

**LAND AND ENVIRONMENT COURT OF NSW**

**ANNUAL CONFERENCE: 6 MAY 2011**

***JUDICIAL REVIEW: GROUNDS, STANDARDS & INTENSITY OF REVIEW OR  
'WHO IS MISS BEHAVIN?'***

The Hon John Basten  
Judge of the NSW Court of Appeal

**Introduction**

I appreciate that this Court has a wide range of jurisdictions, including merit review of decisions made by councils and other public officers, appeals of various kinds, judicial review of administrative decisions and criminal jurisdiction. I propose to focus on aspects of the appellate and judicial review jurisdiction, although I am conscious that not all members of the Court engage in it. Nevertheless, from my own experience, those subject to appellate or judicial review are as interested in the principles to be applied as are those who have to apply those principles. In any event, I hope that may be the case today.

**(1) Judicial review: Australian exceptionalism<sup>1</sup>**

The days are long gone when Australian courts blindly followed English authority, whether strictly binding in this country or not. Both for practical and principled reasons, it is now unusual for Australian courts to follow English case law. The practical reason is one which confronts all of us in an electronic age. The volume of available material is simply overwhelming. It is enough for most of us to try to keep up with Australian case-law, particularly in areas where the general law operates

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<sup>1</sup> The phrase derives from the widely respected New Zealand administrative law academic, Michael Taggart, "Australian Exceptionalism in Judicial Review" (2008) 36(1) *Federal Law Review* 1. As Chief Justice Spigelman has noted, the epithet was not intended favourably: Spigelman, JJ "Public Law and The Executive" (2010) 69 *Australian Journal of Public Administration* at 345, 349; (2010) 34(1) *Aust Bar Rev* 10, 17.

without significant statutory modification and we are required to have regard, not merely to decisions of the High Court, but also to developments in other intermediate courts of appeal. The principled reason arises from changes in the UK which have not been adopted here. In such circumstances, there is a danger in even considering overseas developments: the volumes of cases in other countries are similar or greater and without careful attention to a line of cases, it may be easy to misunderstand an apparent development in a context with which we are not familiar.

Recent points of departure in UK case-law fall broadly within three categories:

- (a) the abandonment of the distinction between jurisdictional and non-jurisdictional errors of law, commonly identified by reference to the decision in *Anisminic*,<sup>2</sup> but more correctly arising from the subsequent decision in *Ex parte Page*,<sup>3</sup>
- (b) the acceptance of a ground of judicial review based on frustration of a legitimate expectation as to outcome (also referred to as substantive fairness), and
- (c) the development of review based on a ground of proportionality.

The combination of these changes has not merely required a selective approach to English case-law, but has, understandably, given rise to a reluctance to engage with English case-law generally.

## **(2) The continued significance of jurisdictional error**

In *Lam's case*,<sup>4</sup> McHugh and Gummow JJ stated:

“An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.

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<sup>2</sup> *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147.

<sup>3</sup> *R v Hull University Visitor; Ex parte Page* [1993] AC 682; see also the comments of Lord Irvine LC in *Boddington v British Transport Police* [1999] 2 AC 143 at 154.

<sup>4</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at [76]-[77].

This demarcation is manifested in the distinction between jurisdictional and non-jurisdictional error which informs s 75(v). Justice Selway has accurately written of that distinction:

‘Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles.’”

While some such distinction may aptly encapsulate current principles, a more sophisticated analysis is required to explore why the separation of powers doctrine does not require that *all* errors of law are “unauthorised”. The importance of the distinction has nevertheless been reinforced by the decision in *Kirk’s case*,<sup>5</sup> that the supervisory jurisdiction of a State Supreme Court is constitutionally protected from diminution by the legislature. The core characteristic thus protected is identified by reference to the power to review for jurisdictional error. One aspect of that judgment which will call for further elaboration is the comment it provides on what had been considered as important guidance from the High Court in respect of the concept of jurisdictional error in *Craig v South Australia*.<sup>6</sup> That guidance must now be treated as less than final. This is not a topic, however, upon which I wish to dwell today.

### (3) Substantive fairness

A more important aspect of the joint judgment in *Lam* addressed the doctrine of legitimate expectation with respect to substantive benefits, contravention of which was identified as a form of “abuse of power”. The discussion focused on the judgment of the English Court of Appeal in *Ex parte Coughlan*.<sup>7</sup> As McHugh and Gummow JJ explained at [66]:

“The doctrine of ‘legitimate expectation’ has been developed in England so as to extend to an expectation that the benefit in question will be provided or, if already conferred, will not be withdrawn or that a

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<sup>5</sup> *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1; 239 CLR 531.

<sup>6</sup> [1995] HCA 58; 184 CLR 163. *Kirk* also cast doubt on the elucidation to be obtained from the term “authoritative” as used in *Craig*: at [68]-[70].

<sup>7</sup> *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, discussed in *Lam* at [68]-[73]. Endicott, T *Administrative Law*, (OUP, 2009) has a full chapter on “Substantive fairness”: Ch 8.

threatened disadvantage or disability will not be imposed. This gives the doctrine a substantive, as distinct from procedural, operation.”

As their Honours noted in *Lam*, the concept of “abuse of power” may operate at a level of generality which is too abstract to provide useful assistance as to the correct approach in specific circumstances.<sup>8</sup> A ground of review for substantive unfairness risks giving rise to a form of public law estoppel which has been rejected in Australian law.

#### (4) The development of proportionality

As Professor Endicott has eloquently remarked, it is “unreasonable to use a sledgehammer to crack a nut, or to make a mountain out of a molehill”.<sup>9</sup> However, colourful illustrations work by way of hyperbole, whereas the law requires a more nuanced approach. (I do not mean to suggest that Professor Endicott does not appreciate that fact: as I will illustrate, he does indeed.) On one view, proportionality is just another way of expressing *Wednesbury* unreasonableness. A manifestly unreasonable decision must be disproportionate. On the other hand, it is also possible to express the test adopted by *House v The King*<sup>10</sup> in respect of appellate interference with discretionary judicial decisions in the same way. Thus, if a particular sentence is outside the range open to the sentencing judge, it may aptly be described as disproportionate to the circumstances of the offence. Therein lies the rub: a test of proportionality will often provide a far lower hurdle for an applicant to clear than the high hurdle of *Wednesbury* unreasonableness. As explained by Endicott:<sup>11</sup>

“Proportionality is *not* a general ground of judicial review, except in the sense in which proportionality is built into *Wednesbury* unreasonableness: it is generally unlawful for a public authority to act in a way that is so disproportionate that no reasonable public authority would act in that way. And even that aspect of *Wednesbury* is limited, because proportionality is a **relation** between two things, and it cannot arise as a ground of judicial review (even in the highly deferential *Wednesbury* form) until the law recognises some interest that is to be protected by a judicial inquiry as to whether it has been damaged in a

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<sup>8</sup> At [72].

<sup>9</sup> Endicott, *Administrative Law*, p 273.

<sup>10</sup> [1936] HCA 40; 55 CLR 499.

<sup>11</sup> *Ibid*, p 274.

way that is out of proportion to the attainment of a public objective. Even in a deferential form, proportionality cannot take over the general judicial control of administrative action.”

Endicott, and other English and North American commentators, tend to speak in terms of comity and deference, concepts which are foreign to our jurisprudence. At least since *Enfield Corporation*,<sup>12</sup> the High Court has eschewed the language of deference on the basis that it is inappropriate (even in State jurisdiction) because, as recognised in *Quinn’s case*,<sup>13</sup> the limits of judicial review are explained by reference to the separation of powers.

That semantic consideration aside, the substance of Endicott’s concern is undoubtedly real. He uses, by way of example, the refusal of the House of Lords to countenance interference with the discretion of a prosecutor to abandon an investigation of allegations that British Aerospace had illegally bribed Saudi Arabian officials in negotiating the sale of fighter aircraft. There were suggestions that Saudi Arabia might retaliate, by withdrawing its co-operation in fighting terrorism, thus placing British lives at risk, if the investigation went ahead. In effect, their Lordships held that that was not an irrelevant public interest, in the sense of one which was inconsistent with the investigator’s duty to uphold the rule of law; once that step had been passed, it was a matter for the government officer to weigh the competing public interests.<sup>14</sup>

The reason for rejecting a specific ground of proportionality, despite the existence of a ground of *Wednesbury* unreasonableness, is an application of the same principle that precludes a court from inquiring into the consequences of procedural unfairness. Unless it can be readily seen that the alleged unfairness could not have had a material effect on the outcome of a case, any assessment of consequences will require the court to investigate the material before the decision-maker and how it was assessed. A proportionality ground would require a similar assessment. By contrast, a ground of *Wednesbury* unreasonableness looks at the outcome and condemns it as “manifestly unreasonable” or otherwise, as the case may be. In each

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<sup>12</sup> *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135.

<sup>13</sup> *Attorney-General (NSW) v Quinn* [1990] HCA 21; 170 CLR 1.

<sup>14</sup> See *R (Cornerhouse Research) v Director of the Serious Fraud Office* [2008] UKHL 60; ....

case the underlying principle is to avoid assessment of the facts and circumstances which resulted in a conclusion as to the preferable decision.

Having said that, I would favour a reformulation of *Wednesbury* unreasonableness; the test articulated by Lord Green in *Wednesbury Corporation* is conclusory, using that term in its deprecatory, rather than a neutral, sense. The test fails to disclose the criteria upon which it operates.

I think we will see developments in this aspect of the law in Australia. To focus on an outcome and describe it as manifestly unreasonable is to adopt a black box approach: the reviewing court is saying that the decision has to be wrong, although it does not know where the decision-maker erred. Where reasons are provided, it should be possible to be more precise as to the nature of the error. Where reasons have not been provided, it is preferable to say, in the more expansive language of *Avon Downs*, that if the decision-maker applied the correct test, and allowing for the most generous findings in respect of facts on the material available, a different decision should have been reached, from which it may be inferred that in reaching the actual decision the wrong test was applied.<sup>15</sup> Such a course is preferable, because it does not cast the decision-maker as irrational or deluded.

In the UK, proportionality found a role foreign to our jurisprudence, as a result of the *Human Rights Act 1998* (UK). In particular, the obligation to assess administrative decisions by the standard of proportionality is believed to have led UK courts into a degree of “merit review” unacceptable in Australia.

This understanding, which is encouraged by most leading UK textbooks, is only obliquely countermanded by the leading cases. In principle, however, the *Human Rights Act* has no direct effect on judicial review, to which it provides an alternative mechanism for challenging administrative decisions. The *Human Rights Act* requires public authorities to conduct their business in a manner compatible with the European Convention on Human Rights, to which it gives effect in UK domestic law.

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<sup>15</sup> *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; 78 CLR 353 at 360 (Dixon J).

In 2001, it was assumed by some that the *Human Rights Act* would impact directly on principles of judicial review.<sup>16</sup> The focus of that assumption was on *Wednesbury* unreasonableness, as that principle is often seen to require an assessment of the outcome, rather than the process, and hence to constitute a form of substantive review.<sup>17</sup> The argument tended to revolve around concepts of “deference” and allowing a margin of appreciation to the public authority.

Section 6 of the *Human Rights Act* renders it “unlawful” for a public authority in the UK to act in a way which is incompatible with a human right protected by the Convention. Since most substantive rights are subject to limitations which are “necessary” in a “democratic society” for a legitimate purpose, an evaluative judgment is required as to whether the extent of the interference with the relevant human right is proportionate, having regard to the permitted purpose.

There are two ways of enforcing such an obligation. One is to require the public authority to undertake the evaluation, subject to judicial review on the usual grounds; the other is to require the courts to test the resultant conduct for compliance with the Convention.

In traditional judicial review language, the first approach would identify compliance with the Convention as a mandatory relevant consideration for the authority to address; the latter would identify compliance as a “jurisdictional fact”, the correctness of which must be assessed by the court. To adopt the first approach is to enhance the decision-making autonomy of the authority, but at the expense of imposing a somewhat legalistic structure on its reasoning process, which may need (in practice) to be revealed in written reasons. On the other hand, to adopt the second approach may be to place on the courts a function which they are ill-equipped to undertake, both in terms of their trial procedures and expertise.

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<sup>16</sup> See, eg, Elliott, M “The *Human Rights Act 1998* and the Standard of Substantive Review” (2001) 60 *Camb LJ* 301.

<sup>17</sup> See Atrill, S “Keeping the Executive in the Picture: A Reply to Professor Leigh”, [2003] *PL* 41; Leigh I, “Taking Rights Proportionately: Judicial Review, the *Human Rights Act* and Strasbourg”, [2002] *PL* 265.

These alternatives were confronted (and resolved, after a fashion) by the House of Lords in *Begum and Denbigh High School*.<sup>18</sup> The school had refused to allow the complainant to wear, instead of one of three kinds of approved school dress, “a long coat-like garment known as a jilbab”.<sup>19</sup> The Court of Appeal adopted the first approach, setting aside the school’s decision because the relevant officers of the school had not addressed the questions raised by the Convention right to freedom of religious belief and manifestation thereof.<sup>20</sup> The House of Lords overturned that judgment, holding that it was for the Court to determine whether the Convention right had been breached in the particular circumstances of the case. Their Lordships unanimously held that it had not, as the interference with the human right was not, objectively assessed, disproportionate to the legitimate purpose of the school uniform policy (in setting which the school had taken genuine and careful steps to accommodate widely-held Muslim beliefs, though not those of the complainant and her brothers).<sup>21</sup>

This approach was confirmed in *Belfast City Council v Miss Behavin’ Limited (NI)*.<sup>22</sup> That case involved a refusal by the Council to licence the respondent to operate a sex shop at a particular address. The respondent alleged infringement of its rights, including that to freedom of speech under Article 10 of the Convention. It complained that the Council had not undertaken the required exercise of weighing its rights against the legitimate purposes underpinning the licensing regime. Again, the House of Lords overturned the “process” analysis in the Court of Appeal, and made its own objective assessment of the decision against the Convention criteria.

What has been said so far should raise a few eyebrows: how did the House of Lords in each case actually undertake its “objective assessment”? What evidence did it have before it? Given that the authorities had not expressly undertaken such an assessment, what weight (if any) could be given to their decisions?

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<sup>18</sup> *R (on the application of Begum (by her litigation friend, Rahman)) v Head Teacher and Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100.

<sup>19</sup> At [10].

<sup>20</sup> At [66].

<sup>21</sup> At [29]-[31] (Lord Bingham) and [68] (Lord Hoffmann).

<sup>22</sup> [2007] UKHL 19; [2007] 1 WLR 1420.



In an earlier case in the House of Lords, *Ex parte Daly*,<sup>23</sup> a similar approach had been enunciated. *Ex parte Daly*<sup>24</sup> concerned a challenge to a Home Office practice providing for prison officers to inspect legal material held by the prisoner in his or her absence. The security justification had to be weighed against the degree of infringement of the right to confidentiality in respect of communications with lawyers. Lord Steyn (with whom Lord Bingham and others agreed) seemed at pains to emphasise the degree of similarity between this approach and that of judicial review. However, he acknowledged differences, particularly that the Court may have to assess the weight to be accorded to “interests and considerations” and “assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions”. Finally, Lord Steyn noted that a policy should not be upheld merely because it was not “irrational”, presumably in *Wednesbury* sense.

Despite the general agreement accorded to this statement, it seems conceptually fraught. What is the reviewing court actually doing? Is it forming its own view as to the outcome, or considering the adequacy of the authority’s view, and, if so, by what standard?

In *Denbigh High School*, Lord Bingham reaffirmed the principles expressed in *Daly*, but added:<sup>25</sup>

“There is no shift to a merits review, but the intensity of review is greater than was previously appropriate .... The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time .... Proportionality must be judged objectively, by the court....”

Again, it appears that their Lordships were having a foot in both camps. The court reviews a decision taken by the repository of the power, with heightened intensity; but also makes its own assessment. If the decision-maker, “has conscientiously paid attention to all human rights considerations, no doubt a challenger’s task will be

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<sup>23</sup> *R v Secretary of State for the Home Department; Ex parte Daly* [2001] 2 UKHL 26; 2 AC 532 at [27].

<sup>24</sup> [2001] UKHL 26; [2001] 2 AC 532.

<sup>25</sup> At [30].

harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it".<sup>26</sup> Lord Bingham considered and upheld the school's assessment, but added:<sup>27</sup>

"It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision."

In *Miss Behavin*, Lord Mance appears to have adopted a two-stage approach: if the decision-maker reached an informed conclusion after addressing Convention issues, the level of scrutiny may be reduced. In some cases a decision either way may be regarded as "proportionate".<sup>28</sup> He continued,<sup>29</sup> that if Convention issues are not addressed "at all", the court "is deprived of the assistance and reassurance provided by the decision-maker's 'considered opinion' on Convention issues". It will then give "closer" scrutiny and may, as Baroness Hale said, have "no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker...."<sup>30</sup>

The English academic debate has long reflected confusion as to the role of the courts under the *Human Rights Act*, at least when considering acts of public authorities. The debate as to the operation of *Wednesbury* principles has assumed that, in dealing with the exercise of a discretionary power, the *Human Rights Act* added a new element to the reasoning process or, if the focus were not on the process, but the outcome, a new element in assessing the result. If the process were under review, the justification for intervention would be based on the view that Parliament had imposed a new mandatory consideration. The House of Lords has, however, rejected that (procedural) approach. Once it is acknowledged that it is not the process, but the outcome, which must be addressed, it is not clear in terms of

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<sup>26</sup> See also Lord Hoffmann at [68], adopted by Lord Rodger in *Miss Behavin* at [26].

<sup>27</sup> At [34].

<sup>28</sup> At [46].

<sup>29</sup> At [46]-[47].

<sup>30</sup> See also [37]; Lord Neuberger at [88]-[90] agreed with the passages at [37], [45]-[47].

strict principle why the primary question is not simply “is the outcome compatible with the Convention?”

*De Smith’s Judicial Review* now states, under the heading “Convention Rights as Grounds for Judicial Review”,<sup>31</sup> “[s]ince Convention rights have been incorporated into United Kingdom law under the *Human Rights Act 1998*, their infringement by public authorities has become a ground of illegality”. No authority is cited for that proposition.

When human rights legislation declares conduct unlawful, it may provide its own mechanisms for enforcement, which exclude other remedies for breach.<sup>32</sup> Perhaps because of such provisions, there is no significant administrative law in Australia dealing with contraventions of such statutes by public authorities as a ground for judicial review. But neither do the courts and tribunals hearing such cases address them as engaging a supervisory jurisdiction: they make their own assessment of the alleged breach. Only where the Act itself imposes a test based on the satisfaction of a decision-maker does the tribunal in effect “review” that opinion.<sup>33</sup>

Accordingly, it seems curious that enforcement of the *Human Rights Act* has, procedurally, been amalgamated with judicial review. Moreover, the procedural amalgamation appears to have given rise to conceptual confusion. Particularly is that so in circumstances where the Convention contains a right to dispute resolution by an independent and impartial tribunal.

To the extent that compatibility with the Convention requires a balancing exercise, the controversial aspect of the courts’ exercise arises at two stages. The public authority must act to protect a permissible purpose, or policy objective. Assessing the legitimacy of the purpose or policy, in a given statutory context, is a conventional aspect of judicial review. Identifying the individual human right of the complainant is usually squarely within the judicial function. However, evaluating the mechanism adopted by the authority and considering whether its adverse impact on a human right is legitimate involves both an evaluative judgment and a balancing exercise. If

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<sup>31</sup> Woolf, Jowell, Le Sueur, *De Smith Judicial Review* (6<sup>th</sup> ed, 2007) at [13-001].

<sup>32</sup> Such constraints are imposed expressly by the *Anti-Discrimination Act 1977* (NSW), for example.

<sup>33</sup> See, eg, *Jamal v Secretary, Department of Health* (1988) 14 NSWLR 252.

the authority has undertaken such a task, what weight (if any) should the court accord to its conclusion?

#### **(5) Nature of appeal**

May I now turn from judicial review to appellate jurisdiction. The nature of an appeal should be kept distinct from the level or intensity of scrutiny, where the appeal is not a fresh hearing. The nature of an appeal is defined by a discrete range of variables. They are (broadly) subject-matter, time, grounds, and powers. These, of course, tend to overlap. The subject matter is usually either the orders made below or an identifiable “decision” of the tribunal below. The temporal element is usually identified as either the time of the decision below or the time of the appeal. That is, the appellate court carries out its task by reference to the facts and law at the time of the judgment or decision of the tribunal below, or at the time it hears the appeal. In the case of an appeal in the strict sense, it is the former; in the case of a re-hearing, the latter. The grounds may allow a complete review without identifying error, they may require error, but if the subject-matter is a decision in point of law, legal error only. The powers will usually flow from the other elements, but need not. Broad powers may expand the issues to be determined on the appeal beyond its primary subject-matter.

The limited combinations of these factors have, in the past, allowed categories of appeal to be identified, as in *Turnbull*,<sup>34</sup> *Sperway*<sup>35</sup> and *Coal and Allied*<sup>36</sup>. The views of a highly experienced and respected judge of appeal (Glass JA in *Turnbull*) greatly assisted a generation of lawyers and judges to address and dispose of appeals expeditiously, confident as to their powers and the nature of the appeal. *Sperway* and *Coal and Allied* were decisions of the High Court and *Turnbull* has been referred to frequently with approval in other decisions of the High Court. Some doubt has,

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<sup>34</sup> *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297.

<sup>35</sup> *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* [1976] HCA 62; 135 CLR 616.

<sup>36</sup> *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194.

however, been cast on the characterisation exercise by the decision in *Kostas v HIA Insurance Services Pty Ltd*.<sup>37</sup>

## **(6) Errors in fact-finding**

What was, perhaps, not fully recognised in cases such as *Turnbull*, was that a particular appeal might have disparate elements.<sup>38</sup> For example, a trial judge, in dealing with a question as to admissibility of evidence may be required to

- (a) identify
  - the proposed evidence to be given by the witness;
  - the probative value in respect of the issues in dispute;
  - the potential prejudicial effects of the evidence, and then
- (b) make a ruling based on the proportion between the last two findings.

These steps require facts to be found, but they are not all of the same kind. Before a finding of primary fact can be made, it may be necessary to evaluate the creditworthiness of one or more witnesses. That exercise, like the drawing of inferences, may require assessment against a background of general experience. Other findings may require a characterisation of circumstances according to a more or less precise standard.

Whatever the difficulties in delineating the boundary between fact and law, statutory provisions require that it be done. The relevant distinction is not properly drawn in some abstract sense. Instead it is preferable to ask how we should determine if the tribunal's decision is a finding of fact or a conclusion of law, or whether it involves both.<sup>39</sup> The correct approach can then be addressed in its statutory context.

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<sup>37</sup> [2010] HCA 32; 241 CLR 390, at[83] and [89] (Hayne, Heydon, Crennan and Kiefel JJ).

<sup>38</sup> This is not true of the analysis of Glass JA in *Azzopardi* at 156-157.

<sup>39</sup> Louis Jaffe, *Judicial Control of Administrative Action* (1965), 548.

It is also important to appreciate that the law does not work with “objective facts”, but only findings made by the relevant authority. The question is - which authority’s findings are determinative of the dispute? And in what circumstances?

In part the answer must be both functional and pragmatic: if there is no formal record of the material on which an administrative tribunal acted, but it is clear that its view was intended to be effective, then the opportunity for intervention by a court will be limited. If the material is recorded and is available to the reviewing court, but the reasons are not, the scope for intervention will increase. If the reasons for decision are also available, the opportunity for review will be further expanded.

The question then becomes, on what grounds should review take place?

- (1) Is there some evidence capable of supporting the conclusion reached;
- (2) is there substantial evidence capable of supporting the conclusion reached (and if so how does it operate with a negative conclusion?);
- (3) is the conclusion “reasonable” in all the circumstances, though not the only one available;
- (4) is the reasoning to the conclusion sound?

Even a negative finding may be open to appeal where an applicant bears an “onus of proof” and has supported his or her claim with credible evidence which is uncontradicted.<sup>40</sup>

Again the UK has seen some fraying of the principle underpinning our rejection of factual review. In *E*<sup>41</sup> the Court of Appeal sought to identify circumstances when review for factual error would be appropriate on an appeal in point of law only. The case involved a refugee claim, although the principles were stated without reference to the circumstances of the case. The Court, in a judgment delivered by Lord Justice Carnwath held that a mistake of fact giving rise to unfairness provides a ground of appeal on a point of law. One condition of such a ground was that the fact or

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<sup>40</sup> See Jaffe at 608; cf *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 156.

<sup>41</sup> *E v Secretary of State for the Home Department* [2004] QB 1044.

evidence must have been “established” in the sense that it was “uncontentious and objectively verifiable”. Why one or other of those tests would not be sufficient was unclear. Further, the language was in some ways reminiscent (to an Australian reader) of the “no evidence” ground in the ADJR Act<sup>42</sup> which can be made out where it is shown that the decision was based on the existence of a particular fact “and that fact did not exist.”

The High Court has also been sceptical about linguistic rigidity in dismissing challenges to fact-finding in judicial review proceedings. The whole Court in *SZJSS* recently affirmed the proposition that a clearly articulated claim based on accepted or uncontentious facts could amount to a breach of procedural fairness.<sup>43</sup>

In the UK, *E's case* has few progeny and there has been a tendency to weaken the conditions and expand the potential for intervention. In Australia, the limits of intervention are those set by *SZJSS*, though its application to appeals on points of law is yet to be determined.

## **(7) Conflicting policies and appeals**

Statutes which confer jurisdiction and powers on a court are not to be read down by reference to implied limitations: see *Shin Kobe Maru*.<sup>44</sup> However, the proper construction of statutory provisions which are unclear or ambiguous raises a different issue. General and specific provisions dealing with appellate jurisdiction reveal particular and common problems of construction, which require a consistent and principled approach.

In New South Wales, the point arises in a variety of statutory contexts from the general operation of s 75A of the *Supreme Court Act 1970* (in the Supreme Court), and the provisions of UCPR, r 50.16, in other courts. These provisions identify powers generally associated with an appeal by way of rehearing. The question is how (and if) they apply to statutory conferrals of appellate jurisdiction which are in more restricted terms.

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<sup>42</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(1)(h) and (3)(b).

<sup>43</sup> *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 85 ALJR 306 at [35].

<sup>44</sup> *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* [1994] HCA 54; 181 CLR 404.

One would expect these more specific statutes to take precedence to the extent of any inconsistency: that is the apparent effect of s 75A(4) which states that the section has effect “subject to any Act.” However, that approach was given somewhat guarded operation in *Thaina Town (on Goulburn) Pty Ltd v Council of the City of Sydney*.<sup>45</sup> In the Court of Appeal, the Chief Justice held that an inconsistency must be clear, in order for the subsection of s 75A to operate.<sup>46</sup> That approach reflects, perhaps, an expectation that the first step is to resolve any apparent inconsistency by available principles of statutory interpretation, but it leaves open a question as to how that task should be undertaken. It also leaves open a question as to whether the approach in *Thaina Town* reflects the special role of the Supreme Court in the State judicial structure.

The operation of s 75A arose in *Thaina Town* with respect to the power of the Court of Appeal, having set aside a judgment in this Court, to vary the costs in respect of the proceedings in this Court, or whether the matter should be remitted to this Court to allow it to reconsider how costs should fall, given the decision of the Court of Appeal. The Chief Justice thought that remittal was not necessary and that the matter could properly be disposed of by the Supreme Court exercising the powers of this Court, in accordance with s 75A.<sup>47</sup>

By contrast with s 75A, UCPR r 50.16 has no provision for resolving inconsistency, but that is no doubt because it was assumed that the general provisions of the *Civil Procedure Act* (“the CPA”) would have the necessary operation. The uniform rules are made under s 9 of the CPA. They are not to be “inconsistent with this Act”.<sup>48</sup> The rules “may make provision, in relation to all civil proceedings in respect of which a court has jurisdiction”: s 9(2).<sup>49</sup> An inference may be drawn from that provision that the rules cannot expand the jurisdiction otherwise conferred on the court. Thus s 5 states:

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<sup>45</sup> [2007] NSWCA 300; 71 NSWLR 230.

<sup>46</sup> At [97].

<sup>47</sup> At [109].

<sup>48</sup> Emphasis added.

<sup>49</sup> Emphasis added.



## 5 Jurisdiction of courts

- (1) Nothing in this Act or the uniform rules limits the jurisdiction of the Supreme Court.
- (2) Nothing in the uniform rules extends the jurisdiction of any court except to the extent to which this Act expressly so provides.

I am conscious that, at least in respect of the appellate jurisdiction of this Court under classes 1, 2 and 3, the *Land and Environment Court Act 1979* (NSW) (“the LEC Act”) prescribes procedures (s 38) and powers (s 39).<sup>50</sup>

The broader point arises in relation to the recent amendment with respect to appeals from the Consumer, Trader and Tenancy Tribunal. Section 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (the “CTTT Act”) provides for an appeal in what appear to be quite limited terms, namely from “a decision of the Tribunal with respect to a matter of law”. Whatever its proper scope in relation to legal error (as to which see *Kostas*) it appears to preclude challenges to findings of fact. At least to that extent, s 75A of the *Supreme Court Act* provides a regime which is inconsistent with s 67 and s 75A should give way. But how far is the question: is s 75A to be completely disregarded or applied as far as it can be?

Section 67 is, in its terms, not dissimilar to ss 56A and 57 of the LEC Act. For example, s 57 permits an appeal to the Supreme Court “against an order or decision ... of [this] Court on a question of law” in class 1, 2, 3 or 8 proceedings. However, the effect is given an additional twist by referring to an appeal against “an order or decision” of the Court on a question of law: s 57(1). Does the term “question of law” qualify the decision, or an order or decision? (It is only with some awkwardness that one can speak of the Court making an “order” on a question of law.) However, if that provision is not so qualified, there can be an appeal to the Supreme Court, presumably by way of rehearing, against any order of this Court in the relevant classes of jurisdiction. It is unlikely that that was intended.

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<sup>50</sup> To the extent that provision is made by the Court Rules, the UCPR will prevail in the case of inconsistency: *Civil Procedure Act*, s 11.

There is a view that specific appeal-conferring provisions should be seen as providing their own stand-alone regimes. An alternative view is that they were intended to be read against the background of the general provisions. An amendment to the CTTT Act, s 67, in September 2008 transferred the jurisdiction on appeal from the Supreme Court to the District Court, but made no other change. The District Court exercises limited and defined jurisdiction. There is no equivalent to s 75A in the *District Court Act 1973* (NSW), but UCPR r 50.16 is probably engaged and was in force at the date of the amendment. There is then a question as to whether the *Thaina Town* construction of s 75A applies, via r 50.16, in the District Court.

By contrast, the appellate jurisdiction within this Court, conferred by s 57, pre-dated UCPR r 50.16, so that if the rules have operation, it must be found without any reference to expectation when the LEC Act was passed.

To all this can be added a further problem: the specific provisions are relatively precise in their conferral of jurisdiction, but remarkably vague in their conferral of powers. Although there are broad common elements, the statutory language is variable in ways which make it difficult to know if different practices are intended. Interestingly, most were drafted while the restrictive approach of *Maurici*<sup>51</sup> (which was not novel) held sway: *Maurici* (and impliedly a line of other cases) were overruled in this respect by *Thaina Town*.

These issues of statutory construction, and their judicial resolution, reflect conflicting policies. On the one hand, the establishment of specialist courts and tribunals, protected by quite limited rights of review and appeal, reveal a legislative policy of keeping identified disputes out of the traditional courts of general jurisdiction. The broad philosophy is to avoid legal technicality and formality; to improve accessibility; to reduce delay and to reduce expense. Limiting rights of review and appeal was central to effecting that philosophy. Whether the philosophy is desirable, the means chosen effective and the disadvantages controllable, are not questions for the courts but the Parliament. However, judges tend to see the bad outcomes and respond

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<sup>51</sup> *Maurici v Chief Commissioner of State Revenue* [2001] NSWCA 78; 51 NSWLR 673 at [53]-[58] (Handley JA, Beazley and Giles JJA agreeing).

accordingly, without any complete knowledge of the extent of the problem, nor an articulated appreciation of the long-term consequences of intervention to remedy a particular apparent injustice. For example, one consequence of intervention will surely be to increase the level of challenges as disgruntled parties more frequently to rely on and expand the new precedent.

## **Conclusions**

These are interesting times for the development of judicial review principles and discussion as to the scope of appeals in point of law. Language once accepted as conventional and sufficient is now seen to be inadequate. In Canada, the Supreme Court has searched for some overarching principle which will give coherence and transparency to judicial review, but it is a course which has caused the Court to lurch in differing directions in recent years, with no solid outcome. However, the underlying search is for something functional and pragmatic.

To be functional is to take account of the purpose of the legislation, the structure of the institution in which power is reposed, and the subject-matter of the power. A decision by a prosecutor as to a criminal investigation is to be treated differently from a decision by a delegate of the Minister in respect of a protection visa for a claimant to refugee status.

Pragmatism is harder to classify. However, it is important that any principles of review are capable of ready application by courts and tribunals of all kinds and that individual decision-makers can understand the scope of the laws within which they operate. It is also important that limits on judicial review and appeals are fixed by reference to underlying policy considerations, rather than semantic distinctions, although they will have to be reduced ultimately to verbal formulae.

In short, we will probably all need to think a little harder about precisely what we are doing. Given the importance of these legal functions in relation to public law in Australia, these developments are to be welcomed. Exceptionalism is necessarily neither good nor bad; but it does require examination.

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