

CHAPTER 2

THE CONTEXT FOR THE DELINEATION OF ADMINISTRATIVE POWER

2.1 INTRODUCTION

This chapter describes the context within which administrative power in South Africa is exercised, and the way it is defined and delimited in legislation. That is the context within which the second aspect of the inquiry will be undertaken in chapter 3, which is to develop a theoretical framework to guide the drafting of ‘effective’ and ‘quality’ legislation that appropriately provides for the delineation of administrative power.

Legislation must be aligned with and contribute to an integrated system of administrative law. In order for drafters to develop legislation that does so, they must understand the scope and principles of administrative law.¹ Baxter distinguishes between ‘general’ principles of administrative law, which apply to regulation generally, and ‘specific’ principles, which apply to a particular area of administration.² Drafters must consistently refer to the general and the applicable specific administrative-law principles when developing legislation.

Consideration of the administrative-law framework in this chapter focuses on the control and delineation of administrative power; the constitutional basis for the transformation of administrative law;³ and the importance and impact of the incorporation of the right to just administrative action in the Constitution and the PAJA. Challenges for legislative drafters to create legislation that is aligned and integrated with the Constitution, the PAJA, original and delegated legislation are noted. The fundamental principles of administrative law that must be

¹ Cases which are relevant for the consideration of the scope of administrative law include *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*); *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC); *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (*SARFU*).

² Lawrence Baxter *Administrative Law* (1984) 2-3.

³ See Cora Hoexter ‘The Principle of Legality in South African Administrative Law’ (2004) 4 *Macquarie Law Journal* 165. See also *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); *United Democratic Movement v President of the Republic of South Africa (No. 2)* 2003 (1) SA 495 (CC).

incorporated in and given effect to in legislation are considered, which are the rule of law and the principles of lawfulness, reasonableness, and procedural fairness. The right to reasons is discussed briefly, as well as the remedy of judicial review, as these matters are dealt with significantly in the PAJA, and often do not need to be addressed in other legislation. The necessity of providing for other mechanisms for redress in addition to judicial review is highlighted.

2.2 THE DELINEATION AND CONTROL OF ADMINISTRATIVE POWER

The rule of law underpins the exercise of administrative power, which may be expressed as providing that ‘the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’.⁴ The application of the rule of law and the principle of legality is how the scope of administrative power is delineated and the exercise of administrative power is controlled.

(a) The Constitution

Constitutional supremacy is the foundation of the constitutional dispensation. The doctrine of constitutional supremacy is incorporated in s 1(c) of the Constitution as a fundamental constitutional value, and in s 2. The Constitution is the foundation and source of administrative power, and is the basis for the delineation and control of administrative power. All organs of state (and administrative officials) are bound by the Constitution, and the Constitution takes precedence over all other law. Any other source of public power must be consistent with the Constitution. All legislation, which is the primary means to confer administrative power, must be authorized by and be consistent with the Constitution.⁵ Accountability, responsiveness, and openness, which are important mechanisms for the control of administrative power, are listed as fundamental constitutional values in s 1(d). Section 1 enunciates the intention of the Constitution to establish a culture of justification and good governance.⁶

Section 33 of the Constitution, which entrenches the right to just administrative action, is central to the constitutional transformation of administrative law. This was partly achieved

⁴ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58 (*Fedsure*).

⁵ Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 26-27 and 30-31.

⁶ *Ibid* 16-19.

by entrenching rights to lawful, reasonable, and procedurally fair administrative action, which would prevent the rights from being infringed by or interfered with in other legislation. Justiciable rights are also provided to individuals to claim relief when their rights to lawful, reasonable, and procedurally fair administrative action are infringed.⁷

The Constitution has transformed South Africa's legal system that was based on parliamentary supremacy to the current regime that is based on constitutional supremacy. Administrative law has fundamentally changed, most notably in the way that administrative power is delineated. In the pre-constitutional era, administrative power was delineated primarily through legislation and the common law. The legislature, under the doctrine of parliamentary sovereignty, could in legislation grant broad administrative powers to the executive and administrators. The courts had limited powers, through the development of the common law, to exert control over the exercise of administrative power. The Constitution now constrains the scope of administrative powers that the legislature may grant, and controls the exercise of administrative power. The courts now also have a vital role to enforce the delineation of administrative power, through judicial review, including the review of legislation.⁸

The Constitutional Court, in *Pharmaceutical Manufacturers*,⁹ described the nature of the transformation in administrative law that the Constitution had brought, as follows:

‘[T]he common law principles that previously provided the grounds for review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain force from the Constitution.’¹⁰

There is now a single system of administrative law that ‘is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control’.¹¹ The advent of constitutional supremacy means that ‘the exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law.’¹² The exercise of all public power, as an aspect of the principle of legality, is subject to rationality review, which requires that decisions must be rationally connected to the purpose for which the power was granted in terms of

⁷ Iain Currie *The Promotion of Administrative Justice Act: A Commentary* 2 ed (2007) 11.

⁸ *Pharmaceutical Manufacturers* (note 1 above) para 45.

⁹ *Pharmaceutical Manufacturers* (note 1 above).

¹⁰ *Ibid* para 33.

¹¹ *Ibid* para 44.

¹² *Ibid* para 20.

legislation.¹³

The doctrine of the separation of powers is central to the delineation of administrative power. Constitutional Principle VI, which was listed in a schedule to the interim Constitution, stated that '[t]here shall be separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'. This principle is not expressly stated in the Constitution, but it underlies the constitutional dispensation.¹⁴ The doctrine recognises the critical importance of ensuring the functional independence of the executive, the legislature, and the judiciary, and the necessity of providing for appropriate checks and balances to prevent the different branches from usurping the appropriate powers of the other branches. The Constitution vests the appropriate powers and functions in the different branches.¹⁵ As stated in *Pharmaceutical Manufacturers*, administrative law is 'an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them.'¹⁶ The separation of powers must be borne in mind when drafting any provision in legislation that confers a power, function or duty, to ensure that the power, function or duty is conferred on a suitable institution or functionary, in an appropriate manner.

In the modern state, the distinction between what is the sphere of the legislature, the judiciary, the executive and the administration is not completely clear, and there is some degree of overlap between the functions of the various spheres. A 'pure' conception of the separation of powers is not present, and arguably is not workable, in practice. The separation of powers is not fixed or rigid, as the branches of government necessarily interrelate and interact.¹⁷ The way the separation of powers is reflected in legislation must, therefore, be crafted to allow a balance to be struck that is consistent with the Constitution and is implementable in practice.

¹³ Ibid paras 85-86, 89-90.

¹⁴ Iain Currie & Johan de Waal *The New Constitutional and Administrative Law* vol 1 *Constitutional Law* (2001) 91ff.

¹⁵ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 60; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 21 et seq. (*Heath*).

¹⁶ *Pharmaceutical Manufacturers* (note 1 above) para 45.

¹⁷ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 paras 109, 111. See also *De Lange v Smuts NO* 1998 (3) SA 785 CC para 60; *Heath* (note 15 above) para 21 et seq..

(b) *The rights to just administrative action*

To understand the content of the constitutional rights to just administrative action, it is necessary to consider the wording of s 33 of the Constitution. Section 33(1) refers to administrative action that is ‘reasonable’, as opposed to the wording of s 24(d) of the Interim Constitution, which provided a right to ‘administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened’. The right to ‘administrative action which is justifiable in relation to the reasons given for it’ incorporates a standard of rationality, while in s 33, the right to ‘administrative action that... is reasonable’ incorporates a standard of reasonableness review, which is a higher standard than ‘rationality’ review.¹⁸ The standard of reasonableness review is further discussed in the section on ‘Reasonableness’ below.

Section 33(3) of the Constitution requires that national legislation be enacted to give effect to the right to administrative action that is lawful, reasonable, and procedurally fair, and the right to be given reasons for administrative action. The legislation must provide for judicial review of administrative action, and impose a duty on administrators to give effect to the rights in s 33(1) and (2). Those rights are qualified in s 33(3) by the requirement that the national legislation must also ‘promote an efficient administration’.

‘Administrative action’ as contemplated under the Constitution is the exercise of public powers of an administrative nature. It is necessary to consider the conception of administrative action under the Constitution prior to the advent of the PAJA, as distinct from the consideration of ‘actions of an administrative nature’ which constitute administrative action under the PAJA (which is discussed in the section under the PAJA below), as they are not co-extensive. Administrative action under the Constitution has broadly been categorized as being distinct from legislative action and exercising ‘political judgment,¹⁹ judicial action,²⁰ and executive

¹⁸ *Bel Porto School Governing Body v Premier, Western Cape* (3) SA 265 (CC) para 46 (*Bel Porto*); *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 67.

¹⁹ See *Fedsure* (note 4 above) para 27; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 48 (*Dawood*); *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) paras 12, 14, 16 (*Ed-U-College*). See *Pharmaceutical Manufacturers* (note 1 above) para 79, where the bringing into operation a proclamation prematurely was held not to be administrative action, even though it related to the implementation of legislation. The action was seen as being more akin to legislative action, distinguishing between bringing the original legislation into operation, and the implementation of legislation. See also *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) paras 80, 83 regarding notices in terms of legislation.

²⁰ *Nel v Le Roux NO* 1996 (3) SA 562 (CC) para 24; *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 97; *Heath* (note 15 above) para 34.

action and ‘policy’ decisions.²¹ Implementing legislation and policy are actions that have characteristically been seen as being of an administrative nature, and making policy has been seen as not being of an administrative nature.²²

Determining what constitutes administrative action or other types of action may be challenging, and must be conducted on a case-by-case basis. The source of the power, the nature of the power, the subject matter, whether it involves the exercise of a public duty, and how closely related it is to policy matters, which are not administrative, or to the implementation of legislation, which is central to the exercise of administrative action, are key considerations.²³ Simply because a function is being exercised by a member of the executive, does not mean that the action is ‘executive’. What is critical to consider is the function and the nature of the power that is being exercised, and not who the functionary is. Members of the executive and the judiciary may, in certain instances, perform administrative actions.²⁴ As the separation of powers is not clear cut, and the different branches of government are interacting and are integrated, it is not surprising that it may be challenging to determine what constitutes ‘administrative action’.

(c) The PAJA

(i) Purpose, role in the administrative-law framework, and relationship with the Constitution

The PAJA was enacted to give effect to the rights to lawful, reasonable, and procedurally fair administrative action and the right to reasons as required in terms of s 33(3) of the Constitution. The Constitution and the PAJA are the foundation of administrative law, and the basis for the delineation of administrative power.²⁵ The PAJA codifies, and to an extent reforms, the

²¹ *SARFU* (note 1 above) paras 138-148 (power to appoint a commission of inquiry); *Ed-U-College* (note 19 above) paras 17, 18, 21 (which considered appropriations to the provincial education budget and the determination of the subsidy formula by the Member of the Executive Council); *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) para 27 (*Geuking*) (extradition decision).

²² Currie (note 7 above) 47-49; cf the approach in *Ed-U-College* (note 19 above) para 18, where it was noted that the formulation of policy ‘in the narrower sense’ by members of the executive may in some instances constitute administrative action.

²³ *SARFU* (note 1 above) para 143.

²⁴ *Ibid* para 141. See *Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) para 38 (*Premier, Mpumalanga*); *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC) para 24; (*Janse van Rensburg*); *Dawood* (note 19 above) para 48; *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC) para 42.

²⁵ *Fedsure* (note 4 above) 58; *Pharmaceutical Manufacturers* (note 1 above) paras 33 and 44; *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 22 (*Bato Star*); *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 101 (*Zondi*).

administrative law.²⁶ The PAJA should be interpreted in a generous and purposive manner, which, as far as possible, is co-extensive with the rights in s 33.²⁷

The PAJA applies to administrative action as defined in the Act. It must be borne in mind that there is administrative action as contemplated in s 33 of the Constitution, and actions which entail the exercise of administrative power, that may not fall within the ambit of s 33 of the Constitution or the PAJA. Constitutional review based on the principle of legality still is possible in respect of any exercise of administrative power that falls outside the scope of administrative action in the PAJA, which is discussed in the section below on drafting other legislation to integrate appropriately with the PAJA.²⁸ In *Albutt*²⁹ the Constitutional Court held that, in the circumstances of the special pardon regime that was the subject of the case, it was irrational that victims of crimes which were the subject of the pardon process had been excluded from making submissions in the process.³⁰ The court declined to consider whether the power to grant a pardon in terms of s 84(2)(j) of the Constitution constituted administrative action.³¹

It is important to note who are the bearers of the rights in terms of the PAJA. In *Gijima*,³² the Constitutional Court held that an organ of state cannot take its own decisions on review in terms of the PAJA. Organs of state are not the holders of the rights to just administrative action, but are rather the bearers of obligations to observe those rights. In giving effect to those rights, the PAJA places obligations on organs of state, and they cannot also be the beneficiaries of the legislation.³³

(ii) *Balancing the rights to lawful, reasonable and procedurally fair administrative action with the need for an effective and efficient administration*

The PAJA is intended to promote the realisation of the transformational objective of the Constitution, specifically by setting limits on and ensuring the proper exercise of public power. This involves balancing the realisation of the rights to just administrative action and the need

²⁶ *Bato Star Fishing* (note 25 above) paras 22 and 25.

²⁷ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 118 (*New Clicks*); *Grey's Marine Hout Bay v Minister of Public Works* 2005 (6) SA 313 (SCA) para 22 (*Grey's Marine*).

²⁸ Currie (note 7 above) 8.

²⁹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) (*Albutt*).

³⁰ *Ibid* para 74.

³¹ *Ibid* paras 79-83.

³² *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) (*Gijima*).

³³ *Ibid* paras 27-34.

to delineate and regulate the exercise of power so that there are not abuses of power, on the one hand, with the need for the state to have enough power to govern effectively.³⁴

The preamble of the PAJA states that, in addition to giving effect to the rights to lawful, reasonable and procedurally fair administrative action, it also seeks to promote the values of an efficient administration, good governance, accountability, openness and transparency, which are values enunciated in s 195 of the Constitution. These objectives may potentially be in tension. Processes that might promote accountability, openness and transparency might potentially reduce the efficiency of the process, for example.³⁵

This balancing is necessary in the modern state, where efficiency and effectiveness require increasing powers to be provided to the administration, as the exercise of state power cannot be efficiently or effectively managed by the legislature or the judiciary. However, powers of judicial review, oversight by the legislature, and legislated procedural and other requirements must also be included in legislation to ensure a balance between efficiency, effectiveness and legitimacy.³⁶

In other legislation, this balancing of the realisation of the rights to lawful, reasonable, and procedurally fair administrative action and the need for administrative efficiency and effectiveness must also be considered and addressed, to provide for the appropriate delineation of administrative power. Incorporating reasonableness, and proportionality as an aspect of reasonableness, in legislation may provide an appropriate balancing mechanism. This is discussed further in the section on ‘Reasonableness’ below.

(iii) *Drafting other legislation to integrate with the PAJA*

The PAJA, as the foundation of general administrative law, is supplementary to rules and principles that are set out in specific administrative law. If other legislation does not provide for specific alternative rules and procedures in relation to the exercise of administrative power, the general rules and procedures in the PAJA apply.³⁷ The legislation that provides for the

³⁴ Currie (note 7 above) 31.

³⁵ Ibid 31-33.

³⁶ Ibid 33.

³⁷ Ibid 4-5. See *New Clicks* (note 27 above) para 150 *per* Chaskalson CJ, supported at para 484 by Ngcobo J and at para 672 by Moseneke J and, where it was noted that where legislation is silent on the procedures to follow in making regulations, the applicable procedure is prescribed by s 4(1) of the PAJA. On the supplementation of the PAJA and the application of other legislation, see *Minister of Home Affairs v Eisenberg & Associates* 2003(5) SA

exercise of administrative power must provide the authority to exercise the power, as the PAJA does not provide a general authorisation for the exercise of administrative power.³⁸ Authority must be provided in all legislation for the exercise of administrative power. It must be ensured that legislation that is being developed is properly integrated with the PAJA. It must be determined whether, in relation to the subject matter of the legislation, the general rules and procedures in the PAJA should apply, or whether specific alternative procedures should be developed and included in the legislation? It must be assessed if there are any provisions in the legislation which may conflict with the PAJA. If different requirements and procedures are included in legislation, drafters must be confident that they may be justified as being ‘fair but different’ rules and procedures as referred to in ss 3(5), 4(1)(d) or 5(5) of the PAJA.

While the PAJA provides some scope for the limitation of the s 33 rights to just administrative action, this would not preclude other legislation addressing areas of specific administrative law from providing for requirements in relation to lawful, reasonable, and procedurally fair administrative action that are additional to, or potentially broader than, the scope of the PAJA. An example is the extensive dispute resolution framework established in chap VII of the Labour Relations Act 66 of 1995 (which is comprised of the Commission for Conciliation and Arbitration, specialized labour courts and the Labour Appeal Court), and chap VIII that addresses unfair dismissal and unfair labour practices.³⁹

Requirements might be imposed in relation to exercises of administrative power that do not fall within the ambit of ‘administrative action’ as defined in the PAJA, but may fall within the ambit of administrative action as contemplated in section 33 of the Constitution. In other legislation that imposes specific administrative law requirements, different but at least equally or more detailed or stringent procedures may be provided for, than the procedures in respect of procedural fairness that are contained in ss 3 and 4 of the PAJA.⁴⁰ Other legislation may require that reasons for certain decisions must be provided automatically in certain instances, and not

281 (CC) (*Eisenberg*); *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) paras 23-25, 27 (*Rustenburg Platinum*); *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 37 (*Fuel Retailers*).

³⁸ Ibid 3-4.

³⁹ The labour relations regime was considered by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) (*Sidumo*).

⁴⁰ Chaps VII and VIII of the Labour Relations Act 66 of 1995 provides a framework for dispute resolution and addressing unfair labour practices.

just on request.⁴¹ Legislation may permit a full appeal of a decision to be considered by an appeal board or Tribunal established in terms of that legislation, and not just a review.⁴²

Legislation might provide for public consultation requirements in respect of matters that do not necessarily fall within the ambit of ‘administrative action’ in terms of the PAJA, or even in terms of s 33 of the Constitution. While the status of delegated legislation as administrative action for the purposes of the PAJA was for some time not settled, recent case law has apparently settled that delegated legislation constitutes ‘administrative action’.⁴³ While delegated legislation would then fall within the ambit of the PAJA, it may be appropriate to provide for a different and extensive procedure regarding consultation and parliamentary oversight of delegated legislation, than is provided for in secs 3 and 4 of the PAJA.⁴⁴

Legislation might conceivably also provide for grounds of review, and remedies on review, in addition to those set out in ss 6 and 7 of the PAJA. Requirements might be included in other legislation to provide guidance to administrators regarding the lawful and reasonable exercise of administrative action, which is not dealt with extensively in the PAJA beyond what is provided in the review grounds in s 6, and the ability to request reasons for administrative action in s 5.

Other legislation that provides for administrative action must be read together with the PAJA, unless the provisions of the other legislation are inconsistent with the PAJA. If there is a constitutional challenge to a provision of other legislation on the basis that it violates s 33 of the Constitution, the first assessment that must be undertaken is to consider whether the provisions in question may be read in a manner that is consistent with the Constitution.⁴⁵ Any provisions that are proposed to be included in other legislation that address matters additional to, or in a manner that differs from how they are addressed in the PAJA, would need to be

⁴¹ See s 9(2) of the Financial Advisory and Intermediary Services Act 37 of 2002, where prior to potentially suspending and withdrawing a licence, notice must be given to the licensee of the intention to suspend or withdraw the licence, along with the grounds on which it is proposed to suspend and withdraw the licence, and an opportunity to make submissions must be provided before the final decision to withdraw or suspend the licence is taken.

⁴² Sections 26, 26A and 26B of the Financial Services Board Act 97 of 1990, prior to the repeal of the Act by the Financial Sector Regulation Act 9 of 2017 (‘FSRA’), provided for a full appeal of decisions in terms of legislation administered by the Financial Services Board to an appeal board established in terms of the Act.

⁴³ See *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* (2010) (3) SA 589 (SCA) para 10 (*Cable City*) and *Hospital Association of SA Ltd v Minister of Health* 2010 (10) BCLR 1047 (GNP) para 35 (*HASA*), both of which relied upon the minority judgment of Chaskalson CJ in *New Clicks* (note 27 above) para 113.

⁴⁴ See part 1 of chap 7 and s 288 of the FSRA.

⁴⁵ *Zondi* (note 25 above) paras 101-102.

subjected to these tests, to assess their compatibility with s 33 of the Constitution and the PAJA.

Legislation that is being developed must be analysed to determine which instances of the exercise of administrative power fall within the ambit of ‘administrative action’ in terms of the PAJA, and do not need to be addressed to the extent that the PAJA provides for rules and procedures. Regarding the exercise of administrative power that does not fall within the ambit of administrative action in terms of the PAJA, it must be considered what should be included in the legislation to promote the exercise of administrative power in a manner that complies with the rights to just administrative action, and the requirement of rationality.

As a result of the increasing range of matters that are subject to regulation,⁴⁶ the need to implement international standards and requirements in certain areas of activity and the increasing complexity of regulation, drafters may be involved with developing areas of specific administrative law. Specialized requirements and procedures may need to be developed for the exercise of administrative action, which may differ from the requirements and procedures that are provided in the PAJA. This is recognized and catered for in ss 3(4) and (5), 4(4), and 5(4) and (5) of the PAJA.

The PAJA does not comprehensively or exhaustively prescribe the duties of administrators regarding the lawful, reasonable, and procedurally fair exercise of public power. As has been noted in the section on the Constitution above, there are various constitutional provisions that impose duties regarding the exercise of public power, and additional duties may also be prescribed in other legislation.⁴⁷

While the PAJA provides for judicial review on specified grounds listed in s 6, other legislation may provide for the establishment of internal appeal mechanisms or tribunals that are empowered to reconsider the substance and merits of the matter.⁴⁸ While judicial review has historically been, and continues to be, an important remedy for aggrieved individuals who have been subject to unjust administrative action, judicial review is not, and should not be, the only remedy available to aggrieved persons. Other remedies available to an aggrieved person might be an appeal to a tribunal established in terms of specific legislation,

⁴⁶ For instance, public procurement, the financial sector and immigration.

⁴⁷ Currie (note 7 above) 8.

⁴⁸ Sections 26, 26A and 26B of the Financial Services Board Act 97 of 1990, prior to the repeal of the Act by the FSRA, provided for a full appeal of decisions in terms of legislation administered by the Financial Services Board, to an appeal board established in terms of the Act. Chap 15 of the FSRA establishes the Financial Services Tribunal which is empowered to reconsider decisions of the Prudential Authority and the Financial Sector Conduct Authority.

providing a complaint to the Public Protector in terms of the Public Protector Act 23 of 1994, or to an ombud scheme established in terms of specific legislation,⁴⁹ or obtaining relevant information through an application in terms of the Promotion of Access to Information Act 2 of 2000. Judicial review may be expensive and time-consuming, and should not be viewed as an ideal or the sole remedy for the correction of maladministration and violations of the rights to just administrative action.⁵⁰ Legislation should provide for other, more cost-effective and expeditious remedies for aggrieved persons, in addition to the right to apply for judicial review in terms of the PAJA. Creativity should be exercised to develop and provide for effective remedies.

Legislation other than the PAJA often specifies contraventions and offences to discourage maladministration, but may not provide for substantial measures to encourage fair, reasonable and lawful decision-making. Greater focus must be placed in legislation on providing sufficient guidance to administrators regarding the exercise of administrative power, and including measures that encourage the exercise of administrative power in a manner that is rational, and in the case of administrative action as contemplated in s 33 of the Constitution, that is lawful, reasonable, and procedurally fair. The need for individuals to make complaints to tribunals, ombud schemes or the Public Protector, or to seek judicial review, should be minimized. This is discussed further in the sections on lawfulness and reasonableness below, and in chapters 4 and 5.

The PAJA does not regulate the exercise of all administrative power, so legislation that is developed must be assessed in relation to the Constitution and the PAJA, to determine what additional measures should be included to ensure that the exercise of administrative power in terms of the legislation is appropriately delineated.

⁴⁹ See chap 14 of the FSRA, which establishes a Financial Services Ombud Schemes Council, and s 211 empowers the Ombud Council to designate an ombud scheme to deal with a complaint regarding a financial product or financial service, if there is not already a recognized or statutory ombud scheme that clearly has jurisdiction to address the complaint. A financial institution must be a member of a recognized or statutory scheme in respect of the financial products or financial services that it provides. A financial customer will always be provided access to an ombud scheme to address a complaint regarding a financial product or a financial service.

⁵⁰ Currie (note 7 above) 9.

(iv) Challenging violations of the rights to just administrative action

Central to the integration of the administrative-law framework is the relationship between the constitutional rights to just administrative action and the PAJA. Prior to the entrenchment of the rights to just administrative action in s 24 of the Interim Constitution and subsequently in s 33 of the Constitution, administrative law was entirely based in the rules and principles developed in the common law. In the period between the entrenchment of the right to just administrative action in s 33 of the Constitution, and the commencement of the PAJA, it was possible to rely directly upon the rights to just administrative action in the Constitution.⁵¹ Subsequent to the commencement of the PAJA, the rights to just administrative action may be referred to as a basis to challenge the constitutionality of the PAJA or other legislation that authorises administrative action. It may also be referred to when interpreting the PAJA and the provisions of other legislation that authorises administrative action.⁵²

In *Pharmaceutical Manufacturers*,⁵³ *Bato Star*⁵⁴ and *New Clicks*,⁵⁵ an approach was expounded that administrative law is now grounded in the Constitution and the PAJA, and generally a review application would need to be launched in terms of the PAJA. This underlines the importance of other legislation being appropriately integrated with the PAJA and the Constitution to form an integrated framework of administrative law. However, the courts have not been entirely consistent in the application of the approach, and have apparently avoided applying the approach in certain instances.⁵⁶

⁵¹ Currie (note 7 above) 2.

⁵² Ibid 35.

⁵³ *Pharmaceutical Manufacturers* (note 1 above) paras 33-45.

⁵⁴ *Bato Star* (note 25 above) paras 22-26.

⁵⁵ *New Clicks* (note 27 above) paras 436-438. See also *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 para 27 n 28 (*Motau*); *SARFU* (note 1 above) para 148; *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 52; *Comair Ltd v Minister of Public Enterprises* 2016 (1) SA 1 (GP) para 14 (*Comair*).

⁵⁶ See *Albutt* (note 33 above), where the court declined to decide the question of whether the pardoning power in issue in the case constituted administrative action (see paras 79-83), and determined the matter based on the application of legality (paras 49-51, 74); *Electronic Media Network Limited v e.tv (Pty) Limited* 2017 (9) BCLR 1108 (CC) para 22 (*Electronic Media*), where the majority judgment agreed with the Supreme Court of Appeal that since legality was triggered, it was unnecessary to consider the PAJA; *Minister of Education, Western Cape v Beauvallon Secondary School* 2015 (2) SA 154 (SCA) para 16 (affirmative action inquiry 'superfluous' in the circumstances); *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 (10) BCLR 1089 (GNP) paras 18-19; *Democratic Alliance v President of the Republic of South Africa* [2016] 3 All SA 537 (WCC) para 78; *Democratic Alliance v South African Broadcasting Corporation* [2017] 2 BLLR 153 (WCC) para 165 (unnecessary to decide unless something turns on it, for example, delay); *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Tourism and Environmental Affairs, KZN* [2017] 1 All SA 429 (SCA) (a mixed approach: PAJA applied to condonation at para 40, but legality applied in reviewing a regulation at paras 42-45);

When assessing whether there might be a violation of the rights to just administrative action in terms of other legislation that was enacted after the commencement of the PAJA, the legislation under scrutiny must be read in conjunction with the PAJA, and in a manner that is consistent with the Constitution, to the extent that is possible.⁵⁷ Currie asserts that the PAJA impliedly repealed pre-existing inconsistent legislation. The principle of interpretation that subsequent legislation repeals earlier inconsistent legislation should be applicable,⁵⁸ and the PAJA clearly intended to alter the existing law. The maxim *generalalia specialibus non derogant* (subsequent legislation dealing with a matter in general terms does not revoke prior legislation doing so specifically, except where the former intends to regulate the matter generally and exhaustively) also would suggest that the PAJA, as general legislation intended to exhaustively regulate the area of administrative law, would repeal earlier inconsistent legislation.⁵⁹ However, *Zondi* adopted an approach that pre-existing inconsistent legislation would need to be assessed in light of s 33 of the Constitution.⁶⁰ While the PAJA forms the basis of general administrative law, it does not preclude the development of specific administrative law, so the PAJA does not ‘exhaustively’ regulate ‘the whole’ of administrative law. The *general specialibus non derogant* maxim would then not apply to the PAJA. That, in turn, would be a factor urging circumspection in the application of the principle that later legislation repeals earlier inconsistent legislation.⁶¹ Whether or not pre-PAJA inconsistent provisions have been impliedly repealed, it is important to identify and amend or repeal those provisions, to prevent any possible confusion or challenges for legislative interpretation.

Can s 33 of the Constitution be relied upon to challenge administrative action as contemplated by s 33 of the Constitution, but which does not fall within the ambit of the definition of ‘administrative action’ in the PAJA? Where mandated legislation exists to give effect to a right, such as the PAJA or the Promotion of Access to Information Act 2 of 2000, it is doubtful that the constitutional provision (s 33 or s 32) might be relied upon directly without challenging relevant provisions of the legislation that seeks to give effect to the right as being

South African National Roads Agency Ltd v Cape Town City 2017 (1) SA 468 (SCA) paras 78-79 (when considering condonation, it was unnecessary to decide whether the PAJA applies).

⁵⁷ *Zondi* (note 25 above) paras 101-102.

⁵⁸ See Lourens du Plessis *Re-interpretation of Statutes* (2002) 73.

⁵⁹ George Devenish ‘The Application of the Generalia Specialibus Non Derogant Maxim in the Interpretation of Statutes’ (2005) 122 *SALJ* 72, 75.

⁶⁰ *Zondi* (note 25 above) paras 101-102.

⁶¹ Du Plessis (note 58 above).

unconstitutional.⁶² It would, however, be possible to review the exercise of administrative power that does not fall within the ambit of ‘administrative action’ in the PAJA on the basis of legality in terms of s 1(c) of the Constitution.⁶³ Legislation must include guidance regarding the exercise of administrative power that does not constitute ‘administrative action’ in terms of the PAJA, to ensure that administrative power is exercised rationally.

(v) Particularities of the structure and drafting of the PAJA

An understanding and appreciation of the particularities of the drafting of certain provisions of the PAJA is required in order to assess what should be provided for in the legislation that is being developed, so that the legislation will be appropriately integrated with the Constitution and the PAJA.

The definition of ‘administrative action’ in the PAJA is the concept that determines the scope of application of the Act. This term was not defined in s 33 of the Constitution, and the meaning of ‘administrative action’ as contemplated in s 33 had to be interpreted in jurisprudence, which considered what administrative action *is* and what it *is not*.⁶⁴ While the definition of ‘administrative action’ in the PAJA is narrower in certain respects than the concept as incorporated in s 33, the constitutional jurisprudence may also assist in understanding the content of the definition of ‘administrative action’ in the PAJA. Consistent with the approach in *Zondi*, the definition in the PAJA should be interpreted as being co-extensive with the content of the concept in the constitutional jurisprudence, as far as possible.⁶⁵ The courts have applied interpretative approaches to try and apply the principle in *Zondi* as extensively as reasonably possible to address the interpretive quirks that arise from the formulation of the definition.⁶⁶

⁶² *Ingledeu v Financial Services Board: In re Financial services Board v Van der Merwe* 2003 (4) SA 584 (CC) para 24; Currie (note 7 above) 36 and n 45.

⁶³ *Police & Prisons Civil Rights Union v Minister of Correctional Services* [2006] 2 All SA 175 (E) para 64 and n 38.

⁶⁴ Yvonne Burns *Administrative Law* 4 ed (2013) at 148. See the discussion on the consideration of ‘administrative action’ under s 33 of the Constitution in part 2.2(b) above.

⁶⁵ *Zondi* (note 25 above) paras 101-102.

⁶⁶ See *Grey's Marine* (note 27 above) para 22; *New Clicks* (note 27 above) para 446 per Ncgobo J; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 12; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 21.

For the exercise of a public power or public function to constitute administrative action, there must be:

‘(i) a decision, (ii) by an organ of State, (iii) exercising a public power or performing a public function, (iv) in terms of any legislation, (v) that adversely affects someone’s rights, (vi) which has a direct, external, legal effect, and (vii) that does not fall under any of the exclusions listed in s 1 of PAJA.’⁶⁷

The Supreme Court of Appeal in *Grey’s Marine* described the crux of the definition as being ‘a decision of an administrative nature taken by a public body or functionary’.⁶⁸ The court noted the complexity and challenges of interpreting the definition as follows:

‘The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications.’⁶⁹

It is, then, necessary to carefully examine the exceptions to the definition of ‘administrative action’, which include:

- (a) specified executive powers and functions of the national executive;⁷⁰
- (b) specified executive powers of the provincial executive;
- (c) executive powers of municipal councils;⁷¹
- (d) legislative functions of Parliament, provincial legislatures, and municipal councils;⁷²
- (e) judicial functions of the judiciary, traditional leaders and Special Tribunals;⁷³

⁶⁷ *Grey’s Marine* (note 27 above) para 21, cited with approval in *Chirwa v Transnet Ltd & Others* 2008 (4) SA 367 (CC), para 181 (*Chirwa*) and *Sokhela v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal)* 2010 (5) SA 574 (KZP) para 60 (*Sokhela*).

⁶⁸ *Grey’s Marine* (note 27 above) para 22. This approach was approved in *Motau* (note 55 above) para 116.

⁶⁹ *Ibid* para 21.

⁷⁰ See *Pharmaceutical Manufacturers* (note 1 above) para 79; *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) (*DA v President RSA*); *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) (*Masetlha*); *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *SARFU* (note 1 above) para 142.

⁷¹ See *Steele v South Peninsula Municipal Council* 2001 (4) BCLR 418 (C); 2001 (3) SA 640 (C) at 643-644.

⁷² See *Fedsure* (note 4 above), paras 27 and 42; in respect of delegated legislation, consider *Cable City* (note 43 above) para 10 and *HASA* (note 43 above) para 35, both of which relied upon the minority judgment of Chaskalson CJ in *New Clicks* (note 27 above) para 113.

⁷³ See *SARFU* (note 1 above) para 141; *Heath* (note 15 above) paras 29, 30 and 31; *De Lange v Smuts NO* (note 17 above) paras 81, 83, 150, 156 and 161; *Investigating Directorate: Serious Economic Offences v Hyundai Motors Distributors* 2001 (1) SA 545 (CC) (*Investigating Directorate*).

- (f) decisions to institute or continue a prosecution;⁷⁴
- (g) decisions of the Judicial Service Commission;
- (h) decisions in terms of the Promotion of Access to Information Act 2 of 2000; and
- (i) decisions to choose a procedure to follow to ensure procedural fairness before making a decision affecting the public in terms of s 4(1) of the PAJA.⁷⁵

Exceptions (a) to (e) listed above are roughly aligned with the constitutional separation of powers between administrative action, executive action, legislative action and judicial action. The other exemptions, (f) to (i), are types of decisions that Parliament decided should be excluded from the definition of ‘administrative action’ during the parliamentary process.⁷⁶

‘Administrative action’ in the PAJA includes a decision taken or a failure to take a decision by an organ of state, or by a natural or juristic person that is not an organ of state, ‘when exercising public power or performing a public function in terms of legislation’. If a statutory provision automatically requires an administrator to take certain action, that would not constitute a decision.⁷⁷

In *Bhugwan*,⁷⁸ it was noted that a reviewable decision would be the result of a decision-making process containing ‘all or at least some’ of the following elements:

1. A final application, request, or claim has been submitted to the authority with decision-making powers;
2. All relevant information has been gathered and placed before the decision-maker;
3. An evaluative process has been undertaken by the decision-maker to consider the information and assess the importance and relevance of the information;
4. A conclusion must be reached by the decision-maker regarding how the decision-maker’s power should be exercised; and
5. The power must be exercised based on the conclusion.⁷⁹

⁷⁴ Consider the continuing saga of *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA); *National Director of Public Prosecutions v Zuma* 2009 (4) BCLR 393 (SCA).

⁷⁵ See *Eisenberg* (note 37 above) paras 53, 55.

⁷⁶ *Currie* (note 7 above) 60-61.

⁷⁷ *Phenithi v Minister of Education* [2006] 1 All SA 601 (SCA) para 9, where the legislation deemed an employee to be dismissed, unless the employer directed otherwise. The court held that the employer had decided not to direct otherwise; cf *Armbruster v Minister of Finance* 2007 (6) SA 550 (CC) paras 44-46, where the Constitutional Court declined to hold that forfeiture of currency occurred by operation of law in those circumstances.

⁷⁸ *Bhugwan v JSE Limited* 2010 (3) SA 335 (GSJ).

⁷⁹ *Ibid* para 10, applied in *Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd* 2014 (1) SA 550 (GSJ) paras 46-47.

While all these steps frequently may not be present in a specific case, this description identifies the frequently present elements of a decision-making process.

The starting point for whether a decision is ‘of an administrative nature’ is to determine whether the action falls within the definition of administrative action in s 33 of the Constitution.⁸⁰ The boundaries of what constitutes administrative action and other types of actions by organs of state may be difficult to define clearly, and must be considered carefully on a case by case basis, taking into consideration the Constitution and the necessity of an ‘efficient, equitable, and ethical administration’.⁸¹ This assessment focuses attention on whether the activity under consideration may properly be classified as being administrative action. The Constitution distinguishes between acts that constitute administrative action and acts that do not, and the courts must assess in each case whether an exercise of public power or a performance of a public function is of an administrative nature. This assessment cannot be a mechanical exercise that involves considering if the action falls within one of the listed categories or exclusions. There must be a detailed analysis to determine the character of the action that is being undertaken, and whether it constitutes administrative action, considering the nature of the power or function and its purpose. Action must be positively identified as administrative action; a conclusion cannot be reached simply as a result that the action is not explicitly excluded.⁸²

However, it is not always clear whether a power is of ‘an administrative nature’ or is an ‘executive power’ of a ‘political’ nature. In *Motau*, the court reiterated earlier jurisprudence that it is the function, and not the functionary, that must be the focus of assessment, and it is not determinative in the analysis that it is the executive that is exercising the power or performing the function. There is no single formula that may be applied in all circumstances.⁸³

Executive powers may be characterized as being ‘high-policy’ or broad direction-giving powers. The formulation of policy and the initiation of legislation are examples of powers that are characteristically seen as ‘executive’ powers.⁸⁴ Alternatively, ‘[a]dministrative

⁸⁰ *Grey’s Marine* (note 27 above) paras 21 and 22; *Sokhela* (note 67 above) para 60; *Motau* (note 55 above) para 35; *New Clicks* (note 27 above) paras 120, 128, 467.

⁸¹ *Sokhela* (note 67 above) para 60. See also *Chirwa* (note 67 above) para 181; *Grey’s Marine* (note 27 above) para 21; *Motau* (note 55 above) para 33.

⁸² *Sokhela* (note 67 above) para 61, cited with approval in *Motau* (note 55 above) para 34.

⁸³ *Motau* (note 55 above) para 36; *SARFU* (note 1 above) paras 141, 143.

⁸⁴ See *Ed-U-College* (note 19 above) para 18 and *SARFU* (note 1 above) para 142; *Motau* (note 55 above) para 37.

action is . . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.⁸⁵ Administrative powers may be characterized as being generally lower-level powers, which are exercised after policy has been formulated. Implementing legislation is a central aspect of administrative power, and the use of the verb ‘implement’ in section 85(2)(a) of the Constitution, which distinguishes that provision from s 85(2)(e), is useful to refer to as a guide. Administrative powers generally involve the application of policy to specific factual circumstances.⁸⁶ When assessing the nature of a power, it is useful to consider how closely the decision is related to either the formulation of policy, or its application. A power that is more closely related to the formulation of policy frequently would be characterized as being an executive power, while one that is closely related to the application of policy would likely be characterized as being administrative.⁸⁷

Some guidelines may be gleaned from the jurisprudence. First, it is helpful to consider the source of the power.⁸⁸ Where a power flows directly from the Constitution, this might indicate that it is executive rather than administrative in nature, as administrative powers are ordinarily sourced in legislation.⁸⁹ It must be borne in mind, however, that while it is more common that administrative powers arise in legislation, powers may arise from various sources, including the Constitution, and executive powers may be sourced in legislation.⁹⁰ A second important point that should be considered, is the constraints that are imposed on the power. If the scope of a functionary’s power is carefully delineated by legislation, that might indicate that the power is administrative in nature.⁹¹ When a discretion is broad, it may indicate that the power is similar to the formulation of policy. However, it must be borne in mind that the scope of the discretion may be related to the complexity of the circumstances in which the discretion must be exercised. It would be important to consider the context of the exercise of

⁸⁵ *Grey’s Marine* (note 27 above) para 24. See also *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) (ARMSA) para 43; *Motau* (note 55 above) para 37.

⁸⁶ *Motau* (note 55 above) para 37.

⁸⁷ *Motau* (note 55 above) para 38; *SARFU* (note 1 above) para 142.

⁸⁸ *Ibid* para 39; *SARFU* (note 1 above) para 143; *Masetlha* (note 70 above) paras 65, 69-70 and 75-76.

⁸⁹ *Motau* (note 55 above) para 40; *Ed-U-College* (note 19 above) para 21.

⁹⁰ *Ibid* para 40.

⁹¹ *Ibid* para 41; *Ed-U-College* above n 34 at para 21.

the discretion.⁹²

It must also be considered whether it is appropriate for the exercise of the power to be subject to the higher level of scrutiny of administrative-law review. It may not be appropriate if the power relates to a sensitive subject matter or a policy matter which warrants a greater degree of deference. Administrative-law review may not be appropriate where the power under consideration is legislative in nature and influenced by political considerations for which public officials are accountable to the electorate.⁹³

The approach of listing specific powers that are expressed in the Constitution as being excluded from the definition of administrative action does not provide a clear delineation between ‘executive’ and ‘administrative’ power. The list of powers of the national executive is open-ended, to avoid under-inclusiveness of the range of ‘executive’ powers that would be excluded from the ambit of administrative action.⁹⁴ The assessment of whether a power constitutes an executive or administrative power may require a careful assessment of the constitutional and statutory powers that are involved in the particular case, to give effect to the approaches enunciated by the courts in *Zondi* and *Motau*. This entails the application of nuanced interpretive approaches to minimize under-inclusiveness in the interpretation of the content of specified powers or the content of administrative action as a whole, and to minimize the effects of inconsistencies or other difficulties of interpretation.⁹⁵

The phrase ‘made under an empowering provision’ is defined broadly in s 1 as including ‘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 definition must not, however, be interpreted as permitting a departure from the fundamental principle that

⁹² *Motau* (note 55 above) para 42, see also paras 45-47, where it was concluded that decision of Minister to remove chair and deputy chair of board of ARMSCOR was an executive rather than an administrative decision.

⁹³ *Ibid* para 43. See also *Dawood* (note 19 above) para 53; *Fedsure* (note 4 above) paras 41, 45; *Geuking* (note 21 above) paras 26-7; *Masetlha* (note 70 above) paras 77, 86, where the majority held that the decision of the President to dismiss the head of the National Intelligence Agency constituted executive action; *ARMSA* (note 85 above) paras 42-5, where the decision of President to increase the annual remuneration of public office bearers was held to be executive action. Other cases which are relevant for considering the nature of ‘executive’ and ‘administrative’ powers and what activities fall within the scope of ‘administrative action’ include *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) (*Scalabrini*); *Comair* (note 55 above) para 26, where the Minister’s decision to issue a guarantee was held to be executive, and not administrative action; *University of Free State v Afriforum* 2017 (4) SA 283 (SCA) para 18, where the University’s executive decision to determine its language policy did not constitute administrative action.

⁹⁴ See South African Law Reform Commission *Project 115: Administrative Justice Report* (August 1999), last accessed from http://www.justice.gov.za/salrc/reports/r_prj115_aja_1999aug.pdf on 15 August 2018.

⁹⁵ For some discussion of the interpretive complexities that may arise in defining the scope of the powers that are included and exempted from the definition of ‘administrative action’, see Currie (note 7 above) 64-70; Cora Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 *SALJ* 484 at 514.

‘every administrative act must be justified by reference to some lawful authority for that act’.⁹⁶ The exercise of public power must always be authorized in terms of the Constitution or a law.⁹⁷

In terms of the PAJA, administrative action must ‘adversely affect the rights of any person’. This is reiterated, in a slightly different form, in s 3(1), where the duty of procedural fairness applies to ‘administrative action which materially or adversely affects the rights or legitimate expectations of any person’. Section 4(1) provides that requirements regarding procedural fairness in relation to administrative action that affects the public apply where the administrative action ‘materially and adversely affects the rights of the public’. Section 5(1) provides that the requirement to provide reasons applies to ‘[a]ny person whose rights have been materially and adversely affected by administrative action’. In *Grey’s Marine*⁹⁸ Nugent JA addressed the interpretive challenge raised by these different formulations as follows:

‘While PAJA’s definition purports to restrict administrative action to decisions that, as a fact, “adversely affect the rights of any person”, I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a “direct and external legal effect”, was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.’⁹⁹

This approach to addressing the interpretive challenge was also applied in *Walele*¹⁰⁰ in relation to the interpretation of s 3(1) of the PAJA. Here Jafta AJ held that he was prepared to interpret

⁹⁶ Baxter (note 2 above) 384; Burns (note 64 above) 177-178.

⁹⁷ Currie (note 7 above) 158-159.

⁹⁸ *Grey’s Marine* (note 27 above).

⁹⁹ Ibid para 23. See also *Minister of Defence v Dunn* 2007 6 52 (SCA), para 4 in respect of a decision not to appoint; *Wessels v Minister for Justice and Constitutional Development* [2009] ZAGPPHC 81 2010 (1) SA 128 (GNP) [2009] JOL 23702 (GNP) (2 June 2009) at 14 and 22 (*Wessels*), where the phrase was interpreted as being intended to convey a capacity to affect legal rights; *Kiva v Minister of Correctional Services* [2007] 1 BLLR 86 (E) paras 26-27 (*Kiva*), in relation to a decision not to promote; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 70 in respect of a refusal to register an applicant as a private security services provider. These cases support a determination approach to the interpretation of the phrase ‘adversely and materially affects’.

¹⁰⁰ *Walele v City of Cape Town* 2008 (6) SA 129 (CC) (*Walele*).

s 3(1) as conferring ‘the right to procedural fairness also on persons whose legitimate expectations are materially and adversely affected by an administrative decision’, as applying the definition of ‘administrative action’ in s 1 when interpreting s 3(1) would ‘lead to incongruity or absurdity that Parliament did not intend’.¹⁰¹ The general rule is that a definition cannot be applied if it would lead to absurd and unintended consequences.¹⁰²

The phrase ‘direct, external legal effect’ originates in German administrative law.¹⁰³ Pfaff and Schneider describe a ‘legal effect’ as occurring where there is a ‘legally binding determination of rights or duties’.¹⁰⁴ A ‘direct effect’ would entail a final decision in the decision-making process, as opposed to earlier stages or preparatory processes in the process.¹⁰⁵ An ‘external effect’ excludes measures that are taken internally within the administration.¹⁰⁶ Wolf, however, notes that this translation of the meaning of ‘direct, external, legal effect’ from the German context has created some confusion. What was meant by a ‘final’ decision is that it is the administrative act in the final form that is communicated to the addressee of the decision, and not earlier internal deliberations that may have taken place. Pfaff

¹⁰¹ Ibid para 37.

¹⁰² *Hoban v ABSA Bank Ltd t/a United Bank* 1999 (2) SA 1036 (SCA) at 1044, cited in *Walele* (note 100 above) para 37.

¹⁰³ Rainer Pfaff & Holger Schneider ‘The Promotion of Administrative Justice Act from a German Perspective’ (2001) 17 *SAJHR* 59 at 70ff.

¹⁰⁴ Ibid 72. In *Union of Refugee Women* (note 99 above) para 70, the requirement of legal effect was held to be satisfied. In *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 27, 29, it was noted that the finding that the applicant’s rights were materially and adversely affected necessarily implied that there was a direct, external legal effect. In *City of Tshwane v Nambiti Technologies* (2016) (2) SA 494 (SCA) para 24, the cancellation of a tender before adjudication was held not to constitute a direct, external legal effect. In *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited* 2017 (6) BCLR (CC) 773 (CC) paras 40-43 (*Business Zone*), the refusal by the Controller and the Minister to refer a dispute to arbitration constituted administrative action, and was not merely preliminary in nature. The refusal affected the rights of the parties of the dispute, and had a direct, external, legal effect on their legal relationship.

¹⁰⁵ Ibid. The requirement for directness was found not to be satisfied in *Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 (5) SA 161 (W) para 13 (*Metcalfe*) in respect of a set of administrative guidelines. In *Registrar of Banks v Regal Treasury Private Bank Ltd* 2004 (3) SA 560 (W) at 567G-I, a decision to apply for a winding up order for a bank was held to lack direct effect. In *Sibiya v Director-General: Home Affairs and 55 Related Cases* 2009 (5) SA 149 (KZN) para 14, failing to supply an identify document was held to affect rights and have direct legal effect. In *Sokhela* (note 67 above) paras 65-66, the suspension of members of a board impacted on their rights and had a direct effect, as they lost benefits and were unable to perform their functions. In *Oosthuizen’s Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* (2008) (2) SA 570 paras 28-9, it was held that the decision to recommend the suspension of operator cards for the transport vehicles amounted to administrative action.

¹⁰⁶ Ibid 73-74. The requirement for an external effect was found not to be satisfied in *Sasol* *ibid* or in *Botha v Matjhabeng Municipality* [2010] ZAFSHC 18 (18 February 2010) para 24, where a decision on voting procedures by a municipal council did not have an external effect. In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* (2006) 27 ILJ 2127 (LC) paras 74-75, it was noted that ‘external’ should not be interpreted as excluding actions that affect members of the public body. In *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) paras 19, 27, the court focused on the lack of ‘public impact’ of the failure to appoint or promote the appellant to an upgraded position in the police service, and was silent on the aspect of external effect.

and Schneider also failed to indicate that the ‘external’ element requires that the decision be communicated to the addressee, which is an important requirement. The ‘legal effect’ is after the addressee receives the administrative act, and it becomes legally binding and enforceable.¹⁰⁷

(d) *Original and delegated legislation*

Legislation is the most important source of administrative power, and almost all administrative power has its source in legislation. The fact that legislation may be enacted, amended, and repealed, reasonably expeditiously (especially in the case of delegated legislation), and that legislation, through publication, is ‘readily accessible and knowable’, are reasons why it is the main source of administrative power.¹⁰⁸ However, legislation is certainly not a perfect means for conferring and delimiting administrative power, as legislative language inevitably is imperfect, and often (even sometimes intentionally) contains an element of vagueness or ambiguity. This inherent challenge of language in legislation is a fundamental concern for drafters, which is examined further in subsequent chapters.¹⁰⁹

2.3 FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW: LAWFULNESS, REASONABLENESS, PROCEDURAL FAIRNESS

The right to just administrative action in s 33 of the Constitution explicitly refers to three fundamental principles of administrative law: that administrative action must be lawful, reasonable, and procedurally fair. To define the scope of administrative power in a manner that is consistent with the Constitution, legislation should be created in a manner that gives effect to the fundamental principles of lawfulness, reasonableness, and procedural fairness.

(a) *Lawfulness*

Lawfulness requires that administrative actions and decisions be authorized by law, and that legislative requirements be complied with.¹¹⁰ The principle of lawfulness is congruent with the

¹⁰⁷ Loammi Wolf ‘In search of a definition for administrative action’ (2017) 33:2 *SAJHR* 314 at 332-333.

¹⁰⁸ Lourens du Plessis *Re-Interpretation of Statutes* (2002) 22. See also Baxter (note 2 above) 7ff.

¹⁰⁹ *Ibid.*

¹¹⁰ Hoexter (note 5 above) 253.

constitutional principle of legality, which is an aspect of the rule of law.¹¹¹

The right to lawful administrative action is primarily addressed in the PAJA through the inclusion in s 6 of grounds of review. There is significant scope for lawful administrative action to be promoted in other legislation that is crafted in a manner that encourages administrators to take decisions lawfully. Considering and examining the grounds of review that relate to lawfulness, which are the result of the accretion and identification over time of categories of unlawful administrative action, highlights the types of instances where unlawful administrative action most frequently arises. This experience may be drawn upon to develop legislative provisions that provide guidance to administrators, promote lawful administrative action and reduce the likelihood of unlawful administrative action. This will be explored further in subsequent chapters.

(i) Authority

Lawfulness requires that the administrator must be properly empowered to take the administrative action or decision in question. The necessary authority is generally granted under legislation. Administrators do not have any powers that are not conferred by law.¹¹² This requirement of authority is addressed in s 6(2)(a)(i) of the PAJA, which provides for the review of administrative action where the administrator ‘was not authorised to do so by the empowering provision’, and s 6(2)(f)(i) provides that administrative action may be reviewed where ‘it is not authorised by the empowering provision’. The requirement of authority might be violated if the administrator is not properly appointed or constituted.¹¹³ An administrator must be properly appointed, suitably qualified for the office, and a body taking a decision must be properly constituted when administrative action is taken.¹¹⁴

An example of legislation that has endeavoured to address many of these concerns is the Council for Medical Schemes Act 131 of 1998, which in chap 3 provides for the establishment of the Council (s 3), its constitution (s 4), who would be disqualified from membership of the Council (s 5), its powers and functions (ss 7 and 8), the establishment of committees and how meetings are conducted (ss 9 and 10). The Competition Act 89 of 1998 in part A of chap 4

¹¹¹ Ibid 254.

¹¹² See *Fedsure* (note 4 above) para 58; *AAA Investments* (note 1 above) para 68; *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) para 27; *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) para 32.

¹¹³ See *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape* 2011 (3) SA 538 (SCA) para 20.

¹¹⁴ Hoexter (note 5 above) 256.

provides for the establishment of the Competition Commission (s 19), its independence is emphasized (s 20), its functions are set out (s 21), and the process and requirements relating to the appointment of the Commissioner and Deputy Commissioner are specified (ss 22-23). Part B similarly establishes the Competition Tribunal (s 26), its functions (s 27), specifies qualifications for the appointment of a member of the Tribunal (s 28), the terms of office of members (s 29), the appointment of the Chairperson of the Tribunal (s 30), requirements for the disclosure of interests are prescribed (s 31), and part C (ss 36-39) provides for the establishment, functions, business of the Competition Appeal Court, and the term of office of judges. For certain important and specialized positions, as some of those referred to above, qualifications for appointment may be specified, and potentially procedures for appointment and removal from office.¹¹⁵ It is also helpful to address where vacancies may arise in an office, or in a decision-making process such as an adjudication.¹¹⁶

To avoid uncertainty and potential challenges, what constitutes quorum both for holding meetings and for voting should be specified, taking into consideration the nature of the body (an advisory committee, for example, may warrant different requirements in legislation compared to a tribunal or other body of a more adjudicative nature). It is common, however, to allow at least some degree of latitude for committees and other bodies to determine their procedures.¹¹⁷

A significant number of cases relating to the lawfulness of administrative action involve instances where an administrator exceeded the authority that was expressly or impliedly granted under legislation, or contravened the powers that were granted.¹¹⁸ In some instances, decisions are taken by administrators for which there is no authority at all in law.¹¹⁹ In other instances, authority to act, while not provided for in legislation, may exist in terms of a

¹¹⁵ See ss 61 and 65 of the FSRA.

¹¹⁶ Section 147 of the Criminal Procedure Act 51 of 1977, for example, provides for cases to continue if a quorum is broken owing to the death or incapacity of an assessor.

¹¹⁷ See s 66 of the FSRA; consider Baxter (note 2 above) 429; *MEC of the KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Amajuba District Municipality* [2011] 1 All SA 401 (SCA); *New Clicks* (note 27 above) para 170 et seq.

¹¹⁸ See *Minister of Correctional Services v KwaKwa* 2002 (4) SA 455 (SCA) para 36; *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 20; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 119 (*Affordable Medicines*); *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 88; *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil (Pty) Ltd* [2006] 2 All SA 17 (SCA) (*Sasol*).

¹¹⁹ See *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T) (*Rangani*); *Maluleke v MEC for Health and Welfare, Northern Province* 1999 (4) SA 367 (T); *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 (2) SA 849 (E) (*Bushula*); *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 7.

constitutional duty, or a right at common law.¹²⁰

The potential for administrators misinterpreting and perhaps unintentionally exceeding their authority may be minimized by clearly specifying in legislation the powers and the scope of the powers that are conferred. For example, it may be specified that an action (for example, a decision to terminate providing a disability grant to a person who is currently receiving a grant) may be undertaken only after a process has been followed (providing a notice to the affected grant recipient and an opportunity to make representations), and specified matters have been taken into consideration (such as the representations of the affected person and medical reports and other information regarding the person's condition).¹²¹

Mechanisms in legislation to prevent administrators intentionally exceeding their authority include providing for oversight and accountability, and specifying consequences (including administrative and even criminal sanctions). This is explored further in chapter 4, where drafting to combat corruption and maladministration is discussed.

Delegation of authority is an important consideration, as if authority has not been properly delegated, an administrator's decision or action might potentially be reviewed under section 6(2)(a)(i) of the PAJA on the basis that the administrator was not properly authorized by an empowering provision. The delegation of powers by the legislature to the executive, regulatory bodies and administrators is an important aspect of modern government.¹²² When delegating powers in legislation, provisions must be assessed to ensure that the provisions do not breach the constitutional separation of powers.¹²³

The breadth of discretionary powers that are delegated requires careful attention. It must be ensured that the scope of powers delegated is not impermissibly broad, and that there are sufficient guidelines provided for the exercise of those delegated powers. The cases of *Dawood*¹²⁴ and *Janse van Rensburg*¹²⁵ have highlighted that where a discretionary power may potentially limit fundamental rights in the Bill of Rights, it is not sufficient to assume that the

¹²⁰ See *Minister of Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) paras 40, 51 (*Kyalami*); *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA) para 11 (*Bullock*); *Grey's Marine* (note 27 above) para 26.

¹²¹ See the cases referred to in note 119 above.

¹²² *Janse van Rensburg* (note 24 above) para 25.

¹²³ See, for example, *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) paras 62-63, 173; *Ynuico Ltd v Minister of Trade and Industry* 1996 (3) SA 989 (CC); *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) paras 62, 65.

¹²⁴ *Dawood* (note 19 above) paras 48 and 54.

¹²⁵ *Janse van Rensburg* (note 24 above) para 25. See also *Affordable Medicines* (note 118 above) para 34.

power will be exercised by administrators lawfully, and in a manner consistent with, the Bill of Rights. The scope of powers that may be justified may vary from case to case. A delegation of broader powers may be justified where ‘the factors relevant to the exercise of the discretionary power are indisputably clear’ or where ‘the decision-maker is possessed of expertise relevant to the decisions to be made’.¹²⁶ It may also be necessary to delegate powers in rather broad terms, where the factors that must be taken into consideration by an administrator ‘are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance’.¹²⁷ Where a fairly broad delegation of powers is granted, and even delegated legislation also permits significant discretion, essential guidance might be provided through guidelines.¹²⁸ When discretionary power is proposed to be delegated, it should be assessed what guidance should be provided in the original legislation. Consideration might also be given to requiring or mandating the formulation of delegated legislation or guidelines to delineate and control the exercise of the power in a constitutionally compliant manner.

Legislation should provide for the necessary subdelegation of powers by the administrator to whom powers were initially delegated by the legislature. Generally, delegated power must be exercised by the administrator to whom the power has been delegated in legislation. In some instances, a power should only be exercisable by the initial delegatee (for example, certain decisions should be taken by a Minister or the head or governing body of a regulatory agency). For practical reasons, it is often necessary to enable the subdelegation of many powers to other officials. To avoid ambiguity regarding the subdelegation of powers, it is helpful for legislation to provide for an express power to sub-delegate in a delegation clause, and to specify which powers may not be subdelegated.¹²⁹ Section 79 of the Local Government: Municipal Finance Management Act 56 of 2003 contains a delegation clause that covers all aspects that it may be desirable to address. An innovative requirement that a ‘system of delegation’ be developed and implemented is included, which ensures that the process of delegation must be carefully considered in a holistic manner, and that the delegations are set down in a written document that is transparent and accessible. It may be worthwhile to require in legislation establishing a regulatory scheme that a system of delegation is required to be put

¹²⁶ *Dawood* (note 19 above) para 53.

¹²⁷ *Ibid.*

¹²⁸ *Armbruster* (note 77 above) paras 78, 80.

¹²⁹ See s 79 of the Marine Living Resources Act 18 of 1998 and s 44 of the Public Finance Management Act 1 of 1999.

in place, to ensure accountability and transparency in the exercise of powers, and to facilitate the effective implementation of the legislation and the regulatory regime. A delegation clause must specify that where a power is delegated, the delegator still retains the responsibility and accountability for the exercise of the power.

The National Treasury and the Department of Public Service and Administration developed Principles of Public Administration and Financial Management Delegations,¹³⁰ which were approved by Cabinet on 7 August 2013. This document discusses delegations and subdelegations in detail. Chapter 3 of the document sets out the legal framework within which delegations and subdelegations are made, including the Constitutional context, the PAJA, and the grounds of review under the PAJA. Delegations in terms of the Constitution, s 44 of the Public Finance Management Act 1 of 1999, and s 42A of the Public Service Act Proclamation 103 of 1994 are addressed.¹³¹ A PAJA compliance checklist and templates for delegations are included as Annexures.¹³² The roles and responsibilities of delegators and delegates are described,¹³³ as well as delegation processes¹³⁴ and principles.¹³⁵ This type of document may assist administrators, and is a useful reference for crafting legislative provisions addressing delegation and subdelegation.

An administrator who has been granted a discretionary power must exercise the power himself or herself, or through a lawfully authorized delegate. The administrator may consult or obtain advice from others,¹³⁶ but ultimately the administrator must exercise the discretion, and not abdicate it to another person, by ‘passing the buck’ to another person who is not authorized to exercise the discretion, or ‘acting under the dictation’ of another person (for example, under pressure or direction from another person). If the administrator does not properly exercise the discretion, the decision would be unlawful.¹³⁷

¹³⁰ Last accessed from <http://www.treasury.gov.za/legislation/pfma/delegations/Delegation%20Principles%20for%20Financial%20Management.pdf> on 10 August 2018.

¹³¹ Ibid chap 3 at 12-19.

¹³² Ibid Annexures A to J at 30-57.

¹³³ Ibid chap 4 at 20-26.

¹³⁴ Ibid chap 5 at 27-29.

¹³⁵ Ibid chap 5 at 30-34.

¹³⁶ And might be required to do so in certain instances. For example, public hearings might be required to be held as contemplated in section 4 of the PAJA, or an administrator might be required to take a decision ‘after consultation,’ ‘in consultation’, ‘on the advice of’, ‘on the recommendation of’ or ‘with the concurrence of’ another administrator or regulatory body.

¹³⁷ *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C) at 117F-G, citing Baxter (note 2 above) 443; *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) para 20 (*Scenematic*).

Regarding the extent of reliance that an administrator might place on the advice or recommendations of others, the administrator would need to be advised and aware of the basis on which the advice or recommendation was provided,¹³⁸ but the administrator would not have to read absolutely all the available information or avoid relying on any assistance by other officials. The administrator must, however, avoid being a ‘rubber stamp’ by relying on the advice of others to an extent that it cannot be considered that the administrator did not exercise the power. If the extent of delegation of the decision-making function through the reliance on the advice of others is relatively limited, it would likely be *intra vires*.¹³⁹

Section 6(2)(e)(iv) of the PAJA provides for judicial review if administrative action was taken ‘because of the unauthorized or unwarranted dictates of another person or body’. ‘Passing the buck’ may fall under the ‘catch-all’ ground of review of ‘the action is otherwise unconstitutional or unlawful in s 6(2)(i), by ‘unwarranted dictates’ in s 6(2)(e)(iv), or by unauthorized subdelegation in s 6(2)(a)(ii).¹⁴⁰ It may, in some instances, be difficult to determine where legitimate reliance on the recommendations of other officials becomes an unlawful abdication of authority.¹⁴¹

It may be clarified in legislation that the decision-maker cannot completely rely upon recommendations or advice received, or act under instructions received, but must take a decision after due consideration of the recommendation, advice, or other information received. This may be appropriate to emphasise, for example, where legislation provides for an advisory committee to make a recommendation to the decision-maker prior to a decision being taken, or where a decision is referred to as being taken by a decision-maker ‘on the advice’ of another administrator. Wording might be included, for example, that the decision-maker, ‘after having considered any recommendations, advice, other submissions, and all other relevant information received’ by the decision-maker, may take the decision. This would convey that the decision-maker may not abdicate the decision-making responsibility, and that the decision-maker must ultimately take the decision. With a committee, defining its function as being an advisory or decision-making body may avoid potential confusion regarding its role in the decision-making process.

¹³⁸ *Vries v Du Plessis NO 1967 (4) SA 469 (SWA)* at 481F-G.

¹³⁹ *Scenematic* (note 137 above) para 20, citing *Baxter* (note 2 above) 436.

¹⁴⁰ *Ibid*; *Hoexter* (note 5 above) 275.

¹⁴¹ See *Walele* (note 100 above) para 69 *per* Jafta AJ and para 116 *per* O’Regan ADCJ.

To minimize the prospect of unlawful dictation, the independence of an administrator or an administrative body may be emphasised in legislation. Section 20 of the Competition Act is a strong example of an ‘independence’ provision, which emphasizes the independence of the Competition Commission, and the steps that the Commissioner, Deputy Commissioners and staff must take to protect the independence of the Commission (and their independence as administrators). Other organs of state are required to assist the Commission to maintain its independence and perform its functions.

Establishing clear lines of reporting and accountability of administrators and administrative bodies in legislation also promotes independence, as it may prevent unlawful ‘meddling’. The processes and grounds for the appointment and removal of key administrators are important for promoting their independence. Providing mechanisms for reporting, oversight and accountability to Parliament may assist in detecting and hopefully addressing instances where significant decisions may have been taken under the pressure of unlawful dictation.¹⁴² Investigations by the previous Public Protector, for example, were significant in highlighting apparent instances of decisions being taken by administrators as a result of unlawful dictation.¹⁴³

The *functus officio* doctrine provides that once an administrator has taken a decision, the administrator has discharged the function, and the administrator may not then revoke, withdraw, or revisit the decision.¹⁴⁴ Where a decision in fact has been induced by fraud, other illegality, or where there was a lack of jurisdiction, an administrator may have to apply to court to have the decision set aside, which is onerous.¹⁴⁵

¹⁴² Consider, for example, scrutiny and inquiries by parliamentary committees currently into certain decisions to enter into agreements by Public Entities as defined in s 1 of the Public Finance Management Act 1 of 1999, which may have been entered into as a result of unlawful dictation, bad faith, or ulterior motive.

¹⁴³ See, for example, the Public Protector’s reports, ‘Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province’, and ‘State of Capture: Report No. 6 of 2016/2017 dated 14 October 2016 on an investigation into alleged improper and unethical conduct of the President and other state functionaries relating to the alleged improper relationships and involvement of the Gupta Family in the removal and appointment of Ministers and Directors of the State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family’s businesses’, both reports last accessed at <http://www.pprotect.org/?q=content/investigation-reports> on 15 August 2018.

¹⁴⁴ Daniel Malan Pretorius ‘The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law’ (2005) 122 *SALJ* 832.

¹⁴⁵ Hoexter (note 5 above) 277.

The Financial Services Board in *Pepcor*¹⁴⁶ had to apply to court to set aside a decision of the Registrar of Pension Funds that had been made as a result of the Registrar being misled regarding the facts of the matter. To avoid the recurrence of that type of situation, in s 95 of the Financial Sector Regulation Act 9 of 2017 ('FSRA'), an explicit power has been provided for the Prudential Authority and Financial Sector Conduct Authority to revoke decisions in limited circumstances.¹⁴⁷

Any legislative authorisation for an administrator to vary or revoke a decision must be carefully crafted to ensure constitutionality. The power of revocation must not be unlimited or too extensive, otherwise the rule of law would be violated. Procedural fairness needs to be provided for, particularly where the variation or revocation would adversely affect rights.¹⁴⁸ Section 95 of the FSRA provides in subsec (3) that a decision may not be revoked if the rights of third persons would be affected by the revocation of the decision, or if notice of proceedings in the Financial Services Tribunal to reconsider the decision has been given, or proceedings have commenced. Subsection (4) requires that before a decision to revoke a decision is taken, the person in respect of whom the decision was taken must be given notice of the intended revocation of the decision, and an opportunity to make submissions, before a decision to revoke the decision is taken.

As a power to reconsider decisions is not yet incorporated in generally applicable legislation, such as the long-awaited replacement for the Interpretation Act 33 of 1957,¹⁴⁹ it may be considered when developing legislation if it would be beneficial to include a limited power to reconsider decisions.

(ii) Jurisdiction

Jurisdiction is another important aspect of lawfulness. In terms of both the principle of legality and the PAJA, an administrator who exceeds the authority or misinterprets the powers that have been lawfully granted to the administrator, acts beyond the scope of the administrator's

¹⁴⁶ *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) paras 14, 24 (*Pepcor*).

¹⁴⁷ This section is reproduced in the Appendix.

¹⁴⁸ See *Fuel Retailers* (note 37 above); *Rangani* (note 119 above) at 392F-H; *Bushula* (note 119 above) at 854D-F.

¹⁴⁹ See South African Law Reform Commission Discussion Paper 112 (Project 25) *Statutory Revision: Review of the Interpretation Act 33 of 1957* (September 2006) paras 4.86, 4.99 et seq..

jurisdiction.¹⁵⁰ Jurisdiction defines the scope of administrative power, and this aspect of lawfulness is where legislative drafting plays a particularly important role. The grounds of review of error of law and mistake of fact provide guidance regarding aspects that should be addressed when delineating administrative power in legislation.

An error of law usually involves a misinterpretation of a legislative provision. This ground of review is covered in s 6(2)(d) of the PAJA. Both the courts and administrators must interpret legislation to determine the scope of jurisdiction that is granted by the legislation. Legislation should be drafted so that it is clear to administrators, and they may understand the scope of their jurisdiction. This also would minimize the necessity for review. Well-drafted legislation also minimizes the difficulties for the courts to interpret legislation when called upon to do so.

The entrenchment in section 33 of the Constitution of the rights to lawful and reasonable administrative action gives the courts the power to review every error of law, provided that it is ‘material’.¹⁵¹ The approach to the review for error of law at the end of the pre-constitutional era was enunciated in *Hira v Booysen*,¹⁵² where Corbett CJ held that the reviewability of an error of law depends upon whether the legislature intended the decision-maker to have exclusive authority to decide upon the question of law in the matter. That question is determined by analysing the statute conferring the decision-making power. If the tribunal ‘is merely required to decide if a person’s conduct falls within a defined and objectively ascertainable statutory criterion’, and the powers or functions are of ‘purely judicial nature’, then a court would likely not conclude that the legislature intended the tribunal to have exclusive jurisdiction to decide on the meaning of the statutory criterion under consideration.

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The current approach to whether a decision is rendered invalid owing to an error of law depends upon the materiality of the error.¹⁵⁴ An error of law is not material if it does not affect the outcome of the decision. If the decision-maker would have made the same decision on the

¹⁵⁰ Hoexter (note 5 above) 281-282.

¹⁵¹ See *Genesis Medical Scheme v Registrar of Medical Schemes and Another* 2017 (6) SA 1 (CC) para 21.

¹⁵² *Hira v Booysen* 1992 (4) SA 69 (A) at 93-94.

¹⁵³ *Ibid* at 93E-F.

¹⁵⁴ *Ibid* at 93G-H.

same facts, despite the error of law, then the error of law is not material.¹⁵⁵

The need for applications for review based upon error of law to be made to courts may be minimized by clearly defining in legislation the role of administrators and the scope of their jurisdiction, and specifying the legal requirements that administrators must abide by and apply. The issue of whether a court's or an administrator's interpretation of the law should be considered correct, would also be less likely to arise. Drafting to promote clarity, precision and unambiguity are important tools in this regard, as that may assist the intention of the legislature being conveyed, and reduce the likelihood of a 'material error' in interpretation of the law occurring.

The common-law ground of review of 'mistake of fact' is addressed in 6(2)(b) of the PAJA, which provides for judicial review where 'a mandatory and material procedure or condition prescribed by an empowering provision was not complied with'.¹⁵⁶ The common-law jurisprudence relating to 'mistake of fact' had developed an approach based on distinctions between 'jurisdictional facts' and 'non-jurisdictional facts', and also included categories of 'jurisdictional facts' (procedural and substantive facts). 'Jurisdictional facts' were required to be observed for a power to be validly exercised. If the necessary facts were not present, or if the required processes and procedures are not followed, then the exercise of the power generally would be found to be invalid by a court.¹⁵⁷ A material mistake of fact in respect of a non-jurisdictional fact was generally not subject to review, owing to a concern to carefully maintain the distinction between review and appeal. Only if a mistake of fact was a result of *mala fides*, ulterior motive, failure to apply the mind or a breach of an express statutory provision, would it be subject to review.¹⁵⁸

¹⁵⁵ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 91; this approach was also applied in *Security Industry Alliance v Private Security Industry Regulatory Authority and Others* 2015 (1) SA 169 (SCA) para 26. See also *Business Zone* (note 104 above) paras 84 to 86.

¹⁵⁶ Hoexter (note 5 above) 291.

¹⁵⁷ Ibid 290. See, in relation to jurisdictional facts, *Meyer v South African Medical and Dental Council* 1982 (4) SA 450 (T) at 454E-H; *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) paras 92-93. In respect of procedural jurisdictional facts, see *Maharaj v Rampersad* 1964 (4) SA 638 (A); *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Weneen Transitional Local Council v Van Dyk* 2000 (3) SA (N) at 444C-D; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) paras 17-20. In respect of substantive jurisdictional facts, see *Shidiack v Union Government* 1912 AD 642; *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A) at 250J-251A.

¹⁵⁸ See *De Freitas v Somerset West Municipality* 1997 (3) SA 1080 (C); *Ferreira v Premier, Free State* 2000 (1) SA 241 (O).

In *Pepcor*¹⁵⁹ Cloete JA held that s 33(1) of the Constitution and the principle of legality required that material mistake of fact should be a basis for the review of administrative decision.¹⁶⁰ It was emphasized, however, that the power to review material mistake of fact should not be permitted to blur the fundamental distinction between appeal and review.¹⁶¹ In *Dumani*¹⁶², it was emphasized that the application of the ground of review should be limited to objectively verifiable facts.¹⁶³ This approach has been applied by the courts to mistake of fact as incorporated in the ground of review in s 6(2)(e)(iii) of the PAJA (irrelevant considerations were taken into account or relevant considerations were not considered).¹⁶⁴

From a drafting perspective, it is notable that common drafting formulations in legislation were used in line with the distinction at common law between procedural and substantive jurisdictional facts, and the practice, in the pre-constitutional era, of conferring a broad scope of powers in terms of substantive jurisdictional facts, and broad subjective discretions when framing substantive jurisdictional facts. Substantive jurisdictional facts were frequently indicated in legislation by using drafting formulas such as ‘if x (the substantive jurisdictional fact is present or the procedural requirement has been satisfied), then the administrator may do y (exercise the power)’.¹⁶⁵ Subjective jurisdictional facts are frequently indicated by the use of wording such as the administrator ‘is satisfied’, ‘is of the opinion’ or ‘reasonably believes’ that a particular fact or state of affairs exists.¹⁶⁶ In the constitutional era, the jurisprudence relating to review for mistake of fact evolved, as evidenced by the judgment in *Walele*,¹⁶⁷ which involved a jurisdictional mistake of fact, where Jafta AJ noted:

‘In the past, when reasonableness was not taken as a self-standing ground for review, the City’s [decision-maker’s] *ipse dixit* could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker’s opinion is challenged on the basis that

¹⁵⁹ *Pepcor* (note 146 above).

¹⁶⁰ *Ibid* para 47.

¹⁶¹ *Ibid* para 48. See also *Government Employees Pension Fund v Buitendag* 2007 (4) SA 2 (SCA) para 12 (*GEPF*); *Dumani v Nair and Another* 2013 (2) SA 274 (SCA) paras 29-32 (*Dumani*); *Gorhan v Minister of Home Affairs and Others* (3899/2015) [2016] ZAECPHC 70 (20 October 2016) para 51 (*Gorhan*).

¹⁶² *Dumani*, (note 161 above).

¹⁶³ *Ibid* para 32, citing *Bato Star* (note 25 above) para 45.

¹⁶⁴ See *GEPF* (note 161 above) paras 9, 11, 12, 14; *Bullock* (note 120 above) para 16; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 25 and n 16 (*Oudekraal*); *Chairpersons Association v Minister of Arts and Culture* 2007 (5) SA 236 (SCA) para 48; *Chairman State Tender Board v Digital Voice Processing (Pty) Ltd* (2) SA 16 (SCA) paras 34-36 *per* Plasket AJA; *Dumani* *ibid* paras 29-32; *Gorhan* (note 161 above) *per* Plasket J.

¹⁶⁵ Hoexter (note 5 above) 290.

¹⁶⁶ *Ibid* 296-297. See also *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A); *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A).

¹⁶⁷ *Walele* (note 100 above).

the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds.’¹⁶⁸

In light of this position that all jurisdictional mistakes of fact must be judged objectively, the Office of the Chief State Law Adviser¹⁶⁹ now frequently queries provisions that use subjective language, and often requests that those provision be phrased in a more objective manner.¹⁷⁰ Wording that is more objective, and that clearly and precisely specifies the facts or describes the circumstances which must be satisfied in order for a power to be exercised, makes the decision-making process more easily assessed on review, in line with the approach in *Pepcor*.¹⁷¹ As the rationale for granting broad, minimally fettered powers and subjectively worded discretions is anathema to the foundations of the constitutional dispensation, the case law has emphasized that approaches for drafting to grant powers must significantly change.

(iii) Abuse of discretion

Another group of grounds of review relate to abuses of discretion. These are described as acting with ulterior purpose or motive, *mala fides* or bad faith, and failure to apply the mind. These grounds of review, some of which are referred to in s 6(e)(i)-(iii), (v) and (vi) of the PAJA, may also be described as aspects of rationality. Section 6(f)(ii) provides for review where the administrative action is not rationally connected to the purpose of the empowering provision, the information that is available to the administrator to consider, or the reasons given for the decision.¹⁷²

Section 6(2)(e)(ii) authorizes review for ulterior purpose or motive in terms of s 6(2)(e)(ii) of the PAJA. The principle underpinning this ground of review is that ‘powers given

¹⁶⁸ Ibid para 60. See also *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 31; *HASA* (note 43 above) para 22; *Bengwenyama Minerals v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) paras 75-78.

¹⁶⁹ The Office of the Chief State Law Adviser is responsible for vetting legislation for constitutionality, both prior to its submission to Cabinet for approval to publish the legislation for public comment, and also prior to Cabinet approving finalized legislation for tabling in Parliament.

¹⁷⁰ For example, clause 27(1) of the Insurance Bill B-1 of 2016, now the Insurance Act 19 of 2017 (Insurance Act), as tabled was amended during the parliamentary process to read ‘the Prudential Authority may suspend a licence of an insurer or controlling company in full or in part, if it appears to the Prudential Authority, *on the basis of available information*, that the insurer or controlling company—’ (emphasis added to indicate the revision that was included in light of discussions with the State Law Advisers to word the provision in a more objective manner).

¹⁷¹ See s 27 of the Insurance Act 19 of 2017 which specifies clearly the circumstances in which the Prudential Authority may suspend an insurance licence.

¹⁷² Hoexter (note 5 above) 307.

to a public body for one purpose cannot be used for ulterior purposes which are not contemplated at the time when the powers are conferred'.¹⁷³ This ground of review overlaps to some extent with s 6(2)(e)(i) of the PAJA, which allows review of administrative action taken for 'a reason not authorized by the empowering provision'.¹⁷⁴

To combat the potential for powers to be exercised for an ulterior purpose or motive, it is essential to craft the objects or purpose clause carefully, to clearly express the purpose of the legislation. The objective or mandate of administrative bodies that are established in terms of legislation should be specified, as well as the purposes for which a power conferred in legislation may be exercised (for example, by explicitly linking the exercise of the power to the object of the legislation and the objective or mandate of the administrative body concerned). Providing for oversight, reporting, and other accountability mechanisms also may promote the exercise of administrative power for proper, and not ulterior purposes. Requiring reasons to be provided for certain decisions might provide evidence that would assist on review if the actions of the administrator or the facts in the manner are inconsistent with the ostensible purpose for which the action was taken.

Section 6(2)(e)(v) of the PAJA enables the review of administrative action taken 'in bad faith', which includes fraud and dishonesty, which involves consciously or knowingly using power for prohibited ends.¹⁷⁵ Activities by members of the executive and administrators in government, ostensibly for 'lawful' purposes, but in reality for their own benefit, have serious deleterious consequences for the country as a whole, and in particular for the poorest and most vulnerable. This is a strong motivation for utilizing the scope of s 6 of the PAJA to encompass dishonesty as a ground of review.¹⁷⁶ Dishonesty may be addressed by in s 6(2)(e)(v) and s 6(2)(e)(ii) (ulterior motive), as well as s 6(2)(e)(i) (action taken 'for a reason not authorised by the empowering provision'). The catch-all ground in s 6(2)(i) may also assist.¹⁷⁷

In addition to what has been proposed in relation to drafting to address 'ulterior motive' above, combatting fraud and dishonesty requires legislation that provides for effective investigative and enforcement powers to uncover and address instances of fraud and

¹⁷³ *Orangezicht Estates Ltd v Cape Town Council* (1906) 23 SC 297 at 308. See also *Van Eck No & Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A), 997, 1000; *Rikhotso v East Rand Administration Board* 1983 (4) SA 278 (W); *Oos-Randse Administrasieraad v Rikhotso* 1983 (3) SA 595 (A).

¹⁷⁴ Hoexter (note 5 above) 310.

¹⁷⁵ *Ibid.* See *Adam's Stores (Pty) Ltd v Charlestown Town Board* 1951 (2) SA 508 (N) at 517B; *Bloem v Minister of Law and Order* 1987 (2) SA 436 (O) at 440J; *Harvey v Umhlathuze Municipality* 2011 (1) SA 601 (KZP).

¹⁷⁶ See Cora Hoexter 'Administrative Justice and Dishonesty' (1994) 111 *SALJ* 700 at 715-716.

¹⁷⁷ Hoexter (note 5 above) 312.

dishonesty, as well as strong and independent institutions. Addressing this scourge is discussed further in chapter 4, where drafting to combat corruption and maladministration is explored.

The common-law ground of review of ‘failure to apply the mind’¹⁷⁸ encompasses arbitrariness and capriciousness, bad faith, unwarranted adherence to a fixed principle, ulterior motive or improper purpose, misconception of the nature of the discretion conferred upon the administrator, and taking into account irrelevant considerations or ignoring relevant considerations. Irrelevant considerations are addressed in s 6(2)(e)(iii) of the PAJA, arbitrariness and capriciousness in s 6(2)(e)(vi), failure to take a decision in s 6(2)(g), and failure to act within a reasonable time in s 6(3). ‘Failure to apply the mind’ is not listed in s 6.¹⁷⁹

To avoid instances of an administrator failing to take a decision or consider an application, or failing to act within a reasonable time, legislation may stipulate that a decision, for example in relation to a licensing application, must be taken within a specified timeframe.¹⁸⁰ Consideration might also be given to providing that if a decision is not taken by an administrator within a reasonable time, the administrator is deemed to have taken a decision in a specified manner (for example, the administrator may be deemed to have refused an application for a licence). An applicant would not be left in limbo for an unreasonably lengthy period waiting for a decision to be taken. An applicant would also be placed in a position, on the expiry of the specified period without a decision being taken, to launch an application for review of the failure to take a decision on the application for a licence, or the effective refusal to grant a licence. Stipulating in legislative provisions the considerations which must be considered when taking a specific decision may provide guidance to administrators, and reduce the likelihood of an administrator failing to take into relevant considerations, or taking into account irrelevant considerations.¹⁸¹

To mitigate against the possibility of an administrator misconceiving the nature of the discretion conferred, the approaches proposed in relation to mistake of law and mistake of fact above are apposite. Ensuring that the nature, scope and purpose of the discretion are clearly

¹⁷⁸ *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) (*Johannesburg Stock Exchange*).

¹⁷⁹ Hoexter (note 5 above) 313.

¹⁸⁰ See s 116(3) of the FSRA.

¹⁸¹ *Ibid* s 115, which sets out relevant factors that must be considered when determining an application for a licence.

specified in legislation also assists.

Administrative action that is ‘arbitrary and capricious’ constitutes a failure to apply the mind and irrationality, and may also relate to the grounds of review of ulterior purpose, and bad faith.¹⁸² Providing adequate guidance for decision-making in legislation as has been proposed in relation to ulterior purpose and bad faith above, may reduce the likelihood of an arbitrary and capricious decision occurring.

The ground of review of fettering discretion is not listed in section 6 of the PAJA, but it may be addressed by s 6(2)(i) (‘otherwise unconstitutional or unlawful’).¹⁸³ The concern underlying fettering is that administrators may not act in a manner that prevents discretionary powers being exercised in the intended manner, either by inappropriately limiting the exercise of the power themselves, or, in the case of the instance of the related ground of review of unlawful dictation, by the dictates of some other party.¹⁸⁴ Fettering may occur as a result of rigid adherence to applying policies, guidelines and precedents, and not properly considering the matter that the administrator must deal with. While guidelines may be of significant assistance in promoting consistency and predictability in how policies are implemented,¹⁸⁵ and may provide important guidance regarding the exercise of discretion when used appropriately,¹⁸⁶ excessive rigidity in their application needs to be avoided. Consistency, predictability and efficiency must not be achieved at the expense of lawfulness, reasonableness, and fairness. An appropriate balance must be struck.¹⁸⁷ In guidelines or policies, it may be emphasized that the administrator handling a matter should consider the guidelines, but that the guidelines are not determinative of a matter, and are not a substitute for the administrator fully considering and appropriately addressing the matter. Of course, administrators understandably wish to adhere to guidelines and precedents, to avoid getting into trouble or having a matter reviewed. Appropriate training might be provided to administrators to assist them to apply guidelines to individual cases.

¹⁸² See *Johannesburg Stock Exchange* (note 178 above) at 152A-E; *Baxter* (note 2 above) 521; *RHI Joint Venture v Minister of Roads and Public Works* 2003 (5) BCLR 544 (Ck); *Mbonani v Minister of Correctional Services* [2011] ZAGPPHC 196 (5 October 2011) para 11.

¹⁸³ Hoexter (note 5 above) 319.

¹⁸⁴ *Ibid* 318-319.

¹⁸⁵ *Metcalfe* (note 105 above) 13. See also *Sasol* (note 118 above) at para 19; *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) paras 1, 10.

¹⁸⁶ The relevance of guidelines was noted in *Bato Star* (note 25 above) para 457 and *Scenematic* (note 137 above) para 17.

¹⁸⁷ Hoexter (note 5 above) 319.

Fettering may also arise by the entering into a contract that may bind future government action and fetter the government's discretion.¹⁸⁸ A test that has been applied by the courts in relation to fettering is to assess whether entering into the contract would be incompatible with the purpose of the power which the contract would fetter.¹⁸⁹ Additional factors that have been identified that are taken into consideration by the courts when considering whether a contract is fettering government discretion include the existence of an express or implied mandate to enter into a contract to exercise the power; the importance of the powers involved that potentially are being fettered; and the likelihood of fettering of government discretion actually occurring.¹⁹⁰

Section 66 of the Public Finance Management Act 1 of 1999 places significant restrictions on departments, public entities and constitutional institutions that are regulated in terms of that Act to borrow, or issue guarantees, indemnities, or security which may bind government to any future financial commitment. Prohibitions on entering into contracts are specified, and other types of transactions require approvals. These requirements are intended to ensure that any financial commitments that are entered into are not likely to compromise the ability of government to deliver on its policies and responsibilities in the future. It should be noted, though, that there are some large-scale, long-term projects that may extend beyond the five-year term of a government, in respect of which it is necessary for government to enter into financial commitments, otherwise the project cannot be undertaken.

Consideration may be given to providing in legislation (particularly in procurement legislation) appropriate requirements regarding entering into government contracts. For example, provisions might be specified that must be included in contracts entered into by government. It might be stipulated that a contract may only be entered into if it will not compromise the achievement of the objective of the legislation, or impede the ability of the administrator or administrative body responsible for implementing the legislation from complying with any legislative requirements. Specialized remedies might be developed in legislation to provide appropriate redress to other contracting parties if it transpires that a

¹⁸⁸ Ibid 322-323.

¹⁸⁹ See *SARFU* (note 1 above) para 198; *Gordon v Pietermaritzburg Msunduzi Transitional Local Council* 2001 (4) SA 972 (N) at 977-8.

¹⁹⁰ Phoebe Bolton 'Government Contracts and the Fettering of Discretion- A Question of Validity' (2004) 19 *SA Public Law* 90 at 107. See also *Southern Metropolitan Substructure v Thompson* [1997] 1 All SA 571 (W); Baxter (note 2 above) 424.

contract that was entered into that was in contravention of the requirement of no fettering by contract.¹⁹¹ Hopefully envisaged forthcoming public procurement legislation will address fettering. Section 8(1) of the PAJA may also provide some scope for courts and tribunals to make orders granting appropriate remedies in relation to fettering, by directing the administrator to act in a manner that the court or tribunal requires.¹⁹²

Fettering may also arise in relation to unauthorized or unlawful promises or assurances that may be given by an administrator. Administrators are not entitled to give any promises or assurances in advance as to how they will act, because that would fetter their discretion to act. Hoexter has proposed that applying the doctrine of legitimate expectation might provide a mechanism to provide some relief to those who have developed legitimate expectations as a result of unlawful representations or promises made by administrators.¹⁹³ Providing a procedure in legislation to address cases where an administrator made an unauthorized or unlawful promise or assurance, and remedies for persons who have suffered prejudice as a result of the promise or assurance, might assist to address this aspect of fettering. Fettering is an example of the need for creativity to develop innovative legislative provisions and remedies to effectively promote lawful administrative action and address the consequences of unlawful administrative action.

It is, finally, necessary to consider what the legal status and implications of unlawful administrative action are. In *Oudekraal*, it was held that until an unlawful administrative decision is set aside, it is in existence, and has legal consequences that cannot be ignored. Otherwise, serious consequences would arise if the subject of an administrative action might just decide whether to abide by or ignore an administrative action.¹⁹⁴ The important consideration is not whether the action was legally valid, but whether the legal validity was a precondition for subsequent actions that were taken. If the subsequent actions were dependent only upon the initial action's occurring, and not on whether the initial action was legally valid, the subsequent actions will have validity until the initial action is set aside by a court.¹⁹⁵ Where a person may be subjected to coercion to comply with an unlawful administrative act, the person might ignore the unlawful action and raise a 'defensive' or a 'collateral' challenge to

¹⁹¹ Consider Bolton, *ibid*, 107ff.

¹⁹² Hoexter (note 5 above) 323-4. See also Paul Craig *Administrative Law* 7 ed (2012) 556-558, discussing possible remedies available for this type of abuse of discretion, including damages, frustration, specialized remedies available in French law, and specialized forms of contracts.

¹⁹³ Hoexter (note 5 above) 324-325.

¹⁹⁴ *Oudekraal* (note 164 above) para 26.

¹⁹⁵ *Ibid* para 31.

the validity of the administrative action.¹⁹⁶ This approach was adopted by the Constitutional Court in *Kirland*,¹⁹⁷ where the court also emphasized that an organ of state may not simply ignore an unlawful administrative action or purport to withdraw it. The organ of state would need to rectify the situation by applying to court to review the administrative action, and the court might then make a determination, and an appropriate order to address any consequences if the administrative action is set aside.¹⁹⁸ Applying *Oudekraal* and *Kirland*, the Constitutional Court held that the appointment of Mr Abrahams as National Director of Public Prosecutions (‘NDPP’) after the constitutionally invalid removal of Mr Nxasana, the previous NDPP, was also constitutionally invalid.¹⁹⁹ While the default position in accordance with *Steenkamp*²⁰⁰ then would have been that Mr Nxasana should automatically resume office,²⁰¹ the majority judgment held that the circumstances of the case in which Mr Nxasana had accepted a payment to vacate office and was not free of blame in the manner in which he left office, and the paramount interest of restoring stability to the National Prosecuting Authority after years of instability, constituted exceptional circumstances²⁰² that justified an order that the President must appoint a new NDPP within 90 days.²⁰³

(b) Reasonableness

The right to reasonable action in s 33(1) of the Constitution is addressed only to a limited extent in the PAJA, through the ground of review in s 6(2)(h). As it is not significantly addressed in the PAJA, drafters have scope and an important role in giving effect to that right in other legislation. Giving meaningful effect to the right to reasonable administrative action in legislation requires careful consideration and creativity by drafters.

¹⁹⁶ Ibid para 32.

¹⁹⁷ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC). See also *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 85. In *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) paras 24-44, 92-152, the minority held that an unlawful act is void *ab initio*, and that to hold that it is enforceable until it is set aside offends the rule of law. The minority at para 128 stated that the majority had misapplied the principle in *Oudekraal* (note 164 above). The minority also stated at para 145 that *Kirland* went too far, and the principle that an unlawful act is valid until it is set aside creates the potential for abuse.

¹⁹⁸ *Kirland* ibid paras 100-105.

¹⁹⁹ *Corruption Watch v President of the Republic of South Africa* 2018 (10) BCLR 1179 (CC) paras 31-35 (*Corruption Watch*).

²⁰⁰ *Steenkamp* (note 66 above) para 29.

²⁰¹ *Corruption Watch* (note 199 above) para 81.

²⁰² Ibid para 87.

²⁰³ Ibid para 94.

Reasonableness review, however, is but an aspect of the right to reasonable administrative action. Consideration has not previously been given to how the right to reasonable administrative action may be given effect to through carefully crafted legislation that would provide guidance to administrators to exercise their powers and perform their functions reasonably. This is an important concern of this research, and it is an area in which drafters may make a valuable contribution to the development of administrative law.

The considerations and concerns that arise when seeking to give effect to the right to reasonable administrative action in legislation differ somewhat from the traditional concerns that have arisen in relation to reasonableness review. With reasonableness review, the concerns relate to the judiciary potentially venturing impermissibly into the terrain of the executive, and undermining the distinction between review and appeal. When drafting and enacting legislation that gives effect to the right to reasonable administrative action by guiding the exercise of administrative power, it is the legislature, and not the judiciary, that is involved, and the distinction between review and appeal does not arise. By providing guidance for reasonable administrative action in legislation, the legislature would ideally be minimising the need for reasonableness review. As the legislature is tasked with enacting legislation, which is the primary source of authority for administrative action, the legislature is within its competence.

In *Dawood*,²⁰⁴ *Janse van Rensburg*²⁰⁵ and *Walele*,²⁰⁶ the legislature was enjoined to provide appropriate guidance in the exercise of the powers that it grants to administrators, to give effect to the rights in the Bill of Rights, including the right to reasonable administrative action. The legislature must ensure that rules are ‘stated in a clear and accessible manner’,²⁰⁷ and that legislation is ‘reasonably clear and precise, enabling citizens and officials to understand what is expected of them’.²⁰⁸ The courts must interpret legislation in accordance with the Constitution,²⁰⁹ and this includes interpreting legislation in a manner that is consistent with and gives effect to the right to reasonable administrative action by administrators. Drafters who develop the legislation that is processed in legislatures, therefore, must assist in the

²⁰⁴ *Dawood* (note 19 above).

²⁰⁵ *Janse van Rensburg* (note 24 above).

²⁰⁶ *Walele* (note 100 above).

²⁰⁷ *Dawood* (note 19 above) para 47.

²⁰⁸ *Investigating Directorate* (note 73 above) para 24.

²⁰⁹ See, for example *Affordable Medicines* (note 118 above) para 36 and n31; *Zondi* (note 25 above) para 102.

fulfilment of this obligation.

This examination of reasonableness focuses on a consideration of how reasonableness is understood in the constitutional era, although reference is made to some pre-constitutional considerations relating to review for unreasonableness, which remain relevant when considering how legislation may be drafted in a manner that promotes the right to reasonable administrative action.

At common law, delegated legislation could be reviewed for unreasonableness based on vagueness or uncertainty.²¹⁰ The test for vagueness was expounded by Boome J in *R v Jopp*:²¹¹ as follows:

‘[T]he Court must first construe the bye-law or regulation, applying the usual canons of construction with no bias towards ‘benevolence’. Having ascertained the meaning, the Court must then ask itself whether the bye-law or regulation, so construed, indicates with reasonable certainty to those who are bound by it the act which is enjoined or prohibited. If it does, it is good; if it does not, it is bad; that is the end of the matter.’²¹²

This is a salutary test for drafters to apply to both original and delegated legislation that they develop. Under the Constitution, original legislation does not constitute administrative action, but original legislation may be challenged for vagueness, as being in violation of the rule of law.²¹³ It has recently been settled that delegated legislation constitutes administrative action under the PAJA.²¹⁴ Avoiding vagueness in all legislation promotes reasonableness and the rule of law. Vagueness is also the enemy of effectiveness in legislation (which is considered further in chapter 3), and avoiding vagueness is a fundamental consideration in legislative drafting. Vagueness and uncertainty in respect of administrative action are not referred to in the PAJA, although they may be accommodated in s 6(2)(i), the catch all provision.

In administrative law, reasonableness has not been clearly defined, and has been rather hazily understood by defining what it is not (unreasonableness), rather than expressing clearly what it constitutes in positive terms. However, two central elements of reasonableness have

²¹⁰ *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) SA 163 (A) at 176G-H, per Schreiner JA. See also *R v Shapiro* 1935 NPD 155 at 159; Hoexter (note 5 above) 332.

²¹¹ *R v Jopp* 1949 (4) SA 11 (N).

²¹² *Ibid* 13-14.

²¹³ See *Fedsure* (note 4 above) paras 41-2, 45; *Affordable Medicines* (note 118 above) para 108; *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) paras 64-67.

²¹⁴ See *Cable City* (note 43 above) para 10 and *HASA* (note 43 above) para 35, both of which relied upon the minority judgment of Chaskalson CJ in *New Clicks* (note 27 above) para 113.

been discussed in the jurisprudence and literature, and the first element is rationality. Rationality requires that a decision taken must be supported by evidence and information that are before the administrator, and that the decision taken is supported by the reasons given for the decision.²¹⁵ Mureinik asserted that rationality review

‘requires the reviewing body to ask whether (a) the decision-maker has considered all the serious objections to the decision taken, and has answers that plausibly meet them; (b) the decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and (c) there is a rational connection between premises and conclusion: between the information (evidence and argument) before the decision-maker and the decision that it reached’.²¹⁶

The Labour Appeal Court in *Carephone (Pty) Ltd v Marcus NO*²¹⁷ framed the question that must be considered when assessing reasonableness as follows:

‘[I]s there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?’²¹⁸

Section 6(2)(f)(ii) of the PAJA provides for rationality by providing for the review of administrative action that

- ‘(ii) is not rationally connected to—
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator.’

This formulation of rationality may provide guidance for facilitating adherence to the requirements of rationality in other legislation.

²¹⁵ See the content of clause 7(1)(f)(iii) of the draft Administrative Justice Bill of the South African Law Reform Commission appended to the South African Law Reform Commission’s *Report on Administrative Justice* (note 94 above).

²¹⁶ Etienne Mureinik ‘Reconsidering Review: Participation and Accountability’ in T W Bennett, A Cockrell, R Jooste, R Keighley & C M Murray (eds) *Administrative Law Reform* (1993) 35 at 41.

²¹⁷ *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC).

²¹⁸ *Ibid* para 37. This approach was applied in *Rustenburg Platinum* (note 37 above); *Sidumo* (note 39 above).

The principle of legality requires that every exercise of public power, including every executive act, be rational.²¹⁹ For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given.²²⁰ The test for rationality is objective²²¹ and is distinct from that of reasonableness.²²² Review for reasonableness is about testing ‘the decision itself’, while review for rationality focuses on determining whether there is a sufficient connection between the means chosen and the objective sought to be achieved, and does not involve assessing whether other means could have been used. Rationality review evaluates whether the ‘minimum threshold’ for the exercise of public power has been met, and involves judicial restraint, to avoid disturbing the separation of powers and the distinction between appeal and review.²²³ However, it has also been highlighted by the courts that the assessment of rationality predates the current constitutional dispensation,²²⁴ and that the exercise of rationality review should not be feared as undermining the separation of powers.²²⁵ When conducting rationality review, the assessment of the means for achieving the purpose for which the power was conferred includes everything that is done to achieve the purpose, including the process of taking the decision.²²⁶

The second element of reasonableness that has been identified is proportionality, and it is the distinguishing feature between rationality and reasonableness review.²²⁷ This concept is

²¹⁹ See *DA v President RSA* (note 70 above) para 27 and *Pharmaceutical Manufacturers* (note 1 above) para 85; *Motau* (note 55 above) para 69.

²²⁰ *Pharmaceutical Manufacturers* (note 1 above) para 85; *Motau* (note 55 above) para 69.

²²¹ On the importance of objective rather than subjective rationality in the context of assessing statutory standards, see *DA v President RSA* (note 70 above) paras 14-26, cited at *Motau* (note 55 above) para 69 n 100.

²²² *Motau* (note 55 above) para 69 n 101, citing *DA v President RSA* (note 70 above) paras 29-32, 42-3, and relying on *Affordable Medicines* (note 118 above). See also *Albutt* (note 33 above) para 51.

²²³ *Motau* (note 55 above) para 69. The distinction between rationality and reasonableness, and the importance of courts exercising restraint, was also emphasized in *Scalabrini* (note 93 above) para 65. See also *Electronic Media* (note 56 above) paras 6, 26.

²²⁴ *Rustenburg Platinum* (note 37 above) para 34; *Westinghouse Electric v Eskom Holdings* 2016 (3) SA 1 (SCA) paras 44-45.

²²⁵ *DA v President RSA* (note 70 above) para 4.

²²⁶ *Ibid* para 36; *Scalabrini* (note 93 above) para 69.

²²⁷ See *Roman v Williams NO* 1998 (1) SA 270 (C); *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) para 36; *Schoombee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T) at 885D-E; *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (TkH) paras 14-15; *Bel Porto* (note 18 above) paras 153-157 *per* Sachs J and Mokgoro J; *New Clicks* (note 27 above) para 637 *per* Sachs J; *Witwatersrand Taxi Owners Association v MEC for Roads and Transport* [2000] ZAGPJHC 28 (3 September 2010) para 19.3; *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) paras 58 -69; *S v Manamela* 2000 (3) SA 1 (CC) paras 32-3; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 paras 98, 100.

conveyed in the saying that one ought not to use a sledgehammer to crack a nut.²²⁸ The principle of proportionality is well established as a principle in German administrative law,²²⁹ and is quite well developed in European law.²³⁰ It is applied to a relatively limited extent in English administrative law, but is pertinent particularly in relation to the application of the Human Rights Act 1998.²³¹ In those contexts, as with the proportionality assessment in relation to s 36 of the (South African) Constitution, proportionality is applied to balance rights and public interests.²³² Proportionality has through the evolution of constitutional and human rights jurisprudence internationally, migrated from Germany, Europe, to Canada, Australia, New Zealand and also from Germany to South Africa through constitutional limitation clauses.²³³ In South Africa, there has been some support in the literature²³⁴ and the jurisprudence²³⁵ for the application of proportionality in relation to reasonableness review, although it has not achieved widespread adoption. The components of proportionality are suitability, necessity, and balance or ‘proportionality in the narrow sense’.²³⁶ Suitability involves an assessment of firstly, the purpose of the exercise of the power and whether it is legally authorized, and secondly, the legal and practical feasibility of the measure.²³⁷ Necessity involves determining which of the possible suitable means to achieve the purpose would result in a lesser infringement of a constitutional right than the proposed administrative action.²³⁸ ‘Proportionality in the narrow sense’, requires that an appropriate balance be struck between the advantages and disadvantages that would arise from the measure, so that the disadvantages to an individual, for example, would not outweigh the advantages that would result to others

²²⁸ See *S v Manamela* ibid para 34; Jeffrey Jowell & Anthony Lester QC ‘Proportionality: Neither Novel nor Dangerous’ in Jeffrey Jowell & Dawn Oliver (eds) *New Directions in Judicial Review* (1988) 51.

²²⁹ The German approach is described in J R de Ville ‘Proportionality as a Requirement of Legality in Administrative Law in Terms of the New Constitution’ (1994) 9 *SA Public Law* 360.

²³⁰ This is considered in Julian Rivers ‘Proportionality and Variable Intensity of Review’ (2006) 65 *Cambridge Law Journal* 174 at 181.

²³¹ 1998 c42. See Alan D P Brady *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (2012); Craig (note 192 above) 641ff and 653ff; Shiva Felix ‘Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka’ 2006 *Acta Juridica* 95 at 116; Jeffrey Jowell ‘Judicial Review of the Substance of Official Decisions’ 1993 *Acta Juridica* 117 at 126-127; Jowell & Lester (note 228 above).

²³² The way rights and public interests are balanced in the UK and European law is explored in Rivers (note 230 above).

²³³ See Ahron Barak *Proportionality: Constitutional Rights and their Limitations* (2012); Grant Huscroft, Bradley W Miller & Gregoire Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014).

²³⁴ See, for example, De Ville (note 229 above); Clive Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (unpublished PhD thesis, Rhodes University, 2002).

²³⁵ See note 227 above.

²³⁶ De Ville (note 229 above) at 361.

²³⁷ Ibid at 365-366.

²³⁸ Ibid at 366.

or the community. An assessment must be undertaken of the advantages and disadvantages that would arise, and the various interests must be weighed.²³⁹

Section 36 of the Constitution entrenches a proportionality analysis to assess whether there is an unconstitutional limitation of a constitutional right. As the right to reasonable administrative action is a constitutional right that is subject to the proportionality approach in s 36, interpreting the right to reasonable administrative action as containing proportionality as an element is harmonious with the constitutional framework.

Proportionality was included in the Law Commission's draft Bill as a ground of review based on 'disproportionality between the adverse and beneficial consequences of the action' and the existence of 'less restrictive means to achieve the purpose for which the action was taken'.²⁴⁰ Section 6 of the PAJA does not include an explicit ground of review for proportionality, but only contains a general ground dealing with unreasonableness in s 6(2)(h). The wording of s 6(2)(h) is similar to the formulation of reasonableness set out in the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,²⁴¹ where Lord Greene MR referred to a decision 'so unreasonable that no reasonable authority could ever have come to it'. Section 6(2)(h) of the PAJA provides for review where

'the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.'

The wording in s 6(2)(h) does not provide meaningful guidance regarding what the actual content of reasonableness is. O'Regan J considered the challenge of interpreting the meaning of the provision in *Bato Star*, and noted:²⁴²

'Even if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not a proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative action to be "reasonable". Section 6(2)(h) should then be understood to require a simple test,

²³⁹ Ibid at 366-367.

²⁴⁰ Bill proposed by the South African Law Reform Commission in its *Report on Administrative Justice* of August 1999 (Project 115) (note 94 above), clause 7(1)(g).

²⁴¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 at 683E and 685C.

²⁴² *Bato Star* (note 25 above).

namely that an administrative decision will be reviewable if, in Lord Cooke's words,²⁴³ it is one that a reasonable decision-maker could not have reached.²⁴⁴

O'Regan J noted that what is reasonable depended upon the circumstances of each case.²⁴⁵ However, factors that should be considered when assessing whether a decision is reasonable are the following:

'[T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for that decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.'²⁴⁶

This approach for assessing reasonableness provides some much-needed guidance to administrators, the courts, and drafters regarding the application of s 6(2)(h) of the PAJA. This approach may be drawn upon to develop legislative provisions to provide further guidance in other legislation in relation to specific types of decisions. Highlighting the factors and competing interests that must be considered when taking a decision, and requiring that the impact of a proposed decision be assessed and considered, are examples of matters that may be addressed in legislation to promote proportionality of decision-making and the reasonableness of the administrative action that is taken.²⁴⁷

Scope for proportionality in the application of legislation may be introduced in various types of provisions. Examples include incorporating proportionality as an element of how the legislation must be applied and the Act must be achieved; providing for the granting of exemptions from the application of requirements; providing for the development and application of requirements that would permit a proportional approach to regulation, by allowing tailored requirements to be applied to different categories of regulated persons, both in the original legislation, and through delegated legislation. It may also be required that when imposing requirements, the existing regulatory burden on regulated persons in terms of other legislation must be considered. The Appendix provides examples of types of provisions that

²⁴³ In *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129 (HL) at 157, cited in *Bato Star* (note 25 above) para 44.

²⁴⁴ *Bato Star* (note 25 above) para 44.

²⁴⁵ *Ibid.* See also *New Clicks* (note 27 above) paras 108, 135 *per* Chaskalson CJ.

²⁴⁶ *Ibid* para 45.

²⁴⁷ In ss 98(1) and 288(4) of the FSRA, for example, prior to making delegated legislation, a financial sector regulator (when making standards) or the Minister (when making regulations), must first publish a notice inviting public comment on the delegated legislation, which explains the need for the delegated legislation, the intended operation of the legislation, and also contains an explanation of the expected impact of the delegated legislation.

might be developed.

In *Bato Star*,²⁴⁸ O'Regan J noted that legislation may seek to achieve several objectives, which in the context of certain administrative decisions, may be in tension:

'In this regard, it should be noted that section 2 [of the Marine Living Resources Act 18 of 1998] contains a wide number of objectives and principles, for example, the conservation of the marine ecosystem, the sustainable use of marine living resources, and the need to utilise marine living resources to achieve economic growth, to build capacity in the industry and to create employment. Not all the objectives and principles will be relevant to every decision taken under the Act. In determining the amount of the total allowable catch, for example, the provision relating to the sustainable use of marine resources and the need to conserve the marine ecosystem will clearly be relevant, although once that decision has been taken and the process of allocation of fishing rights commences, those factors will be of less relevance. In relation to some decisions, the objectives and principles listed in section 2 may to some extent conflict with one another as they cannot all be fully achieved simultaneously. Moreover, there may be many different ways of achieving each of the objectives individually. The section does not give clear guidance on which method should be selected or how an equilibrium is to be reached.'²⁴⁹

The *Bato Star* approach provides a mechanism for the application of proportionality in the consideration of reasonableness under s 6(2)(h) of the PAJA, both explicitly by referring to the impact of the decision, and implicitly by providing for the cumulative consideration of the other factors referred to. It may then not be necessary to try to address proportionality under the catch-all ground of review of s 6(2)(i).²⁵⁰ The approach also enables proportionality to be applied to the entire range of decisions and decision-making processes, as a central component of a workable legislative approach that may guide administrators to find the necessary 'reasonable equilibrium' among a range of competing interests.²⁵¹

The approach recognizes that it is appropriate for there to be scope for variation in the application of reasonableness, to suit the specific context. This is consistent with the concepts of a 'sliding scale' of reasonableness and variability in the intensity of judicial review, which have been developed in the United Kingdom and other jurisdictions.²⁵² There has also been

²⁴⁸ *Bato Star* (note 25 above).

²⁴⁹ *Bato Star* (note 25 above) para 32.

²⁵⁰ Hoexter (note 5 above) 349-350

²⁵¹ *Bato Star* (note 25 above) paras 49-54.

²⁵² See Johannes Chan 'A Sliding Scale of Reasonableness in Judicial Review' 2006 *Acta Juridica* 233 at 234-5; Julian Rivers (note 230 above) 174.

consideration in different jurisdictions of the contribution that proportionality may make to the development of reasonableness review, including identifying the potential discipline that might be provided by engaging in a closer and context-sensitive elaboration of the indicia of unreasonableness,²⁵³ and elucidating the vaguely described concept of reasonableness.²⁵⁴ Proportionality is the critical component that allows reasonableness to be applied in a context specific manner. The legislature would need to grant an appropriate degree of deference to administrative decision-makers, to ensure compliance with the constitutionally mandated separation of powers,²⁵⁵ and the legislature would want to avoid being overly prescriptive and impermissibly fettering the ability of decision-makers to make a decision that is lawful, reasonable and procedurally fair in each case. When incorporating proportionality in legislation to promote reasonable administrative action, what might be aimed for is facilitating a ‘variable intensity of regulation’ which administrators might apply to take reasonable administrative action in various circumstances that would allow an appropriate ‘margin of appreciation’ to the discretion of administrators, while providing the necessary degree of guidance.

Brady has considered proportionality and deference exercised in the United Kingdom in relation to the UK Human Rights Act,²⁵⁶ in order to develop an integrated account of the application of proportionality that takes an institutionally sensitive approach²⁵⁷ as to how proportionality is applied in relation to different types of decision-making.²⁵⁸ Different types of government activity are considered in this study, in particular immigration,²⁵⁹ criminal law,²⁶⁰ and an example of multi-level decision-making, which was housing. This approach may be drawn upon to develop an analysis of how reasonableness and proportionality might be promoted by legislation, through engaging in a similar in-depth assessment of decision-

²⁵³ David Mullan ‘Proportionality — A Proportionate Response to an Emerging Crisis in Judicial Review Law?’ [2010] *New Zealand Law Review* 233, 261, 264.

²⁵⁴ Paul Craig ‘Proportionality, Rationality and Review’ [2010] *New Zealand Law Review* 265. Consider also approaches to and views regarding proportionality discussed by Michael Taggart ‘Proportionality, Deference, *Wednesbury*’ [2008] *New Zealand Law Review* 423, 465ff; Thomas Poole ‘Proportionality in Perspective’ [2010] *New Zealand Law Review* 369; more critical perspectives are provided by Tom Hickman ‘Problems for Proportionality’ [2010] *New Zealand Law Review* 303; Jeff King ‘Proportionality: A Halfway House’ [2010] *New Zealand Law Review* 327.

²⁵⁵ See *Bato Star v Minister of Environmental Affairs* (note 25 above) paras 44-46, cited and discussed in *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 (2) SA 199 (C) at 210D-F per Davis J.

²⁵⁶ Brady (note 231 above).

²⁵⁷ *Ibid* chap 3 at 76-120.

²⁵⁸ *Ibid* chap 2 at 39-58.

²⁵⁹ *Ibid* chap 5 at 123-165.

²⁶⁰ *Ibid* chap 6 at 210-253.

making processes and the case law, among other aspects. Pre-and post-enactment impact assessment that incorporates the reasonableness, proportionality of impacts, and overall effects of administrative decision-making, would be essential for promoting reasonable administrative action through legislation.

Ekins has examined the role of the legislature in legislating proportionately. Legislatures seek to bring about a certain state of affairs, to promote the common good. Legislating proportionately entails choosing means that are fit to achieve the intended ends, while if the means do not achieve the desired ends, and produce effects that are not warranted by reason, they are disproportionate.²⁶¹ The rule of law is important in this consideration, and limitation clauses that are more ‘fact sensitive’ tend to be more likely to produce proportionate legislation that is responsive to the detail of specific cases.²⁶² Legislatures need to enact legislation with clear general rules, which seek to regulate complex circumstances to produce intended results.²⁶³ According to Ekins,²⁶⁴ there may be a tension between legislating in clear rules, and providing for a linkage between means and ends in specific cases, which he characterizes as a potential tension between legality and proportionality. Clear rules, rather than discretion or an opaque standard, may generally produce better action in general, and consistency in action.²⁶⁵ It is also possible that a focus on proportionality may lead a legislature to focus on assessing the means to a single end, a question of efficiency, rather than a complex state of affairs potentially involving a range of ends and effects.²⁶⁶ He concludes that proportionality in legislative action should not be the only consideration of legislatures in their deliberations, and legislatures should discipline themselves to ensure that they do not allow proportionality to consume the deliberations.²⁶⁷

Ekins raises valuable points regarding the role of the legislature in enacting and amending legislation that realizes the rights to just administrative action generally, and reasonable administrative action in particular. The assessment of reasonableness and proportionality of a complex piece of legislation would need to be much more nuanced and entail a much more complex and comprehensive assessment than would be engaged in by a court when considering an application for review of a specific administrative action involving

²⁶¹ Richard Ekins ‘Legislating Proportionately’ in Huscroft, Miller & Webber (note 233 above) 347.

²⁶² *Ibid* 349-350.

²⁶³ *Ibid* 351.

²⁶⁴ *Ibid* 343.

²⁶⁵ *Ibid* 352.

²⁶⁶ *Ibid* 368-369.

²⁶⁷ *Ibid* 369.

a specific set of circumstances. The legislation's purpose may need in fact to be defined as including more than one objective, and sometimes those objectives may potentially even be in tension. The legislative framework that is proposed to be established needs to be assessed whether it may handle that complexity. The endeavour to legislate in clear rules to provide certainty and consistency is important. However, it is critical that the legislative framework is able to empower the general rules and principles set out in primary legislation to be implemented by administrators in specific cases, including through the making of delegated legislation, guidelines, and the exercise of discretion subject to necessary guidance, so that fundamental rights, including the rights to just administrative action, as well as the regulatory objectives of the legislation, are realized. Enabling the proportionate application of legislation may empower administrators to strike the correct balance when implementing legislation.

In *Ehrlich v Minister of Correctional Services*²⁶⁸ Plasket J applied Professor Jowell's categorization of three types of unreasonable administrative decisions.²⁶⁹ The first type are decisions where there are extreme defects in the decision-making process, such as where there is bad faith, there is a failure to take into account relevant considerations or irrelevant considerations are taken into account, or irrationality.²⁷⁰ The second category of unreasonable decisions is where common law principles or requirements governing the exercise of public power such as equal treatment or legal certainty are violated.²⁷¹ The third category is where the effect of the decision is unnecessarily disproportionate or onerous.²⁷² Plasket J held that the decision by the head of the prison to deny all medium-category prisoners access to a gymnasium in the prison was unreasonable on all three grounds, as it was irrational and discriminatory, statutory imperatives regarding rehabilitation were violated, and it was disproportionate and unduly onerous.²⁷³ Jowell's analysis provides insight regarding the content of reasonableness, and also guidance for both the courts and administrators for assessing whether administrative action is unreasonable.

Incorporating reasonableness and proportionality into legislation may promote reasonable, nuanced decision-making by administrators. It may also reduce the likelihood that constitutional rights, including the rights to lawful, reasonable and procedurally fair

²⁶⁸ *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E).

²⁶⁹ *Ibid*, para 42; Jeffrey Jowell 'Judicial Review of the Substance of Official Decisions' 1993 *Acta Juridica* 117 at 120-125.

²⁷⁰ Jowell *ibid* 121-123.

²⁷¹ *Ibid* 123-124.

²⁷² *Ibid* 124-125.

²⁷³ *Ehrlich* (note 268 above) paras 43-44.

administrative action, will be violated, or that any violation of rights by the legislation cannot be justified in terms of s 36 of the Constitution. The necessity for administrative action to be taken on review on the grounds of unreasonableness will also be minimized. Decision-makers will be assisted to achieve ‘a reasonable equilibrium in the circumstances’²⁷⁴ of the matter that is before them. There is, therefore, clearly an important obligation on drafters to develop legislation that promotes reasonable administrative action, and incorporates the principle of proportionality. This will be discussed further in subsequent chapters.

(c) Procedural Fairness

Procedural fairness is the focus of ss 3 and 4 of the PAJA, so the extent to which procedural fairness needs to be addressed in other legislation is not as great as the need to address lawfulness and reasonableness. When developing legislation, ss 3 and 4 of the PAJA need to be considered, and the extent to which it is necessary to provide for additional measures to provide for procedural fairness in the context that the legislation is addressing. This assessment should be based on an understanding of the content of procedural fairness as developed in the jurisprudence.

When interpreting the right to procedurally fair administrative action, the Constitutional Court started from the basis of the common law principles of *audi alteram partem* and the case specific application of procedural fairness requirements. The role of the courts is not to determine whether the decision itself was fair, but whether the procedure that was followed in making the decision was fair. There is not a right to substantively fair administrative action.²⁷⁵ The right to procedural fairness in s 24(b) of the interim Constitution and item 23(2)(b) of the Schedule to the Constitution was interpreted as requiring procedural fairness where a person’s rights or legitimate expectations were affected.²⁷⁶ The content of the right is case specific.²⁷⁷ What the right requires in a specific case involves the application of proportionality, and requires ‘balancing of various factors including the nature of the decision, the “rights” affected by it, the circumstances in which it is made, and the consequences resulting from it’.²⁷⁸ Affected individuals are generally entitled to notice of proposed administrative action that would affect

²⁷⁴ *Bato Star* (note 25 above) para 49.

²⁷⁵ *Bel Porto* (note 18 above) paras 87-88.

²⁷⁶ *Kyalami* (note 120 above) paras 100-101; *Bel Porto* (note 18 above) para 97.

²⁷⁷ *Bel Porto* (note 18 above) para 13; *Premier, Mpumalanga* (note 24 above) para 39; *Janse van Rensburg* (note 24 above) para 24.

²⁷⁸ *Kyalami* (note 120 above) para 102.

their rights or legitimate expectations, and to be provided with an opportunity to make representations.²⁷⁹ In certain circumstances, such as where a decision needs to be taken urgently (although arguably not self-created urgency), the requirement to give notice and a right to make representations might be dispensed with.²⁸⁰ The limitations clause in the Constitution cannot justify a violation of procedural fairness in a specific case, if the violation of the right was a decision that did not constitute a law of general application.²⁸¹ Legislation potentially may permit an administrator to limit the right to procedural fairness, but the legislation must provide guidance as to how that power must be exercised.²⁸² For example, if legislation permitted the requirements for notice or the opportunity to make representations in certain urgent circumstances to be reduced or dispensed with, it would be helpful to administrators to provide guidance as to what circumstances would qualify as being ‘urgent’, and also to possibly provide for some alternative mechanism after the taking of an urgent decision to perhaps mitigate the impact of dispensing with giving notice and an opportunity to make representations. Some alternative procedure might even be provided that would be followed in ‘urgent’ circumstances, that might mitigate the impact on the right to procedural fairness to a certain extent.²⁸³

The jurisprudence relating to what procedural fairness requires in the context of executive decisions is important to consider. In *Masetlha*,²⁸⁴ the majority judgment held that presidential powers under the Constitution to appoint critical positions such as the director of the National Intelligence Agency do not constitute ‘administrative action’, and are reviewable for rationality, and it would be improper to constrain these powers as being subject to procedural fairness.²⁸⁵ However, the exercise of those powers is still subject to rationality,²⁸⁶ and there may still be legal consequences as a result, such as an entitlement to remuneration and benefits.²⁸⁷ In *Albutt*,²⁸⁸ the President’s executive power to grant pardons was held to be subject to a procedural fairness requirement based on rationality to consult victims prior to taking a decision to grant a pardon, and the failure to do was held to be irrational.²⁸⁹ The court declined to hold whether or not the pardon power constituted administrative action that is

²⁷⁹ *Premier, Mpumalanga* (note 24 above) para 41.

²⁸⁰ *Kyalami* (note 120 above) para 105.

²⁸¹ *Premier, Mpumalanga* (note 24 above) para 42.

²⁸² *Janse van Rensburg* (note 24 above) para 24.

²⁸³ Section 100 of the FSRA, for example, provides for a procedure for making ‘urgent’ regulatory instruments.

²⁸⁴ *Masetlha* (note 70 above).

²⁸⁵ *Ibid* para 77.

²⁸⁶ *Ibid* paras 78-82.

²⁸⁷ *Ibid* para 91.

²⁸⁸ *Albutt* (note 29 above).

²⁸⁹ *Ibid* para 74.

subject to the PAJA.²⁹⁰ In *ARMSA*,²⁹¹ the court followed the approach in *Masetlha*,²⁹² as opposed to the approach in *Albutt*.²⁹³ In *Scalabrini*,²⁹⁴ the Supreme Court of Appeal adopted the approach in *Albutt*, and held that the failure of the Director-General to hear representations in that matter was irrational.²⁹⁵ In *Motau*,²⁹⁶ the court noted the approach in *Masetlha*, but emphasized that that decision was specific to the particular circumstances of the relationship between the President and the National Director of Intelligence, and should not be interpreted as a general proposition.²⁹⁷ The court noted the approach in *Albutt*,²⁹⁸ and the fundamental importance of the *audi* principle in the constitutional regime enunciated in *Mahomed*,²⁹⁹ and held that there was a requirement for procedural fairness in the matter under consideration.²⁹⁹

Section 3 of the PAJA addresses administrative action that affects ‘any person’, while s 4 addresses administrative action affecting the public. The differences in wording between s 3(1) and 4(1) were noted above in the section discussing the PAJA.

Section 3(2)(a) is consistent with the common law and pre-PAJA approach, and the current constitutional jurisprudence, that the precise requirements would depend upon the circumstances of the case. Section 3(2)(b) specifies minimum requirements for fair procedures, although the application of those requirements may vary depending on the specific circumstances.

Section 3(2)(b)(i) requires that adequate notice of the nature and purpose of the proposed administrative action be provided, and s 3(2)(b)(ii) requires that a reasonable opportunity be provided to make representations. Section 3(2)(b)(iii) requires that a clear

²⁹⁰ Ibid paras 79-83.

²⁹¹ *ARMSA* (note 85 above).

²⁹² Ibid para 59; *Albutt* (note 29 above).

²⁹³ *Scalabrini* (note 93 above).

²⁹⁴ Ibid paras 68-70. See also *DA v President RSA* (note 70 above) para 12. The approach in *Scalabrini* (note 93 above) was applied in *e-tv v Minister of Communications* [2016] 3 All SA 362 (SCA) paras 39-43, which was not, however, supported in the majority judgment of the Constitutional Court in *Electronic Media* (note 56 above) paras 65-71, where the majority declined to consider the application of the approach in *Motau* (note 55 above) and *DA v President RSA* (note 70 above) because in this instance a statutory consultation process was provided for. See also *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) para 17, where the duty to consult was found in relation to a decision persons who may have special knowledge regarding that matter; *The National Treasury v Kubukeli* 2016 (2) SA 507 (SCA) para 25, where the court distinguished *Albutt* (note 29 above) and *Scalabrini* and found that there was not a duty to consult in that case.

²⁹⁵ *Motau* (note 55 above).

²⁹⁶ Ibid 81.

²⁹⁷ Ibid para 59; *Albutt* (note 29 above). See also the approach in *Minister of Defence v South African National Defence Union* 2014 (6) SA 269 (SCA) para 16, where the Court was prepared to consider the case on the basis that procedural fairness may flow as a requirement of rationality.

²⁹⁸ *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC).

²⁹⁹ *Motau* (note 55 above) paras 82-84.

statement of the administrative action be provided, para (b)(iv) requires that adequate notice of rights of review or internal appeal be given, and para (b)(v) requires that adequate notice of the right to request reasons in terms of s 5 of the PAJA is provided. Regulations 23-25 of the Regulations on Fair Administrative Procedures³⁰⁰ provide further detail of the content of these requirements.

Section 3(3) sets out discretionary procedures which a decision-maker may choose, but is not obligated, to adopt. The discretionary procedures are providing an opportunity to obtain assistance, and if a case is serious or complex, to obtain legal representation (para (a)); an opportunity to present and dispute information and arguments (para (b)); and an opportunity to appear and make representations in person (para (c)). A decision-maker would have to consider which of the discretionary procedures would need to be applied in a matter, depending upon what the right to procedural fairness would require, as the exercise of the discretion must be consistent with the realization of the fundamental right. A decision whether to allow for a discretionary procedure to be followed in a specific case would be subject to review in terms of s 6.³⁰¹

Some aspects of procedural fairness that have been recognized as common law are not explicitly included as requirements in s 3. The right to be informed of opposing evidence is an example, which might be argued to be included in the requirement for a reasonable opportunity to make representations in s 3(2)(b)(i), or an opportunity to present and dispute information and arguments in s 3(3)(b). Section 3 is not an exhaustive list of requirements for procedural fairness, so additional requirements might arguably be necessary to provide procedural fairness in a specific case.³⁰² Section 3(4)(a) allows for administrators, in an individual case, to depart from the mandatory requirements in s 3(2) if the departure is 'reasonable and justifiable in the circumstances'. Section 3(4)(b) provides some guidance for what should be considered when assessing whether a departure is 'reasonable and justifiable'. Consideration might be given, if it is envisaged in relation to certain decisions taken in terms of other legislation, that there might need to be a departure from the general requirements from procedural fairness in s 3(2) in certain circumstances, to specifying in the other legislation what those limited, extreme circumstances might be, and what process should be followed in those circumstances.

³⁰⁰ Regulations on Fair Administrative Procedures, published as Government Notice R 1002 of 31 July 2002, published in *Government Gazette* No 23674.

³⁰¹ Burns (note 64 above) 260-261.

³⁰² Currie (note 7 above) 112.

Additional detail might be provided beyond what is specified in s. 3(4)(b), for example, as to what might constitute justifiable urgency (to avoid self-created urgency from leading an administrator to fail to adhere to otherwise applicable procedural requirements). It might also be specified what procedure would be followed if there needed to be a departure in from the requirements.³⁰³

Section 3(5) envisages that ‘an empowering provision’ (as defined in s 1) might provide for other procedures that are ‘fair but different’. Any other procedure would need to satisfy scrutiny that they would provide procedural fairness in the circumstances in which the procedure is applied in relation to the right to procedural fairness in s 33(1), and also in relation to the requirements in s 3.³⁰⁴

Section 4 of the PAJA provides for procedures for administrative action that affects the rights of the public. A notice and comment procedure is provided for, as well as a notice and public hearing procedure, and a combination of the procedures might be applied. The Regulations on Fair Administrative Procedures also supplement s 4.³⁰⁵

Section 4(1) refers to ‘rights’ only, and not to ‘legitimate expectations’ as is also referred to in s 3(1), which apparently indicates that the scope of s. 4 is narrower than s. 3. However, Burns argues that s. 4 should be interpreted generously, and as including legitimate expectations, as ‘rights’ adhere mainly to natural and juristic persons, and in some instances groups, but not the ‘public’.³⁰⁶

Section 4(1) applies to where ‘rights of the public’ are ‘materially and adversely affected’. Interpreting ‘rights of the public’, in accordance with the definition in s 1 (xii) of the PAJA, refers to the rights of the members of a group or class of the public. Section 4 applies where (a) there is administrative action that has a general impact, that (b) has a significant public effect, and (c) constitutional, statutory, or common-law rights of members of the public are at issue.³⁰⁷

A ‘general impact’ suggests that the administrative action applies to members of the public in an impersonal and equal manner. In some cases, administrative action might have

³⁰³ See Burns (note 64 above) 264-266.

³⁰⁴ Burns (note 64 above) 266-267. See, for example *Magigngxa v National Commissioner* 2002 (3) SA 451 (T) at 467.

³⁰⁵ Note 300 above. See also Burns (note 64 above) 275-279.

³⁰⁶ Burns (note 64 above) at 272.

³⁰⁷ *Ibid.*

both a general impact, as well as a specific, serious impact on an individual or a small group of individuals.³⁰⁸ In these types of instances, where it may be difficult to categorise a decision as clearly falling within the ambit of s 3 or 4 of the PAJA, potentially s 4(1)(e) of the PAJA, which refers to following ‘another appropriate procedure that gives effect to s 3’ might be interpreted as permitting that in addition to appropriate procedures of s 4, procedures in terms of s 3 might also be applied in relation to those persons who are impacted in a manner that differs from the general impact on the public.³⁰⁹

When legislation is being developed, it should be considered whether ‘another appropriate procedure’ contemplated in s 4(1)(d) of the PAJA should be included, to address certain administrative actions that will be taken in terms of the legislation that will affect the public, to ensure that the constitutional right to procedurally fair administrative action is realized. Even though it is now relatively settled that delegated legislation falls within the ambit of the PAJA,³¹⁰ it would be appropriate for legislation to specifically provide for notice and comment procedures that cater specifically for making delegated legislation and rules. The notice and comment procedure in s 4 of the PAJA also does not provide for a role for Parliament in the oversight of making delegated legislation and rules. Some current legislation provides for a notice and comment procedure for Regulations that includes a requirement for submission of delegated legislation to Parliament for scrutiny prior to final promulgation, the provision of specified information relating to the impact of proposed delegated legislation, and a summary of comments received during public consultation processes, and responses to those comments.³¹¹ Some legislation also specifies notice and comment procedures and parliamentary oversight in respect of rules made by regulators.³¹²

A decision or a failure to take a decision regarding the procedure that is followed in terms of 4 are excluded from the definition of ‘administrative action’. However, this might be reviewed on the basis of legality.³¹³

No consequences are specified in the PAJA for non-compliance with the requirements of ss 3(2) and s 4. There have been a few interpretive approaches proposed as to how

³⁰⁸ See *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 12 *per* Milne JA.

³⁰⁹ Currie (note 7 above) 123-124.

³¹⁰ Note 43 above.

³¹¹ See ss 98-100 and 288 of the FSRA, s 107 of the Financial Markets Act 19 of 2012, s 72(2B) of the Long-term Insurance Act 52 of 1998 and s 70(2B) of the Short-term Insurance Act 53 of 1998.

³¹² See s 24 of the Credit Rating Services Act 24 of 2012, s 62(4)(a)(ii) of the Long-term Insurance Act 52 of 1998 and s 55(4)(a)(ii) of the Short-term Insurance Act 53 of 1998.

³¹³ Burns (note 64 above) at 270-271.

contraventions of these provisions might be handled, which approach the issue from differing perspectives.³¹⁴ This ambiguity is an example that it is necessary in legislation to consider and ensure that it is clarified what the implications of a contravention of a legislative provision

2.4 THE RIGHT TO REASONS

Section 33(2) of the Constitution provides that '[e]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons'. Section 5 of the PAJA is intended to give effect to that right. The wording in s 5(1) of the PAJA differs from the wording in s 33(2) of the Constitution, in that the administrative action must have 'materially and adversely' affected a person's rights.

In *Transnet*,³¹⁵ the court described the importance of the right to reasons for enabling the protection of other fundamental rights, and adopted an approach that everyone with rights to lawful, reasonable and procedural fairness also would have a right to reasons. The right to reasons is a 'bulwark' for the rights to just administrative action.³¹⁶ In *Kiva*,³¹⁷ Plasket J eloquently stated the importance of the right as follows:

'...the right to reasons must be interpreted consistently with s 33(2) of the Constitution and with the purpose of that right, which is to give effect to the values of accountable, responsive and open governance, enshrined as a founding value in s 1(d) of the Constitution. In this sense the giving of reasons is not a values-free mechanical process. It serves to make judicial review of administrative action effective and contributes to the attainment of a culture of justification for the exercise of public power. It attains even more significance in South Africa where the Constitution places the public administration under specific obligations to act ethically, efficiently, impartially, fairly, equitably, without bias and accountably.'³¹⁸

The use of the phrase 'materially and adversely affected' in s 5(1) should not affect the interpretation of the right, as it is difficult to contemplate where rights would be affected, but not materially.³¹⁹ The importance of reasons has been recognized and noted in relation to the

³¹⁴ See in relation to contraventions of s 3(2), discussions in Currie (note 7 above) 108–110 and Hoexter (note 5 above) 385-286; and in respect of s 4, Currie 132-133 and n 55 and 56 and Hoexter 417-418.

³¹⁵ *Transnet Ltd. v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA).

³¹⁶ *Ibid* para 42.

³¹⁷ *Kiva* (note 99 above).

³¹⁸ *Ibid* para 22.

³¹⁹ *Ibid* para 23.

judgments of judges in promoting accountability³²⁰ and support has been expressed for an approach that the principle of legality imposes a duty to give reasons by a functionary exercising a public power.³²¹

Section 5 of the PAJA requires that a person whose rights have been materially and adversely affected must make a request for reasons, which would seem to constitute a limitation on the scope of the right to reasons.³²² It would be possible in other legislation to provide for an automatic right to be provided with reasons for certain decisions or proposed decisions.

Section 5(1) allows a person a period of 90 days to request reasons, from the date on which the person became aware or might reasonably be expected to have become aware of the administrative action. Section 5(1) of the PAJA only applies where a person ‘has not been given reasons for the action’, so if a person had been provided with reasons already, an administrator would not be required to provide reasons again in terms of s 5(1).³²³ In *Koyabe*,³²⁴ it was held that s 33(2) of the Constitution and the PAJA when read together entitled the applicants in that case to reasons, even without making a request, as the mechanism for requesting reasons in s. 5 of the PAJA presumes that there was already the existing right to reasons in s. 33(2).³²⁵ The importance of reasons for pursuing internal remedies, and ensuring fairness, accountability and transparency as contemplated in s. 195 of the Constitution, the *batho pele* principles, the values of ubuntu, and the spirit of the Constitution, was highlighted.³²⁶

What constitutes ‘adequate’ reasons would depend upon the factual and statutory context of the case,³²⁷ and it is not described. Fundamentally, reasons must explain why the decision was taken.³²⁸ The decision-maker’s understanding of the relevant law, findings of fact, and the reasoning processes that led to the conclusions reached and the decision taken are pertinent. Clear and unambiguous language should be used, not vague or overly formal language. The reasons should be an appropriate length, which would depend upon factors such

³²⁰ *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) paras 8-9.

³²¹ *Wessels* (note 97 above) 27. See also *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) paras 42-45 where the Judicial Service Commission was held to have a general duty to give reasons, citing also *Bel Porto* (note 18 above) para 159 *per* Mokgoro and Sachs JJ.

³²² *Currie* (note 7 above) 139-141.

³²³ *Burns* (note 64 above) 285.

³²⁴ *Koyabe v Minister for Home Affairs* 2010 (4) SA 237 (CC).

³²⁵ *Ibid* para 60 and n1.

³²⁶ *Ibid* paras 61-62.

³²⁷ *Ibid* paras 62-63.

³²⁸ Consider the context of *Gumede v Minister of Law and Order* 1984 (4) SA 915 (N); *Nkondo v Minister of Law and Order* 1986 (2) SA 756 (A).

as the nature and importance of the decision, the complexity of the decision, and the time that is available for preparing written reasons.³²⁹ The factual context of the administrative action, the nature of the proceedings, and the nature of the functionary taking the administrative action also would be relevant considerations for assessing the appropriate length and detail of reasons.³³⁰ The nature of the right that is affected, whether the matter involves a deprivation of a right or an application for a benefit, and administrative efficiency may be further important factors.³³¹ The purpose for which reasons are intended, the stage at which they are given, and the further remedies that are available to challenge the decision should also be considered.³³²

Section 5(2) allows an administrator 90 days to furnish adequate written reasons. Section 5(3) provides that if there is a failure to provide adequate reasons within that 90-day period, there is a presumption that the administrative action was taken without good reason. Section 5(4) contemplates potential departures from the requirement to furnish reasons if reasonable and justifiable, after taking account all relevant factors, including those listed.

Section 5(5) contemplates that other legislation might specify detailed ‘fair but different’ requirements in relation to the provision of reasons. It might be indicated in delegated legislation matters that should be addressed in reasons given for certain types of decisions. For example, if in legislation it is specified matters that must be considered before a decision is taken, it might be indicated that in reasons given for the decision, it should be indicated how the specified factors were considered and the decision was reached based upon the consideration of those specified factors (and other relevant factors that the administrator identified that were taken into account).

³²⁹ *Minister of Environmental Affairs v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) para 40, citing the Australian case of *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507. In respect of the factor of the importance of the decision, see *Moletsane v Premier of the Free State* 1996 (2) SA 95 (O) at 98H. Regarding inadequate reasons, see *Kiva* (note 99 above) paras 39-40; *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) (*Maimela*); *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (E); cf *Ngomana v CEO, South African Social Security Agency* [2010] ZAWCHC 172; *Minister of Social Development v Phoenix Cash & Carry-Pmb CC* [2007] 3 All SA 115 (SCA) para 23. An example of where adequate reasons were given is *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment; SARS v Sprigg Investment 117 CC* 2011 (4) SA 551 (SCA) paras 14, 17.

³³⁰ *Maimela* *ibid* at 485J-486B.

³³¹ J R de Ville *Judicial Review of Administrative Action in South Africa* rev ed (2005) 294.

³³² *Koyabe* (note 327 above).

Section 5(6) empowers the Minister to publish a list of administrative actions in respect of which reasons will be given automatically.

Chapter 4 of the Regulations on Fair Administrative Procedures.³³³ (regs 26–28) provide some additional requirements in relation to the provision of reasons. Consideration might be given in other legislation, additional delegated legislation in terms of the PAJA, or in terms of other guidelines, to providing additional guidance regarding what matters should be addressed in order to constitute adequate reasons. The Australian Administrative Review Council, for example, has provided helpful guidelines to assist administrators in the provision of reasons.³³⁴ The guidelines emphasise that a statement of reasons must: (1) state the decision; (2) the findings made on material questions of fact, including inferences made and specifying the relevant law; (3) refer to the evidence and other material upon which the findings are based; and (4) provide the real reasons that the decision was taken.³³⁵ These types of guidelines may assist administrators to provide adequate reasons.

2.5 JUDICIAL REVIEW

As judicial review is quite thoroughly addressed in ss 6 and 7 of the PAJA, it is not generally necessary to address judicial review to a significant extent in other legislation. Potentially, additional grounds of review might be included in other legislation. As section 8 of the PAJA empowers the courts to make a wide range of orders to provide a just and equitable remedy in a specific case, consideration may be given in other legislation as to whether it would be appropriate to empower the court to grant additional specific types of orders to provide an appropriate remedy in relation to an application for review in relation administrative decisions in terms of that legislation.

Judicial review has been the principal remedy for aggrieved persons where administrative action has been taken in a manner that is unlawful, unreasonable, or violates the requirements of procedural fairness. Judicial review has been treated as being the main mechanism for

³³³ Note 300 above. See also Burns (note 64 above) at 275-279.

³³⁴ Australian Administrative Review Council *Practical Guidelines for Preparing Statements of Reasons* (revised November 2002), last accessed from <https://www.arc.ag.gov.au/Documents/arcguidelinesnew.pdf> on 15 August 2018. See also Australian Administrative Review Council *Commentary on the Practical Guidelines for Preparing Statements of Reasons*, last accessed from https://www.arc.ag.gov.au/Documents/arc_commentary.pdf on 15 August 2018.

³³⁵ *Ibid.*

addressing maladministration and abuses of administrative power. Judicial review, however, has definite limitations as a remedy. Judicial review has a narrower scope than full appeal processes which may be provided by internal appeal processes and specialist tribunals. Internal dispute resolution and appeal mechanisms and tribunals may also be more efficient and cost-effective, and therefore accessible to aggrieved persons.³³⁶ Internal dispute resolution and appeal mechanisms, ombud schemes, and tribunals may be more familiar with the practical and technical particularities of the area under consideration, and may be able to draw upon specialist expertise which a court may not possess. They may, therefore, have a better understanding than a court may possess of the nature of the complex decision making that needs to be undertaken, and the policy issues and interests involved. Internal dispute resolution and ombud schemes may be more conducive to promoting further discussion of issues and exploring possible resolution of the matter than an adversarial court process. Parliamentary processes and oversight may provide a forum for the discussion of policy issues and the development of potential refinements to legislation to address identified shortcomings. The Public Protector, with investigative functions and the power to make binding recommendations, may play an important role, particularly regarding matters that may involve administrative action that impacts upon groups of people, or involves systemic issues.³³⁷

The potential to develop other mechanisms for the promotion of lawful, reasonable and procedurally fair administrative action, and other mechanisms for providing redress to persons affected by unlawful, unreasonable, or procedurally unfair administrative action is explored further in Chapter 4.

The grounds of judicial review contained in s 6 of the PAJA, which have been developed in the common law over a very lengthy period, may provide guidance as to the types of failures in the exercise of administrative action that most commonly occur. The ‘catch all’ provision, s 6(2)(i), may provide scope for additional grounds of review to address irregularities in administrative action to be provided for in other legislation.³³⁸

³³⁶ Hoexter (note 5 above) 167.

³³⁷ Ibid 168-169.

³³⁸ Ibid 325-326.

2.6 CONCLUSION

Administrative power is exercised in accordance with the foundation provided by the Constitution and the PAJA, and in terms of specific original and delegated legislation that addresses administrative action. Other legislation must be crafted in a manner that is appropriately integrated with the Constitution and the PAJA. Drafters have a significant role in promoting the realisation of the rights to lawful and reasonable administrative action in other legislation, as the PAJA primarily addresses those rights in the grounds of review in s 6. The realisation of the right to procedural fairness and the right to reasons in the context of the implementation of specific legislation may also be addressed. In addition to judicial review, which is dealt with extensively in the PAJA, appropriate mechanisms for redress where administrative action has not adhered to the requirements of lawfulness, reasonableness and procedural fairness may be provided for in other legislation.