ADDRESS BY MR JUSTICE TOOHEY TO AGM

Mr Justice Toohey addressed the Annual General Meeting of the Australian Institute of Administrative Law in Canberra on 23 September 1997.

A week or so ago, I spoke at the annual dinner of the Blackstone Society, the society of law students at the University of Western Australia. As it is 50 years since I entered Law School, I felt justified in engaging in some reminiscences.

Don't be alarmed, I shall not do the same this evening. Time limits are the order of the day and I can hardly complain that I have been allotted something less than is an applicant for special leave to appeal. Perhaps I am entitled to look back a little. One of the matters I mentioned at the dinner was the dearth of Australian texts when I was a student, except in the field of constitutional law. It is therefore of some interest that 1950 saw the publication of Friedmann's *Principles of Australian Administrative Law*. While it later ran into several editions, the first edition was a slim volume of just over 100 pages. The work was reviewed, in the first volume of the *University of Western Australia Review*, by "B" who, I take it, was Professor Beasley, the Dean of the Law School. In the review he wrote:

> In general, the High Court and State Supreme Courts have been largely content to base their attitude to local administrative tribunals on the model provided by the English superior courts; this is mainly due to the exaggerated respect, almost veneration, which our Courts still pay to House of Lords and even Court of Appeal decisions, and does not necessarily mean that the problem presents itself in Australia in the same way, and with the same complexities, as in the United Kingdom.

As might be expected, Friedmann approached the supervision of administrative authorities and tribunals by the courts through the mechanism of the prerogative writs. He did refer to the declaratory judgment, observing[1]:

> It may well develop into one of the most important means of ascertaining the legal powers of public authorities in the intricate mixture of public and private enterprise which is becoming a distinctive feature of ... Australian life.

Associated Provincial Picture Homes Ltd v Wednesbury Corporation[2] had been decided some three years earlier and was seen by Friedmann as confirming Lord Greene's opposition to judicial interference with administrative discretion for all but the most compelling reasons. In the light of later developments, it is perhaps curious that Friedmann did not appear to attach much significance to the requirement that the discretion conferred on a statutory body must be exercised "reasonably", since Lord Greene gave a meaning to what is "unreasonable" which included directing oneself properly in law, considering what is relevant, excluding what is irrelevant as well as not acting in a way that no reasonable person would act.

Although the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("ADJR Act") identifies[3] expressly as an improper exercise of power

> an exercise of power that is so unreasonable that no reasonable person could have so exercised the power

Australian courts still speak of the *Wednesbury* principle. Indeed in England it has taken on a life of its own. In a recent decision[4], concerned with the inferences to be drawn from the failure to give

evidence by a 15 year old with a mental age of 9, the Court of Appeal considered whether the judge's directions were "*Wednesbury* unreasonable".

Between 1950 and the enactment of the *Administrative Appeals Tribunal Act* 1975 (Cth) and the ADJR Act there were, I think, only two other Australian texts on administrative law, Benjafield and Brett. Since that time there has been a plethora of works, more than 80 if text books and reports are taken into account. And AGIS records more than 1000 articles since 1977, over 900 of which have been written since 1990. A growth industry indeed.

The 1960s was a decade of debate as to the future of administrative law, whether there should be administrative tribunals or a continuance of the traditional review by the courts. In the 70s Australia struck out on its own with the establishment of the Administrative Appeals Tribunal, empowered to review decisions under certain enactments and, it was held, to make the "correct or preferable" decision if it had not been made by the decision-maker. The ADJR Act conferred on the Federal Court jurisdiction to quash administrative decisions on a variety of grounds which, broadly speaking, answered the description of errors of law.

The *Federal Court of Australia Act* 1976 (Cth) was in existence for a time before the ADJR Act came into operation and conferred on the Federal Court this new and extensive power of judicial review. The judges were called upon to exercise jurisdiction in fields that were relatively new such as trade practices or had assumed a particular shape as in the case of administrative review. There was inevitably a time lag before the legal profession saw the potential of the new legislation. But applications under the new legislation soon began to grow and the index to any set of reports, particularly the Federal Court Reports and Australian Law Reports, reveals the dominant role administrative law now plays. Still, we are talking about less than 20 years.

There are two ideas underlying these remarks, one obvious enough, the other perhaps not so. The first is what is often described as the tension between judicial review and decision-making. The second is the way in which judicial review has taken the courts into different areas of the law.

In its early judgments the Federal Court made it clear that it was not empowered to review a decision on the merits or to substitute its decision for that of the decision-maker. But the Court was faced with a number of basic questions. Was there a decision or conduct susceptible of review? Was there an error of law involved in the decision impugned or was the Court being asked to review matters of policy? Did the application in reality invite the Court to look at the merits of the decision? There were and continue to be hard decisions to make. Government departments and statutory bodies have at times not welcomed what they saw as interference by the courts in day to day decision-making.

Much has been written about the distinction between administrative and judicial review. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[5] Mason J emphasised the distinction when he said:

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

Mason J completed this passage with a reference to *Wednesbury Corporation* and his language is very much that of *Wednesbury*.

Undoubtedly, the question which hangs over judicial review of administrative decisions is whether the courts have trespassed too far into the areas of decision-making. This has perhaps been most controversial where the courts' intervention has been to ensure natural justice or procedural fairness. Of course the controversy is not peculiar to Australia; it exists wherever there is an independent judiciary. It has taken particularly dramatic turns in England, in relation to sentencing of child offenders, criminal compensation, deportation, foreign aid and other matters, thereby attracting some media hostility and the Civil Service publication, "The Judge Over Your Shoulder".

Much has been said and written about the so-called tension between judicial review and administrative decision-making. Tension can be a pejorative term and it is often used pejoratively in this context. But in its ordinary meaning, it does fairly point up that there is necessarily a difficult relationship between the judicial and administrative roles. The limits cannot be defined in a way that forecloses debate. They have to be worked out in the traditional way, through decided cases.

The High Court has spoken from time to time on these matters and in cases such as *Australian Broadcasting Tribunal v Bond*[6], *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[7] and *Minister for Immigration and Ethnic Affairs v Guo*[8] the Court has identified some of the parameters of the review permitted by the ADJR Act.

Most of the emphasis in academic writings has been on the scope and limits of judicial review in the sense I have mentioned. What has not been sufficiently recognised perhaps is the development of other areas of the law which have taken place within the framework of judicial review. In this regard I would acknowledge as an exception Mr McMillan's article "Recent Themes in Judicial Review of Federal Executive Action"[9].

The law is something of a seamless web and administrative law does not fall in a discrete compartment. Thus, the protection of individual rights through procedural fairness has gained emphasis in decisions under the ADJR Act, as where the construction of a statute has been at issue. But the cases go further than that, stressing the need to recognise individual rights where decision-making is involved.

Something similar can be seen in the judgments of the European Court of Human Rights. In its implementation of the Convention on Human Rights, the Court has used Art 6, the right to a fair and public hearing within a reasonable time, to set aside administrative decisions which have failed to accord natural justice or due process and to make decisions where there has been an inordinate delay. This has happened particularly with the granting or refusal of licences, planning permission and the like. Likewise the European Court of Justice has included human rights breaches in its consideration of European Community Law.

Statutory construction has drawn in considerations such as international conventions which have not become part of domestic law. Legitimate expectations have been held to arise in relation to decision-making. It is possible to give other examples.

The language of European laws, the margin of appreciation for instance, has been referred to in the context of constitutional decisions in the High Court. So too has proportionality but it is also a term that has surfaced in the language of judicial review. Does proportionality bear on the question of unreasonableness is one question that has been asked. To know the vocabulary of the courts and tribunals of other countries is one thing. The meaning the words have in those

countries does not always translate so readily.

Not only does time prevent me from exploring these issues, it would not be appropriate to do so. But even a brief consideration shows how interwoven are areas of the law and how difficult it is to maintain administrative law as some discrete set of legal principles.

No doubt this is part of the fascination of the subject. The Institute has a valuable role to play, particularly because it brings together those who make the decisions and those who review them. From this cross fertilisation of ideas much, I think, has been gained and will continue to be gained in a field of such great importance to the whole community.

Endnotes

1 Friedmann at 72.
2 [1948] 1 KB 223.
3 s 5(2)(g), 6(2)(g).
4 *R v Friend* [1997] 2 All ER 1011 at 1018.
5 (1986) 162 CLR 24 at 40-41.
6 (1990) 170 CLR 321.
7 (1996) 185 CLR 259.
8 (1997) 144 ALR 567.
9 (1996) 24 *Federal Law Review* 347 at 349-365.