principle of legality.

It is submitted that such an interpretation would go too far. What the exclusion seeks to accomplish is to insulate from AJA review the duty of Cabinet members to fulfil direct constitutional obligations such as reporting to Parliament. The AJA is not the appropriate vehicle for measuring Cabinet members' actions with respect to constitutional duties outside those contained in the administrative justice right. In other words, using the AJA, one can challenge the action of a Cabinet member as an infringement of the right to procedural fairness but not, for example, as

⁵⁰ See the discussion of policy formulation in the narrow and broad senses in para 2.12 above.

⁵¹ The Constitutional Court has clearly indicated that some functions of members of the executive (other than the clear case of implementation of legislation) may constitute administrative action. See *Ed-U-College* (n 2 above) para 18: 'The Court [in *SARFU* (above, n 4)] noted that senior elected members of the executive (such as the President, Cabinet ministers in the national sphere and members of executive councils in the provincial sphere) exercise different functions according to the Constitution. For example, they implement legislation, they develop and implement policy, and they prepare and initiate legislation. At times the exercise of their functions will involve administrative action and at other times it will not.'

⁵² See *Hoexter* (n 21 above) 514 (irrational to exclude the duty in s 92(3)(a) of the Constitution but not that in s 133(3)(a)).

contrary to the doctrine of separation of powers or the division of national–provincial competence where administrative action is not involved.⁵³

Executive powers or functions of the provincial executive

[2.18] Along similar lines to the national executive exclusion, subpara (*bb*) of the definition of administrative action excludes ‘the executive powers or functions of the Provincial Executive’. The subparagraph then lists constitutionally enumerated powers that are considered clear cases of such powers and functions. What has been said in the preceding paragraphs in respect of the national executive will apply also to the provincial executive exclusion.

All the listed executive powers or functions in subpara (*bb*) relate to duties or powers of the Premier or of other members of a provincial executive council. The term ‘provincial executive’, at least as it is used in the AJA, therefore means the Premier and the other members of the executive council.⁵⁴

The exercise of executive authority by ‘developing and implementing provincial policy’ in terms of s 125(2)(*d*) of the Constitution is specifically excluded from the definition of administrative action. However, as with the similar exclusion of the national executive’s s 85(2)(*b*) powers, this exclusion will require careful interpretation to correspond to the distinction, identified in the *SARFU* case, between the formulation and the implementation of policy. Apart from the most formal and deliberative instances of policy formulation (for example, formal executive council deliberations), policy development and implementation will constitute administrative action.

An interesting omission from subpara (*bb*) is that it lists s 133(3)(*b*) and not s 133(3)(*a*) of the Constitution. Section 133(3) provides: ‘Members of the Executive Council of a province must (*a*) act in accordance with the Constitution and, if a provincial constitution has been passed for the province, also that constitution; and (*b*) provide the legislature with full

⁵³ This is an instance where the third element of the definition of administrative action (‘in terms of an empowering provision’) should be interpreted to be in harmony with the fourth element (not specifically excluded). It is submitted that action taken pursuant to an empowering provision (other than the Constitution) will not fall within the specific exclusions of the AJA. Likewise, action taken directly pursuant to the Constitution will be excluded.

⁵⁴ Unlike the President at the national level, the Premier is not referred to as the head of the provincial executive in Chapter 6 of the Constitution. Moreover, the term ‘provincial administration’ is used in the Chapter, in addition to the terms ‘executive council’ and ‘provincial executive’. Finally, s 125(2)(*c*) seems to indicate that the provincial executive is the Premier and the executive council (which includes the Premier in his or her capacity as head of the council).

and regular reports concerning matters under their control.’ Likewise, s 125(6) is not excluded: ‘The provincial executive must act in accordance with the Constitution; and (b) the provincial constitution, if a Constitution has been passed for the province.’ This would appear to mean that AJA administrative action does include the performance by the provincial executive of direct constitutional duties other than those excluded by subpara (bb). One example of such a duty is s 207(3)’s concurrence to be given by the provincial executive to the National Commissioner of the police service in the appointment of the provincial commissioner.

Table 2
Table of constitutional executive powers referred to in subparas (aa) and (bb) of the definition of administrative action

Sections of the Constitution	Power or function
79(1) 121(1)	President/Premiers must assent to and sign Bills or, if in doubt about their constitutionality, refer them back to the National Assembly/provincial legislature for reconsideration
79(4) 121(2)	President/Premiers must assent to and sign Bills reconsidered by National Assembly/provincial legislatures or refer them to Constitutional Court
84(2)(a) 127(2)(a)	President/Premiers to assent to and sign Bills
84(2)(b) 127(2)(b)	President/Premiers to refer Bill back to National Assembly/provincial legislature for reconsideration of its constitutionality
84(2)(c) 127(2)(c)	President/Premiers to refer Bill to the Constitutional Court
84(2)(d)	President/Premiers to summon Parliament/provincial legislature to an extraordinary sitting to conduct special business
84(2)(e)	President to make appointments other than as head of the national executive
84(2)(f) 127(2)(e)	President/Premiers to appoint commissions of inquiry
84(2)(g) 127(2)(f)	President/Premiers to call referendums
84(2)(h)	President to receive and recognise foreign diplomats
84(2)(i)	President to appoint diplomatic representatives
84(2)(k)	President to confer honours

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Sections of the Constitution	Power or function
85(2)(b) 125(2)(d)	Cabinet to develop and implement national policy Executive councils to develop and implement provincial policy
85(2)(c) 125(2)(e)	Cabinet/executive council to co-ordinate the functions of state/provincial departments and administrations
85(2)(d) 125(2)(f)	Cabinet/executive council to prepare and initiate legislation
85(2)(e)	Cabinet members/MECs to perform any other executive function provided for in the Constitution or in legislation
91(2)	President to appoint Deputy President and Ministers, assign their powers and functions, and may dismiss them
132(2)	Premiers to appoint MECs, assign their powers and functions, and may dismiss them
91(3)	President — (a) must select the Deputy President from among the members of the National Assembly; (b) may select any number of Ministers from among the members of the Assembly; and (c) may select no more than two Ministers from outside the Assembly
91(4)	President must appoint a member of the Cabinet to be the leader of government business in the National Assembly
91(5)	Deputy President to assist President in the execution of the functions of government
92(3)	Members of the Cabinet must — (a) act in accordance with the Constitution; and (b) provide Parliament with full and regular reports concerning matters under their control
133(3)(b)	MECs must — (a) act in accordance with the Constitution and provincial constitutions; and (b) provide the legislature with full and regular reports concerning matters under their control
93	President may appoint and dismiss Deputy Ministers

Sections of the Constitution	Power or function
97 137	President/Premiers may transfer to a member of the Cabinet/MEC administration of any legislation entrusted to another member or powers or functions entrusted by legislation to another member
98 138	President/Premiers may assign to a Cabinet member/MEC any power or function of another member who is absent from office or is unable to exercise that power or perform that function
99 126	Cabinet members/MECs may assign any power or function that is to be exercised or performed in terms of legislation to a member of a provincial executive council or to a municipal council
100	When a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation
139	When a municipality cannot or does not fulfil an executive obligation in terms of legislation, provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation
145(1)	Premiers must assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court

Executive powers or functions of a municipal council

According to s 151(2) of the Constitution, the executive and legislative authority of a municipality is vested in its municipal council. Section 156 provides that the executive authority of a municipality includes the specified local government matters referred to in Schedule 4 and Schedule 5 of the Constitution as well as any other matter assigned to the municipality by provincial or national legislation. [2.19]

The exclusion of 'the executive powers and functions of a municipal council' from the definition of 'administrative action' has been a source of considerable uncertainty during the process of implementing the AJA. Does the exclusion mean that all action by municipalities is beyond the reach of the AJA?

The exclusion did not appear in any of the draft Bills and was added to the Act by the parliamentary committee. Arguments have been made that

the exclusion was a deliberate choice by Parliament to exempt all administrative action by municipalities from the ambit of the AJA.⁵⁵

The counter-argument is that the exclusion must be read as following the pattern set by subparas (*aa*) and (*bb*): ‘executive’ (policy-making) powers and functions of municipalities are not administrative action, while ‘administrative’ (legislation-implementing) powers and functions are. This fits the constitutional distinction between executive and administrative power identified in the *SARFU* judgment.⁵⁶ Given the lack of resources and the low level of administrative skills widespread in the municipal sphere of government, there is an obvious need for judicial supervision of municipal administration to give effect to the right to administrative justice. This is therefore the better interpretation of subpara (*cc*).⁵⁷ The provision, along the lines of the national and provincial executive exclusions, excludes only a relatively narrow class of decisions of municipal councils — policy-formulation decisions made in the course of the exercise by the municipal council of its direct constitutional executive competence regarding the local government matters of Parts B of Schedule 4 and Schedule 5. Albeit narrowly circumscribed, a municipal council therefore has, like its national and provincial counterparts, an area of political operation not controlled by the administrative justice clause or by the AJA. For instance, a decision of a municipal council to draft a by-law (or to redraft existing by-laws) dealing with the provision of child care facilities in the municipality (a matter referred to by Part B of Schedule 4) would be excluded from the AJA definition of administrative action. Further, the adoption by a municipality of a policy of outsourcing refuse removal services (a matter referred to by Part B of Schedule 5) would be a decision excluded from the AJA definition of administrative action.

This leaves by far the major portion of the work of municipalities covered by the AJA definition of administrative action. Included will be the decisions of municipal councils with respect to the implementation of provincial, national and local legislation.⁵⁸ Also included will be the

⁵⁵ See R Pfaff & Schneider ‘The Promotion of Administrative Justice Act from a German Perspective’ (2001) 17 *SAJHR* 59 (noting such an interpretation of the exclusion).

⁵⁶ Note 4 above.

⁵⁷ Cf Pfaff & Schneider (n 55 above) 22.

⁵⁸ The distinction between executive and administrative action in this regard is complicated by the concurrent allocation of powers and functions between the spheres of government. For example, in the child care example given above, child care facilities are a matter of concurrent competence between national and provincial government. To the extent that either level of government (but most likely the national sphere) has legislated in the area, a municipality investigating the provision of child care facilities may be involved in implementing legislation as well as exercising its executive authority under Part B. To the extent a municipality’s decision involves the implementation of legislation from another level of government, the decision will be administrative action under the AJA.

decisions of municipal administrators with regard to both Part B local government matters and the implementation of national, provincial and local legislation.

Legislative functions of Parliament, a provincial legislature or a municipal council

The rationale for this exclusion stems from the separation of powers doctrine: the law-making and administrative processes of government are constitutionally distinct, and subject to different mechanisms and standards of control. The right to just administrative action, designed as it is to control the power of administrative officials and institutions, therefore has no bearing on the deliberative legislative process of democratically elected bodies. [2.20]

In the *Fedsure* case⁵⁹ the Constitutional Court held that budgetary resolutions made by a municipality were legislative action and not administrative action for purposes of s 24 of the interim Constitution. The reason was that the resolutions were taken by an elected, deliberative legislative body established by the Constitution itself. They therefore had to be regarded as original and not delegated legislation and were therefore not subject to the right of just administrative action. *Fedsure* therefore distinguishes between those decisions of a legislature which are deliberated upon in the exercise of the constitutionally apportioned legislative authority and those decisions which are not. Along similar lines, in the *Ed-U-College* case the passing of budget legislation allocating and appropriating public money was held to be legislative and not administrative action.⁶⁰

This exclusion does not mean that all action by legislative bodies is excluded from the AJA definition of administrative action. As with the other exclusions, this exclusion covers only certain types of action by legislatures. Other non-legislative action, such as the implementation of legislation in the hiring or firing of staff, for example, would fall within the AJA definition of administrative action.

Judicial functions of the judiciary, traditional leaders and Special Tribunals

The rationale for this exclusion once again stems from the separation of powers doctrine. The right of administrative justice is neither necessary nor appropriate to ensure the legality, fairness and reasonableness of the exercise of judicial authority. Other constitutional and legal mechanisms ensure the maintenance of these values.⁶¹ [2.21]

⁵⁹ Note 2 above.

⁶⁰ Note 2 above, paras 11–14.

⁶¹ *Carephone (Pty) Ltd v Marcus* NO 1999 (3) SA 304 (LAC).

[2.22]

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In *Nel v Le Roux NO*⁶² the Constitutional Court decided that the summary sentencing procedure provided for in s 205 of the Criminal Procedure Act 51 of 1977 is 'judicial' rather than 'administrative' in nature. The court reasoned that the procedure was conducted by a judicial officer and was subject to constitutional control through the ordinary rules for criminal appeals rather than through the right of administrative justice.

[2.22] Traditional leaders have the power to adjudicate civil claims arising in customary law and to try minor offences under common or customary law. The Black Administration Act 38 of 1927 (and similar provisions in TBVC legislation) authorises recognised chiefs to hold court and to hear and determine such claims within their area of jurisdiction.⁶³ A transitional provision of the interim Constitution — s 181(1) — provided for the continued recognition of chiefs' courts by continuing the existing powers and functions of traditional authorities recognised by law immediately before the commencement of the Constitution. Item 16 of Schedule 6 of the 1996 Constitution similarly provides for the continued functioning of chief's courts by providing that 'every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it'.⁶⁴

The exclusion of the judicial functions of traditional leaders from the scope of the AJA will need to be interpreted with care. As indicated above, part of the Constitutional Court's rationale for the non-application of the right of administrative justice to the exercise of the judicial function in *Nel v Le Roux*⁶⁵ was the existence of safeguards in the constitutional regulation of the appointment process of judicial officers and the constitutional guarantee of judicial independence. Arguably, this regulation is less

⁶² *Nel v Le Roux NO* 1996 (3) SA 562 (CC) para 24.

⁶³ In terms of s 12(1) of the Black Administration Act 38 of 1927 chiefs' and headmen's courts may hear and determine 'civil claims arising out of Black law and custom' brought by 'Blacks against Blacks resident within [their] area of jurisdiction'. In terms of s 20(1)(a) traditional leaders may try and punish minor offences in common, customary and statutory law, provided the accused was a black person or the offence was suffered by a black person.

⁶⁴ The future of the chiefs' courts is currently the subject of an investigation by the South African Law Commission. SA Law Commission Discussion Paper 82 *Traditional Courts and the Judicial Function of Traditional Leaders* (May 1999). The initial recommendations of the Commission were that chiefs' and headmen's courts should be retained, with more or less the same jurisdiction as they currently have. While chiefs would continue to preside over the courts, the Commission recommended a degree of popular control over the appointment or election of councillors to sit with a chief.

⁶⁵ Note 62 above.

extensive in the case of traditional leaders⁶⁶ and correspondingly greater care should be taken in determining the ambit of the judicial function of such traditional leaders excluded from the AJA definition of administrative action.

Decisions to institute or continue a prosecution

The rationale for this exclusion is pragmatic. According to the SA Law Commission in its *Report on Administrative Justice*: 'This exemption, though controversial, is designed to avoid a multiplicity of hearings about the "merits" of criminal charges, which must be determined at the trial and through the antecedent steps envisaged by the Criminal Procedure Act 51 of 1977.'⁶⁷ As Pfaff & Schneider put it, 'the Law Commission had it in mind to exclude those decisions that were scrutinized by a court in the course of a criminal trial anyway'.⁶⁸ [2.23]

The effect of the exclusion is to relieve prosecutors of the specific duties of following the procedures outlined in AJA s 3. This exclusion is one of the policy choices made by Parliament in the enactment of the AJA. While this exclusion does not have a specific constitutional basis in the same way as the exclusion of executive, legislative and judicial functions do, there is some constitutional recognition and regulation of the prosecutorial function by virtue of s 179. Section 179(2)–(5) prescribe various rules and procedures for the exercise of the prosecutorial function and could be seen to provide an alternative source of constitutional accountability and responsiveness to the right of administrative justice. While we have classified it as one of the Act's justifiable legislative policy exclusions, it is one close to the line of constitutionality.

In any case, what the exclusion does not do is to place prosecution decisions beyond review entirely. As the Law Commission points out, there is a separate body of law applying to prosecution decisions. This turns on the reviewable discretion given to prosecutors by legislation (currently the National Prosecuting Authority Act 32 of 1998). In

⁶⁶ See, however, *Bangindawo v Head of the Nyanda Regional Authority* 1998 (3) SA 262 (Tk), defending the independence and impartiality of traditional courts, set up under old Transkei laws. The court held (327D) that that is 'no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting' since the 'believers in and adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial functions'.

⁶⁷ SA Law Commission (n 46 above) 17. The Commission cited *Wiseman v Borneman* [1971] AC 297 (HL) and *Park-Ross v Director: Office for Serious Economic Offences* 1998 (1) SA 108 (C) paras 14–25.

⁶⁸ Pfaff & Schneider (n 55 above) 22. The authors interpret this to exclude also decisions *not* to prosecute or *not* to continue with prosecution. Given the definition of 'decision', this is a reasonable interpretation of the Act.

Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order the High Court held that limited judicial review of such decisions was available.⁶⁹ Prosecutorial decisions can be reviewed for legality as a direct constitutional matter, rather than as an AJA matter. The effect of the exclusion therefore is not to make prosecution decisions unreviewable, but rather to make them unreviewable under the AJA.

Decisions of the Judicial Service Commission

[2.24] The rationale for the exclusion of decisions by the Judicial Service Commission is not clear. In all likelihood it was motivated by the apparent proximity of such decisions to the exercise of judicial authority.⁷⁰ This is not, however, a particularly convincing justification. The JSC is an organ of state, with powers granted by legislation. Even though some of its members are members of the judiciary, the Commission does not perform judicial functions. Certainly, JSC decisions are administrative action under s 33 of the Constitution and the exclusion in the AJA is therefore a narrowing of the scope of the right. This exclusion should be restrictively interpreted as far as possible to reduce the under-inclusiveness of the AJA. While the deliberative process of the JSC should be protected and be subject only to the safeguards of legality provided for in the Constitution, other aspects of its operation should be subject to the right to administrative justice.

In any case, it should be noted that the JSC has other functions besides the appointment of judges (notably making findings of incapacity, gross incompetence and gross misconduct in terms of s 177 of the Constitution). It is significant that these functions are not enumerated within the specific exclusion. To the extent that the exercise of these powers is a not a decision 'relating to any aspect regarding the appointment of a judicial officer', those decisions are administrative action subject to the AJA.

⁶⁹ *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* 1994 (1) SA 387 (C). In this case the court held that s 3 of the Criminal Procedure Act 55 of 1977 (now repealed — the predecessor of similar provisions in Act 32 of 1998), which provides that the Attorney-General 'shall have authority to prosecute', confers a 'wide discretion' on prosecutors. 'It is not, however,' the court continued, 'a discretion which is beyond the jurisdiction of the Court. Thus, if the Attorney-General has exercised his discretion in a way which would be regarded, in terms of *Shidiack v Union Government (Minister of Interior)* 1912 AD 642, as improper, that exercise of discretion is assailable in the Supreme Court.'

⁷⁰ If this is so, it is difficult to understand why appointment decisions by the Magistrates Commission are not similarly exempted. The Law Commission's *Report* (n 46 above) 17n8 is not particularly helpful: 'This exemption was added by the SALC, by virtue of what it sees as the particular constitutional status of the JSC.'

Decisions under the Promotion of Access to Information Act

This exclusion immunises decisions under the Access to Information Act 3 of 2000 from review under the AJA and exempts decisions by information officers from the procedural requirements of the AJA. This is a decision Parliament is competent to make. The Information Act contains its own review mechanisms, reason-giving requirements, and procedures for the consideration of requests for information. Since, arguably, the Information Act provides internally for the lawfulness, reasonableness and procedural fairness of decisions made under the Act, it is justifiable to simplify matters by excluding the AJA from operating additionally in respect of such decisions. Particularly in view of the specific constitutional command to give effect to the right of access to information, it is arguable that this exclusion does not need to be restrictively interpreted. Instead, it is Parliament's function to determine how the AJA and its cognate legislation, the Information Act, can most effectively function together.⁷¹ [2.25]

Decisions taken, or failure to take a decision, in terms of s 4(1) of the AJA

Section 4(1) gives administrators a discretion to choose a particular procedure to follow before making a decision affecting the public. The exclusion seems to be aimed at preventing review of this choice.⁷² [2.26]

The exclusion of s 4(1) from AJA administrative action does not remove the statutory obligation placed on administrators by the subsection itself to take such a decision. Instead, the exclusion simply means that there is no remedy available through the institutions of the AJA to someone aggrieved by a particular s 4(1) decision, nor a right to be provided with reasons for such a decision.

Made by an organ of state or by a private person exercising public power

The next step in analysing administrative action is to determine the entities that are capable of performing administrative action. This element defines administrative action with respect to the person performing administrative action rather than with respect to the subject-matter of the administrative action or with respect to the consequences or effect of the administrative action.⁷³ [2.27]

⁷¹ See Pfaff & Schneider (n 55 above) 23.

⁷² See further the discussion in para 4.12 below.

⁷³ As discussed in para 2.37 below, it should also be noted that the Minister has the power in terms of s 2(1) to exempt a specific instance of administrative action or a group or class of administrative action from the provisions of ss 3, 4 or 5. One of the mechanisms for this could be the exemption of a class of administrators.

The AJA defines administrative action to be ‘any decision . . . by (a) an organ of state, when — (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function’.

As discussed above,⁷⁴ it is only a useful simplification to state that administrative action is the conduct of the public administration. Administrative action may also be taken by persons outside the public service and the public administration.

Nonetheless, the personal element of the definition of administrative action must be satisfied. Administrative action must be taken by either an organ of state or by a natural or juristic person exercising a public power or performing a public function.

As s 1(ix) of the AJA makes clear, ‘organ of state’ bears the meaning attached to it in s 239 of the Constitution. The Constitution’s definition is wide. Most pre-AJA decisions on ‘administrative action’ were confined to action by organs of state and its definition will follow general constitutional law and be relatively unproblematic in the AJA context. In any case, public bodies that do not fall within the definition of ‘organ of state’ may well be included under the second part of the AJA’s definition as a natural or juristic person exercising a public power or performing a public function. The limiting factor here is whether a natural or juristic person is, in a particular case, exercising a public power or performing a public function.

It is submitted that this element needs to be read with the determination of whether a decision is a decision of an administrative nature and specifically whether it has a public character.⁷⁵ There is, however, an added focus brought to the determination by this element. The requirement that administrative action is performed by a natural or juristic person exercising public power or performing a public function shifts the focus away from the specifics of the matter, as might be the case with the ‘decision of an administrative nature’ elements. Instead, the attention is directed towards the more general question of whether the function or power at issue is public.⁷⁶

⁷⁴ See para 2.11 above.

⁷⁵ See paras 2.10–2.12 above.

⁷⁶ Cf *SARFU* (n 4 above) para 141 (in administrative action inquiry, focus should be on nature of power exercised, not identity of actor).

There is at least one prominent example of a High Court deciding that the power exercised by a natural or juristic person was not subject to the administrative justice right. In *Bushbuck Ridge Border Committee v Government of the Northern Province* the court decided that political parties were not subject to the rules of administrative justice.⁷⁷ More recently, in *Cape Metropolitan Council*⁷⁸ the SCA found the termination of a contract by a public body to be an exercise of private power and not subject to the administrative justice rights.

It is submitted, following the *Pharmaceutical Manufacturers* decision,⁷⁹ that ‘administrative action’ for purposes of the constitutional right does not, as a general rule, include the conduct of private, non-statutory bodies that have been subjected at common law to administrative law principles, such as voluntary associations exercising contractual disciplinary powers.⁸⁰ It will, however, apply to those persons where those persons are exercising public power or performing public functions.

Administrative law has long been applied to certain decisions of so-called ‘domestic tribunals’, such as those of the Jockey Club.⁸¹ The basis for the application of administrative review in such cases has been understood to be the courts’ common-law review powers and the terms of the contract, voluntarily entered into by the parties.⁸²

Since the *Pharmaceutical Manufacturers* decision, these decisions will need to be reconsidered and reclassified. Some of them will fall under the constitutional right to administrative justice, but not all. The Act applies only to natural and juristic persons ‘when exercising a public power or performing a public function in terms of any legislation’. This indicates

⁷⁷ *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 (2) BCLR 193 (T) 200B. See further the discussion of the case by L Thornton ‘The Constitutional Right to Just Administrative Action — Are Political Parties Bound?’ (1999) 15 *SAJHR* 351 (in certain circumstances, political parties should be bound by the right to just administrative action because they are considered organs of state in some of those circumstances, and in others because the Constitution is applicable to them as juristic persons).

⁷⁸ *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* (SCA, 30 March 2001, unreported).

⁷⁹ Note 5 above.

⁸⁰ See further the discussion in para 1.25 above.

⁸¹ See, for example, *Marlin v Durban Turf Club* 1942 AD 112; *Turner v Jockey Club of SA* 1974 (3) SA 633 (A) (an implied term of a constitution of non-statutory bodies that its tribunals are obliged to observe the elementary principles of justice); *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A); *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A).

⁸² *Government of the Self-Governing Territory of KwaZulu v Mahlangu* 1994 (1) SA 626 (T) at 634F–G: ‘Many decisions were given by way of disciplinary decisions taken concerning jockeys. Those powers of review were exercised because the jockeys concerned contractually bound themselves to a club, and the contract enjoined the disciplinary body of the club to act in a particular way, for example by applying natural justice. The fons et origo of the power of review in every instance was the agreement of membership of the jockey club.’

that, while a private person or entity can be an ‘administrator’ for purposes of the Act, what is important is the *public nature of the power exercised*, rather than the person or entity exercising it. This shift from examining the private or public nature of the person to the private or public nature of the power or function is crucial. The rationale for the application of administrative justice (at least through the vehicle of the AJA and the constitutional right) cannot be the agreement of the parties nor the courts’ common-law powers of review. Instead, the question that must be answered in each instance is whether the power exercised or function performed is public. If so, the action is capable of being administrative action.⁸³

Exercise of common-law contractual powers by public bodies

[2.28] The question whether public bodies exercising common-law contractual powers are engaged in administrative action arose in *Cape Metropolitan Council v Metro Inspection Services*.⁸⁴ The Supreme Court of Appeal held that the cancellation of a contract without notice on the grounds of fraud was not administrative action contemplated by the right to administrative justice in the Constitution and that, therefore, the audi principle did not apply. The rationale for this decision turned on the equality of bargaining position of the parties. According to the court: ‘Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.’⁸⁵ The court apparently assumed that if the exercise of the contractual power had been administrative action, the public body ‘should have made full disclosure of the case upon which it proposed to act and should have given the other party a reasonable opportunity to state its case by way of written or oral representations before terminating its appointment’.⁸⁶

⁸³ See *Transnet Ltd v Goodman Bros* (n 10 above) paras 36–9 (parastatal’s tender is an exercise of public power and thus administrative action).

⁸⁴ Note 78 above.

⁸⁵ *Cape Metropolitan Council v Metro Inspection Services* (n 78 above) para 18.

⁸⁶ *Cape Metropolitan Council v Metro Inspection Services* (n 78 above) paras 8 and 20.

Cape Metropolitan Council does make it clear that any exercise of power in the making of contracts or any exercise by a public body of a statutory or regulatory power in relation to a contract or any exercise of a common-law contractual power in furtherance of a governmental policy is administrative action. This is partly because of the operation of s 217 of the Constitution (dealing with procurement) and partly because of the legislative or policy source of such powers.⁸⁷

The decision precedes the AJA, and is difficult to accommodate in the Act's framework. Because of the wording of the definition of 'empowering provision' in the AJA, the focus in *Cape Metropolitan Council* on the common-law provenance of the exercise of power makes the decision difficult (though not impossible) to reconcile with the AJA. The AJA definition of 'empowering provision' covers rules of the common law as well as legislation. One possible way to reconcile the decision with the Act would be to find that the Council's decision was not a decision 'of an administrative nature' owing to the equality of bargaining position. However, such an approach would make litigation turn on fine assessments of equality of bargaining position. Perhaps the best way to reconcile the *Cape Metropolitan Council* decision with the AJA would be through the fifth element of the definition of administrative action. The exercise of a contractual power such as the one dealt with in the *Cape Metropolitan Council* case is not an exercise of a public power.

The policy issue posed by the *Cape Metropolitan Council* case is this: what place does government contracting have in general administrative law, the new foundation of which is the AJA? There are three alternative routes to resolve this issue.

The first option is the *Cape Metropolitan Council* non-application route. Some contractual activities by public bodies in some situations would not be covered by the AJA. Such causes of action would continue to be heard in the magistrates' and High Courts as part of those courts' usual private-law jurisdiction. The substantive law applied would be the common law of contract as well as the constitutional law on procurement, as set out in s 217 of the Constitution. The law of government contracting would develop along separate tracks: procurement and exercises of statutory powers in the AJA courts and in terms of the AJA; common-law powers in the ordinary courts and in terms of the private law.

⁸⁷ *Cape Metropolitan Council v Metro Inspection Services* (n 78 above) para 15 (distinguishing the implementation of governmental policy in *Ramburan v Minister of Housing (House of Delegates)* 1995 (1) SA 353 (D)) and para 19 (distinguishing the cancellation of a contract from the making of that contract).

The second option is for administrative law to apply to public body contracting, but for its content to remain the common law of contracting. All contractual activities by public bodies would be covered by the AJA. However, one could interpret the substantive protections of the AJA to mean that the present common law of contracting applied. This route is not explored by the *Cape Metropolitan Council* court. One could argue that the requirements of procedural fairness are satisfied by the express or implied terms of a contract. This option does not require the courts to make the difficult and tenuous distinction between public body contracting governed by the common law and public law contracting governed by the procurement provisions of the Constitution and the exercise of statutory powers. The law of government contracting would develop within the AJA courts and under the AJA.

A third option is for all of public body contracting to be considered administrative action, but for the substantive law applicable to such contracting to change. In this option the existing common law of contract would be directly subject to the just administrative action right. In relation to this option it is submitted that to apply the right to procedural fairness with full force to public body contracting would hamper governmental processes unduly. It was this danger that influenced the *Cape Metropolitan Council* decision. Thus, option one or two should be preferred to option three. Nonetheless, it should be noted that as the statutory, regulatory and policy coverage of government contracting increases (as is likely in an era of privatisation), the substantive issues cannot continue to be avoided. In addressing these issues an approach based on the parameters laid down for procurement in s 217 of the Constitution rather than on the right to procedural fairness is preferable. If, for instance, a court had to determine the consistency of a contract-making process with the Constitution, it is suggested that the substantive standards of s 217(1) — ‘a system which is fair, equitable, transparent, competitive and cost-effective’ — be used rather than general procedural fairness standards.

This policy option has two particular advantages. First, government contracting presents issues that differ from those in ordinary commercial contracting. Even with arm’s length bargaining, the ability of some public bodies to alter their legal environment after the bargain has been struck means that common-law rules will not provide the certainty and stability needed for commercial activity. Secondly, AJA coverage of all government contracting would minimise the transaction costs of deciding which situations are those of arm’s-length bargaining and which are not.

Adversely affects rights

[2.29] Depending on its interpretation and application, this element could be one of the most significant restrictions on the scope of the AJA. Its presence

in the definition section and in a number of substantive sections of the AJA has enormously complicated the question of the scope of application of the Act. This element focuses on the consequence or effects of the administrative action rather than on its subject-matter or on the person performing the administrative action. This element should be read together with the seventh element of the definition (direct external legal effect).

A further difficulty is that this element has a different application in each of the substantive provisions of the AJA in which it occurs. That is, each one of ss 3, 4 and 5 further narrows s 1's definition of administrative action. Moreover, each narrowing is done in a different way. Section 3 narrows by adding a requirement that administrative action has a material effect on rights and is then broadened by the addition of legitimate expectations.⁸⁸ Section 4 narrows by adding a materially affecting requirement and by specifying that rights of the public must be affected.⁸⁹ Section 5 narrows by adding a materially affecting requirement.⁹⁰ Each one of these scope requirements will be discussed further in Chapters 3, 4 and 5 below. However, the specific scope requirements of ss 3, 4 and 5 must be read with the general definition of administrative action discussed here. Only after first passing through the gateway of s 1 can administrative action pass through the subsequent gateways of ss 3, 4 and 5.

Simply paralleling the language of the constitutional right, the Law Commission's draft Bill did not limit the scope of the rights to which it was intended to give effect. Instead, as we saw in para 1.9 above, this provision was inserted by the Parliamentary Committee relatively late in the drafting process.⁹¹

Linguistically as well as analytically, there are three components to this element 'adversely', 'affecting' and 'rights'. We will deal with each separately. Nonetheless, it is important to remember the obvious point that each component should be considered in the context of the others.

Adversely

The 'adversely' qualification narrows the field of administrative action considerably. In order to qualify as administrative action the effect of the decision must be adverse in the sense of imposing a burden or a cost. This would include decisions requiring someone to do something, to tolerate something or not to do something, and decisions limiting or removing someone's rights or making an adverse determination of rights. A positive **[2.30]**

⁸⁸ See paras 3.3–3.4.

⁸⁹ See para 4.2 below.

⁹⁰ See para 5.3 below.

⁹¹ See para 1.9 above.

[2.31]

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determination of rights, a granting of a benefit, or the removal of an encumbrance is not administrative action. With this element one needs to look at the consequences or effects of the action to decide whether it is AJA administrative action. For example, declining to grant a licence would have an adverse effect, while deciding to grant one would not.

However, even a decision to grant a benefit may in some circumstances have an adverse effect on someone other than the beneficiary. This will be the case when, for example, both X and Y apply for the same licence and the administrator decides to award it to X. From Y's perspective this is an adverse decision. Likewise, when permission is granted to X to construct a building, this decision could have an adverse effect on Y, a neighbour whose view will be blocked by the new building.

As straightforward as the adverb 'adversely' may initially appear, there will undoubtedly be cases where it is difficult to determine whether a decision is adverse to a party or not. Where there is a mixture of effects or consequences, the mixture can be adverse in the view of some and beneficial in the view of others.

Beyond the line-drawing difficulty there is also a constitutional difficulty here. The inclusion of the 'adversely' qualification is a considerable restriction of the scope of the constitutional administrative justice rights. Positive decisions are not covered by the Act and therefore do not need to comply with the Act's duties of legality, fair procedure and reasonableness.⁹² It can be argued that this provision of the AJA is under-inclusive, when compared to s 33. The problem is that the adverse effect requirement could be interpreted to exempt the broad class of beneficial government action from the scope of the constitutional right to administrative justice. For instance, it could be argued that a decision to provide welfare benefits cannot adversely affect any person. Such an interpretation should be avoided since it will require the difficult task of classifying benefits as the result of either rights or privileges.

Affects

[2.31] The verb 'affect' is ambiguous. It may mean either 'deprive' or 'determine'. Where, for example, a person applies for a licence for the first time, the refusal of the application will not deprive the applicant of any established right. The decision would, however, determine what the

⁹² The Bill drafted by the Law Commission (n 45 above) defined administrative action without reference to the positive or negative nature of the decision. The 'adverse effect' qualification was then introduced in respect of specific duties (such as the duty to use fair procedures). This did not have the effect of notionally exempting all positive decisions from the ambit of the Act.

applicant's rights are. Taking 'affect' to mean deprive (sometimes referred to in the literature as the 'deprivation theory') will cover a narrow class of administrative action.⁹³ Taking 'affect' to mean determine (the 'determination theory') will cover a much broader class of administrative action.

This difficulty in deciding how to interpret the term 'affect' is not new to South African administrative law. Our courts have wrestled with this problem for some time, particularly in determining the reach of the *audi alteram partem* rule, traditionally confined to decisions 'prejudicially affecting the property or liberty of an individual'.⁹⁴ Which of these meanings should we ascribe to the use of the word in the AJA definition of administrative action?

The Act is intended to give effect to the constitutional rights to administrative justice. The scope of administrative justice in the Constitution is unqualified by any restriction. Accordingly, we must give as wide an interpretation to the definition of administrative action in the AJA as possible. This is certainly appropriate when considering the 'gatekeeper' concept of administrative action. This term determines the scope of the Act and must thus be interpreted so that the Act will have substantial coverage. Had the Act been intended to be more restrictive it would have been a simple matter to use the words 'existing rights' instead of simply 'rights' or to use the word 'depriving' instead of 'affecting'. The 'determination' meaning, which does not restrict the application of the Act to decisions affecting established rights, is therefore preferable.⁹⁵

⁹³ Interpreted literally, it is arguable that the effect of using the term 'adversely' together with 'affect' is to signal a preference for the deprivation theory.

⁹⁴ *Minister of the Interior v Bechler* 1948 (3) SA 409 (A). See, for example, *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A) at 549, where the court applied the so-called 'deprivation theory' in interpreting 'affect': 'What happened here was that the appellant was refused the written permission which in terms of sec. 24 (1) of Act 18 of 1936 he required before he could lawfully go upon [Native Land] Trust property. He clearly had no antecedent right to go upon the property and the refusal did not prejudicially affect his property or his liberty. Nor did it affect any legal right that he already held. It can be said to have affected his rights only in the sense that it prevented him from acquiring the right to go on to the property; to the same extent but no further it may be said to have involved legal consequences to him.' See contra *Hack v Venterpost Municipality* 1950 (1) SA 172 (W) at 189–90, where the court applied the 'determination theory': 'It is suggested . . . that a body acts quasi-judicially only if its function is to deprive a subject of an existing right or to lay a charge or burden upon him. This in my view is too narrow a test. It would exclude liquor licensing boards and transportation boards which are clearly administrative boards with quasi-judicial functions . . . I think it is probably correct to say that as a general rule, a tribunal, or a body, even if administrative, must exercise its functions in a judicial or quasi-judicial way whenever it is empowered to make decisions, not in its own arbitrary discretion, but as a result of an enquiry into matters of fact, or of fact and law, and these decisions may affect the rights of, or involve civil consequences to, individuals.'

⁹⁵ See, however, Hoexter (n 21 above) 517 (given the tight-fisted nature of South African courts, it is difficult to imagine how determination theory will hold sway).

During the 1980s the courts attempted to resolve the problem of the scope of application of the audi principle by adopting neither the determination theory nor the deprivation theory. Instead, in cases where no clear rights were involved, it was held that there could nevertheless be a legitimate expectation of natural justice. In their definition of administrative action the drafters of the AJA have blocked resort to this doctrinal move. The simple textual fact is that legitimate expectations are not in the s 1 definition of administrative action.

In an influential article on the subject of the application of the audi principle, Etienne Mureinik did not defend the widest possible reading of the determination theory, but instead proposed a middle way — a ‘provisional determination theory’ — in preference to use of the doctrine of legitimate expectation.⁹⁶ Resort to the determination theory, according to Mureinik, could well ‘frustrate . . . effective government’.⁹⁷ Instead of moving outwards from the deprivation theory, the appropriate move in Mureinik’s view was for courts to work inwards from the determination theory:

Rather than work outwards from the deprivation theory, our courts might have done better to work inwards from the determination theory. The goal of fostering participation in governmental decision-making might have been served better if the courts had set themselves the task not of liberalizing the boundaries of deprivation, but of putting proper boundaries to determination. Any decision, after all, which determines what your rights are is prima facie one of importance to you. That makes it proper to ask not why you should be heard before the decision is taken, but why you should not be heard.

In respect of a particular kind of decision, there might well be a cogent case against participation: participation might frustrate expedition; it might destroy confidentiality; it might be that, within a class of decisions, so very few cases are contested that it is far more efficient to permit participation only on appeal; the interest affected might be too trivial to justify any kind of procedure, no matter how rudimentary; generally participatory process might be an undue clog on good government. Some of these kinds of arguments have been advanced with such profligacy in South Africa that our administrative lawyers now respond to them with instinctive scepticism. But it is important to remember that they have generally been put forward to justify limitations upon the already restrictive deprivation theory. As arguments to justify limitations upon the much more generous determination theory, they may be far more persuasive. In any event, that they have in the past been abused does not mean that they are bereft of validity.

⁹⁶ E Mureinik ‘Reconsidering Review: Participation and Accountability’ in H Corder (ed) (1993) *Administrative Law Reform* 35. In Mureinik’s view the doctrine of legitimate expectations had a ‘relatively accidental basis’ and left beyond the reach of natural justice many decisions that could have decisive effects on a person’s future.

⁹⁷ At 37.

It may consequently be that the best via media between the constraints of the deprivation theory and the burdens of a pure determination theory is what we might call a provisional determination theory: a theory which gives anyone affected by a decision determining his or her rights a prima facie entitlement to participate in the decision-making process; an entitlement, that is, which may be defeated by some cogent case to the contrary, but which cannot so be defeated unless the government discharges the burden of justifying that defeat. Such a theory would recognize that any person is entitled to participate in the making of any governmental decision that settles his or her rights unless there is good reason to the contrary.⁹⁸

As noted, through their continuing embrace of the doctrine of legitimate expectations⁹⁹ the common-law courts did not take up Mureinik's challenge. In this sense the drafters of the AJA have presented judicial and other statutory interpreters with a fresh opportunity. However much it may be an unintended consequence of the parliamentary contribution to the drafting process, the drafters of the AJA may have forced the courts at last to heed Mureinik's words and to work inwards from the determination theory and not outwards from the deprivation theory. It is then the provisional determination theory that we argue ought to be employed by the interpreter of the AJA in relation to its phrase 'adversely affecting rights'.

Rights

The decision must have an adverse impact on rights to qualify as administrative action, but the rights in question need not necessarily be that of the applicant. This follows from the use of the words 'rights of any person' and from the absence of any standing restrictions in the AJA.¹⁰⁰ The term 'right' is usually understood to mean an enforceable claim maintainable against a duty-holder. There are several ways in which the term 'rights' can be interpreted broadly.

⁹⁸ Ibid.

⁹⁹ See D Pretorius 'Ten Years after *Traub*: The Doctrine of Legitimate Expectations in South African Administrative Law' (2000) 117 *SALJ* 520.

¹⁰⁰ The Law Commission draft contained a definition of 'qualified litigant' which replicated the standing requirements for Bill of Rights litigation in s 38 of the Constitution. The definition was deleted by the Parliamentary Committee, which considered it unnecessary. In the absence of specific standing restrictions and because the Act gives effect to constitutional rights, the standing provisions of the Bill of Rights can be read into the Act. Following the decision of the Constitutional Court in *Ferreira v Levin* 1996 (1) SA 984 (CC), an applicant for relief under the Bill of Rights must allege the violation of a right in the Bill of Rights and have 'sufficient interest' in the outcome of the litigation. Importantly, the right that is relied on need not be the applicant's own right. See generally, J de Waal et al *The Bill of Rights Handbook* 4 ed (2001) ch 4 and para 7.2 below.

First, 'rights' is unlikely to be restricted to constitutional rights, but means rights in general — statutory and private-law rights such as contractual or delictual rights.¹⁰¹

Moreover, the Constitutional Court has indicated that a 'right', for purposes of s 24 IC, should probably be interpreted more broadly than the definition of the term in private law to include liability incurred by the state through the making of unilateral promises or undertakings.¹⁰² If this approach is followed, the term 'rights' approaches 'legitimate expectations' in its ambit.

Furthermore, it may be possible to argue that one of the rights affected in some instances is the constitutional right to just administrative action

¹⁰¹ In this regard the jurisprudence on the constitutional right of access to information 'required for the exercise or protection of any of . . . [the applicant's] rights' (s 23 of the interim Constitution) is instructive and, while not uniform, leans toward the broader interpretation. In *Uni Windows v East London Municipality* 1995 (8) BCLR 1091 (E) Leach J adopted a wide meaning of 'rights', saying the right to be protected or exercised did not have to lie against the state. In this case the applicant required the municipality to consider properly his position with respect to a potential claim against the municipality and a third party. It was held that the applicant required access to information to protect or exercise his rights as envisaged by s 23. In *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) the applicants attempted to protect their property rights by compelling the Minister to exercise his statutory powers to intervene and dissuade provincial authorities from rezoning certain land. To protect their property rights, information in possession of the Minister was held to be reasonably required.

A more restrictive approach was adopted in *Directory Advertising Cost Cutters CC v Minister for Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T). It was held that access to information could only be required from an organ of state where the information was required for the exercise of one of the applicant's fundamental rights. Since the Bill of Rights protected a lengthy list of fundamental rights, it was unlikely that the drafters would have used the word 'right' in s 23 with a wider meaning. In the opinion of the court the access to information section was included for the purpose of protecting fundamental rights. It followed, that the word 'rights' meant the rights in the Bill of Rights.

In *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) the court took the view that the decision in *Cost Cutters* on the meaning of 'rights' was 'clearly wrong' and unduly restrictive and that rights should be interpreted to include contractual or delictual rights against the state. The word should be read as having the same meaning that it bears in s 24 of the interim Constitution (the right to written reasons or to fair administrative procedures where any 'rights' have been affected or threatened) (*Cost Cutters* at 812).

¹⁰² *Premier, Mpumalanga* (n 7 above) para 31n9. The court cited, as an example, *Dilokong Chrome Mines v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A), a case concerned with a claim in terms of an export incentive scheme, the details of which had been published in the *Government Gazette*. The Appellate Division held that although no contractual relationship had been established between the appellant and the government, the state had unilaterally incurred liability by announcing the scheme. See also the obiter dictum in *Minister of Public Works v Kyalami Ridge Environmental Association* (CC, 29 May 2001, unreported) para 101: 'It may well be that persons with prospective rights such as applicants for licences or pensions, are entitled to [procedural fairness] protection, but it is open to greater doubt whether this is so in the case of persons whose interests fall short of actual or prospective rights.'

itself.¹⁰³ It is somewhat circular to use an allegation that a constitutional right is affected to cross the threshold to access the protection afforded by a statute giving effect to that same constitutional right. The Act conditions the holding of the rights it grants on adverse affect to a right. The right affected, logically speaking, must be a right other than the Act's rights. Nonetheless, given that access to the constitutional right has been limited by the statute and given that the right to just administrative action has several different components, this interpretation may be viable at least in certain instances, such as to claim the right to be given reasons.

Direct external legal effect

The 'direct external legal effect' requirement is also a late addition to the Act by the Parliamentary Committee. It did not appear in the draft Bill prepared by the Law Commission nor in the Bill introduced in Parliament. The phrase derives from art 35 of the German Federal Law of Administrative Procedure of 1976 (VwVfG). The German provision reads as follows: [2.33]

Administrative act is every order, decision or other sovereign measure taken by an authority for the regulation of a particular case in the sphere of public law and directed at immediate external legal consequences.

The general import of the provision, according to Pfaff & Schneider, is as follows: 'As a general principle, [the term "direct, external legal effect"] means that the decision may not only have an effect internally, i e within the sphere of the public administration. Instead, the decision is required to have a direct effect on a person's right by determining the scope of a specific individual right. The purpose is to avoid legal disputes with regards to measures and actions of public authorities, which may well influence the final decision, but do not determine individual rights in a binding way.'¹⁰⁴

Despite its being borrowed from German law, it will be necessary to find a South African interpretation of the phrase. It is submitted that, read in the context of the AJA, the phrase 'direct, external legal effect' is intended to capture the idea that, to qualify as administrative action, decisions must have a real impact on a person's rights. A short, obviously simplifying, interpretation goes along the following lines, tracking the three components — a decision must have a legal effect, a direct effect, and an external effect.

¹⁰³ This appears to be the rationale of *Transnet Ltd v Goodman Bros* (n 10 above) para 11 (Schutz J concurring) (separating the right to just administrative action into components and arguing that the right to be given reasons protects the right to lawful and procedurally fair administrative action). Note also *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) (the protected right is the right of access to information which enabled the requester to take the matter further).

¹⁰⁴ See Pfaff & Schneider (op cit n 55) 14–19.

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Legal effect

- [2.34]** This means that a decision must be a legally binding determination of someone's rights. In other words, a decision must establish what someone's rights are, or change or withdraw them.

Direct effect

- [2.35]** If the making of a decision requires several steps taken by administrators and only the last step is directed at a member of the public, then only the last step will have direct effect in this sense. In this case only the last decision may be considered administrative action and taken to court for judicial review. This component is an addition to the element of 'adversely affecting rights'. The idea of finality captured by 'direct effect' is implicit in that element, but was not spelled out.

External effect

- [2.36]** This means that the person affected has to be different from the organ of state (or private body exercising a public power) making the decision. This requirement will be satisfied even where members of (or persons within) such an organ of state (such as public servants, students, prisoners, etc) are concerned, if those persons are affected in their individual rights and not only through measures that are part of the daily business of the organ of state. The suspension of a public servant or failure in a final matric exam by a student affects those persons in their individual rights. However, a supervisor's instructions to a public servant to perform a specific task or a teacher's administering of a routine, not decisive, school test for students would be measures that are part of the daily business of the organ of state. 'External' should therefore not be interpreted literally. Even persons within an organisation are included if their rights or status are changed because of the action.¹⁰⁵

Ministerial exemptions

- [2.37]** It should be noted that the Minister has the power in s 2(1) to exempt a specific instance of administrative action, or a group or class of

¹⁰⁵ In *Transnet Ltd v Goodman Bros* (n 10 above) the separate opinion of Olivier JA used as a basis of defining administrative action whether or not the action 'directly related to affairs not confined to the internal affairs of Transnet'. The majority opinion 'fail[ed] to see how such a distinction is to be drawn' (Schutz JA para 9). In this dispute the majority opinion has the better view. In any case, the interpretation of the phrase 'direct external legal effect' does not map on to the distinction that Olivier JA attempts to draw.

administrative action from the provisions of ss 3, 4 or 5. One way to do this could be to designate a particular subject-matter of administrative action as exempt from the Act. Another way could be to exempt a class of administrators.

Any exemption granted by the Minister will obviously have a bearing on the scope of application of the Act since it will result in the exclusion of administrative action that would otherwise have been covered by the Act. The Act will obviously have to be read together with any regulations providing for such exemptions. In the implementation of the AJA so far it has been the policy of the Department of Justice to discourage the granting of exemptions. Although some exemptions have been requested, none have been granted.

Rule-making

Does the Act cover the making of rules?. The question may be posed either as a matter of interpretation of s 1 and the definition of administrative action or as a matter of interpretation of ss 3 and 4. It will be discussed here in the context of s 1, but the discussion is equally relevant to the interpretation of s 4. It is our view that the Act does apply to the making of rules and delegated legislation. [2.38]

The draft Bill submitted by the Law Commission clearly covered rules as well as adjudicative decisions.¹⁰⁶ However, the Cabinet and the Parliamentary Committee deleted many of the provisions relating to the Bill's coverage of rules, including its definition of a rule. Arguably, the adoption of definitions (from Australia and Germany) was partly motivated by the desire to limit the AJA's coverage of rule-making.

It is submitted that the phrase 'direct external legal effect' used in the definition of administrative action in s 1 does not prevent inclusion of rule-making within the term 'administrative action'.¹⁰⁷ However, the usual Australian understanding of the term 'decision', which is also used in the definition of administrative action in s 1, does not include rule-making (including making subordinate legislation) as indicated above. Nonetheless, as discussed above, the AJA's language should be interpreted within the context of the Act as a whole and not on the basis of specific foreign jurisprudence.¹⁰⁸

¹⁰⁶ The Law Commission's draft Bill in Discussion Paper 81 *Administrative Law* contains a definition of a rule (s 1(m)): SA Law Commission Discussion Paper 81 *Administrative Law* (February 1999).

¹⁰⁷ Pfaff & Schneider (op cit n 55) 19–21. The German Administrative Procedure Act governs the behaviour of public agencies only when they implement general policies in particular cases. It does not apply to the formulation of legal regulations and administrative guidelines.

¹⁰⁸ See paras 2.9, 2.10, 2.13 and 2.33 above.

There are several arguments in favour of interpreting the AJA to include rule-making. The notice and comment procedures of s 4 are a particularly strong indicator in favour of coverage of rule-making by the AJA. The inclusion of a section on notice and comment procedures, a set of procedures historically developed specifically to provide for public participation in rule-making, makes little sense if rule-making is not covered by the Act.

Secondly, the AJA (unlike its Australian model) is intended to give effect to constitutional rights to just administrative action. As we saw in paras 2.2 and 2.3 above, these rights have been held to apply to the making of delegated legislation. Thus, reading 'decisions of an administrative nature' too narrowly would give rise to the challenge that the AJA does not give effect to the constitutional rights.

Retrospective application of the AJA

[2.39] There are no express provisions in the Act providing for its retrospective operation.¹⁰⁹ In accordance with the ordinary rules of statutory interpretation the Act can therefore be taken to be prospective in operation. This is based on the presumption of interpretation that a statute does not have retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless a clear intention appears to the contrary.¹¹⁰

However, there is more that can be made of the issue of retrospectivity. There are two senses in which the term 'retrospective' is used.¹¹¹ The second and stronger sense of the term is used of a statute that operates as of a time prior to its enactment. A better word for this sense is 'retroactive'. There is certainly no indication that the Act has retroactive force. This means that the Act grants substantive rights and imposes duties only in respect of administrative action taken *after* commencement. Administrative action taken before commencement will be governed by the just administrative action rights in the Constitution.¹¹² For example, the Act

¹⁰⁹ It can also be noted that there are no transitional provisions in the Act. This absence may reflect the intention of the drafters to bring the Act into operation as quickly as possible and possibly also an intention to have the Act in place before the constitutional deadline of 4 February 2000.

¹¹⁰ *Peterson v Cuthbert and Co Ltd* 1945 AD 420 at 430.

¹¹¹ See the discussion in *National Director of Public Prosecutions v Carolus* 2000 (1) SA 1127 (SCA) paras 33–5 and *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission* 1999 (4) SA 1 (SCA) paras 12–14.

¹¹² More precisely, administrative action prior to 4 February 2000 is governed by the interim administrative justice clause in the Sixth Schedule to the Constitution, while administrative action taken between 4 February and 30 November 2000 (the date of commencement of the AJA) is directly governed by s 33 of the 1996 Constitution.

itself does not impose a duty on administrators to follow the procedures outlined in s 3 in relation to decisions taken before commencement of the Act.

While the Act is not retroactive in the sense that it does not apply to administrative action taken before commencement, it may still provide the best interpretation of the requirements of the constitutional right of administrative justice (the s 33 right). In this sense the Act provides an interpretation of the detail of the content of the constitutional right to administrative justice. This right (which is in some respects phrased quite differently from the right to administrative justice continued from the interim Constitution) has been in effect since 4 February 2000. From 4 February 2000 to 30 November 2000 the constitutional right to administrative justice had direct effect. In this sense, while the AJA is not retrospective itself, it may have such a substantive effect indirectly, since it can be used to interpret the content of the constitutional right of administrative justice that was in effect from 4 February 2000.

A statute may be retrospective in the weaker sense of the term when it operates prospectively, but attaches new procedural or remedial consequences to events that took place before the statute was enacted. The statute will be retrospective in this sense if it affects the way in which existing rights are enforced. For example, where administrative action taken before commencement of the AJA is challenged after commencement, do the Act's provisions relating to judicial review or its remedial provisions apply to the matter?

Generally, the courts have held that a new procedure applies to any action instituted or application initiated after the date on which an amending statute takes effect unless a contrary intention appears from the legislation. The rationale for this rule is that, by the time the action is instituted or the application initiated, the old procedure is not part of the law any more. The fact that the old procedure existed when the cause of action or the cause of the application arose does not in itself create a right to rely on procedures that no longer exist.¹¹³ In a case where legislation takes effect after an action has been instituted, the rule is that unless a contrary intention appears from the amending legislation, the existing procedure in the interests of fairness and equity remains intact.¹¹⁴

¹¹³ *Unitrans* (n 112) para 17.

¹¹⁴ Paragraphs 18–19.

In our view, the Act should be read as being neither retroactive nor retrospective in the weaker sense of the word outlined above.¹¹⁵ The Act's procedures and remedies apply only to administrative action within the scope of the Act, and therefore to decisions taken after commencement. Section 6(2) provides that 'a court has the power to judicially review an administrative action', while s 7 (procedures) and s 8 (remedies) both refer to 'proceedings for judicial review in terms of s 6(1)'. A challenge to administrative action taken before commencement will therefore be premised on an allegation of an infringement of the just administrative clause in the Constitution, and will be governed by the procedural and remedial provisions of the Constitution that pertain to direct constitutional challenges.¹¹⁶ The practical consequence is that administrative action taken between 4 February and 30 November 2000 may only be reviewed in the High Courts, the Supreme Court of Appeal and the Constitutional Court and not in the AJA courts and not in terms of the Act.¹¹⁷

¹¹⁵ It is possible to argue that, because it is legislation required by the Constitution to give effect to constitutional rights from 4 February 2000, a contrary intention can be read into the AJA. However, this argument is undercut by the fact that administrative action taking place during the period between 4 February and the commencement of the AJA is reviewable by the High Courts as a direct application of s 33 of the Constitution.

¹¹⁶ These procedures and remedies are discussed in chapters 5 and 8 of De Waal et al (n 100 above).

¹¹⁷ The concept of 'AJA courts' is discussed in para 8.2 below.