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MODERN JUDICIAL REVIEW – AN OVERVIEW

John Basten*

The title of this session is Judicial Review of Administrative Action: however, I propose to focus on statutory interpretation. Why? The answer is that the development of administrative law in the last 20 years is not readily comprehended without a clear focus on statutory interpretation.¹ That is not to say that a doctrinal approach to judicial review can be reduced to an exercise in statutory interpretation, but rather that the two areas have developed together and judicial review cannot, or can no longer be, treated separately.

Some 35 years ago in *Cooper Brookes*² Mason and Wilson JJ stated that the rules of statutory interpretation “are no more than rules of common sense ... [t]hey are not rules of law.”³

There is an appealing kernel of truth which underlies this proposition. If a statute provides an appeal limited to errors of law, we have to be able to apply the statute (and we do on a daily basis) despite disquiet and uncertainty as to the distinction between errors of law and other errors. The common sense approach warns against the scepticism which flows from our inability to identify watertight distinctions, which may in turn lead to unhelpful sophistry. On the other hand, it is clear that the significance of statutory interpretation as a judicial function, and its place in the scheme of public law, no longer allows for characterisation of its principles as merely

* Judge of Appeal, Supreme Court of NSW. I am grateful to Agnieszka Deegan for assistance in the preparation of this paper.

¹ The Hon Robert French AC, “Statutory Interpretation and Rationality in Administrative Law” (AIAL, National Administrative Law Lecture, Canberra, 23 July 2015).

² *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.

³ *Cooper Brookes* at 320.

rules of common sense. In 2004 in *Electrolux*,⁴ Gleeson CJ described the presumption against reading a statute as modifying or abrogating fundamental rights, “as an aspect of the principle of legality which governs the relations between Parliament, the executive and the courts. The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted.”

These were not mere straws in the wind. In 2009 in *Zheng v Ca*⁵ the High Court stated that “judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws.” A year later in *Saeed v Minister for Immigration and Citizenship*⁶ the Full Court reiterated the statement of Gleeson CJ in *Electrolux*.

If judicial findings as to legislative intention are an expression of a constitutional relationship, it follows that the principles of statutory interpretation by which those findings are made have constitutional significance. Because statutory interpretation is an important part of determining what the law is, which is a core function of the courts, principles of statutory interpretation must reflect (and be limited by) the constitutional doctrine of the separation of powers.

Rejecting an explanation as to the proper limits of judicial review based on a public law doctrine of “ultra vires”, in *Attorney-General (NSW) v Quin*, Brennan J wrote:⁷

“The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. ...

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which

⁴ *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309; [2004] HCA 40 at [21], referring to the opinion of Lord Steyn in *R v Home Secretary; Ex parte Pierson* [1998] AC 539 at 587, 589.

⁵ (2009) 239 CLR 446; [2009] HCA 52.

⁶ (2010) 241 CLR 252; [2010] HCA 23.

⁷ (1990) 170 CLR 1 at 35-36.

determines the limits and governs the exercise of the repository's power. ... 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.”

This passage is understood to have placed the legitimacy and limits of judicial review squarely within the doctrine of the separation of powers. It is significant in that respect that *Quin* was a case concerned with executive action by a State government, namely the appointment of magistrates, and did not fall within the division of powers effected by the federal Constitution.

Once principles of statutory interpretation are identified as having a constitutional dimension, they must be more than common sense. Being identified as a part of the judicial function, the limits of statutory interpretation become an element in the separation of powers. Their limits will be defined by reference to the limits of judicial power.

The relevance of this for judicial review of administrative action may be found in the 1998 decision of the High Court in *Project Blue Sky*.⁸ The case concerned the validity of a standard set by the Australian Broadcasting Authority with respect to the Australian content of programs for commercial television. In identifying the correct approach to that question, Brennan CJ (dissenting as to the outcome) stated:⁹

“The purpose of construing the text of a statute is to ascertain therefrom the intention of the enacting Parliament. When the validity of a purported exercise of a statutory power is in question, the intention of the Parliament determines the scope of a power as well as the consequences of non-compliance with a provision prescribing what must be done or what must occur before a power may be exercised.”

⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28.

⁹ *Project Blue Sky* at [41].

To similar effect, the joint reasons,¹⁰ abandoning the “elusive distinction between directory and mandatory requirements” and the test of “substantial compliance” stated:¹¹

“A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.”

The application of these principles may usefully be explored by reference to three highly contested areas as to the limits of judicial review of administrative action. These are (1) privative clauses, (2) procedural fairness and (3) reasonableness. Let me start with privative clauses.

(1) Privative clauses

Privative clauses have always created trouble for judicial review: indeed, that is their sole purpose. A standard form of privative clause will state that a decision under the particular statute is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal. The conventional language appears to have two functions, one being to remove any statutory or common law jurisdiction to consider the validity of a decision; the other being to remove power to quash, being a form of relief available for invalidity. Such provisions are readily seen to be problematic in federal jurisdiction as being potentially inconsistent with s 75(v) of the Constitution, which confers original jurisdiction on the High Court with respect to writs of mandamus and prohibition and injunctions against officers of the Commonwealth.¹² However, that was not the basis upon which courts limited the effect of privative clauses. How they did so is far more interesting than current jurisprudence would have us believe.

A strong privative clause takes effect by protecting “decisions”, which constitute the exercise of statutory power. It has been held that an invalid decision may not be a decision to which the clause applies, as a matter of statutory construction, and

¹⁰ McHugh, Gummow, Kirby and Hayne JJ.

¹¹ *Project Blue Sky* at [93].

¹² Quashing orders have long been accepted as available as an incidental power in that protected jurisdiction. See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 at [14] (Gaudron and Gummow JJ).

therefore may not be protected.¹³ (As a matter of construction, that conclusion is not entirely persuasive: only if it is non-compliant need the decision – then a ‘purported decision’ – be quashed.) Further, where the exercise of jurisdiction is expected to exceed the limits of the power, the clause may not prevent pre-emptive action by way of injunction or prohibition.¹⁴

As we now know, privative clauses are ineffective to preclude judicial review for jurisdictional error. That was the principle adopted in federal jurisdiction in *Plaintiff S157*.¹⁵ A different course was taken with respect to privative clauses under state laws, but with the same result. Based on the integrated system for the administration of justice revealed by Ch III of the Constitution, and particularly the conferral on the High Court of jurisdiction to hear appeals from state Supreme Courts, the High Court held in *Kirk v Industrial Court of New South Wales*¹⁶ that a state law could not remove the essential characteristic of a state Supreme Court to exercise supervisory jurisdiction over other courts of limited jurisdiction and (at least by inference) administrative decision-makers.

These developments are superficially satisfying: they provide a constitutional basis for judicial review generally and in particular judicial review of administrative decision-making. However, their application has been frustrating and has led to a significant level of uncertainty in courts below the High Court as to the precise scope of the new criterion of invalidity, namely “jurisdictional error”. The problem is identified, rather than solved, by calling jurisdictional error a conclusory label.¹⁷

Counter-intuitively, a better understanding can be obtained as to the scope of judicial review by revisiting the decision which governed privative clauses for half a century, but which appeared to be cast into oblivion by *Plaintiff S157*. That case is, of course, *Hickman*.¹⁸

¹³ *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476; [2003] HCA 2 at [76]-[77] and [83].

¹⁴ *Fish v Solution 6 Holdings Limited* (2006) 225 CLR 180; [2006] HCA 22 at [44] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

¹⁵ *Plaintiff S157/2002* at [76]-[77] and [83].

¹⁶ (2010) 239 CLR 531; [2010] HCA 1 at [55], [88]-[99].

¹⁷ M Aronson, “Jurisdictional error and beyond” in M Groves, *Modern Administrative Law in Australia: Concepts and Context* (Cambridge UP, 2014) 248 at 252-253.

¹⁸ *The King v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

As explained by Dixon J in *Hickman*, a privative clause is interpreted as meaning “that no decision which is in fact given¹⁹ by the body concerned shall be invalidated on the ground that (i) it has not conformed to the requirements governing its proceedings or the exercise of its authority or (ii) has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision (a) is a bona fide attempt to exercise its power, (b) that it relates to the subject matter of the legislation, and (c) that it is reasonably capable of reference to the power given to the body.”²⁰

Each of the three so-called *Hickman* provisos can be justified by principles of statutory interpretation. Thus, the carrying out of a purpose in good faith is an implied condition of any power and to purport to exercise a power in bad faith would be to act for an extraneous purpose. The second and third limbs relate to the subject matter of the power and the kind of decisions that can be made; there may be fuzzy edges to any power, but there will always be a limit to the scope of authority conferred on a statutory decision-maker.

Thus, consistently with *Project Blue Sky*, the privative clause is to be approached as part of a statutory scheme which constitutes an administrative body, specifies its area of operation and defines the powers which it may exercise.

As explained in *Plaintiff S157*, *Hickman* identified “a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions,”²¹ although there was not really a “rule” of construction, as opposed to a methodology. There are other principles of construction which apply, two of which were identified in *Plaintiff S157*. The first was that such a clause be construed so as to be consistent with any constitutional limitations on legislative power.²² That will include avoidance of a construction which would allow an administrative body to determine conclusively the question of its own jurisdiction (or power) a function which, in accordance with the doctrine of separation of powers, is judicial.²³

¹⁹ Language which appeared to be limited to an actual decision, not a failure to act.

²⁰ *Hickman* at 615 (with identifiers of the elements added).

²¹ *Plaintiff S157* at [60].

²² *Plaintiff S157* at [71], reflecting the discussion in *Hickman* at 616.

²³ *Plaintiff S157* at [73].

A second rule, also said to apply to privative clauses generally, is the presumption that parliament “does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies”.²⁴ (Whether that helps much with a provision whose sole apparent purpose is just that, may be doubted.) In any event, with one eye on constitutional limitations, privative clauses can readily be controlled by applying principles of statutory interpretation.

(2) Procedural fairness

Let me turn to procedural fairness. There are other principles of statutory interpretation which may be invoked. One is the implication of procedural fairness: that is, “when a statute confers power to destroy or prejudice a person’s rights or interests, principles of natural justice regulate the exercise of that power.”²⁵ That passage from *Saeed* continued:²⁶

“The implication of the principles of natural justice in a statute is therefore arrived at by a process of construction. It proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power of the kind referred to in *Annetts v McCann*.”

There may be circumstances in which silence on the part of the legislature is inconclusive. In the 1977 case of *Salemi*²⁷ in a passage apparently approved by the Court in *Saeed*,²⁸ Barwick CJ noted that a contrary intention might be derived from a reading of the statute as a whole, silence notwithstanding. Further, as recognised by Jacobs J in *Salemi* (again in a passage referred to with apparent approval in *Saeed*),²⁹ the usual question is not whether the most extensive scope of procedural fairness was included or excluded, or wholly excluded, but what particular principles were intended to apply with respect to the exercise of a specified power. However, what is slightly curious about the exercise in statutory construction is an apparent assumption that failure to comply with procedural fairness (whatever the implied

²⁴ *Plaintiff S157* at [72].

²⁵ *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ) cited with approval in *Saeed* at [11].

²⁶ *Saeed* at [12] (citation omitted).

²⁷ *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 401 (Barwick CJ).

²⁸ *Saeed* at [12], fn (40).

²⁹ *Salemi* at 451; *Saeed* at fn (40).

content be) will always render the decision invalid,³⁰ an approach adopted without reference to *Project Blue Sky* principles.

There is also a degree of imprecision in identifying the relevant principles of statutory interpretation. Is the so-called ‘principle of legality’ relied on to import a general law standard; or is it used, as elsewhere, as a constraint on the abrogation of fundamental rights?³¹

(3) Reasonableness

A similar approach has been developed with respect to an implied criterion of reasonableness. Thus, in *Quin*, Brennan J stated:³²

“Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action.”

Brennan J treated this as an example of review for abuse of power and not as the opening of a gateway to judicial review of the merits of a decision otherwise within power. Thus, reasonableness review was seen as a potential intrusion on the functions exclusively reserved to the administrative officer, regardless of the existence or the absence of a privative clause. The exception, gross or *Wednesbury* unreasonableness, was generally not understood to apply to fact-finding, but only to crazy exercises of a discretionary power. But that limitation has always been doubtful.

The standard of gross unreasonableness is often a cause of puzzlement. It may appear tautological³³ and may be seen to cover a range of disparate circumstances. However, in this context it helps to see decisions as falling into two broad categories: (i) those for which no reasons are provided (or required) and (ii) those where reasons are given.

³⁰ *Saeed* at [13]; *Ex parte Aala* at [17].

³¹ *Polo Enterprises Australia Pty Ltd v Shire of Broome* [2015] WASCA 201; 209 LGERA 425 at [114]-[115] (Martin CJ).

³² *Quin* at 36.

³³ But see A Robertson, “The Contemporary Approach to Jurisdictional Error” in D Mortimer (ed), *Administrative Justice and its Availability* (The Federation Press, 2015) 59 at 61.

In *Avon Downs*, a case where there were no reasons and thus the Court had before it only the material available to the decision-maker, and the decision, Dixon J said:³⁴

“If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.”

Thus, absent reasons, judicial intervention could often be justified only by drawing *Avon Downs* inferences of legal error. In cases where the decision-maker has given reasons for his or her conclusion, one might well expect to be able to identify the taking into account of some irrelevant consideration (that is, one prohibited by statute), or the exercise of the power for an improper purpose, either of which would constitute a legal error. Furthermore, the fact that reasons are now commonly required may help to explain the recent development and apparent expansion of this criterion. Of course, not all primary decision-makers are obliged to give reasons, especially under state law; but merit review tribunals which are required to give reasons are now commonplace. Indeed, the mere existence of such bodies may encourage primary decision-makers to give reasons.

Until the commencement in 1980 of s 13 of the ADJR Act and, in 1984, s 25D of the *Acts Interpretation Act* (the latter specifying generally the content of reasons, where required) there was no general requirement that administrative decision-makers give reasons.³⁵ Indeed, the established principle was to the contrary, as explained in *Osmond's case*.³⁶ Once there is a statutory duty to give reasons, it is easy to infer that a decision must be “rational”, because the very purpose of requiring reasons is to reveal the basis of rational decision-making. At least that inference is available: it

³⁴ *Avon Downs Pty Ltd v The Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

³⁵ *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13 commenced on 1 October 1980; s 25D, *Acts Interpretation Act 1901* (Cth) commenced on 12 June 1984; *Acts Interpretation Amendment Act 1985* (Cth); see also s 430 of the *Migration Act 1958* (Cth), originally s 166E, in relation to decisions of the Refugee Review Tribunal, commenced on 1 July 1993; *Migration Reform Act 1992* (Cth), s 32.

³⁶ *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

is certainly more plausible than the implication of an obligation of rationality when the law requires no reasons and there is no disclosure of a reasoning process.

There remains a question as to the scope of the obligation to act rationally. It may extend to:

- the exercise of a discretionary power only (*Wednesbury*);
- the existence of a condition to the exercise of power (jurisdictional fact);
- findings of primary fact;
- inferences from primary facts, and
- the application of law to the facts.

Of course, one might well ask, why impose limits on rationality review? If rationality is required, it should condition the whole decision-making process. Whilst that is a legitimate consideration, it is also necessary to bear in mind the need for judicial restraint in circumstances where Parliament has conferred exclusive fact-finding and decision-making power on its chosen authority.

(a) exercise of a discretionary power only (*Wednesbury*)

First, the exercise of a discretionary power: are we still constrained to review only of grossly unreasonable decisions? Or has the standard required of decision-makers been raised (and the hurdle to judicial intervention lowered)?

The answer depends on what we should make of the 2013 decision of the High Court in *Minister for Immigration and Citizenship v Li*.³⁷ *Li* involved an application to the Migration Review Tribunal to defer final consideration of the applicant's request for a visa until a skills assessment (critical for her success) had been completed. Two factors worked against the adjournment application. One was that the visa application had been pending, undetermined, for almost three years. The second was that an initial skills assessment had (as the applicant conceded) been based on false information supplied by her. A second skills assessment was received, but was unfavourable. The applicant sought an opportunity to challenge that assessment on the basis of alleged error.

³⁷ (2013) 249 CLR 332; [2013] HCA 18.

The Tribunal refused to delay its decision, ultimately rejecting the application to review the adverse decision of the delegate.

The applicant then challenged the refusal to defer a final decision, a refusal which was found to be an unreasonable exercise of discretion by the Federal Magistrate, the Full Court of the Federal Court and a unanimous High Court. Of the five judges who sat in the High Court, Hayne, Kiefel and Bell JJ wrote jointly, with separate judgments from French CJ and Gageler J.

The Chief Justice identified the question as whether the Tribunal's decision not to defer its determination "was so unreasonable as to constitute jurisdictional error."³⁸ After a discussion of the principles to be found in the case law and commentary, the Chief Justice, in dismissing the appeal, referred to the failure of the Tribunal to deal either in terms or by implication with (i) the substance of the matters relied on by the applicant in her submissions to it or (ii) the legislative objectives set out in the statutory scheme or (iii) to disclose a recognition that its decision was fatal to the visa application, with the result that there was "an arbitrariness about the decision, which rendered it unreasonable in the limiting sense explained above."³⁹ Justice Gageler, also writing separately, adopted what might be considered a conventional approach, asking whether the Tribunal had failed to perform its statutory duty to review the decision of the delegate. He said:⁴⁰

"The MRT does fail to perform its statutory duty to review a decision where: (i) the manner of its performance of a procedural duty, or of its exercise or non-exercise of a procedural power, is so unreasonable that no reasonable tribunal heeding [the statutory] exhortations or adhering to those aspirations could have done what the MRT in fact did; and (ii) that unreasonableness, or neglect, on the part of the MRT is shown to be material to the outcome of the review that the MRT has undertaken in fact."

The plurality appeared to adopt a less demanding approach. They noted, as did the other judges, the statutory obligation to provide a mechanism of review that is "fair,

³⁸ *Li* at [22].

³⁹ *Li* at [31].

⁴⁰ *Li* at [98].

just, economical, informal and quick” and to “act according to substantial justice and the merits of the case.”⁴¹ They then stated that:⁴²

“The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.”

After referring to *Wednesbury*, the joint reasons continued:⁴³

“The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified.”

This reasoning resulted in the conclusion that in the circumstances of the case “it could not have been decided” that the review should be brought to an end if the matter had been dealt with properly according to law.

There are three things which may be said in relation to the decision in *Li*. First, it is important to note that it was dealing with the exercise of a discretionary power. On the other hand, discretionary powers come in different forms. Thus, there was reference to the reasoning in *House v The King*,⁴⁴ a case involving, of course, a statutory appeal with respect to a sentence; that exercise involved the selection of a point within an available range and not a binary choice as to whether to grant an adjournment or not. Furthermore, the purpose and function of appellate review, as an exercise of judicial power is not the same as review of administrative decision-making, controlled as explained above, by principles based on the separation of powers.

⁴¹ *Migration Act 1958* (Cth), s 353.

⁴² *Li* at [67] (citation omitted).

⁴³ *Li* at [68].

⁴⁴ (1936) 55 CLR 499.

Secondly, two leading academic administrative lawyers, Matthew Groves and Greg Weeks, have expressed the view that the decision can be explained on the basis that “all three judgments can be traced back to the fact that the MRT gave inadequate reasons for its decision to refuse a further adjournment.”⁴⁵ Groves and Weeks concluded that, to escape review, the Tribunal must have made a statement of its reasons which was “utterly clear”.⁴⁶ That was because, previously, “all that a government party needed to do to avoid a finding of *Wednesbury* unreasonableness was to posit some possible, even if improbable, valid reason for the exercise of power under question.” I am not entirely persuaded by this reasoning.

Thirdly, and importantly, it is not clear that the Court has greatly lowered the bar for unreasonableness review. What it has done, and this reflects my general theme, is to locate the standard of reasonableness within a particular statutory context, albeit one which was rather too easily treated as analogous to a judicial proceeding.

(b) existence of a condition to the exercise of power (jurisdictional fact)

One can deal briefly with jurisdictional fact. That is because a jurisdictional fact is one the final determination of which is not reposed in the administrative officer, but in the reviewing court. However, sometimes the jurisdictional fact, better described as a pre-condition to the engagement of the statutory power, is the opinion of the primary decision-maker. As explained by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu*,⁴⁷ a different principle may be identified with respect to such facts,⁴⁸ following a line of authorities including *Hetton Bellbird Collieries*⁴⁹ and *Buck v Bavone*.⁵⁰ The jurisdictional fact in *Eshetu* was the state of satisfaction of the Minister’s delegate as to the criterion for the issue of a visa.

⁴⁵ M Groves and G Weeks, “Substantive (Procedural) Review in Australia” in H Wilberg and M Elliot (eds), *The Scope and Intensity of Substantive Review – Traversing Taggart’s Rainbow* (Hart Publishing, 2015) 133 at 147 (citation omitted).

⁴⁶ *Ibid* at 149.

⁴⁷ (1999) 197 CLR 611; [1999] HCA 21 at [127].

⁴⁸ *Eshetu* at [130].

⁴⁹ *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 (Latham CJ).

⁵⁰ (1976) 135 CLR 110 at 118-119 (Gibbs J).

(c) fact finding generally

Thirdly, it is necessary to turn to the question of unreasonable findings of fact, where the power to determine factual disputes is vested in the administrative officer. Whether review was allowed on this ground was discussed (but not resolved) by Edelman J in *Pilbara Infrastructure*.⁵¹ In *Bond* Mason CJ stated:⁵²

“So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v Maryborough Mining Warden*.⁵³

But it is said that ‘[t]here is no error of law simply in making a wrong finding of fact’: *Waterford v The Commonwealth*,⁵⁴ per Brennan J. Similarly, Menzies J observed in *Reg v The District Court; Ex parte White*.⁵⁵

‘Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law.’

Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.”

However, as I suggested in *Amaba v Booth* in 2010,⁵⁶ in a passage not addressed by the High Court in dismissing an appeal:⁵⁷

⁵¹ *The Pilbara Infrastructure Pty Ltd v Economic Regulatory Authority* [2014] WASC 346 at [148]ff. (Reference to “the ultra vires theory of judicial review” at [155] has an English flavour.)

⁵² *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356.

⁵³ (1975) 132 CLR 473 at 481, 483.

⁵⁴ (1987) 163 CLR 54 at 77 (per Brennan J).

⁵⁵ (1966) 116 CLR 644 at 654.

⁵⁶ *Amaba Pty Ltd v Booth* [2010] NSWCA 344; [2011] Aust Torts Rep 82-079 at [22]-[25]; referring to *Goodwin v Commissioner of Police* [2010] NSWCA 239 at [12].

⁵⁷ *Amaca Pty Ltd v Booth* (2011) 246 CLR 36; [2011] HCA 53.

“...some doubt has been cast on the scope and operation of that principle by reference in later judgments to the need for findings or inferences of fact to be supported by ‘logical grounds’.⁵⁸

Implicit in the statement that there is no evidence to ‘support’ a particular finding, is the characterisation of a relationship between the evidence and the finding. It is the same relationship inherent in the concept of ‘relevance’, on which the laws of evidence depend. That relationship depends on a process of reasoning which must be logical or rational. Thus, evidence is relevant which, if accepted, ‘could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding’.⁵⁹ As explained by Gleeson CJ, Heydon and Crennan JJ in *Washer v Western Australia*:⁶⁰

‘The word “rationally” is significant in this context. In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury’s assessment of the probability of the existence of a fact in issue at the trial.’

Whether an inference is reasonably open, in the sense of being logically available, involves an evaluative judgment, which is to be assessed by the court exercising appellate or supervisory jurisdiction.

Although it appears not to have been addressed in these terms, it seems that the reviewing court should make its assessment, based on findings of primary fact made by the trial judge, as an exercise of its own judgment, rather than by analysing the cogency of the reasons given by the primary judge. This point may be significant, depending upon whether the challenge is directed to inferences drawn from primary facts, or to the findings of primary facts themselves, which are

⁵⁸ See *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 77 ALJR 1165 at [52] (McHugh and Gummow JJ, Callinan J agreeing); *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 78 ALJR 992 at [38] (Gummow and Hayne JJ); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [40] (Gummow and Kiefel JJ, dissenting); cf [113], [119] and [129]-[130] (Crennan and Bell JJ).

⁵⁹ *Evidence Act 1995* (Cth and NSW), s 55(1).

⁶⁰ *Washer v Western Australia* (2007) 234 CLR 492; [2007] HCA 48 at [5].

said not to be supported by the evidence. As a practical matter, of course, it is neither appropriate nor necessary to disregard the reasons given by the primary judge for reaching a particular conclusion.”

In the past there was an alternative basis for an implied obligation to act rationally, which derived from the fact that bodies subject to judicial review were identified as those required to act “judicially”, in the sense used by Lord Atkin in *Electricity Commissioners*.⁶¹ That language was abandoned as the scope of judicial review expanded, but the possible implications of the language in an expanded context were not fully explored. Justice Deane in *Bond* might well have been understood as transposing the concept of a “duty to act judicially” from *Electricity Commissioners*, when stating:⁶²

“If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably.”

A range of factors was then identified which, at least by implication, involved examples of one or other of the attributes referred to in this passage. Nevertheless, it was not entirely clear whether the three labels (arbitrarily, irrationally or unreasonably) were used as synonyms, or as separate disjunctive concepts. However, the further remark that a tribunal must act with “a minimum degree of ‘proportionality’” hinted at something more demanding than merely non-arbitrary or rational reasoning. Justice Deane’s language was not that of the majority, although it is still referred to on occasion.⁶³

Conventionally, judicial review could apply to fact-finding only in very limited circumstances. There has been a tendency in some High Court jurisprudence to move away from a particular line of established authority without noting that a new course is being set, but one would not expect well-established principles to be

⁶¹ *The King v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 205; cf *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190 at [12]-[19] (Spigelman CJ), [82]-[83] (Basten JA) and [260] (McDougall J).

⁶² *Bond* at 367.

⁶³ *Ex parte Applicant S20/2002* at [9] (Gleeson CJ).

abandoned without acknowledgment that a fresh course was being charted. On the other hand, thoroughly unreasonable fact-finding may lead a reviewing court to infer error in a conventional sense, such as failure to ask the right question, failure to address the applicant's claims or other constructive failure to exercise jurisdiction, as perhaps seen in *FTZK*.⁶⁴

That raises a further question, namely whether, where reasons are provided, reasonableness is to be assessed solely by reference to the reasons, or whether a court may still adopt an *Avon Downs* approach and examine the final decision in the light of the evidence before the decision-maker, to see if there may be some unrevealed error.⁶⁵

Conclusions

I hope that this excursus into three areas of judicial review which have proved controversial has established a basis for my broad proposition that principles of administrative law, as recently developed, are to a large degree dependent upon statutory construction and hence principles of statutory interpretation.

That is not a development which should be deplored; nor is it particularly novel. However, statute-based judicial review, such as that under the *Administrative Decisions (Judicial Review) Act*, tends to focus attention on particular kinds of decisions and particular grounds of challenge. One consequence has been, at least for a period, to distract attention from underlying principles, including the possibility that the grounds will have variable content depending upon the statutory context in which they are to be applied. Also, identifying grounds of challenge tended to distract attention from the proper focus of judicial review, namely identifying the standards imposed by statute on the decision-maker and the consequences of breach.

What is more unsettling, however, is that the principles of statutory interpretation have not developed a degree of coherence and comprehensibility to fit them for the task to which they are now committed. Often, to use the words of Gleeson CJ, we

⁶⁴ *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26; 88 ALJR 754.

⁶⁵ *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437; [2014] FCAFC 1 at [47] (Allsop CJ, Robertson and Mortimer JJ).

are working where the statute runs out. No doubt, in the usual way of the common law, cases will clarify the approach to be taken.⁶⁶ The general principle, that procedural fairness is to be implied as a condition of the exercise of almost every statutory power affecting the interests of individuals, has developed within the last 30 years. What was once highly contestable is now conventional reasoning; nevertheless, the original view that the content of procedural fairness might be highly statute-specific, requiring a nuanced approach, has been less well-developed. There is a tendency to impose judicial standards of fair procedures without careful consideration of the context and the effects on public administration, of which courts know little.

Similarly, the process by which some standard of reasonableness or rationality is to be imported into the decision-making process is also, as yet, under-developed.

This conclusion is not helpful for those advising clients, nor for counsel seeking to assist a court as to the appropriate outcome of a challenge to an administrative decision. Uncertainty carries with it undoubted economic costs. However, we all need to grapple with what is undoubtedly a changing legal culture with respect to judicial review, in order to advise more confidently and, for courts, to decide cases appropriately.

⁶⁶ *Salemi* at 451 (Jacobs J).