

LAND AND ENVIRONMENT COURT CONFERENCE

9 May 2008

JUDICIAL REVIEW: INTENSITY OF SCRUTINY

Justice John Basten

Introduction

It is an honour to have the opportunity to speak to you today about developments in administrative law. As administrative law constitutes the daily fare of this Court in the exercise of its various jurisdictions, it may be helpful if I step back from a survey of recent case-law and offer some broader reflections on the scope and nature of judicial review. In particular, I will discuss the variability of different forms of judicial review under the heading “Intensity of Scrutiny”.¹

To do that I propose to start with some comments about judicial review in the broader legal context, including analogous situations which arise outside the area of public law.

Secondly, it may be helpful to provide some broad characterisation of the way in which issues arise in administrative decision-making, viewed from the point of view of the decision-maker, rather than from the position of the reviewing court.

Finally, I will seek to draw some of these threads together to suggest how questions of the intensity of scrutiny may assist an understanding of the operation of judicial review.

Private law analogies

It is possible to give a number of analogous situations in which the courts are constrained as to the bases on which they may intervene in decisions of individuals

¹ The phrase is derived from a reference in the judgment of Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth* [2003] HCA 2; 211 CLR 476 at [13].

holding particular positions, otherwise than under statute. Three examples may suffice. The first concerns the position of trustees. The power in equity to set aside a decision of a trustee will depend, in the first instance, on whether the power in question involved a duty or a discretionary power, a distinction well understood in public law.² Acting, or failing to act, in contravention of a duty will invite the intervention of a court. (The distinction may, of course, appear blurred if a duty is conditioned upon the formation of an opinion.)

Where there is in truth a discretionary power, the grounds of permissible intervention sound remarkably like the available grounds of judicial review of administrative decision-making. The following extract, from a judgment of Northrop J in the Federal Court, was quoted with approval by six members of the High Court in *Attorney-General (Cth) v Breckler*.³

"Where a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the settlor, or without giving a real or genuine consideration to the exercise of the discretion. The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable or unwise. Where a discretion is expressed to be absolute it may be that bad faith needs to be shown. The soundness of the exercise of a discretion can be examined where reasons have been given, but the test is not fairness or reasonableness."

In this context, what may be described as "fair or reasonable" is not dissimilar to that which may be described as the correct or preferable decision, in the context of a body such as the Administrative Appeals Tribunal. In other words, a fair and reasonable exercise of a trustee's power involves a decision on the merits and is not reviewable.

A second example may be found in the power of a court to review the conduct of the directors of a corporation. Again, the limits of intervention may be expressed in terms which mirror aspects of judicial review in administrative law. In *Wayde v New*

² See *Samad v District Court of New South Wales* [2002] HCA 24; 209 CLR 140.

³ [1999] HCA 28; 197 CLR 83 at [7].

South Wales Rugby League Ltd,⁴ a case challenging the League's decision to exclude Western Suburbs from the competition, Brennan J noted that there was no supervisory role for the courts in reviewing management decisions of company boards on their merits, subject to statutory requirements. His Honour explained:

"But in the absence of statutory authority, the court may not intervene and hold the decision invalid on the ground that the court thinks the decision unreasonable. If the decision is such that no reasonable board of directors could think the decision to be substantially for a purpose for which the power was conferred, the court may infer that the directors did not make the decision in good faith for a purpose within the power and intervene on that ground In the present case the good faith of the directors was conceded and Wests' complaint was not that the directors failed to consider the object of fostering the game or failed to take into account the impact of their decision on Wests. ... The validity of an exercise of power cannot be challenged merely because too little weight is given to some matters which properly fall for consideration and too much to others, for the court will not substitute its discretion for the discretion exercised in good faith by the directors."

Thirdly, there are two other areas in which similar language is used, both involving appeals within the judicial sphere. As we know, the grounds on which it is said to be appropriate for an appellate court to interfere with a discretionary order of a trial judge are described in *House v The King*,⁵ dealing with an exercise of sentencing power. As explained in the joint judgment of Dixon, Evatt and McTiernan JJ, it is not enough that the appeal court thinks that they, in the position of the sentencing judge, would have made a different order.

"It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first

⁴ (1985) 180 CLR 459 at 469-470.

⁵ (1936) 55 CLR 499 at 505.

instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.”

Similar language is used (indeed in our Court there is a tendency to refer to such authorities interchangeably) where the trial judge has embarked upon a fact-finding exercise which involves making an evaluative judgment. Often this will concern inferences to be drawn from primary facts. Speaking generally, that exercise is different in principle from choosing the appropriate sentence from a range, or otherwise making a discretionary order, but is related to the drawing of an inference which characterises particular conduct as, for example, misleading or deceptive or as materially contributing to a particular outcome. In fact the power of an appeal court to intervene in the latter circumstances are greater and, where the primary facts are not in question, it is as open to the appellate court to form a view as to the particular inference and to characterise the conclusion as it was to the primary judge. The court will then intervene if it thinks that the primary judge was wrong, but not where there are equally available inferences.⁶

Finally, before leaving the legal context within which judicial review may be seen to operate, it is worth noting that the scope of review might, in theory, depend upon the availability of particular forms of relief. Much of the discussion of grounds of judicial review is found in cases which are dealing with forms of prerogative relief or the power to make orders in the nature of prerogative relief, to adopt the rather contorted approach by which the basis of intervention is preserved, but the forms are modernised.⁷ However, there may be a different scope for intervention where the relief sought involves an injunction. This was touched upon by three members of the High Court in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*.⁸ In the joint judgment of Gaudron, Gummow and Kirby JJ, the following remarks are found:⁹

“Writing extrajudicially, Sir Anthony Mason has said that:

⁶ See *Warren v Coombes* (1978-1979) 142 CLR 531 at 552-553 (Gibbs ACJ, Jacobs and Murphy JJ).

⁷ See, eg, *Supreme Court Act 1970* (NSW), s 69.

⁸ [1998] HCA 49; 194 CLR 247.

⁹ At [24] and [25], albeit in the context of a discussion of standing.

‘[E]quitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.’

In this field, equity has proceeded on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies) of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration.”¹⁰

Similarly, in *Project Blue Sky Inc v Australian Broadcasting Authority*,¹¹ after noting the distinction between circumstances where the failure to comply with a statutory precondition to the exercise of power rendered a decision invalid, from one in which validity was not affected, the majority judgment continued:¹²

“Although an act done in contravention of s 160 is not invalid, it is a breach of the Act and therefore unlawful. Failure to comply with a directory provision ‘may in particular cases be punishable’. That being so, a person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.”

It seems likely that their Honours had in mind an act which might be valid, though unlawful in the sense of invoking a criminal penalty, as an example of an act which might be enjoined. Whether a valid act which is otherwise not subject to any penalty could be enjoined remains doubtful.

In short, the concepts underlying judicial review in administrative law are not a remote island in the ocean of legal principle but rather form part of a network. Developments in one area should not be ignored in others.

Characterisation of issues

The grounds of review look back upon a decision already made, but sometimes they are better understood by considering the steps in the decision-making process.

¹⁰ Footnote omitted.

¹¹ [1998] HCA 28; 194 CLR 355.

¹² At [100].

There is nothing recondite about the stages in the process. Nor is administrative decision-making remote from judicial decision-making.

The first stage will be to identify the issues and the material to be considered in that regard. A failure to identify properly the matters raised for determination may give rise to a constructive failure to exercise jurisdiction, which is undoubtedly reviewable. The problem, of course, is that there may be room for different views as to what precisely is raised for determination in a particular case. For that reason, there was a cautious statement of principle by Gummow and Callinan JJ in *Dranichnikov v Minister for Immigration and Multicultural Affairs*¹³ in the following terms:

“To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice. ...

The question remains however whether what occurred, either characterised as a failure to accord natural justice or as that, and more, which we consider it to be, including a constructive failure to exercise jurisdiction, entitles Mr Dranichnikov to relief under s 75(v) of the *Constitution*.”

The second stage involves the process of consideration. In some situations the procedures to be adopted are specified by statute. In other cases, the decision-maker is given a broad power to determine his or her own procedures. Further, it is not uncommon for the statute to provide that the decision-maker “shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms”. To similar effect, a statute will frequently direct that the decision-maker is not bound by the rules of evidence and may inform himself or herself on any matter as he or she thinks fit.

Generally speaking, these provisions will not be seen as exempting decision-makers from the rules of procedural fairness, nor as protecting decisions which have been made in contravention of those principles.¹⁴ (I return to the case-law below.)

The issue with respect to statutory procedures is twofold. The first question is whether, by providing a set of procedures, the Parliament should be understood to

¹³ [2003] HCA 26; 77 ALJR 1088 at [24]-[25].

¹⁴ See generally *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26.

have codified relevant aspects of procedural fairness, so as to exclude any different or greater entitlement under general law principles. The second question concerns the effect of breach. In *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*,¹⁵ the High Court adopted a strict approach to such statutory requirements, even in the face of a privative clause. That case involved the requirement in s 424A of the *Migration Act 1958* (Cth) that the Refugee Review Tribunal give an applicant particulars of any information that the Tribunal considers “would be the reason, or a part of the reason, for affirming the decision” adverse to the applicant’s interests. The Tribunal was also required to invite the applicant to comment on the information. Further, the method of providing the information was prescribed and required the transmission of a written document. However, in *SZBYR v Minister for Immigration and Citizenship*,¹⁶ the High Court took a more guarded approach to such questions. Their Honours relied in part on the statement in s 422B of the *Migration Act* that the subdivision containing s 424A “is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with”. In a joint judgment, five members of the Court¹⁷ stated:¹⁸

“Certainly, there was nothing in the conduct of that hearing which was of itself procedurally unfair and, given the presence of s 422B, it might be surprising if s 424A were interpreted to have an operation that went well beyond the requirements of the hearing rule at common law. Unlike *SAAP*, where the relevant ‘information’ was testimony of the appellants’ daughter which had been given in their absence, the ‘information’ in this case consisted of the appellants’ own prior statutory declaration, to which the Tribunal explicitly drew their attention during the course of the hearing. If the common law rules of procedural fairness applied, one would certainly not criticise the Tribunal’s approach in this regard. However, it follows from *SAAP* that the Parliament has determined that, if s 424A is engaged, only written notice will suffice.”

¹⁵ [2005] HCA 24; 228 CLR 294.

¹⁶ [2007] HCA 26; 81 ALJR 1190.

¹⁷ Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; Kirby J and Hayne J decided the case on a restricted basis.

¹⁸ At [14].

Their Honours held that s 424A was not engaged at all.¹⁹

The third stage of the proceedings involves the decision-making process. To an extent that process must be anticipated, because identification of relevant matters, which could be critical, may engage requirements of procedural fairness at an earlier stage. On the other hand, the process itself does not. Thus, in *SZBYR*, the joint judgment affirmed the remarks of Finn and Stone JJ in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs*²⁰ that the word “information”:

“does not encompass the tribunal's subjective appraisals, thought processes or determinations ... nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc”.

The joint judgment continued:

“If the contrary were true, s 424A would in effect oblige the Tribunal to give advance written notice not merely of its reasons but of each step in its prospective reasoning process.”

Those remarks apply equally under the general law. The decision-making process may, of course, be revealed if the decision-maker provides reasons for his or her findings and determination. Those reasons may reveal reviewable error.

In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,²¹ the joint judgment stated:

“[T]he reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed. In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision.”

That statement was recently affirmed in *SZBYR*.²² It is a principle more usually honoured in the breach than in the observance.

¹⁹ At [21].

²⁰ [2004] FCAFC 123; 206 ALR 471 at 476-477, quoted at [18].

²¹ [1996] 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

There is a second issue which arises in relation to reasons. Complaints of inadequacy of reasons are frequently raised in our Court as a ground of appeal in run-of-the-mill civil cases. However, it is frequently overlooked that the obligation to set out findings of fact and give reasons for a decision is limited to findings which have actually been made and reasons which are actually relied upon. As explained by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Yusuf*²³ in discussing what was to be included in a written statement of reasons given pursuant to s 430 of the *Migration Act*:

“The Tribunal is required, in setting out its reasons for decision, to set out ‘the findings on any material questions of fact’. If it does not set out a finding on some question of fact, that will indicate that it made no finding on that matter; and that, in turn, may indicate that the Tribunal did not consider the matter to be material. It was not suggested, in either of the present cases, that the Tribunal made some finding of fact which it failed to set out. The substance of the complaint was that the Tribunal failed to make a finding upon a particular question.”

His Honour continued:²⁴

“There is nothing in that language which imposes a requirement to make a finding on every question of fact which is regarded by the Federal Court, on judicial review of the Tribunal's decision, as being material. A good deal of materiality jurisprudence has developed Questions of fact which appear to have been regarded by the Tribunal as material are sometimes described as ‘subjectively material’, to distinguish them from questions of fact which are regarded as material by a court reviewing the Tribunal's decision. Facts of the latter kind are then described as ‘objectively material’. And the level of generality, or particularity, at which facts are to be classified for the purpose of determining their materiality is a problem. The distinction between facts in issue, particulars, and evidence, which may be difficult even in adversarial litigation conducted with or without formal pleadings, is even more difficult when applied to proceedings before the Tribunal.

The requirement imposed by s 430 is to prepare a written statement that, in the context of setting out the Tribunal's reasons for decision, ‘sets out the findings’ on any material questions of fact. It is impossible to read the expression ‘the

²² At [25].

²³ [2001] HCA 30; 206 CLR 323 at [5].

²⁴ At [9] and [10].

findings' as meaning anything other than the findings which the Tribunal has made. By setting out its findings, and thereby exposing its views on materiality, the Tribunal may disclose a failure to exercise jurisdiction, ... or may provide some other ground for judicial review."²⁵

It is convenient to identify a final stage of the process, namely the publication of a determination. While State statutory provisions often require the giving of reasons for administrative decisions, the general law principle remains that administrative decision-makers are not required to provide reasons.²⁶ As we know, in such a case the scope for judicial review is likely to be quite muted. Nevertheless, a court may conclude from a combination of the relevant legal principles, the matters presented to the decision-maker for determination, together with the actual decision, that a relevant legal error should be inferred.²⁷

Levels of scrutiny

With this background in mind, it is possible to reach some tentative conclusions about the different levels of scrutiny which may be applied to review of administrative decisions. I assume for this purpose that the scope of judicial review is limited to an assessment of the legality of the decision as opposed to its merit, without intending to diminish the problematic nature of that distinction.

Most administrative decision-making (though not all) takes place pursuant to statutory powers. The intensity of scrutiny appropriate on judicial review will depend first upon the statutory regime. Thus, at least in principle, the least intense, or most deferential, level of scrutiny will apply where there is a privative clause. In its terms, a privative clause seeks to free the decision-maker from the possibility of judicial review. As has been clear since the decision in *Hickman*,²⁸ the presence of such a provision "makes it necessary to say whether and to what extent it is ineffectual to protect the decision of the Board from invalidation". *Hickman* was decided against a background of the constitutional writs empowering the High Court to grant relief against an officer of the Commonwealth who had acted or was seeking to act in

²⁵ See also the joint judgment of McHugh, Gummow and Hayne JJ at [75].

²⁶ See *Public Service Board of New South Wales v Osmond* (1985-1986) 159 CLR 656.

²⁷ See *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J).

²⁸ *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 614.

excess of his or her power. Nevertheless, as was explained in *Plaintiff S157/2002 v The Commonwealth*,²⁹ the *Hickman* principle required that the privative clause be construed in its statutory context. Thus Dixon J had explained in *Hickman*³⁰ that “it becomes a question of interpretation of the whole legislative instrument whether transgression of the limits, so long as done bona fide and bearing on its face every appearance of an attempt to pursue the power, necessarily spells invalidity”.³¹ It may be inferred that where Parliament confers a power to take action of a certain kind in certain circumstances, it does not intend to confer on that officer a different kind of power, subject to different preconditions. Where any breach of a statutory precondition is alleged, it is therefore necessary for the court to undertake an exercise in statutory construction to determine whether the contravention was concerned with a precondition which was essential to the validity of the exercise of the power.

A slightly different exercise must be undertaken in circumstances where a relevant constraint on power is not statutory, but is derived from the general law. The most obvious example is procedural fairness. As *Plaintiff S157* made clear, principles of statutory construction will permit exclusion of aspects of procedural fairness only if expressed in clear and unambiguous language. The generality of a privative clause will not necessarily have that effect. Similarly, an ‘equity and good conscience clause’ is unlikely to have that effect, although it may provide a basis for weakening the scrutiny which would otherwise operate in relation to procedural error.

I also want to say a little about ‘equity and good conscience clauses’. They have not received significant clarification as to their effect in the case-law. In *Minister for Immigration and Multicultural Affairs v Eshetu*,³² Gleeson CJ and McHugh J noted that such provisions “are intended to be facultative, not restrictive”. Their Honours continued:

“Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals.

²⁹ [2003] HCA 2; 211 CLR 476.

³⁰ At 616.

³¹ 70 CLR at 616; see *Plaintiff S157* at [17]; see also at [19] and [26] (Gleeson CJ) and at [60] and [64] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

³² [1999] HCA 21; 197 CLR 611 at [49].

The extent to which they free tribunals from obligations applicable to the courts of law may give rise to dispute in particular cases, but that is another question.”

Other courts have grappled with such provisions in specific contexts. The Full Court of the South Australian Supreme Court considered how such a provision might affect a challenge to the validity of an election. In *Featherston v Tully*,³³ Bleby J (Mullighan J agreeing) held that the section freed the Court from the need to consider, in relation to each relevant elector how a particular defect or irregularity may have affected their votes. He stated:

“It permits resort to a common sense judgment in all the circumstances. However, the court’s judgment cannot be merely arbitrary. It must still apply the common law principles. ... [I]t must apply the well known standard of being satisfied on the balance of probabilities that the result of the election was affected by the defect, irregularity or defamation as the case may be.

The section therefore has a useful function, but it does not, as was suggested in the course of the petitioner’s argument, allow the court to create new law.”

In *Medical Board of South Australia v N, JRP*,³⁴ the Full Court of the South Australian Supreme Court divided on the question whether the Medical Board had power to stay a complaint on the ground that it would be an abuse of process to continue its inquiry. The majority held that it had no such power, but Debelle J in dissent found support in an equity and good conscience clause for the proposition that it did have such power.³⁵

In *Jacobs v OneSteel Manufacturing Pty Ltd*,³⁶ Debelle J held that such a provision, when applied to a tribunal exercising judicial power, did not remove the statutory obligation of the tribunal to resolve disputes according to law.³⁷

There is an equity and good conscience clause in the *Land Court Act 2000* (Qld), which was considered by the Queensland Court of Appeal in *Townsville City Council*

³³ [2002] SASC 243; 83 SASR 302 at [156]-[158].

³⁴ [2006] SASC 19; 93 SASR 546.

³⁵ At [33].

³⁶ [2006] SASC 32; 93 SASR 568.

³⁷ At [11]. See also *Griggs v Noris Group of Companies* [2006] SASC 23; 94 SASR 126 at [31]-[39] (White J, Perry J agreeing).

*v Chief Executive, Department of Main Roads.*³⁸ That was a resumption case in which there had been a misapprehension as to the nature of the expert evidence from two valuers. The member at first instance declined to reopen the matter, a decision which was overturned by the Land Appeal Court. That result was upheld by the Court of Appeal, Keane JA finding support for that approach in an equity and good conscience clause. His Honour stated:³⁹

“The authorities suggest that a statutory obligation to have regard to the ‘substantial merits of the case’ means that the merits may not be able to trump a countervailing rule of law but that they are one factor that must be taken into account when exercising a discretion.

In my opinion, where there is reason to suppose that the outcome of the rehearing may substantially affect the parties in terms of the ultimate result, then the possibility of injustice in the sense of a decision which does not reflect the ‘substantial merits of the case’ if leave is not granted, inevitably emerges as a consideration material to the exercise of the discretion

It may be that, in the circumstances of a particular case, considerations of justice require that the desirability of a ‘perfect’ outcome give way to the practical consideration that ‘justice delayed is justice denied’; and, in some cases, the conduct of the applicant may have been so egregious as to lead to a refusal of a rehearing without considering the impact of the resolution of the issue sought to be reagitated. But to say this is merely to acknowledge that the discretion falls to be exercised as a matter of balancing competing considerations having regard to all relevant circumstances. Generally speaking, the likely impact of the alleged error on the outcome of the case will be a consideration relevant to that balancing exercise.”

Three things may be said about this jurisprudence. First, apart from freeing a tribunal from the obligation to apply the rules of evidence (which may have significant consequences) one has the feeling that equity and good conscience clauses are something of an anachronism. They suggest a world of decision-making in which technicality and form might be expected to override justice and substantial merit. It is not easy to find obvious examples of this today at the primary decision-making level.

³⁸ [2005] QCA 226; [2006] 1 Qd R 77 at [24] and [37]-[45].

³⁹ At [43]-[45].

Secondly and consistently, in those cases where such a provision has been applied, one may wonder whether the decision would have been different in the absence of the clause. Thirdly, it might be suggested that a clause, which is facultative and not restrictive of the powers of a tribunal, might be seen to diminish the strictness of the scrutiny which might otherwise apply to a procedural decision. *Townsville City Council* is an interesting case in this regard. One is inclined to think that the member at first instance was indeed wrong to refuse a reopening of the inquiry, where one party had laboured under a misapprehension through no fault of its own. On the other hand, if such a provision is intended to remove fetters from the exercise of procedural steps by the primary decision-maker, it may be necessary to let the original decision stand. However, the application of the provision in that case was complicated by the fact that a similar provision applied to the Land Appeal Court itself.⁴⁰

It might be added that such provisions may have a different effect in relation to tribunals exercising administrative powers and those exercising judicial power. Similarly, it is undoubtedly necessary to read such provisions in their statutory context. Thus, s 38 of the *Land and Environment Court Act 1979* (NSW) which contains such a provision in relation to classes 1, 2 and 3 of the Court's jurisdiction needs to be reconciled with the statutory right of appeal under s 57, which is limited to a question of law. This was an issue to which I adverted briefly in *Roads & Traffic Authority of New South Wales v Peak*.⁴¹

Assuming the absence of a privative clause, the next level up in the scale of scrutiny, may be identified by reference to the fact-finding process. Putting to one side, jurisdictional facts, which condition the exercise of power and cannot be conclusively determined by the decision-maker, questions of jurisdiction frequently depend upon the satisfaction or opinion of the decision-maker with respect to particular matters.

⁴⁰ See also *Ballantyne v WorkCover Authority of NSW* [2007] NSWCA 239 at [89]-[90]; *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 at [88] (McColl JA); *Italiano v Carbone* [2005] NSWCA 177 at [68]-[77].

⁴¹ [2007] NSWCA 66 at [128]-[129].

As explained by Latham CJ in *The King v Connell; Ex parte the Hetton Bellbird Collieries Limited*:⁴²

“[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.”

His Honour noted the ways in which a failure to apply the law correctly could arise, including taking into account irrelevant considerations, and stated that the statutory precondition would not be satisfied in such a case, nor if it were shown “that the opinion was arbitrary, capricious, irrational, or not bona fide”.⁴³

Thus, although primary fact-finding is largely immune from review, it is not entirely so. Similarly, an assessment of the significance of facts and the proper inferences which should be drawn from them is largely immune from review on the basis that to enter into such matters would be to involve a reconsideration of the decision on the merits. However, complaints of legal error may arise in considering such inferences and conclusions based on them. That being said, the degree of tolerance likely to be exhibited by the court will depend in part on the nature of the decision in question. Thus, a decision involving specialist expertise, a high degree of evaluative judgment based on imprecise criteria, or matters involving questions of the public interest, are likely to receive a relaxation in the degree of scrutiny which might otherwise be imposed.

What is noticeable from a broad reading of the decisions of higher courts is that a heightened level of scrutiny is imposed on procedural steps which would, I suspect, have amazed an earlier generation of administrative lawyers. This is different from the willingness of the Courts of King’s or Queen’s Bench to set aside decisions of magistrates or justices on the basis of technical breaches of procedural

⁴² (1944) 69 CLR 407 at 430.

⁴³ At 432 Gummow J repeated these passages in *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at [133]. See also *Buck v Bavone* (1976) 135 CLR 110 at 118-119.

requirements, which led to parliamentary intervention through Lord Jervis' Acts of 1848 and their progeny in this country. On the other hand, it may stem from a similar psychological urge, namely to do justice and not merely correct illegality. Attempts by the legislature to rein in challenges based on procedural unfairness have been as ineffective as broader privative clauses. This conclusion is illustrated by the decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*.⁴⁴ That case was unusual in the run of federal jurisdiction cases, in that the applicant, having failed to invoke the statutory scheme for review of primary decisions in the Refugee Review Tribunal, brought proceedings in the High Court to review the primary decision itself. Further, he needed to satisfy the Court that what was described in the Act as a "code of procedure for dealing fairly, efficiently and quickly with visa applications" was not a complete code but allowed for challenges based on lack of procedural fairness under the general law. Two factors affected Mr Miah's challenge. The first was that his right of merit review in the Tribunal was constrained by an unwaivable time limitation which had not been met, through no fault of his own, but in circumstances where his solicitor had filed the signed application for review in his filing cabinet, rather than in the registry of the Tribunal. A second factor was the meagre nature of the reasons given by the primary decision-maker, which contrasted with the usually lengthy and detailed reasons provided by the Tribunal, with which the High Court had by then become familiar.

Those factors aside, *Miah*, like *SAAP*, reflects the strict scrutiny applied to procedural steps. The limits of such scrutiny may be seen in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*⁴⁵ in which a challenge was dismissed where the only complaint was that the decision-maker, having indicated that certain inquiries would be made before determining the application, did not do so, without notifying the applicant of the change of approach. No unfairness was demonstrated because it had not been shown that, had the applicant been notified, he would have taken any steps which he did not take. Similarly, the decision in *SZBYR* may also reveal a marginal lessening in the degree of scrutiny applied to questions of procedural fairness.

⁴⁴ [2001] HCA 22; 206 CLR 57.

⁴⁵ [2003] HCA 6; 214 CLR 1.

Conclusions

Judicial review is an area of law where it is likely that variations in approach will continue to appear over time. What seems undoubted is that the increasing availability of reasons has vastly increased the susceptibility of administrative decision-making to successful challenge. On the other hand, there is a view, recently repeated by Chief Justice Sian Elias of the New Zealand Supreme Court, that judicial review in Australia has been constrained by the introduction of a comprehensive system of independent merit review at the federal level, through the institution of the Administrative Appeals Tribunal.⁴⁶

Whether judicial review is unduly constrained in Australia is a matter on which opinions may differ. The limits on judicial review constitute a boundary between the powers of the executive and judicial arms of the state. The placing of that boundary has constitutional consequences. To the extent that the placement of the boundary lies in the hands of the judiciary, each extension of judicial review constitutes an arrogation of power by the judiciary to themselves at the expense of the executive. This is well understood by the executive, including both ministers and administrative officers. It is a consideration which also needs to be borne in mind by the judiciary.

Nevertheless, assuming that judicial review is more constrained in Australia than elsewhere, one can be sceptical of the suggestion that it is due to the extent of independent merit review. This being a Court which exercises both forms of review, your opinions on that matter are certainly worth more than mine.

⁴⁶ The view was expressed in her Honour's 2008 Sir Maurice Byers lecture delivered on 24 April 2008.