

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
BOOK LAUNCH
‘KEY ISSUES IN JUDICIAL REVIEW’
MONDAY 7 APRIL 2014

1. It is a great pleasure to join you this afternoon to launch this excellent collection of papers, gathered together as *Key Issues in Judicial Review*.¹

2. Can I first congratulate Neil and each of the authors who contributed to the book, along with those present who are involved with the Constitutional and Administrative Law Section. This book really is a testament to the value of professional legal education, the quality of such education voluntarily offered by the Bar Association, and the ability of those who participate to produce a work that addresses issues that are relevant to practitioners, written from a practitioner’s perspective. Its publication also allows those who were unable to attend the seminars, nor should I add the excellent dinners, to profit from the work of those involved in its publishing.

3. If over the last 30 years all areas of the law had expanded to the same extent as administrative law, the wheels of justice would have ground to a halt; there simply would not have been enough judges to service the

¹ Neil Williams (ed.), *Key Issues in Judicial Review* (The Federation Press, 2014).

- work. The threatened increasing demand on judicial resources if the mandatory sentencing provisions were introduced would pale into insignificance at the thought.
4. The increasing importance of this area of the law is likely to only continue. Over the past 50 years the law has evolved from a system where most activities were governed by common law with relatively modest government interference, to a situation where a wide range of activities are regulated by statute and subordinate legislation, with a corresponding upsurge in regulatory bodies. This has provided fertile ground for developments in this area, to say nothing of the implications of the High Court's decision in *Kirk*.² The publication of *Key Issues in Judicial Review* could not have come at a more propitious time.
 5. One theme that emerges from a number of the chapters is the ongoing need to articulate a coherent and principled approach which underpins judicial review. For instance, Justice Basten, in his chapter that focuses on the High Court's decision in *Li*,³ notes that only courts can articulate the broader 'rule of law' values that inform judicial review and, significantly, that focusing on statutory language will not necessarily reveal those principles. Following the adoption of a functional approach in *Kirk*, John discusses *Li* as an important decision that recognises and attempts to

² *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531.

³ *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 87 ALJR 618.

locate some of the fundamental principles that inform judicial review.

6. Kristina Stern also argues for a clearer articulation of the rationale and principles for granting relief in judicial review claims, and particularly one that extends past statutory interpretation and parliamentary intention. She provides a refreshing comparative analysis with English administrative law decisions as to the basis for, and substantive principles that underpin, the availability of relief by way of judicial review. While Australian and English administrative law jurisprudence is generally considered to have travelled in very different directions, there are some core similarities and also much to be gained from considering the approach of English courts.

7. I must say I found the paper on legislative drafting by Peter Quiggin particularly enlightening. It is inevitably the case that when barristers and judges interpret statutes, we rarely reflect on the various minds that laboured during the drafting process and, if we do, we are quickly corrected by the High Court. Neither do we stop to consider the challenges of translating often high-level policies into useable, consistent and legally certain legislation. When I spoke to a group of law students a few weeks ago I attempted to recite a tongue-twisting UK provision.⁴ I don't plan on reprising the performance here; needless to say the section avoided virtually all of the drafting techniques that Peter Quiggin refers to.

⁴ *Land Compensation Act 1961* (UK), s 26(3) (as enacted) referred to in The Hon. T F Bathurst, "The Trials and Tribulations of Being a Lawyer", Newcastle University (3 March 2014) at 3.

8. Justice Perram rightly notes in his comment on the paper that we generally consider legislation only in circumstances where its meaning is in dispute. It is true that there are vast expanses of legislation that are regularly referred to and applied without any need for intervention by the courts. In this respect, it is difficult to overstate the growing presence of statute in the legal landscape. I couldn't agree more with Nye that there is perhaps a trend toward increasingly specific and complex statutes that attempt to address every issue that could conceivably arise in a given area, rather than establishing broad principles to guide the courts. This of course is a decision that lies with parliaments rather than with parliamentary drafters.

9. Thankfully things have not descended to the level of a Minnesota statute that I read about recently, which requires insurance contracts to be written in language that is easily 'readable and understandable by a person of average intelligence and education' – and yes, that is a direct quote.⁵ You may think concepts like 'readable', 'understandable', 'education' and 'average intelligence' leave space for careful reasoning. However, that would be wrong. Instead, the Statute requires that insurers file a 'Flesch scale readability analysis' with each policy. For the uninitiated, this involves applying a formula to the number of syllables, words and

⁵ Readability of Insurance Policies Act MINN. STAT. § 72C (2013) discussed in The Hon. Sir R Megarry, *A New Miscellany-At-Law* (Oxford and Portland, 2005) at 186-188.

sentences to supposedly test the policy's clarity. A terrifying approach.

10. Putting that tangent aside, I should conclude by saying a few words about the opening chapters of *Key Issues in Judicial Review*. Jeremy Kirk's essay provides a comprehensive and practical analysis of jurisdictional error. He addresses a number of issues arising from *Kirk*, including its likely effect on State privative clauses, and the nature or status of decisions of superior courts that are infected by jurisdictional error.
11. The opening chapter – a speech by Justice Keane to the Bar Association – is a fascinating reminder as to why the judiciary is ill suited to deal with political matters that raise issues of morality or values. He describes a litany of judges from history who – often to their great misfortune – have either been drawn or happily waded into the political arena. This includes the judges 'drawn, hanged and attained' for answering questions put by Richard II. Lord Denning also makes the cut for his decision that Sikhs were not a group protected by the *Race Relations Act*, and an extra-curial piece where he suggested a black jury had not reached an honest verdict where the defendants were also black. Unsurprisingly, this resulted in a defamation claim against Lord Denning.
12. Predictably, there are many cases of judges engaging in politics during the early years of European settlement. Alfred McFarland, for instance, was

the sole judge of the Criminal and Civil Courts of Western Australia and also sat as an ex officio member of the Legislative Council. Apparently he enjoyed working Governor Kennedy into a state of ‘almost unendurable anger’. He maintained his political interests after moving to New South Wales where, while a District Court judge, he drafted legislation, engaged in battles with the parliament and defended actions in his own court in relation to a litany of outstanding debts he owed. Apparently he had a knack for remitting cases against him to be heard in Wilcannia in a year’s time.⁶ Pat’s address is a sharp reminder as to why judges should avoid the pitfalls of politics, and it reinforces the very different responsibilities and decision making processes of the three branches of government.

13. There are many issues relating to judicial review that continue to be disputed and debated by academics and practitioners alike. The principles underpinning judicial review, the utility of the distinction between jurisdictional and non-jurisdictional error, the status of privative and validation clauses, and the void/voidable distinction are to name but a few. These issues should be robustly discussed; the answers ultimately arrived at by the courts will only benefit from debate. However, as Justice Basten notes, any shift in the boundaries of judicial review in turn affects the judiciary’s relationship with both the executive and the legislature. While this should not stultify debate, the connection between judicial

⁶ See H.T.E. Holt, *A Court Rises: The lives and times of the judges of the District Court of New South Wales (1859-1959)* (Law Foundation of New South Wales, 1976) at 78-84, discussed in The Hon. K Mason, *Lawyers Then and Now* (Federation Press, 2012) at 94.

review and the separation of powers ought to inform it. *Key Issues in Judicial Review* makes an important contribution to the conversation.

14. Finally, an interesting observation is made by Chief Justice Allsop in his foreword to the text and also by Justice Basten. They both emphasise that for some decades the discrete area of migration-related decisions, and particularly decisions affecting asylum seekers, has shaped the development of administrative law in Australia. The Supreme Court has obviously been immune from that particular field; although we certainly deal with a significant number of judicial review applications, particularly in relation to industrial and environment and planning matters. However, it is interesting to consider the nature of and the extent to which this very distinct field has driven the direction of administrative law in this country.

15. I congratulate Neil and each of the authors who contributed to *Key Issues in Judicial Review*. It is a testament to the excellent work being done by the Constitutional and Administrative Law Section and I have no doubt that it will be an important resource for all who have an interest in the field. The book has been very recently published and, as a consequence, I have not read it in depth. Believe it or not, I propose to start doing so as soon as I go home this evening.