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"STANDARDS OF REVIEW" – AN AUSTRALIAN PERSPECTIVE

(ORAL PRESENTATION)

Yesterday, Prof Mullan spoke of movement away from a grand overarching theory of judicial review, a theme I would like to follow from an Antipodean perspective. In my written paper, I said that the language of "standards of review" was not found in Australian administrative law jurisprudence. Nor indeed do we rely upon concepts of "deference" or "intensity of scrutiny". Nevertheless, we face similar problems in identifying the boundaries of judicial review.

In Australia, we retain the somewhat old-fashioned distinction between jurisdictional and non-jurisdictional error and, at least in relation to the exercise of discretionary power, we use the language of *Wednesbury* (or manifest) unreasonableness, which clearly invokes a large element of deference, or low intensity of scrutiny. "Jurisdictional error" may be a conclusionary label, but it is not for that reason an empty description: any substitute must do better.

It is legitimate to ask why Australian administrative law is not more transparent in addressing issues which clearly engage the concepts we eschew. There are probably a number of answers to that question, but it is likely to have been due, at least in part, to the reduction of judicial review principles to statutory form in the federal *Administrative Decisions (Judicial Review) Act 1977* (Cth). That occurred when, at least in our country, the explosion of modern judicial review was only just commencing. By reducing the traditional general law grounds for prerogative relief to statutory form, the Act may have thrown an intellectual straightjacket over the development of judicial review principles. (Several influential commentators, including Prof Mark Aronson, have discussed that issue.)

The question of practical importance is, however, not what language we use to structure judicial thinking, but where we in fact draw the boundaries on a case-by-

case basis. The answer to that question is not as easy as it should be. In 1947 Sir Frederick Jordan, Chief Justice of New South Wales, and one of the most distinguished Australian judges not to sit on the High Court, memorably said, in relation to a mistake by a magistrate in construing legislation, "but there are mistakes and mistakes"; *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420. That is, some are more serious than others. Chief Justice Jordan continued, saying "if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply 'a wrong and inadmissible test' …, 'misconceive its duty,' or 'not to apply itself to the question which the law prescribes', … or 'to misunderstand the nature of the opinion which it is to form' … in giving a decision in exercise of its jurisdiction or authority, a decision so given will be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law." At the moment, one cannot provide any more precise understanding of the distinction between jurisdictional and non-jurisdictional error of law. But our High Court, which does refer to *Dunsmuir*, has never been persuaded that a 'standards of review' approach helps. (I once invited the Court to adopt a 'deference' approach, but that language was not adopted either.)

In our country too, there has been a shift in recent years from the language of *Wednesbury* unreasonableness, which is now confined to its original provenance, namely the exercise of discretionary power, leaving the broader area of evaluative judgment to review according to a standard merely described as "reasonableness". The intensity of scrutiny permitted under that rubric is also uncertain.

One can detect winds of change in the Australian High Court, but without any certainty as to the direction in which they will settle. It is easier to identify the causes.

First, much is due to the explosion of migration cases, particularly under the Refugee Convention. In a country without a Bill of Rights or a Charter, in the mid-1990s, following the removal of a humanitarian category of visa, the authorities were suddenly flooded with refugee claims by persons asserting a well-founded fear of persecution in their homelands, based on violation of well-known categories of human rights. Initial decisions were subject to merit review before a tribunal; judicial review of tribunal decisions, despite a plethora of attempts to impose legislative constraints, flooded the Federal Court (where immigration cases rose to over 40% of

the Court's workload). Judges were naturally imbued with a concern that Australia might be returning people who were probably at risk, to countries where human rights were not respected, or not adequately protected.

Secondly, there has been growing concern that conventional distinctions, between fact and law, jurisdictional error and non-jurisdictional error, and unreasonableness and manifest unreasonableness, are not intellectually tenable.

Thirdly, there appears to be a strong (and growing) concern as to the consequences of the proliferation of tribunals and specialised courts, especially where decisions are protected by full privative clauses. There is, in fact, a long tradition in Australia of specialist tribunals being seen, not as a source of expertise, to which respect should be accorded, but as an Alsatia, within which certain vested interests are protected and preferred. Thus, early Australian administrative law was replete with cases from specialised industrial courts. There, in the first half of the 20th Century, the battleground was between labour and capital, a highly politicized arena. The new battlefield (at least to a significant extent) involves contests between the individual and the State.

There is some irony in the fact that some of the most articulate opponents of a Bill of Rights in our country have enthusiastically embraced the protections found in Chapter III of our Constitution, conferring judicial power on the courts. Thus, under Commonwealth law, privative clauses have long run into the potential barrier of s 75 of the Constitution, which places the old categories of prerogative relief in the hands of the High Court, thus constitutionalising its supervisory jurisdiction. However, even that no longer matters. In a recent appeal from our Court, the High Court construed the constitutional conferral of jurisdiction on itself to hear appeals from State Supreme Courts as guaranteeing not merely the continued existence of State Supreme Courts, but the maintenance of their supervisory jurisdiction, the limits of which, the High Court defined by reference to jurisdictional error: see *Kirk v Industrial Relations Commission* [2010] HCA 1; 239 CLR 531. The concept of jurisdictional error has thus been constitutionalised. Not only does it mark the limits of federal legislative power, long established but reaffirmed in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476, but it extends that constraint to State legislatures.

Privative clauses are not, however, the only source of contention in defining the boundaries of legislative and judicial power. To digress, but only marginally, from judicial review, many state tribunals and lower courts exercise jurisdiction subject to

statutory rights of appeal confined, in substance, to errors of law. That language invokes the distinction between errors of law and fact. Various semantic differences, ("involving", "with respect to", "in point of") have led to discussions as to the precise jurisdictional limits of the appellate court. Importantly, there is a tendency to expand the scope of such appellate rights, and hence the jurisdiction of the appellate courts: see, eg, *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32. However, what is missing in Australia is an acknowledgment of the dangers inherent in the unqualified embrace of individual human rights as a proper subject for universal judicial protection.

First, a general policy underlying the creation of many specialist tribunals with informal procedures has been to permit resolution of disputes between individual parties who could not afford the full regalia of the law, or whose disputes did not warrant the expense of engaging the judicial system. While Prof Richard Abel and others have argued that private (non-commercial) disputants were shifted out of the regular courts at a time when, through legal aid and other mechanisms, access to justice was becoming more widely available, nevertheless the benefits of informal tribunals should not be discounted. Similarly, in relation to disputes between citizen and government, the establishment of a tribunal system was often the creation of a mechanism for a degree of independent review, which had not hitherto be available.

Whilst rough justice may result in some cases, permitting wider rights of appeal and judicial review tends to diminish the benefits of cheap, quick and easy to access justice, by encouraging disappointed parties to expect intervention on appeal.

Secondly, underlying the first qualification is a judicial view that the procedures and practices of the traditional courts provide the gold standard for the administration of justice, being a standard which most tribunals and lower courts fail to achieve. If Parliament says that a tribunal does not have to apply the rules of evidence, the courts regularly point out the value of those rules, honed over long periods, in providing procedural fairness. Rarely nowadays does one see in the higher courts in our country acknowledgment of the expense of formality, both to the parties and the government which maintains the court system.

Thirdly, there is a risk that we, as members of superior courts, and whilst casting ourselves as the protectors of human rights and the rule of law, will be seen to be maintaining our own powers at the expense of lower courts and tribunals; an appearance of self-aggrandisement which will place us in conflict with the apparent intentions of the elected legislatures. The importance of the courts as an institution

to stand against bureaucratic inefficiency, mismanagement and preconceptions should not be understated. Nevertheless, it is important for us to recognise that there are both social and financial costs to this exercise and that we are not necessarily disinterested players.

Let me turn briefly to another topic – one concerning the basis on which we exercise supervisory jurisdiction. It involves another aspect of the imposition of judicial standards on administrative decision-making. There is in Australia an increasing level of complaint of inadequacy of reasons as a ground of review. Under the general law, administrative decision-makers are not required to give reasons, though courts are. (There is a grey area with respect to some tribunals.) Where a tribunal is required to give reasons (and statutory provisions to that effect are commonplace) failure to do so will not merely constitute a ground for mandamus (which is unattractive to most dissatisfied claimants) but also an error of law invalidating the decision. It has been but a short step to move from a failure to provide reasons to a failure to provide adequate reasons. And often reasons seem adequate or not, depending upon whether you agree with the outcome. Almost 20 years ago, the Full Court of our Federal Court asserted that "reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error": *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287. That principle was affirmed by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) HCA 6; 185 CLR 259. There are now an increasing number of cases where the principle appears to be more honoured in the breach than the observance. Tribunals constituted by non-lawyers provide reasons for decision which are parsed and analysed with an intensity more appropriate for the judgment of a superior court. (Even trial judges in the lower courts seem to be subjected by appeal courts to an examination in the technique of judgment writing.) The burden thus imposed on administrative tribunals and decision-makers is not to be underestimated. In effect, extra resources must be devoted to dispute settlement which could better be directed to other social purposes.

Whilst judicial review is undoubtedly a salutary mechanism for ensuring administrative competence and diligence, there is a balance to be undertaken. The rule of law, a concept frequently called in aid in judicial review, is vague in its terms, does not constitute a coherent legal principle, as opposed to a political philosophy, and anyway is not to be viewed in splendid isolation from its social context.

For us at least, control of administrative decision-making is in large part in the hands of judges who undertake judicial review. Despite the plethora of statutory controls,

neither the legislature nor the executive has any real input into the content of judicial review, nor the maintenance of its proper boundaries. The only check on the system is judicial self-restraint. The fact that there is no clear outspoken majority in favour of a Bill of Rights in Australia suggests that there is a large element of public scepticism in relation to the capability of judges to exercise self-restraint.

For us, the ultimate issue must always be whether the approach (I avoid "test") adopted – (1) is simple, clear and transparent to the parties, other courts and legal advisers, and (2) limits manipulability – fine distinctions may increase intellectual satisfaction, but curiously they tend to promote manipulation.