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“The Exceptionalism of Australian Administrative Law?”

I should have learned by now that I should never, on this side of the Tasman, talk about administrative law. It is not as if I have not been warned. Professor Gummow once told me “You New Zealanders don’t understand Australian administrative law”. In the years since, I would like to assure you that I have tried very hard. In preparation for speaking today, I have even had the advantage of a suggested reading list kindly provided by Professor Gummow. I thought it might help to illustrate the themes of difference - and what we have in common - that is the topic of this session. I thought too that I could touch on some of the issues that are exercising us in New Zealand and recent approaches taken, because again they may illustrate common themes and comparable solutions, even if the methods and vocabulary may differ.

It is just as important to emphasise what we have in common as to understand the reasons for difference. Although comparative insights may require more translation and borrowings must be more cautious in public law because of different constitutional contexts, the effort of looking further afield for ideas prevents isolationism. It allows us to plug into a wider world of ideas, expressed in judicial decisions and in the academic literature. In New Zealand, our size has made such connections essential and we have always ransacked the case-law and legal writings of other jurisdictions for help. It is therefore striking to a New Zealand reader to see how few references there are to comparative law in the major administrative law judgments of the High Court in the last ten years. In part, that may reflect the developed jurisprudence of a mature apex court. But only in part. It has been said that the jurisprudence of the High Court in administrative law lasts longer than the work of other final courts in the Commonwealth. I think there is truth in that and strength. I am not sure however that such stability is necessarily or always a virtue in administrative law, which is an area of law that depends on the application of standards which may need to evolve. Constitutionalisation of administrative law may have important benefits – particularly in the protection of judicial function – but it may come at a price not only in national isolation but in isolating administrative law from the currents of the common law, including areas of law such as tort, contract, company law, labour law and criminal law, from which

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many of its principles were derived.² As Felix Frankfurter pointed out “the problem of rule *versus* discretion is far broader than its manifestations in administrative law”.³ Too close a tie to constitutional law may blunt that sense of connection.

I should say immediately that I think references to Australian exceptionalism in administrative law are exaggerated. Although Robin Cooke in his Hamlyn lectures thought that *Craig v South Australia*,⁴ in retaining a distinction between jurisdictional and non-jurisdictional error, marked the modern deviation of Australian administrative law,⁵ the cases since have made it clear that “jurisdictional error” has expanding scope.⁶ Indeed, it is an open question whether the differences in methodology in Australia and New Zealand lead to very different outcomes in practice. In New Zealand, despite the abandonment of the distinction between jurisdictional and non-jurisdictional error of law (overtaking the importance of the record), application is usually conservative. Courts are more comfortable identifying procedural error than substantive unreasonableness and most successive judicial review cases turn on statutory interpretation rather than broader considerations of administrative injustice. In practice, although usually acknowledged, deference to expertise is observed. In New Zealand, as in Australia, vigilance about protecting judicial function generally renders privative clauses ineffectual, although in the constitutional setting of New Zealand this is a fraught exercise. In both jurisdictions the courts have been unwilling to provide leeway to administrative agencies in matters of interpretation of statutes conferring jurisdiction, although perhaps in both the justification is not entirely easy to reconcile with greater deference to discretion in decision-making and may be an area in which some movement may develop at least in the context of modern regulation of utilities. Contextual standards in judicial review are treated as inevitable in both jurisdictions, although perhaps more acknowledged in New Zealand, especially since adoption of human rights standards. The same statements of human rights may make us more comfortable to look to principles and values in administrative justice as well as in the context of the statute conferring powers, promoting review that is more clearly substantive and which is less concerned with avoiding merits review, although in New Zealand, too, we say that judicial review is not concerned with the merits of a decision.

In both jurisdictions modern methods of government provide challenges to traditional justifications for judicial review. My impression is that in New Zealand we have been more ready to review on public law grounds the use of public power through private law forms, perhaps because of the scale of privatisation that occurred in New Zealand in the 1980s and 1990s. Since 1990 this impulse has the support of the New Zealand Bill of Rights Act 1990, which requires observance of the rights contained in it by “any person or body in the performance of any public

² See DGT Williams “Criminal Law and Administrative Law: Problems of Procedure and Reasonableness” in P Smith (ed) *Essays in Honour of JC Smith* (Butterworths, London, 1987) 170.

³ Felix Frankfurter “The Task of Administrative Law” (1927) 75 U Pa L Rev 614 at 619. In *Ridge v Baldwin* [1964] AC 40, Lord Reid drew on private law cases concerned with control of powers.

⁴ *Craig v South Australia* [1995] HCA 58, (1995) 184 CLR 163.

⁵ Lord Cooke *Turning Points of the Common Law* (Sweet and Maxwell, London, 1997) at 76–78.

⁶ See *Kirk v Industrial Court of New South Wales* [2010] HCA 1, (2010) 239 CLR 531 from [73].

function, power, or duty conferred or imposed on that person or body by or pursuant to law”.⁷ Section 27 of the Act requires the observance of natural justice by “any tribunal or other public authority which has the power to make a determination in respect of ...[a] person’s rights, obligations, or interests protected or recognised by law”. It also provides anyone affected by a determination of any tribunal or other public authority with “the right to apply, in accordance with law, for judicial review of that determination”.

The reading list provided to me by Professor Gummow included the 2007 decision of the High Court in the *East Australian Pipeline* case.⁸ The judgment of Gummow and Hayne JJ is beautifully written of course. But a categorical distinction between what constitutes unreasonableness under a statutory power of review and what constitutes unreasonableness justifying judicial review of the outcome under administrative law is not the sort of analysis that is familiar to a New Zealand lawyer. That is not to say that the difference would not be reflected in New Zealand law. But it would arise in New Zealand because reasonableness is applied as a contextual standard which may be stricter in application by a Tribunal exercising a statutory review than by a court judicially reviewing the Tribunal.

Professor Gummow included in the reading list his article “Why injunction but no certiorari?”⁹ While I appreciate this question is one of real practical significance in Australia, in the application of s 75(v) of the Constitution, it carries the whiff of mothballs to a New Zealander. Although the prerogative writs remain part of our law, very few lawyers or judges have had occasion to think of them since the procedural reforms of 1972 established the application for judicial review as the means by which the supervisory jurisdiction of the High Court is exercised. Nor has there been any distinction in application of the remedy to tribunals or inferior courts (as the omission of certiorari and the inclusion of injunctions in the original jurisdiction of the High Court permits under s 75(v)). It is also not immediately obvious to us, when the constitutional writs are cited as a reason for retention of jurisdictional and non-jurisdictional error, why the remedies should dictate the grounds on which the supervisory jurisdiction is exercised and whether it can evolve, although I accept that constitutional theory based on separation of powers and constitutional accountabilities provides an explanation for how the position came about and a reason based on constitutional structure why it is retained.

New Zealand “exceptionalism”

New Zealand’s constitutional arrangements, like those of the United Kingdom on which they are based, are properly seen as a source of some exceptionalism too. While separation of powers underlies even an unwritten constitution in the Westminster tradition, the balances are far less robust and judicial authority in particular is fragile. Drawing the teeth of privative clauses is constitutional brinkmanship for judges in our system. That makes the success in the United

⁷ New Zealand Bill of Rights Act 1990, s 3.

⁸ *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* [2007] HCA 44, (2007) 233 CLR 229.

⁹ William Gummow “The scope of section 75(v) of the Constitution: Why injunction but no certiorari?” (2014) 42 Fed L Rev 241.

Kingdom and New Zealand in depriving such clauses of their effect remarkable. In New Zealand, it owes perhaps more to Parliamentary avoidance of such techniques in recent years. It is not a course that should be taken for granted. It explains, perhaps, judicial caution in exercising judicial review in New Zealand.

Separation of powers, although not elaborated in any constitutional text in New Zealand, is the assumption of our constitution too. It is not however more a compass for constitutional values than an institutional structure which marks out distinct spheres of responsibility. In our system, certiorari and orders in the nature of certiorari under modern procedure are a primary response of the courts to error of law by administrative decision-makers and decisions and the decisions of inferior courts. There is no need in our system to retain error of jurisdiction in the narrow sense of usurpation of function to enable review jurisdiction to apply to inferior courts.

Some questions

In reading Australian judicial review cases, it is clear that approaches are sometimes affected by wider themes. They include the High Court's pursuit of a single common law of Australia and its determination to protect the judicial authority of the Commonwealth and protect its purity. A question I am not qualified to answer but which cannot help occur to an outsider is whether the single common law of Australia inhibits common law development by the State Supreme Courts.

My imperfect understanding of Australian constitutional history suggests that the struggle to maintain the judicial authority conferred by Chapter III of the Constitution explains the different treatment of administrative tribunals and inferior courts in terms of jurisdictional error.¹⁰ This leads to complexity not familiar to New Zealand lawyers and perhaps continues in part to explain the attachment to a wider conception of jurisdictional error in supervision of administrative tribunals while granting more scope for error to inferior courts (through narrower conception of jurisdictional error), a result that without the constitutional background of protection of judicial function seems odd.

Use of comparative law materials in both jurisdictions

My reading of the decisions of the High Court suggests that, since *Craig*,¹¹ citations of other Commonwealth jurisdictions tend to be for early statements of principle rather than contemporary case-law. In *Li*¹² for example reference was made to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,¹³ *Secretary*

¹⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10, (1956) 94 CLR 254; *Craig v South Australia* [1995] HCA 58, (1995) 184 CLR 163.

¹¹ *Craig v South Australia* [1995] HCA 58, (1995) 184 CLR 163.

¹² *Minister for Immigration and Citizenship v Li* [2013] HCA 18, (2013) 249 CLR 332.

¹³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680.

of *State for Education and Science v Tameside Metropolitan Borough Council*,¹⁴ and *Kruse v Johnson*.¹⁵ The exception is *Momcilovic* which,¹⁶ not surprisingly given the human rights subject matter, referred to the case-law of other jurisdictions with human rights statutes comparable to that of Victoria, including New Zealand. Even there, the discussion of the United Kingdom made reference to the influence of Europe on English law as a reason why recent decisions of the House of Lords are less helpful in Australia today. The same point was made by Chief Justice Gleeson in a lecture in Singapore in 2007.¹⁷

In New Zealand, citation of Australian administrative law continues to be made but often with the comment that the authorities are not helpful because of the retention of the jurisdictional error requirement. So, in *Tannadyce Investments v CIR*,¹⁸ the Supreme Court said that the decision of the High Court in *Commissioner of Taxation v Futuris Corporation Ltd*¹⁹ as to the availability of judicial review was “of limited assistance” on the interpretation of equivalent and similar legislation protecting assessments of tax, because of a “fundamental difference between the two jurisdictions on the scope of judicial review”.²⁰ (It should be noted that decisions of the Court of Appeal in *Tannadyce*²¹ and an earlier case, *Westpac*,²² picking up on the constitutional exception for fraudulent behaviour grounded on the injunction remedy referred to in s 75(v), fails to appreciate the constitutional dimension and is an example of the risks in comparative law application in a different context.) Ironically, in *Tannadyce*, as is indicated in the review of decisions of the New Zealand Supreme Court below, the majority ended up excluding judicial review on the basis of the statutory protection for assessments.

Top down or bottom up? “The maintenance of this Constitution”

In New Zealand, we have no such challenges as the need for purposive interpretation of the executive power under the Australian Constitution to maintain the Constitution. As some of the recent case-law in the High Court indicates, whether such power is limited to the functions allocated to the Commonwealth by the Constitution (as Zines suggests) or includes any power to meet the governmental needs of a modern national government and which do not impinge on the rights of others does not arise in as acute form in New Zealand.

¹⁴ *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, [1976] 3 WLR 641 (HL).

¹⁵ *Kruse v Johnson* [1898] 2 QB 91.

¹⁶ *Momcilovic v The Queen* [2011] HCA 34, (2011) 345 CLR 1.

¹⁷ Murray Gleeson, Chief Justice of Australia “Australia’s Contribution to the Common Law” (speech to the Singapore Academy of Law, 20 September 2007).

¹⁸ *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

¹⁹ *Federal Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32, (2008) 237 CLR 146.

²⁰ *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [30].

²¹ *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2010] NZCA 233, (2010) 24 NZTC 24,341.

²² *Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.

Outsourcing

Public power is commonly distributed today through bodies that are not part of the executive. Much of this outsourcing lacks legislative underpinning. “Soft law” (administrative interpretation of statutes, manuals as to how discretions are to be exercised or laws applied) is everywhere.

Today public ends are achieved by incentives, subsidies, government contracting, tax policies, trade-able permits, and self-regulation. These mechanisms are often delegated to private bodies. In addition, distinct regulatory systems within government concerned with standard-setting, audit, fiscal responsibility, and grievance mechanisms operate partly outside primary or secondary legislative frameworks. The “public function” test applied in *Datafin* is still an outlier.²³ But I expect that it may yet point the way. In Australia, cases like *Tang*²⁴ and *NEAT Domestic*²⁵ indicate that the project may take some time.

I have mentioned Sir David Williams’ view that administrative justice is not an island but is connected to the mainland of the common law. More attention needs to be paid to these connections. I am not sure whether the strength of the constitutional writs in Australian administrative law will be impediment here. In *Kirk v Industrial Relations Commission (NSW)*, the High Court has affirmed that there is no “rigid taxonomy” of judicial review and that the classifications of when error is jurisdictional are only examples.²⁶

In Canada, which also prefers to justify review by jurisdictional error, what is such error is an intensely contextual assessment. Behind these labels there is a large measure of agreement that supervisory jurisdiction requires vitiating error (a matter of degree not susceptible to rule or test) and is not warranted where the decision maker reasonably has a choice in the assessment made.

Jurisdictional error in Australia post *Kirk* as Mark Aronson has long observed “expresses a conclusion that judicial intervention is appropriate”.²⁷ Harry Arthurs thought that “jurisdiction” was a “mediating” concept for judicial review. The terms of any statute conferring the power are critical, as is the gravity of the error and its impact on rights and interests.

In New Zealand, as in the United Kingdom, the bodies exercising such powers and functions may well be bound by the New Zealand Bill of Rights Act. The courts are only starting to come to grips with these modern forms of regulation.

²³ *R v Panel on Take-overs and Mergers, Ex parte Datafin Plc* [1987] QB 815, [1987] 2 WLR 699.

²⁴ *Griffith University v Tang* [2005] HCA 7, (2005) 221 CLR 99.

²⁵ *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35, (2003) 216 CLR 277.

²⁶ *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

²⁷ Mark Aronson, Bruce Dyer and Matthew Groves *Judicial Review of Administrative Action* (5th ed, Lawbook, Sydney, 2013) at [1.140].

That the courts must step up to this challenge follows from the nature of judicial function. Lord Diplock made it clear that it is the responsibility of the courts to adapt their processes “to preserve the integrity of the rule of law despite changes in the social structure, methods of government, and the extent to which the activities of private citizens are controlled by government authorities”.²⁸ I am not sure under the Australian constitution where this jurisdiction and responsibility sits.

Reasonableness

Decision-makers must act in accordance with law and fairly and reasonably. *Wednesbury* was pitched by Lord Greene MR at a level that shades into bad faith.²⁹ Reasonableness takes its content from context. The nature of the interests affected and the relative competence of decision-makers and courts to judge what is reasonable affect what is reasonable. As Peter Cane has pointed out, it is difficult to understand in what sense a judgment that an administrative decision is unreasonable is not a judgment about the merits of the decision.³⁰

The Federal Law reform package of the 1970s

Chief Justice Gleeson in a 2006 lecture identified both the constitutional balances and the federal administrative law reforms of the 1970s as an explanation why Australian law had not taken up the North American jurisprudence of judicial deference nor the English justification for judicial review in abuse of power.³¹ Rather, he said, the focus has been on jurisdiction and legality. Critics such as Peter Cane and Michael Taggart have suggested that the establishment of the Administrative Appeals Tribunal “fragmented administrative law by giving the distinction between judicial review and merits review a unique and rigidifying significance” and inhibiting the development of Australian administrative review.³²

In New Zealand and the United Kingdom, the provision of merit-based review by administrative tribunals has not led to the narrowing of the supervisory jurisdiction of the superior courts.

I have elsewhere expressed the view that the movement to varied intensity review was under way long before adoption of statements of human rights. A substantive conception of the rule of law was evident long before. I think there has been a shift in what our societies have come to expect of law and legal process and the need for power to be justified. That accords with freedom of information statutes and

²⁸ *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 639–640.

²⁹ See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680.

³⁰ Peter Cane “Merits Review and Judicial Review - the AAT as Trojan Horse” (2000) 28 Fed L Rev 213 at 221.

³¹ Murray Gleeson, Chief Justice of Australia “Administrative Appeals Tribunal 30th Anniversary: Outcome, Process and the Rule of Law” (Canberra, 2 August 2006).

³² Peter Cane “The Making of Australian Administrative Law” (2003) 24 Aust Bar Rev 114 at 133; see also Michael Taggart “Australian Exceptionalism’ in Judicial Review” (2008) 36 Fed L Rev 1 at 2–3.

requirements for reasons. Overwhelmingly, judicial review vindicates official conduct and provides legitimacy. That is a principal contribution of legal process to the rule of law. It is not achieved through supervision for procedural exactness but deference in matters of substance. The way in which executive government is conducted has changed. In many jurisdictions public power must now comply with substantive values, as in the human rights legislation of the United Kingdom, New Zealand and Victoria.

Exercise of discretion requires the same choices as interpretation of legislation to decide what limits there are to apparently wide discretion. It makes little sense to insist that formal interpretation of a statutory text is only for the courts but that exercise of discretion is subject to deference. The better view may be the middle way, equally applicable, that a reasonable interpretation is equally available to administrators in applying statutory powers. Because reasonableness is contextual, in cases where human rights or interests of high importance are engaged, stricter supervision is appropriate. Values such as the principle of legality and presumptions of conformity with international law attach as much to discretionary decisions as to interpretation. Where reasonable minds, properly informed and after proper consideration, can take different positions, the primary decision maker should prevail.

The view that it is for the courts to determine the law is ingrained. Deference comes hard. But the meaning of words very often has to be assessed in relation to facts - speech in relation to flag burning, for example. Where such evaluation may properly be influenced by exercise possessed by the decision-maker, there is room for the courts to accept the interpretation if reasonable. Reasonableness is flexible. It can accord respect for the primary decision-maker and separation of powers where a range of reasonable options is available. In some cases a standard of correctness is necessary, as was acknowledged in *Dunsmuir* in Canada.³³ In others the courts are concerned only with decisions that fail a reasonableness standard, leaving choice to the administrative decision-maker. But Lord Cooke was surely right to say in *Daly* that "it may well be that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd".³⁴ That seems to me to be where the majority in *Minister for Immigration and Citizenship v Li* have ended up. Hayne, Kiefel and Bell JJ concluded that the standard of unreasonableness is not limited to "an irrational, if not bizarre, decision which is to say one that is so unreasonable that no reasonable person could have arrived at it".³⁵ Gageler J emphasised the stringency of the standard but considered that it was comparable to the standard before appellate correction of a discretionary decision.³⁶ Although review given the stringency of the standard was rare, the Court concluded that the failure to grant an adjournment in the case was indeed unreasonable. Tick the box formalism or perfunctory consideration should not pass muster.

³³ *Dunsmuir v New Brunswick (Board of Management)* [2008] SCC 9, [2008] 1 SCR 190.

³⁴ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [32].

³⁵ *Minister for Immigration and Citizenship v Li* [2013] HCA 18, (2013) 249 CLR 332 at [68].

³⁶ At [108].

Injunctive relief

The jurisdiction to grant injunctive relief may not turn on jurisdictional error, as Gaudron J suggested in a number of cases,³⁷ and as was left open in the joint reasons in *Plaintiff S157/2002*.³⁸

The role of the State Supreme Courts

One of the significant differences between Australia and New Zealand is that the court system is unitary, not divided between the federal courts and the State Supreme Courts and the High Court of New Zealand contains the entire jurisdiction possessed by the courts at Westminster. Although the jurisdiction of the High Court is protected by the Constitution, the original jurisdiction of the Federal Court is statutory.

³⁷ *Abebe v Commonwealth* [1999] HCA 14, (1999) 197 CLR 510 at [103] and *Muin v Refugee Review Tribunal* [2002] HCA 30, (2002) 76 ALJR 966 at [47].

³⁸ *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, (2003) 211 CLR 476 at [82] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.