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THE SCOPE OF POWER: DETERMINING THE LIMITS

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There are occasions, especially when discussing issues of principle with people who are familiar with the territory, when it is helpful to step away from the current case-law, to take a look at the underlying pressures.

Judging involves the resolution of tensions; not merely between disputing parties, but between continuity and change. According to the common law tradition, courts apply established principles in accommodating novel problems. If significant changes in direction are required, we expect parliament to respond; unelected judges should stand apart from such pressures. If the Parliament changes the law, the new law must be applied and established principles must adapt.

But the courts are an arm of government and must accommodate change in the structure of government, in which field I include the growth of bureaucracies involved (for example) in delivering welfare, administering tax laws, controlling immigration and regulating business. That pressure will be felt in the area we call administrative law. Some courts, perhaps uncertain of the proper course, will search for solutions in history and in comparable overseas jurisdictions. A court more confident of its course (or perhaps insensitive to the pressures on it) may be less likely to seek instruction from history and more likely to dismiss overseas experience as based on a different legal culture and constitutional framework, and to assert the dangers of selective reliance on case-law not well understood by regular application. Usually a balanced approach is desirable.

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In *Plaintiff S157*[1] the High Court reworked the established response to a strong privative clause, as expressed in *Hickman*, but without settling on a clear limit to legislative attempts to remove judicial control of the Executive. The joint reasons adopted an approach based on statutory construction, saying that a decision under an Act may be non-reviewable, but a decision which only purported to be an exercise of power conferred by the Act, was not immune. Gleeson CJ and Callinan J looked to history in a way to which I will return.[2] More recently, the High Court has been conscious of the need to realign its approach to judicial review of both administrative and judicial decisions. It has consciously sought assistance from history and in comparable overseas jurisdictions.

When the Court was confronted by a strong State privative clause, protecting a judicial body, it found a limit on legislative power to exclude the supervisory jurisdiction of the Supreme Court, in *Kirk v Industrial Court of New South Wales*.[3] To support that conclusion (which was not strictly necessary given the concessions of the parties) it looked to history[4] and to the US, and in the latter respect, to the work of Professor Louis Jaffe. Most recently, in *Minister for Immigration and Citizenship v Xiujuan Li*,[5] the joint reasons in the High Court relied heavily on the English text by Wade and Forsyth.[6]

Use of history, like use of overseas jurisprudence, tends to be selective. In *Plaintiff S157,* Gleeson CJ had referred to the 1874 Privy Council decision in *Willan,*[7] which upheld the availability of certiorari, in the face of a privative clause, to quash a decision but only "upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it".[8]

Gleeson CJ referred to the phrase a "manifest defect of jurisdiction" as reflecting the degree of strictness of scrutiny to which a decision may be subjected,[9] with the

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1 *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; 211 CLR 476.
2 The joint reasons were content to rely exclusively on High Court authority.
3 [2010] HCA 1; 239 CLR 531.
4 Referring to *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at [97].
5 [2013] HCA 18.
6 Wade and Forsyth, *Administrative Law*, (10th ed, 2009).
7 At [12] and [18]; see also Callinan J at [152-[160].
8 Ibid at 442; set out in *Plaintiff S157* at [12].
9 At [13].

intended inference that the jurisdictional defect was to be apparent without subjecting the decision to heightened or strict scrutiny.

Because the issues raised in *Plaintiff S157* came before the Court by way of a case stated, the principle was identified at a high level of generality. The Court rejected the proposition that the privative clause excluded the requirement of a fair hearing as a limitation upon the decision-making authority of the Refugee Review Tribunal. Whether such a clause affected the content of the obligation to afford procedural fairness was not considered.

As to the reliance in *Kirk's case* on the views of Professor Jaffe, some further background is of assistance. Writing in 1967, Professor Harry Whitmore set out the disparate approaches of two leading US academic writers on administrative law, being Jaffe and Kenneth Culp Davis. Jaffe's approach was characterised as analytical; Davis's as a "practical, functional, pragmatic or policy approach".[10] Each, as Whitmore noted, relied on discrete lines of authority, including key decisions in the US Supreme Court, to support their respective positions. To rely on one approach rather than another, was to risk unintended selectivity.

Whitmore wrote before the House of Lords Decision in *Anisminic*,[11] to which is commonly attributed the English abandonment of the distinction between jurisdictional error and error of law, the latter being the broader category which enfolded the former. However, Whitmore saw no relevant future in that distinction, noting that Julius Stone had doubted whether it should not be included in his category of meaningless reference. Rather, Whitmore's focus was on whether "error of law" was a meaningful basis on which to define the scope of judicial review and the growing scope of statutory appeals so limited. He thought the then state of judicial authority was a "sorry mess"[12] revealing intolerable complexity and uncertainty. It was a verdict (joined by Professor Geoffrey Sawer) of failure on the

[10] H Whitmore, "O! That Way Madness Lies: Judicial Review for Error of Law" (1967) 2 Fed L Rev 159 at 168, fn 57.
[11] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
[12] Page 182.

part of the judiciary to come to grips with "the administrative difficulties posed by the modern welfare state".[13]

Federally, legislation ensued, following the publication of the Kerr Report in 1971. The administrative law package, which included the *Administrative Decisions (Judicial Review) Act 1977* (Cth) responded to some of Whitmore's criticisms. However, that Act adopted a descriptive approach to the grounds of review: it used language derived from general law cases, with a few twists such as the reformulation of the 'no evidence' ground. In terms of the Jaffe/Davis divide, it sided with Jaffe, at least by silence. It supported an analytical approach; it required courts to police the boundaries of power. It assumed, without expressly so stating, that errors of law and fact could be distinguished; and that some errors could be jurisdictional, while other errors of law could occur within jurisdiction. It gave no support to a functional approach, nor to differing intensity of scrutiny. Tribunals enjoying particular expertise were to be cut no more slack than others. Law was for the courts, ultimately: administrative bodies had no authority to move within limits of reasonable interpretation. No "deference" was to be accorded. At least, that is how the courts read the ADJR Act, and that is how the general law principles have developed, each effectively in tandem with the other.

Both statutory appeals and judicial review required attention to concepts such as error of law. The first post-ADJR generation of cases, including *Azzopardi* (1985),[14] *Peko-Wallsend* (1986),[15] *Quin* (1990)[16] and *Craig* (1995)[17] maintained the analysis based on four key dichotomies, being –

(1) fact and law,
(2) errors within or without jurisdiction,
(3) binary versus discretionary decisions, and
(4) procedure and substance.

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[13] Page 182.
[14] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139.
[15] *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; 162 CLR 24 at 41
[16] *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1, at 35-36.
[17] *Craig v South Australia* [1995] HCA 58; 184 CLR 163.

These dichotomies, and their limitations, were well understood but were seen to have value. Each comprised an element in defining the limits of judicial review and hence the extent of the field within which administrators and tribunals could operate without judicial intervention. However, all four distinctions are now seen to be flawed and inadequate for their assigned functions. Only the separate concept of jurisdictional error has survived intact in this country (though not elsewhere) and has been elevated to the status of a constitutional doctrine.

What is happening, and why? Perhaps illogically, one can usefully start with "Why". In a wonderful paper entitled "The Great Depression, This Depression, and Administrative Law"[18] Mark Aronson remarked that "[t]his is not the place and I am not the person to write a history of administrative law scholarship".[19] If he can say that of himself, the rest of us should retire as gracefully as possible. But some broad propositions are necessary for my topic (as they were for his). The first concerns the development of what Harry Whitmore described as the growth of the modern welfare state. It is, of course, a regulatory state as well, especially in the sphere of business and commerce. These descriptors capture three related elements of significance for present purposes. One is a massive growth in the sheer volume of administrative decision-making. The second has been a tendency for statutes to move from conferral of broad discretionary powers on administrators, to specification of criteria of entitlement. In the latter case, criteria are defined, where possible, in measurable terms, no doubt reflecting the need for consistent decision-making across a growing army of officials. The third element is the increasing insistence on fair procedures, which may reflect the growth of merit review tribunals.

No doubt there are other factors at work: the point to be made is that the development of judicial review can never be fully understood by looking at court judgments without also considering the underlying framework of administrative decision-making.

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[18] (2009) 37 Fed L Rev 165.
[19] At p 167.

(1) Error of fact or law

Let me return to 'what is happening' and start with the fact/law distinction. *Azzopardi* involved an appeal limited to error "in point of law" from a judge determining workers compensation claims. Glass JA (with whom Samuels JA agreed) made three important points. First, he said that a claimant who bears the onus of proof cannot rely on a 'no evidence' ground. Secondly, he said that a factual conclusion which is "perverse, illogical or marred by patent error" does not constitute an error of law.[20] Thirdly, he sought to distinguish three steps of decision-making, noting where legal error could arise. In terms similar to Glass JA's second point, Mason CJ in *Bond*,[21] referring to *R v District Court; Ex parte White*[22] noted that illogicality in fact-finding is "not synonymous with error of law".

There are various ways of discussing this distinction. It must suffice for present purposes to note the point of intersection, namely, the 'no evidence' ground. In the US, the *Administrative Procedure Act 1947*, s 10, provided that administrative action is judicially reviewable if "unsupported by substantial evidence". This language may be compared with that of the ADJR Act, which provides for judicial review where there is "no evidence or other material to justify the making of the decision".[23] That ground is qualified by the twin requirements that the matter must have been one which was legally essential to the decision and that there was no evidence or other material "from which" he or she "could reasonably be satisfied that the matter was established".[24] The second limb thus introduces a test of capacity reasonably to support the conclusion, which is close in substance to the US test.[25]

(2) Jurisdictional error

The second dichotomy is that between errors within and those without jurisdiction. To the extent that jurisdictional facts define jurisdiction, this dichotomy can extend to

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[20] At pp 152 and 157C.
[21] *Australian Broadcasting Commission v Bond* (1990) 170 CLR 321 at 356.
[22] (1966) 116 CLR 644 at 654 (Menzies J).
[23] Section 5(1)(h).
[24] Section 5(2).
[25] See, eg, *Amaba Pty Ltd v Booth* [2010] NSWCA 344 at [23].

fact or law but, for present purposes, it is sufficient to treat it as dealing with categories of error of law.

I do not want to cover again the well-known statements which render this distinction obscure and difficult to apply. The nature of the distinction is by no means limited to debate in this country and in England. Let me turn instead to the United States of America. As you may be aware, at the federal level, there is a well-established practice for Congress to enact legislation at a high level of generality, which is then given particularity and content by rulings issued by federal agencies. Much of US administrative law involves challenges to what we would call delegated legislation. Recognising that many agencies have expertise in the areas which they administer, pursuant to the *Chevron* case, the courts accord deference to the agency's construction of the legislation it administers where the legislation is ambiguous or uncertain, so long as the construction is one which was permissible, or reasonably open to it.[26]

Telecommunication networks require towers and antennae, the siting of which is subject to approval by local government authorities. The US *Federal Communications Act* of 1934 requires state or local authorities to deal with applications "within a reasonable period of time". The Federal Communications Commission, which administers the *Communications Act*, issued a ruling that a "reasonable period of time" is presumed to be 90 days in respect of a new antenna on an existing tower or 150 days for any other application, a presumption which is rebuttable. In *City of Arlington, Texas v Federal Communications Commission*,[27] the US Supreme Court considered a challenge to the FCC ruling. The Court split 6:3.[28] The opinion of the Court, delivered by Scalia J, identified the issue for determination in the following way:

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[26] *Chevron USA Inc v Natural Resources Defense Council, Inc* 467 US 837 (1984).

[27] 569 US – (2013) (decided 20 May 2013). I am grateful to Mark Aronson for referring me to it.

[28] The opinion of the Court was delivered by Scalia J, (Thomas, Ginsburg, Sotomayor and Kagan JJ joining) and Breyer J concurring in part. The dissenters were Roberts CJ, Kennedy and Alito JJ. Not only are the opinions of the majority and minority intriguing, but so are the identities of the judges in each camp.

> "We consider whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron*…."[29]

After referring to the operation of *Chevron*, the opinion continued:[30]

> "*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. … Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."

The opinion then expressed the issue for determination in more expansive terms:

> "The question here is whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction). The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations – the big, important ones, presumably – define the agency's 'jurisdiction.' Others – humdrum, run-of-the-mill stuff – are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."

This passage is conclusory and rhetorical rather than reasoned. It draws a distinction in unattractive terms and then declares it to be a "mirage". The opinion then conceded meaning to the distinction in the judicial context, saying that "[w]hether the court decided *correctly* is a question that has different consequences from the question whether it had the power to decide *at all*".[31] The opinion continued:

> "A court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to res judicata effect. Put differently, a jurisdictionally proper but substantively incorrect judicial decision is not ultra vires."

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[29] Slip opinion, p 1.
[30] Slip opinion, p 5.
[31] Slip opinion, p 6; see also at p 9.

It should be remembered, of course, that the purpose of the distinction being drawn by Scalia J was not to identify the validity or correctness of the FCC ruling, but to decide whether to accord the ruling deference, or low level scrutiny. However, what may intrigue an Australian lawyer is the approach to statutory construction which is revealed in the next explanatory passage.

> "An example will illustrate just how illusory the proposed line between 'jurisdictional' and 'nonjurisdictional' agency interpretations is. Imagine the following validly-enacted statute:
>
> > COMMON CARRIER ACT
> >
> > SECTION 1. The Agency shall have jurisdiction to prohibit any common carrier from imposing an unreasonable condition upon access to its facilities.
>
> There is no question that this provision – including the terms 'common carrier' and 'unreasonable condition' – defines the Agency's jurisdiction. Surely, the argument goes, a court must determine de novo the scope of that jurisdiction.
>
> Consider, however, this alternative formulation of the statute:
>
> > COMMON CARRIER ACT
> >
> > SECTION 1. No common carrier shall impose an unreasonable condition upon access to its facilities.
> >
> > SECTION 2. The Agency may prescribe rules and regulations necessary in the public interest to effectuate Section 1 of this Act."

In dissent, Roberts CJ (in a passage to which I will come) also addressed this example, in terms which might gain more traction in this country. However, in a footnote rejecting the dissenters' approach, the Court's opinion stated:

> "The two statutes are substantively identical. Any difference in outcome would be arbitrary, so a sound interpretive approach should yield none."

Roberts CJ accepted the statement of the issue by the majority, except that he saw the use of the term "jurisdiction" as describing the scope of an agency's statutory authority as inappropriate. He stated:[32]

> "The parties, *amici*, and court below too often use the term 'jurisdiction' imprecisely, which leads the Court to misunderstand the argument it must confront. That argument is not that 'there exist two distinct classes of agency interpretations,' some 'big, important ones' that 'define the agency's "jurisdiction,"' and other 'humdrum, run-of-the-mill' ones that 'are simply applications of jurisdiction the agency plainly has.' …. The argument is instead that a court should not defer to an agency on whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue."

In Part II of his dissent, Roberts CJ stated:

> "'It is emphatically the province and duty of the judicial department to say what the law is.' *Marbury v Madison* …. The rise of the modern administrative state has not changed that duty. Indeed, the Administrative Procedure Act, governing judicial review of most agency action, instructs reviewing courts to decide 'all relevant questions of law.' …
>
> We do not ignore that command when we afford an agency's statutory interpretation *Chevron* deference; we respect it. We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law.' …
>
> But before a court may grant such deference, it must on its own decide whether Congress – the branch vested with lawmaking authority under the Constitution – has in fact delegated to the agency lawmaking power over the ambiguity at issue."

The dissent then dealt with the two extracts I have set out above from the opinion of the Court. In Part V, the Chief Justice reasoned:

> "As the preceding analysis makes clear, I do not understand petitioners to ask the Court – nor do I think it necessary – to draw a 'specious, but scary-sounding' line between 'big, important' interpretations on the one hand and 'humdrum, run-of-the-mill' ones on the other. … Drawing such a line may well be difficult. Distinguishing between whether an agency's interpretation of an ambiguous term is reasonable and whether that term is for the agency to interpret is not nearly so difficult."

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[32] Slip opinion, p 5.

The Chief Justice then turned to the hypothetical Common Carrier Acts which, he stated "do not demonstrate anything different".[33] Approaching the matter as a question of statutory interpretation, the Chief Justice stated:

> "For the second Common Carrier Act, the answer is easy. The majority's hypothetical Congress has spoken clearly and specifically in Section 2 of the Act about its delegation of authority to interpret Section 1. As for the first Act, it is harder to analyze the question, given only one section of a presumably much larger statute. But if the first Common Carrier Act is like most agencies' organic statutes, I have no reason to doubt that the agency would likewise have interpretive authority over the same ambiguous terms, and therefore be entitled to deference in construing them, just as with the second Common Carrier Act."

Roberts CJ described his disagreement with the majority as "fundamental"[34]. Certainly it led him to the conclusion (contrary to that of the majority) that the judgment below should be set aside and the matter remitted for further consideration. Breyer J, who joined in the order and generally with the reasoning of Scalia J, noted that the question "whether congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently"[35]. Dealing with the merits of the case, he reached the same conclusion as the Court below. An Australian court, applying the *Project Blue Sky* approach, would probably prefer the reasoning of the Chief Justice or Breyer J to that of Scalia J. The answer might in a particular case be different, but that is because we treat the statement from *Marbury v Madison*[36] as having greater effect than it is accorded in its country of origin. On the one hand, the US is (at least in theory) more restrictive in the circumstances in which the legislature may delegate legislative power to the executive, but is less concerned with the idea that the executive may have power to determine what the law is, if Congress has so provided. On the other hand, given the degree of particularity with which our parliaments circumscribe grants of administrative power, it may be the application of constitutional principle, rather than the constitutional principle itself which is the source of any disparity.

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[33] Slip opinion, p 15.
[34] Slip opinion, p 1.
[35] Slip opinion, p 4.
[36] 1 Cranch 137, 177 (1803).

An interesting comparison could be made between the approach of the US Supreme Court in *City of Arlington* and the approach of the High Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*.[37] The latter case involved an attempt by Fortescue Metals Group Ltd to obtain a declaration by the National Competition Council of certain railway lines in the Pilbara. The effect of the declaration sought, under Part 3A of the *Trade Practices Act,* would have been to allow a third party iron ore producer to negotiate access to the rail lines. In order to recommend a declaration of the railway lines, the NCC had to be satisfied of six matters, including "that it would be uneconomical for anyone to develop another facility to provide the service".[38] Power to make such a declaration was vested in the Minister, who acted on the recommendation of the NCC. Both the parties seeking the declaration and the owner of the service had a right of review by the Australian Competition Tribunal. The disaffected parties sought judicial review of the decisions made by the Tribunal.

The appeal to the High Court turned on a point belatedly raised for the first time in that Court concerning the nature of the review to be undertaken by the Tribunal. In deciding that question, the Court considered the approach which the Tribunal had taken to the phrase "uneconomical for anyone to develop another facility" and to the requirement that access to the service "would not be contrary to the public interest". In the course of determining, in effect, whether the Tribunal should have considered the Minister's decision on the basis of the material before the Minister, or conducted a de novo hearing, the Court determined how the criteria should be understood. Because of the manner in which those questions arose, it is perhaps not fruitful to derive too much from the reasoning in the case. Nevertheless, it is clear that the High Court considered that the proper construction of the word "uneconomic" in its statutory context, was not a matter which should be left to the Tribunal. However, there is little by way of articulated reasoning as to why that course would not have been preferable, nor why it was necessary for the Court to embark upon the points of construction in order to determine the nature of the process before the Tribunal.

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[37] [2012] HCA 36; 246 CLR 379.
[38] *Trade Practices Act 1974* (Cth), s 44H(4)(b).

(3) Discretionary powers

The third dichotomy is between what may be described as binary decisions and discretionary powers, where the answer falls within a range. In *Eshetu*,[39] Gummow J noted that the ground of *Wednesbury* unreasonableness had been formulated with respect to a true discretionary power, and not with primary fact-finding or the choice between granting a visa, licence or permit and refusing it. I do not want to spend time on this distinction because it is apparent that the Court has moved beyond it. The clear message of *Xiujuan Li*[40] is that a broad principle of rationality applies to all administrative decision-making, although involving low level scrutiny, like *Wednesbury* unreasonableness.

(4) Substance and procedure

The final dichotomy was that between substance and procedure. In conventional terms, judicial review extends to procedural unfairness, but not substantive unfairness.[41] Although procedural fairness has expanded its empire significantly in the last 25 years, it is not through that gate, but through the back door of rationality review, that the tendency towards a more interventionist review will advance.

Conclusion

In beginning these remarks, I sought to step back a little from analysis of decisions made in the course of judicial review to explore a few aspects of the governmental environment in which judicial review operates. Drawing the threads together: first, accepting that there has been and will continue to be a high volume of administrative decisions, some affecting the daily lives of individuals in profound ways, others affecting commerce and business, principles of judicial review must retain the flexibility to operate across the range of functional disparity. That will include the need to distinguish kinds of decisions (as well as subject matter) across the

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[39] *Minister for Immigration v Eshetu* [1999] HCA 21; 197 CLR 611.
[40] Above, n 5.
[41] See *Re Minister for Immigration and Multicultural and Indigenous Affairs*; *Ex parte Applicants S134/2002* [2003] HCA 1; 211 CLR 441

spectrum from the application of specific quantifiable criteria, to evaluative criteria, to broad governmental policy.

Secondly, assuming we have exhausted merit review, but have a tribunal with limited jurisdiction or authority, the availability of judicial review is inevitable – the question is at what level of intensity it should operate. A legislature seeking to limit review can say, "this decision is not appellable and may be reviewed only for want of authority (jurisdictional error)", or it can say "this decision is reviewable (or appellable) for error of law". In other words, one cannot avoid a boundary such as that between fact and law and that which sets the limits of authority. The critical questions relate to how courts fix those boundaries in particular cases.

The last 15 years have revealed a degree of dissatisfaction with the approach adopted in the ADJR Act of defining the scope of judicial review by the adoption of semantic labels which themselves lack precision and clarity. I welcome the departure from reliance on labels.[42] Reliance on that approach tended to produce variable results: judges who had a "feel" for judicial review might well produce outcomes consistent with principle and authority, but not so much by application of labels as by applying their understanding of the proper role of judicial review.

Nor, as *City of Arlington* reveals, is a reversion to simplistic references to jurisdiction or ultra vires a sufficient alternative.[43] Rather, a more nuanced approach is required, being one with functional and pragmatic elements. Courts exercising powers of judicial review may well be undertaking an important constitutional function within the Australian polity. However, they are policing the rules set by the legislature as construed in accordance with established principles of interpretation. It is to these principles that we must turn in order to understand the future of judicial review.

To return to Professor Witmore's concerns and the inherent difficulties in dissociating fact and law in evaluating a process (namely administrative decision-making) it is

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[42] Although the Administrative Review Council is content to stay with the current s 5: see *Report – Federal Judicial Review in Australia* (2012)

[43] In *Regina (Cart) v Upper Tribunal* [2011] QB 120 at 163 Sedley LJ suggested a relabelled version of jurisdictional error, "outright excess of jurisdiction", but that language was rejected by the Supreme Court: *Regina (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663. I discussed the UK developments in "Jurisdictional error after *Kirk*: Has it a future?" (2012) 23 PLR 94.

inevitable that the boundary is often contestable and context is critical. The context will include an understanding that what the Court is doing is patrolling the separation of powers. If we err in principle in this country, it is in holding too glibly to the views, (a) that the fact/law boundary is not porous and (b) that law is inherently and self-evidently a matter for courts alone to determine. The same remarks apply to identifying the boundaries of authority (or jurisdiction).

However, there is a qualification to all this, flowing from the novel constitutional life breathed into jurisdictional error. Since *Kirk*, the concept of jurisdictional error imposes a constitutional limitation on legislative power of a State Parliament (and, presumably, a fortiori the Federal Parliament) to limit the jurisdiction of superior courts exercising the supervisory jurisdiction or, in the case of the High Court, a constitutional supervisory jurisdiction. This derives from the fact that all courts in Australia have limited jurisdiction. However, there is much more thinking to be done about the nature of the limitations. The limitation on the jurisdiction of the Industrial Court identified in *Kirk* did not flow from the Constitution, but from State statute. Yet, it is not clear why a strong privative clause in respect of the judicial function does not constitute a clear statement of statutory intention that the court in which jurisdiction is reposed, should have power to determine the scope of its own authority. Such a conclusion is entirely consistent with the conventional understanding of the role, at least of a superior court.

Furthermore, surely the concept of jurisdictional error in relation to a court is, in all sorts of ways, fundamentally different from the concept of jurisdictional error with respect to an administrative tribunal or delegate of the Minister. Semantics should not be allowed to dominate functional reality. “Jurisdictional error” is misleading because it invites the understanding that we have a unitary concept. But if we call this the ‘legal limit of authority’, we are more likely to recognise the variable outcome of the task.

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