Justice Basten and the New Frontiers of Administrative Law: Crime, Tort and Contract
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This appreciation of Justice Basten's judicial and extra-judicial contribution to administrative law focuses upon three areas outside the mainstream: in crime, tort and contract. These areas of administrative law at the State level have seen considerable developments over the last two decades, coinciding with the intrusion of statute into areas traditionally regulated by common law (such as assessments of personal injury in motor vehicle and industrial accidents and adjudicators' determinations in construction claims) and with the recognition of a constitutionally entrenched supervisory jurisdiction for jurisdictional error. The article identifies some of his significant judgments and writings in these areas, and the nature of the influence they enjoy. The article also mentions Basten JA's awareness of the significance of language – the text of the statute, and the label used to describe legal principle.

Introduction

If the last two decades of the 20th century witnessed the working out of the "New Administrative Law"[1] borne of the legislative reforms[2] enacted with bipartisan support[3] which emerged from the work of high-powered committees in the 1970s,[4] the first two decades of the 21st century saw an efflorescence at the State level of a substantially unreformed administrative law, with a focus on

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1 Precisely from where this meme derives is unclear, but for at least the last four decades it has been used in this country and abroad to describe the federal legislative reforms mentioned below: see for example M Kirby, "Towards the New Federal Administrative Law" (1981) 40 *Australian Journal of Public Administration* 103 and M Dixon, "The new administrative law: Australia's novel approach" (1980) 13 *Comparative and International Law Journal of Southern Africa* 291.

2 Principally, the *Administrative Appeals Tribunal Act 1975* (Cth), the *Ombudsman Act 1976* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

3 The process is described by J McMillan, "Parliament and Administrative Law", Research Paper no 13, 2000-01 (Department of Parliamentary Library, 2000).

jurisdictional error and an expansion into areas traditionally occupied by tort and contract and criminal law, punctuated in 2010 by the recognition of a constitutionally entrenched Supreme Court supervisory jurisdiction.[5] This expansion has been markedly influenced by Justice Basten's judicial writings for most of the 21st century (from May 2005 to date), and by his extra-judicial writings for the entirety of the 21st century. It is not merely that his judgments have shaped these new frontiers, although they have done that. He has also contributed as much as anyone to the maintenance of orthodox principles of administrative law, including an appropriate emphasis upon the legislative text and the significance of statutory construction, running against generations of tradition in common law actions.[6]

[93] The focus of this paper is upon administrative law arising out of three traditionally "common law" areas: contract, tort and crime. It would be quite wrong to think that that was the limit of Justice Basten's contribution to the development of administrative law. There are many, many decisions in administrative law which bear his mark, as other comments in this journal testify. One point of this paper's narrow focus is to demonstrate, by way of three examples somewhat removed from the mainstream, something of the breadth of his contribution.

The supervisory jurisdiction and criminal law

In an important paper,[7] Justice Basten analysed the moderately arcane area of judicial review of criminal proceedings, based on s 17 and the Third Schedule of the *Supreme Court Act*.[8] Section 17

4 Notably the Kerr Committee which produced a report on Judicial Review (Cth Parl Paper No 144 (1971)), the Bland Committee which produced interim and final reports of the Committee on Administrative Discretions (Cth Parl Paper Nos 53 and 316 (1973)) and the Ellicott Committee, which produced a report on Prerogative Writ Procedures (Cth Parl Paper No 56 (1973)). "The reform package that emerged was a comprehensive scheme of interrelated elements including courts, tribunals, a right to reasons, procedure, an ombudsman-type body, access to information rights and a body to monitor the arrangements": R Creyke, "Administrative Justice – Towards Integrity in Government" (2007) 31(3) *Melbourne University Law Review* 705 at 711.

5 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1.

6 Although outside the scope of this note, this is closely related to the delayed embrace of the *Civil Liability Act 2002* (NSW), and is one of the processes described in M Leeming, "Statute Law in the Law of Obligations" in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019), ch 15.

7 J Basten, "Judicial Review in State Jurisdiction" (2016) *AIAL Forum* No 84, 10.

8 Section 17(1) provides "Except as provided in this section this Act and the rules do not apply to any of the proceedings in the Court which are specified in the Third Schedule, and no claim for relief lies to the Court against an interlocutory judgment or order given or made in proceedings referred to in paragraph (a1) or (a2) of that Schedule." Paragraphs (a), (a1) and (a2) of the Third Schedule provide: "(a) Proceedings in the Court for the prosecution of offenders on indictment (***indictment*** including any information presented or filed as provided by law for the prosecution of offenders) including the sentencing or otherwise dealing with persons convicted, (a1) proceedings (including committal proceedings) for the prosecution of offenders on indictment (***indictment*** including any information presented or filed as provided by law for the prosecution of offenders) in the Court or in the District Court, (a2) proceedings (whether in the Court or the District Court) under sections 97 and 99 and Division 9 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986*."

when read with the Third Schedule disapplies most of the *Supreme Court Act* to a large range of criminal proceedings; the *Supreme Court Act* is thus inapplicable to much of the most important litigation conducted in the Supreme Court. The paper analyses the interaction between s 17 and s 69 (which replaces the old writs[9] and alters what was held in *Craig v South Australia*[10] so that, for the purposes of error of law on the face of the record, the record of a court or tribunal includes the reasons). It addresses three important issues. First, Justice Basten observes that s 69 neither confers nor constitutes a statement of the pre-existing jurisdiction, but instead reflects a procedural liberalisation. He asks if s 17 disapplies s 69 for the purpose of judicial review of criminal proceedings, then does that preserve the unmodified general law concerning prerogative writs, and in particular does it leave in place the unamended general law that the reasons of a court or tribunal are generally not part of the record? Secondly, what is the effect of the privative clause in s 17 for errors falling short of jurisdictional error? Thirdly, how does the entrenched supervisory jurisdiction of the Supreme Court recognised in *Kirk* interact with s 17 (which pre-dated *Kirk* by 40 years)? The paper contains a valuable discussion of the handful of decisions on this important topic,[11] and will be used with profit in future cases.

It is not difficult to bring to mind a series of decisions written by Justice Basten speaking for the Court of Appeal concerning the judicial review of post-conviction decisions under a range of statutes, which involve issues of the utmost importance and complexity.[12] This is a topical area. Very recently, there has been a rapid growth in attempts to seek judicial review of criminal decisions of the District Court from which no appeal lies (notably, decisions of the District Court determining appeals from the Local Court – which may involve full-time custodial sentences of up to three years). By way of illustration, of the 213 decisions of the Court of Appeal delivered between 1 July and 31 December 2021, no fewer **[94]** than 11 were applications alleging

9 See *Dickinson v Perrignon* [1973] 1 NSWLR 72 at 79E (Moffitt JA) and 82-83 (Street CJ in Eq).

10 (1995) 184 CLR 163; [1995] HCA 58.

11 *Adler v District Court of New South Wales* (1990) 19 NSWLR 317; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 and *El-Zayet v Director of Public Prosecutions* [2014] NSWCA 422.

12 Including *Sinkovich v Attorney General of New South Wales* (2013) 85 NSWLR 783; [2013] NSWCA 383 (holding that a decision of a Supreme Court judge determining an application for review of a conviction under Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) constitutes executive action which is not susceptible to appeal but is reviewable for jurisdictional error), *Lodhi v Attorney General of New South Wales* [2013] NSWCA 433; 241 A Crim R 477 (authorising review of a decision to refuse consent to investigate a claim of juror irregularity) and *Huynh v Attorney General (NSW)* [2021] NSWCA 297 (no jurisdiction to review convictions or sentences of federal offenders under Part 7 of the *Crimes (Appeal and Review) Act*).

jurisdictional error by the District Court in final[13] or interlocutory[14] criminal decisions. The New South Wales Director of Public Prosecutions appears to be the most frequent active litigant in the Court of Appeal. When three other applications[15] in the Court's supervisory jurisdiction in that period are considered (including review of decisions to refuse to state a case),[16] these applications approach 10% of the 166 principal judgments[17] delivered by the Court of Appeal in that six month period. In short, while the Court of Criminal Appeal deals exclusively with crime, the Court of Appeal's workload includes substantial aspects that derive from criminal proceedings. The notion that administrative law and criminal law occupy distinct silos may be suggested by law school curricula, but it is not borne out in practice.

Three comments may be made. First, the growth in challenges to criminal decisions following *Kirk* was almost certainly unforeseen when the decision was delivered, yet when it is borne in mind that most litigation is criminal, and most criminal proceedings involve a guilty plea, it is far from surprising that most of the challenges have been made to sentencing decisions. Secondly, a disproportionately large share are judgments written by Justice Basten. Thirdly, the 2016 article was prescient. Alexander Hamilton, echoing Montesquieu, observed that the courts were the least dangerous branch, because they "can take no active resolution whatever", their authority being limited to resolving controversies which arose before them.[18] But another important aspect of Basten JA's influence has been extra-judicial writings which, with appropriate diffidence in relation to issues that might squarely arise, have prompted and improved the quality of argument in subsequent cases. The 2016 paper concluded:

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13 *Stanley v Director of Public Prosecutions (NSW)* [2021] NSWCA 337; *McNab v Director of Public Prosecutions (NSW)* [2021] NSWCA 298; *Quinn v Commonwealth Director of Public Prosecutions* [2021] NSWCA 294; *Purcell v The Director of Public Prosecutions* [2021] NSWCA 269; *Blissett v Director of Public Prosecutions (NSW)* [2021] NSWCA 253; *Lunney v Director of Public Prosecutions* [2021] NSWCA 186; *DK v Director of Public Prosecutions* [2021] NSWCA 134.

14 *Yenuga v Director of Public Prosecutions (NSW)* [2021] NSWCA 293; *Dacich v Director of Public Prosecutions (NSW)* [2021] NSWCA 275; *Gibson v Director of Public Prosecutions (NSW) (No 2)* [2021] NSWCA 218; *Gibson v Director of Public Prosecutions* [2021] NSWCA 176.

15 *Eliezer v Sydney Water Corporation* [2021] NSWCA 300; *Hariz v Director of Public Prosecutions (NSW)* [2021] NSWCA 264; *Huynh v Attorney General (NSW)* [2021] NSWCA 297.

16 *Gibson v Director of Public Prosecutions (NSW) (No 2)* [2021] NSWCA 218 and *Yenuga v Director of Public Prosecutions (NSW)* [2021] NSWCA 293; see further for example *Mack Fleet Pty Ltd v Transport for NSW* [2020] NSWCA 149, *Forrest v Director of Public Prosecutions (NSW)* [2020] NSWCA 162.

17 The category of "Principal judgments" excludes interlocutory decisions, decisions by single Judges of Appeal, and supplementary decisions on orders and costs. Incidentally, 2021 conformed to the trend in previous years for many more decisions to be delivered in the second half of the calendar year than the first, which reflects the annual vacation but also efforts to minimise the number of judgments reserved over the Christmas break.

18 The Federalist No 78, "The Judiciary Department" *The Papers of Alexander Hamilton*, Volume IV: January 1787-May 1788 (Columbia University Press, 1962).

> "Much of the discussion of judicial review in Australia focuses upon federal jurisdiction. That may have led to a misapprehension that there are no particular issues arising specifically within a state jurisdiction. The role of the New South Wales Court of Appeal in reviewing decisions in criminal jurisdiction is, I think, one which is worthy of careful attention."

Notwithstanding the recent spate of decisions, this area is far from being fully worked out, and when that occurs, Basten JA's analysis is apt to be illuminating and influential.

Administrative regimes in high volume areas of tort and contract

The growth of the modern regulatory State has seen the *introduction* of statutes into many of the most important aspects of community and commercial life (such as capital raising, planning law, financial services, occupational health and safety), and the corresponding growth of litigation about statutes. The next phase of this "Age of Statutes"[19] may be seen in the *replacement* of curial by administrative regimes **[95]** in traditional areas. The legislative focus has been on high volume areas where it is considered that the costs and delays of litigation warrant a less adversarial and more streamlined approach. In the case of personal injury, the focus has been on reducing legal costs;[20] in litigation concerning payment claims in the construction industry, the focus is upon a speedy resolution of a dispute (under the mantra that cashflow is the life blood of the construction industry).[21] Each is addressed in turn. It would be difficult to overstate the contribution Justice Basten has made to the understanding of what is required of decision-makers under these regimes.

Tort

Legislative reforms at the turn of the century brought about the removal of courts and their replacement by administrative mechanisms for assessing personal injury in the two highest volume areas, workers compensation and motor accidents. The Compensation Court of New South Wales was abolished on 1 January 2004[22] and replaced by an expanded administrative system.[23] Some contentious aspects of litigation, including (generally speaking) the extent of permanent injury and

19 The term popularised by G Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982), although his argument – that courts could overturn superseded statutes – has not been accepted.

20 This is well illustrated by *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (20003) 57 NSWLR 282; [2003] NSWCA 146, a challenge to rules capping the costs recoverable in workers compensation proceedings.

21 See Second Reading speech of Building and Construction Industry Security of Payment Amendment Bill 2002 (Legislative Assembly, 12 November 2002, Hansard pp 6541-6542), citing without attribution what had been said by Lord Denning ("the very lifeblood of the enterprise") referred to in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 at 215.

22 *Compensation Court Repeal Act 2002* (NSW), s 4.

23 Exceptionally, the District Court was given a "residual jurisdiction" (relabelled by the *Regulatory and Other Legislation (Amendments and Repeals) Act 2016*) (NSW) as its "compensation jurisdiction") to hear and determine claims by, inter alia, coal miners and police officers.

whether it was caused by the defendant, were replaced by conclusive determinations of assessors. Thus a medical assessor would determine, conclusively, whether an injured worker's degree of permanent impairment was at least 15%, without which no modified common law damages were available.[24] An assessor would likewise determine, conclusively, whether a plaintiff injured in a motor vehicle accident suffered a degree of permanent impairment in excess of 10%, without which no damages for non-economic loss were available.[25] An amalgam of statute, regulations and guidelines, quite prescriptive and intricately inter-related, governed making applications for assessment, the procedure, the way disputes were determined, the right of review or appeal and the right to make a further application. All of this took place outside courts, by way of executive action. Administrative appeals and review lay to a "Medical Appeal Panel" or in some cases to the President of the Workers Compensation Commission, and were ordinarily resolved on the papers. One explicit purpose of the regime was to reduce court time, and in particular, reduce the legal fees generated by high-volume, relatively less serious injuries. No right of appeal to a court was given from most such determinations, and many were protected by privative clauses.

But those administrative decisions not protected by privative clauses were reviewable for error of law on the face of the record, and all decisions were reviewable for jurisdictional error. Thus administrative law litigation in State courts emerged from specialist areas, such as tax and industrial and planning law, into the mainstream of common law personal injury litigation.

That in turn led to the growth in judicial review of administrative decisions of medical assessment panels, proper officers, and medical assessors. Justice Basten participated in leading decisions on the roles of registrars and proper officers[26] and medical assessment panels[27] within the schemes, the **[96]** operation of time limits and pre-filing statements,[28] the function of "Guidelines"[29] and the obligations to give reasons.[30] Accompanying that shift was a sharper focus on statutory text. In a recent note on "Statute and the Common Law", Justice Basten observed that what Paul Finn had

24 *Workers Compensation Act 1987* (NSW), s 151H. See *Sleiman v Gadalla Pty Ltd* [2021] NSWCA 236 at [50].
25 *Motor Accidents Compensation Act 1999* (NSW), s 131; *Motor Accident Injuries Act 2017* (NSW), s 4.11 (the latter applies to motor vehicle accidents occurring on or after 1 December 2017).
26 *Mahenthirarasa v State Rail Authority of New South Wales* [2008] NSWCA 101; *Meeuwissen v Boden* (2010) 78 NSWLR 143; [2010] NSWCA 253; *QBE Insurance (Australia) Ltd v Miller* [2013] NSWCA 442.
27 *Boyce v Allianz Australia Insurance Ltd* (2018) 96 NSWLR 356; [2018] NSWCA 22; *McKee v Allianz Australia Insurance Ltd* (2008) 71 NSWLR 609; [2008] NSWCA 163.
28 *Strasburger Enterprises Pty Ltd v Serna* [2008] NSWCA 354.
29 *Ali v AAI Ltd* [2016] NSWCA 110.
30 *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372; [2006] NSWCA 284.

once described as a "strange complacency" about the relationship between statute and common law,[31] which had been supplanted by a new approach:[32]

> [L]awyers have undoubtedly shifted their frame of reference from an assumption that primacy should be given to judicial statements of principle to a focus on the statutory text, which is the most common source of the governing law.

For example, although the regimes governing workers compensation and motor accident claims serve similar purposes and use similar statutory language, there are vital differences. One is that the review of a medical assessment under the workers compensation regime is confined to the grounds stated, while under the motor accidents regime it is "to be by way of a new assessment".[33] Another is in the obligation to give reasons. The regime for administrative appeals under the workers compensation legislation was held in *Vegan* to be subject to an implied statutory obligation to give reasons, anticipating substantially the result reached by the High Court.[34] But the motor accidents compensation scheme also made explicit provision for reasons for some other decisions, reinforcing the need for attention to the statute.[35]

Contract

Similar policy goals applied to another high volume area of common law litigation – building cases. The regime created by the *Building and Construction Industry Security of Payment Act 1999* (NSW) has led to an extension of mainstream principles of administrative law.

Until very recently, building cases fell into two broad classes. Disputes between "consumers" and builders were litigated in the Administrative Decisions Tribunal (later, NCAT).[36] Larger claims – often worth many millions of dollars – gave rise to a specialist regime, the *Building and Construction Industry Security of Payment Act 1999* (NSW) for the determination of claims on an interim[37] basis enabling contractors and subcontractors to be paid, but without prejudice to the parties' ultimate contractual rights at a final hearing. An adjudicator's certificate was made

31 P Finn, "Statutes and the Common Law: The Continuing Story" in S Corcoran and S Bottomley, *Interpreting Statutes* (Federation Press 2005), 52.

32 J Basten, "Statute and the Common Law" (2019) 93 *Australian Law Journal* 985.

33 *Motor Accidents Compensation Act 1999* (NSW), s 63(3A). See *Sydney Trains v Batshon* [2021] NSWCA 143 at [41]-[42].

34 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 (in relation to a cognate Victorian scheme).

35 See for example *Insurance Australia Group Ltd t/as NRMA Insurance v Keen* [2021] NSWCA 287 at [47].

36 From March 2021, the scope of claims under the Security of Payments regime has expanded to include consumers formerly subject to the protections of the *Home Building Act 1989* (NSW). The details are outside the scope of this paper; see P Davenport, *Adjudication in the Building Industry* (Federation Press, 4th ed 2021), pp 10-17.

37 On why the regime is well described as "interim" see *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [39]-[40].

enforceable as if it were a judgment. That led to a swathe of applications for judicial review of determinations by adjudicators, alleging jurisdictional error and, at first, error of law on the face of the record of the determinations of adjudicators. Justice Basten, writing for an expanded court constituted by five Judges of Appeal, identified in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* that review for error other than jurisdictional error had been *impliedly* excluded as inconsistent with a regime for the rapid determination of the parties' rights on an interim basis, without prejudice to the outcome of the contractual dispute.[38] The High Court dismissed an **[97]** appeal, substantially for the same reasons.[39] The result is a leading decision on the circumstances when, despite the absence of express language, something which might well be regarded as a "fundamental" right – the right to approach a court to seek review for error of law on the face of the record – may by implication be abrogated.

At the more granular level, a coherent regime was established, identifying which aspects were "essential preconditions" to a valid payment claim,[40] considering the effect of an adjudicator issuing a void adjudication,[41] determining whether an adjudicator exceeded jurisdiction in determining a claim other than that made,[42] and the scope of the obligations to provide procedural fairness[43] and to act in good faith.[44] The result is an extension of the established framework seen in areas such as the review of planning or taxation decisions to a new area subject to a novel legislative regime.

A lot is written about coherence in law.[45] Often the focus is upon rationalising discordant legal doctrines applicable to the same factual situation (for example, whether any tortious duty contended

38 (2016) 95 NSWLR 157; [2016] NSWCA 379.
39 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4.
40 *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; [2006] NSWCA 238; *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93.
41 *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716; [2011] NSWCA 399.
42 *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339.
43 *L & B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15.
44 *Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd* (2018) 98 NSWLR 712; [2018] NSWCA 276.
45 See for example E Bant, "Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence" (2015) 38(1) *University of New South Wales Law Journal* 367; A Fell, "The Concept of Coherence in Australian Private Law" (2018) 41(3) *Melbourne University Law Review* 1160; R Grantham and D Jensen, "Coherence in the Age of Statutes" (2016) 42(2) *Monash University Law Review* 360; J Hudson, "The Price of Coherence in Estoppels" (2017) 39(1) *Sydney Law Review* 1; D Meagher, "The 'Modern Approach' to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?" (2018) 46(3) *Federal Law Review* 397. See also *Minister for the Environment v Sharma* [2022] FCAFC 35 at [239]-[245].

for is compatible with administrative law[46] or a criminal law[47]). But another aspect of coherence is the extension of generally applicable principles to new statutory regimes. It may not be as dramatic, or written about as frequently, as other instances of coherence, yet it is the daily work of courts especially intermediate appellate courts. It is to be firmly borne in mind that legislation is the prime source of innovation in the legal system. Sir Henry Maine wrote, "The capital fact in the mechanism of modern States is the energy of legislatures,"[48] and some 150 years later that energy is undiminished; far from it. With that innovation comes the task of reconciling the operation of the new regime with the rest of the legal system, often in factual circumstances which have not been addressed expressly. As was observed in one of the many papers Justice Basten presented to the profession:[49]

> [A]s in many areas, modern forms of statutory regulation (and indeed judicial functions) did not arise like Venus, fully developed, from no identifiable source other than the will of the gods. The problem is always to construe the *language* in the relevant statute or instrument, but with an appreciation of social context and the previous law. There may be a tension between past practice and the language of the statute.

My personal experience of the conduct of hearings sitting with Justice Basten resulting in 162 principal judgments[50] of the Court of Appeal over the last nine years has included healthy attempts to suggest that counsel spend more time addressing the statutory language and exploring the leeways of choice it presents, and less time telling the court about judgments, especially judgments on different statutory regimes which are unlikely much to assist the issue at hand. Most questions of law which occupy **[98]** appellate courts are statutory, and it is not uncommon for the statutory language not to be given the attention in written and oral advocacy which it warrants.

A note on legal language

Justice Basten also recognised the importance of the labels given by lawyers to legal concepts. He preferred "supervisory jurisdiction" to "judicial review", because the latter is often thought of as referring to judicial review of administrative action, while an important aspect of the Supreme

46 *Precision Products (NSW) Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102; [2008] NSWCA 278 at [119]-[120], but cf P Vines, "Straddling the Public/Private Divide: Tortious Liability of Public Authorities" (2010) 9 *The Judicial Review* 445 (contending at 448 that "any emphasis on taxonomy in the common law system is essentially misconceived").

47 *Miller v Miller* (2011) 242 CLR 446; [2011] HCA 9; *Bevan v Coolahan* (2019) 101 NSWLR 86; [2019] NSWCA 217.

48 H Maine, *Early History of Institutions* (J Murray, 1875), p 398, cited by R Pound, "Common Law and Legislation" 21 *Harvard Law Review* 383 at 403 (1908).

49 J Basten, "Year in Review – Cases in the Court of Appeal", paper presented to EPLA Conference, 5 November 2021.

50 The category of "principal judgments" excludes interlocutory decisions and decisions on orders and costs; see note 16 above.

Court's supervisory jurisdiction extends to the control of excess or want of jurisdiction by any court or tribunal, whether exercising judicial or administrative power or even (bearing in mind the absence of separation of powers at the State level) "something in between".[51] As Lord Hoffmann once said in a different context,[52] "The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition." That is true of contracting parties' use of a definition (which was the occasion for Lord Hoffmann's statement) but all the more true of the label used for a legal concept which will by its connotations and etymology shape legal reasoning. Hence Lord Goff's disdain for "proximity".[53] This has been significant in the new areas for the application of administrative law. The obscurity of s 17 of the *Supreme Court Act* is not unrelated to the unlikelihood of that legislation disapplying itself to a significant portion of proceedings in the Supreme Court. It is to be borne in mind that the nature of litigation is that regularly either or both sides seek to extend the scope of legal principles, and do so as persuasively as they may. This is where labels matter. The term "principle of legality" is euphonious, but often its invocation is less than helpful, as Justice Basten has repeatedly observed.[54]

It is very difficult to be more than impressionistic when speaking of influence.[55] But it is tempting to claim that in addition to a wide-ranging influence upon all areas of administrative law, both main-stream and less familiar, Justice Basten has also influenced the way advocates and judges conceptualise disputes in administrative law, and therefore how they are argued and resolved. This has been not merely to the advantage to the litigants and the other members of the Court, but also to the future development of the law.

51 J Basten, "Judicial Review in State Jurisdiction" (2016) AIAL Forum No 84, 10 at 11. This point was subsequently reflected in the joint judgment in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [29].

52 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101; [2009] UKHL 38at [17].

53 See the 1983 Maccabean Lecture in Jurisprudence, "The Search for Principle" (1984) 69 *Proceedings of the British Academy* 169 echoed in *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350 at 395; see also *James Adam Pty Ltd v Fobeza Pty Ltd* (2020) 103 NSWLR 850; [2020] NSWCA 311 at [27]-[28].

54 See *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 95 NSWLR 157; [2016] NSWCA 379 at [39]-[47], *Elliott v Minister administering Fisheries Management Act 1994* (2018) 97 NSWLR 1082; [2018] NSWCA 123 at [33]-[40], *Attorney General of New South Wales v WB* [2020] NSWCA 7; 281 A Crim R 252 at [45]; see also the joint judgment in *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599; [2018] NSWCA 209 at [25]-[42].

55 See, generally, N Duxbury, *Jurists and Judges – An Essay on Influence* (Hart Publishing, 2001).