FACULTY OF LAW: UNIVERSITY OF NSW

LECTURE ON JUDICIAL REVIEW

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Delivered by the Hon John Basten,
Judge of the NSW Court of Appeal

As will no doubt be quite plain to you now, if it was not when you enrolled in the course, administrative law is much more about the law than it is about public administration. It is about the way in which the courts control the activities of administrative decision-making. At least, that is the inevitable focus of a session on judicial review of administrative action. I do not want merely to emphasise that there are other aspects of administrative law, such as the roles played by the Ombudsman, the Independent Commission Against Corruption and freedom of information legislation, although it is important to bear in mind that there are other important areas of regulation. My concern is to emphasise that we are dealing with the ways in which courts regulate the conduct of executive government. The perspective is that of lawyers, not administrators.

You will also be aware that, in the much quoted language of Justice Brennan in *Attorney-General (NSW) v Quin*[1] the courts are concerned with the principle of legality, that is they enforce the legal limits of power conferred on the administrator. Conduct which exceeds the power conferred will be set aside or declared invalid and the officer will be directed to address the exercise of a power which has not been considered, or not properly considered. There may be other consequences: things which have happened, have happened. However, as Justice Brennan memorably remarked, "the court has no jurisdiction simply to cure administrative injustice or error". He continued "The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone".

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[1] [1990] HCA 21; 170 CLR 1 at 26 and 36.

The qualification is important, but not explored. The assumption is that, in general, law and merits, or law and fact, can be kept in separate baskets. That may be doubted; however, the importance of Justice Brennan's statement of principle was the emphasis on restraint. Courts have a legitimate function, but if they exceed their role, they will jeopardise the nice balance between the three arms of government just as much as would an uncontrolled executive.

In understanding the role of judicial review in Australia, in context of the separate arms of government, a further dichotomy is relevant. Thus it is accepted constitutional dogma that the Federal Constitution reflects a relatively strict separation between the legislative, executive and judicial arms of government. At State level, by contrast, the dogma is that no such strict separation of powers is to be found. On one view, that is surprising. If you look at the *Constitution Act 1902* (NSW) you will find separate parts dealing with the legislature (Parts 2 and 3), the executive (Part 4) and the judiciary (Part 9). Why the Commonwealth Constitution and the State *Constitution Act* are to be read differentially in this respect need not trouble us today. More importantly, the statement by Brennan J in *Quin*, which appears to reflect a basic separation of powers doctrine, was not made in the context of federal jurisdiction, but in relation to the administration of the State. That is because the principle of legality or, as it is more commonly called, the rule of law, is premised on a similar understanding of the structure of government.

At this point, two further questions open up: first, can the parliament limit judicial control of executive power? Secondly, at least in State jurisdiction, where there is no clear dichotomy between executive and judicial power, do the same principles apply to judicial review of court decisions as to administrative decisions?

The first question leads one into a consideration of the scope and effectiveness of privative clauses. There are different forms of privative clauses and, indeed, some forms of restriction on judicial review are not classified as privative clauses at all. One form of control which is not so classified is an unextendable time limit.[2] However, the classic form of privative clause excludes any right of challenge in the

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[2] See *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; 228 CLR 651.

courts by an aggrieved party and, for good measure, usually removes the power of the courts to grant relevant forms of relief.[3] The courts have traditionally viewed such clauses with hostility. That is because they appear to infringe the principle of legality, and thus undermine the rule of law, by permitting unreviewable legal error to be committed by an administrative decision-maker. To the extent that such clauses have been given effect, one attempt to reconcile the principle of legality with the unavailability of judicial review is to say that the power of the administrator has been expanded to the extent that judicial review is unavailable, thus avoiding any overt breach of the principle of legality. The courts have not accepted the concept of unlimited executive power, all powers being limited by reference to the purposes for which they were conferred and by reference to basic principles of fairness, in respect of their manner of operation. That approach was reflected in *Hickman*[4]. Some exercises of power will be seen as nullities, on that approach, and thus, at least in the federal sphere, incapable of having legal effect and thus subject to the constitutionally entrenched power of the High Court to be reviewed: that was the lesson provided in *Plaintiff S157/2002 v The Commonwealth*[5], applying s 75(v) of the Constitution.

That leads to the second question.

The same principle was applied in relation to State Supreme Courts in *Kirk v Industrial Court (NSW)*.[6] However, as its name suggests, *Kirk* was not concerned with administrative decision-making but with error on the part of the Industrial Court, the decisions of which were protected by a strong privative clause.

Kirk was a strong decision in the sense that, not only was there a privative clause, the Industrial Court was classified as "a superior court of record".[7] Further, the Commission was designated as a court of equivalent status to the Supreme Court.[8] Nevertheless, as the Industrial Court was a superior court of limited jurisdiction (as is this Court) the Supreme Court was held to have a constitutionally mandated

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3 See, for example, *Migration Act 1958* (Cth), s 474.
4 *R v Hickman; Ex parte Fox and Clinton* [1945] HCA 53; 70 CLR 598.
5 [2003] HCA 2; 211 CLR 476.
6 [2010] HCA 1; 239 CLR 531.
7 *Industrial Relations Act 1996* (NSW), s 152(1).
8 Section 152(2).

jurisdiction to review decisions of the Industrial Court which might be afflicted by jurisdictional error. That jurisdiction was derived, not from the *Constitution Act 1902*, but from the Federal Constitution, s 73, dealing with the appellate jurisdiction of the High Court. Section 73 confers on the High Court jurisdiction to hear and determine appeals from all judgments of a State Supreme Court. Consistently with the maintenance of that jurisdiction, a State parliament is limited in the extent to which it can remove jurisdiction from its Supreme Court. The limit of legislative power was defined by reference to the concept of "jurisdictional error". This concept was chosen on the basis that the jurisdiction of a State Supreme Court at the date of federation permitted it to grant relief by way of prerogative writs in respect of purported decisions affected by jurisdictional error. It was accepted that the writ of certiorari extended to error of law on the face of a record, but noted that, in 1901, English law was familiar with (and accepted as valid) privative provisions which precluded the grant of certiorari in such circumstances. Such an intrusion on the power of a Supreme Court was therefore permissible, but an attempt to prevent review entirely, where a decision was properly understood to be a nullity, because of jurisdictional error, was beyond legislative power.

As has been explained by Professor Wendy Lacey,[9] the principles by which the supervisory jurisdiction of the Supreme Court operates in respect of all inferior courts and tribunals, was identified by McPherson JA in *Higgins v Comans*[10] and by the Commonwealth Solicitor-General in his written submissions in *Kirk*.

The distinction between jurisdictional and non-jurisdictional error has a long and well documented history. As we know, it was abandoned in England by the House of Lords in a change of policy usually attributed (somewhat inaccurately) to *Anisminic v Foreign Compensation Commission*.[11] An attempt to revive that distinction was recently rejected by the UK Supreme Court in *Cart v The Upper Tribunal*, Baroness Hale explaining that to return to such a test would be to reintroduce "some of the

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9 W Lacey, Case Note *Kirk v Industrial Court of New South Wales – Breathing Life into Kable* (2010) 34 MULR 642 at 666.

10 [2005] QCA 234; 153 A Crim R 565 at [5].

11 [1969] 2 AC 147; see also *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 696, 702 (Lord Diplock).

technicalities of the past".[12] As I have noted in the paper of which you have a copy, antipathy to the dichotomy between jurisdictional and non-jurisdictional error is not restricted to the UK: Kirby J expressed dissatisfaction with the distinction in a number of cases.

One criticism of the distinction is that it is truly circular: it seeks to identify those decisions which are "nullities", without providing any clear criteria to distinguish between decisions which are erroneous in point of law and those which are nullities. In Australia, it was only relatively recently that the High Court stated that decisions affected by procedural unfairness exhibited jurisdictional error, in *Re Refugee Review Tribunal; Ex parte Aala*.[13]

The difficulty with identifying the boundaries of the distinction may be accepted as not conclusive. Any language is likely to run into similar difficulties, and the use of these concepts may be justified as historically based. However, the question arises at a deeper level, namely whether this approach, based on the principle of legality, is itself sustainable.

To answer this question some background information is required, much of which is not readily available in Australia in usable form. However, in the UK two experienced administrative lawyers, Mark Elliott and Robert Thomas, writing about the decision in *Cart*, have noted that in 2010 tribunals heard 650,000 cases nationally, as against 223,000 criminal cases and 63,000 civil cases heardy by regular courts.[14] In order to devise a sensible system for appellate and supervisory review, it is necessary to understand the nature and extent of the jurisdiction in question. (For present purposes, it is assumed that there is no fourth category of administrative decisions which are subject to review otherwise than via a court or tribunal appeal.) It is then necessary to consider whether the appeal system is, or should be, adequate to ensure that justice is done in most cases. If the system is not adequate, there is likely to be added pressure for an expansive role for judicial review; if it is perceived to be adequate, that pressure will be diminished. As Elliott

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[12] *Regina (Cart) v Upper Tribunal* [2011] UKSC 28; [2011] 3 WLR 107 at [40].
[13] [2000] HCA 57; 204 CLR 82.
[14] Mark Elliott and Robert Thomas, "Tribunal Justice and Proportionate Dispute Resolution", 71 Camb J 297 at 297-298.

and Thomas explain, the approach adopted by the UK Supreme Court in *Cart* involves giving priority to the need for a system which permits a proportionate allocation of resources in relation to categories of dispute. That approach may indeed recognise that there will be legal errors which are not corrected, as indeed there will be factual errors about which no one is concerned. Furthermore, those errors which are to be corrected are not readily identifiable by reference to the ground upon which the aggrieved party seeks to raise a challenge (ie jurisdictional error). The proper course, adopted in *Cart*, was to permit judicial review of tribunal decisions only in respect of cases which raised "some important point of principle or practice" or "some other compelling reason" for review.

There are two important aspects of this approach which bear consideration. First, a filter is being imposed on a case by case basis, through a mechanism of applications for leave to bring proceedings. Secondly, the filter is designed to exclude cases which do no more than raise an injustice as perceived by the aggrieved individual. On the other hand, if the error were thought to be manifest and the effect of the error were to return an individual to face death in circumstances which involve persecution rather than a legitimate prosecution in his or her country of nationality, there might be thought to be a "compelling reason" to intervene.

It may be observed that this approach is not dissimilar to the requirement for special leave to appeal to the High Court. The grounds for such leave must identify a question of law "of public importance, whether because of its general application or otherwise" or a need to resolve differences of opinion within the lower courts as to the state of the law: *Judiciary Act 1903* (Cth), s 35A. It is further required that it be in the interests of the administration of justice, either generally or in a particular case, for the High Court to consider the judgment under challenge.

The first limb of the requirements will allow a case of individual injustice to be reviewed where there is a putative error of law in circumstances where maintaining the regular administration of justice appears to require the court to review the case. On the other hand, even where the first limb is satisfied, the court may reject a particular application because the case is deemed to be an inappropriate vehicle to consider the issue raised.

Two factors need to be considered in applying such a filter. The first is the opportunity for the concepts to be applied strictly or loosely. This may depend upon the available resources and the demands placed on those resources. In the case of the High Court, leaving aside applications in its original jurisdiction, the Court is likely to hear and determine between 50 and 60 cases a year. In granting special leave, some allowance must be made for settlements. If there are expected to be 600 leave applications a year, it may also be expected that only one in 10 will be granted. This knowledge will have its own effect in modulating the number of applications likely to be made.

Secondly, there is a question as to the importance placed upon the likelihood that error has occurred. In reviewing tribunal decisions there may be significant pressure to avoid review where the error is less than manifest and, where there is generally faith in the system, a relaxed level of scrutiny is likely to be applied in considering such applications. The language adopted in the judgments in *Kirk* suggests that, despite the nominal status of the Industrial Court, and its expertise in resolving matters involving occupational health and safety, there was a diminished level of faith in its ability to deal appropriately with the questions raised in the cases.

Having noted how a filter may work, it is necessary to go back a stage and ask whether a similar approach, pragmatic in the sense that it takes account of the allocation of resources, both public and private, involved in resolving particular forms of dispute, and functional, in the sense that it takes account of the institutional setting in which decision-making occurs, and the nature of the cases of themselves, could realistically be adopted in Australia.

Two factors suggest that it could. First, the justification for a limitation on State legislative power to interfere with the supervisory jurisdiction of the Supreme Court depends, ultimately, on the constitutional need to maintain an integrated and hierarchal system for the administration of justice. A leave requirement is not inconsistent with that constitutional mandate, as s 35(2) of the *Judiciary Act* demonstrates. Further, if a court below the High Court were to refuse leave to bring a judicial review application, that decision would be appellable to the High Court, absent a provision preventing an application for special leave to appeal, which would, separately, be invalid: such a statutory provision did not prevent review of a

judgment of the Federal Court because Federal Court judges are officers of the Commonwealth and subject to review pursuant to s 75(v) of the Constitution, as demonstrated by *Edwards v Santos Ltd*.[15]

In other words, so long as the process of filtering applications for exercise of the supervisory jurisdiction remains in the court, the underlying principles relied on in *Kirk* will not be contravened.

Secondly, this approach is essential to protect common and well known aspects of the system for the administration of justice in most States, which would itself have been well understood by the High Court and would undoubtedly have been the subject of comment in *Kirk*, had it been intended to invalidate such schemes. For example, in criminal matters heard in the Local Court, there is a right of appeal to the District Court, but not thereafter. Similarly, in respect of civil matters dealt with in the Consumer, Trader and Tenancy Tribunal, there is a right of appeal to the District Court but no further right of appeal. In each case, a challenge to the decision in the District Court must invoke s 69 of the *Supreme Court Act 1970* (NSW) and seek remedies in the nature of prerogative relief. In relation to criminal matters, there is a privative clause in the *District Court Act* which has been construed as precluding review for errors of law on the face of a record, but as not affecting the availability of review for jurisdictional error.

A significant part (though by no means all) of appellable administrative decisions in this State go to the Administrative Decisions Tribunal. The only appeal from a single member of the Tribunal is to the Appeal Panel.[16] The Appeal Panel may refer a question of law to the Supreme Court,[17] and there is a right of appeal to the Supreme Court (Court of Appeal) on a question of law from a decision of the Appeal Panel.[18] Where the decision is interlocutory, or with the consent of the parties, or as to costs only, an appeal lies only with leave of the Court.[19]

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[15] [2011] HCA 8; 242 CLR 421.
[16] *Administrative Decisions Tribunal Act 1997* (NSW), s 113.
[17] Section 118.
[18] Section 119.
[19] Section 119(1A).

None of these schemes is called into question by the actual decision in *Kirk*, nor should it be implied that some broader invalidation of State legislation was intended.

I would add one footnote to this discussion. There is a level of uncertainty as to the powers of the Supreme Court, both when exercising appellate jurisdiction where the appeal is limited in some way to a question of law, and in relation to the exercise of its supervisory jurisdiction. The formulation of rights of appeal fall into three broad categories, as I suggested in *HIA Services Pty Ltd v Kostas*,[20] although the High Court did not like the characterisation. Questions of taxonomy apart, the precise nature of the appeal may be significant in terms of the powers the court can exercise once error of law has been identified. If the subject matter of the appeal is a decision of a tribunal with respect to a question of law, and, having identified error, it appears that there are questions of fact or exercises of discretion which have not been addressed by the Tribunal and will need to be addressed, it is generally understood that the Court must remit the matter to the Tribunal to decide those questions, unless they are limited to orders as to costs. Broadly the same principle applies in respect of the supervisory jurisdiction, although, in *Edwards v Santos*, Hayne J took a restrictive view as to the ability of the High Court, exercising 75(v) jurisdiction, to award costs of the proceedings in the court below.

Broadly speaking, *Kirk* is unlikely to see a significant and immediate expansion in the volume of judicial review cases within State jurisdiction. That is in part because in many areas administrative decisions are able to be reviewed by a tribunal which should provide relief by more informal processes, at lower cost and more speedily than the regular court system. Most aggrieved parties are likely to adopt that option, where available. The fact that there is ultimately a right of appeal on a question of law from any determination of the tribunal is also likely to provide a simpler mechanism for challenge than the more cumbersome procedure of judicial review. Further, where there is a statutory procedure available, a party ignoring that procedure for no valid reason is likely to find that judicial review will be declined on discretionary grounds. Finally, it is not unfair to say that, despite the inclusion of administrative procedures in respect of many aspects of employment claims and

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[20] [2009] NSWCA 292.

motor accident claims, the profession operating in State jurisdiction has been remarkably slow to recognise that judicial review of administrative decisions provides a useful remedy for perceived legal error. Although the volume of judicial review cases in this State is growing, it is by no means overwhelming.[21]

[21] The Supreme Court does keep statistics in relation to administrative law cases, but their reliability is questionable.