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"STANDARDS OF REVIEW" – AN AUSTRALIAN PERSPECTIVE

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To an Australian administrative lawyer, the phrase "standards of review" has little resonance. It is not a concept we use – ostensibly. To Australian ears, it gives rise to an unnecessary complication, with the potential for conceptual confusion. We rely on limiting judicial review to traditional grounds, all of which involve an aspect of the boundaries of legality. Those boundaries are matters for determination by a court exercising supervisory jurisdiction, without varying "standards", applicable in different circumstances.

However, that response does justice neither to the value of the concept, nor to aspects of Australian jurisprudence. We do apply differing levels of scrutiny to different kinds of decisions, according to principles well-established as part of appellate review. To a limited extent, those principles operate with respect to judicial review.

Australian administrative law works basically from a characterisation of errors as:

- factual errors
- errors of law

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[1] I am grateful to Derek Wong and Kate Cornford for research assistance in preparing this paper.

- procedural mistakes
- errors in evaluation, and
- wrong exercise of discretionary power.

These categories are by no means distinct or self-explanatory. Thus, factual error may include error as to a jurisdictional fact (conditioning the conferral of authority) or a factual matter which is within the authority of the decision-maker. Further, a jurisdictional fact may be beyond the scope of the decision-maker and thus may require determination by the court exercising supervisory jurisdiction. Even where the authority of the tribunal to act depends upon its own opinion or satisfaction as to a jurisdictional matter, that opinion will not be beyond judicial review.

Factual errors may result from errors of law, such as in the construction of the relevant statute. On the other hand, an error will be identified as an error of law, rather than fact, if a factual finding is one which was not open to the tribunal because there was no evidence or other material providing support for the finding made.

In some cases, jurisdictional facts may require evaluative judgment. Often those judgments will be infused by consideration of matters of policy. In such cases the tribunal will usually have a wide scope to reach its own valid conclusion.[2]

The various Australian jurisdictions either retain a supervisory jurisdiction effected primarily by use of the old prerogative writs, or have power to grant relief "in the nature of" such writs.[3] Accordingly, there remains a distinction between jurisdictional error and error of law on the face of the record, for the purposes of certiorari. There are also statutory schemes for judicial review which, particularly at the federal level, have been of great significance.[4] However, they continue to refer to grounds of

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2 *Buck v Bavone* [1976] HCA 24; 135 CLR 110.
3 See, eg, *Supreme Court Act 1970* (NSW), s 69; *Judicial Review Act 1991* (Qld), s 41.
4 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR Act"); see also *Judicial Review Act 1991* (Qld).

review which, for the most part, are formulated in terms familiar under the old prerogative writs.[5]

The statutory schemes have, to a limited extent, broadened the grounds of review, but their greatest contribution has been the requirement that administrative decision-makers provide reasons for their determinations.[6] Without reasons, the opportunity for review is clearly more limited, although as explained by Dixon J in a classical passage in *Avon Downs Pty Ltd v Commissioner of Taxation*:[7]

> "If the result appears to be unreasonable on the supposition that [the decision-maker] 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."

Systems of appellate review know, of course, a range of degrees of constraint, which may be identified, according to the severity of intervention, as appeals (or "reviews"):

(a) by way of a rehearing on the merits,

  (i) unlimited by reference to the material before the primary decision-maker and having effect from the date of the subsequent decision;

  (ii) restricted to the transcript of the evidence and documents before the primary decision-maker, subject to leave to call evidence afresh or tender further evidence;

  (iii) where further (or fresh) evidence is admitted only with leave and in special circumstances;

(b) limited to error of law; or

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5 Ibid, s 5.
6 ADJR Act, s 13.
7 [1949] HCA 26; 78 CLR 353 at 360.

(c) limited to review of a specific decision of the primary decision-maker, which is on a point of law.

In relation to categories (a)(ii) and (iii), the constraints on appellate review are formulated by reference to the different roles of the primary judge and the appellate court. Thus, they depend upon the advantages enjoyed by the primary judge or tribunal in assessing oral evidence, not only in making findings as to the credibility of witnesses, but also in gaining insight into the case as a whole, as a result of exposure to all the evidence and seeing the case unfold, often in the context of on-going discussion with counsel. However, once the primary facts are identified and determined, the appellate court will generally treat itself as equally well-placed to draw inferences, including inferences which involve a degree of evaluative judgment.[8]

On the other hand, a distinction is commonly drawn between cases involving an evaluative judgment of a binary character (was the defendant negligent or not?) and those involving the choice of a point on a range (such as sentencing in criminal matters, assessment of damages and apportionment of contributory negligence in civil matters). In the latter category of cases, often referred to, somewhat imprecisely, as discretionary decisions, the classic statement of principle is that made by the High Court in a sentencing case, in the following terms:[9]

> "The appeal is a full one on law and fact…. But the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his

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8 *Warren v Coombes* [1979] HCA 9; 142 CLR 531.
9 *House v The King* [1936] HCA 40; 55 CLR 499 at 504-505 (Dixon, Evatt, McTiernan JJ).

> order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

Two points may be made in respect of this approach. The first is that, although the language reflects familiar grounds for judicial review, the principles are not equated. The idea of interference to correct "a substantial wrong", or a substantial miscarriage of justice, recognises a power to reassess the facts in a manner which would not be thought appropriate in exercising powers of judicial review. That distinction is also reflected in the willingness to interfere where it appears that the sentencing judge has given "undue weight to some of the facts".[10]

The second point to be made in relation to this passage is that, although the language may be thought to establish a standard of review, its similarity to the language in which we define grounds of review is striking. One implication may be that in Australia, unlike the jurisprudence in Canada, there has been a reluctance to separate out standards from grounds.

If one accepts a rigid taxonomy, whereby decisions on the merits are left to the administrative decision-maker, and the boundaries of power are defined by the courts, the distinction between standards and grounds is ostensibly avoided. It is strictly in accordance with a doctrine of separation of powers that administrative tribunals cannot define the legal limits of their jurisdiction and, hence, their views as to that matter impose no constraints on a reviewing court. There is nothing to which the court need defer. On that approach, the language of "deference" has been rejected.[11]

The problem with this position is that a rigid taxonomy is difficult to sustain at the critical points where a doctrine of deference may bite deeply. As a result, a failure in Australian law to acknowledge the importance of setting standards of review in

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[10] *House* at 505, referring to *R v Sidlow* (1908) 1 Cr App R 28 at 29.

[11] See *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135.

particular categories of case has led to a degree of uncertainty and the grounding of conceptual principles on sands which tend to shift.

There are three particular areas which can be used to illustrate the difficulty, namely:

(a) review of jurisdictional facts;

(b) procedural unfairness; and

(c) the "no evidence" principle.

Jurisdictional fact

If a precondition to the exercise of a statutory power is identified as a jurisdictional fact, it is a matter, the absence of which, must be established by the party challenging the validity of the administrative decision. The question as to whose opinion is determinative is treated in Australia as involving a dichotomy: it is either the decision-maker or the court. The answer is a question of statutory construction. Sometimes that is a difficult question to answer, but in many cases the legislature provides the answer by conditioning the exercise of the power on the opinion or satisfaction of the repository of the power as to the relevant fact.[12] It is sometimes said that, in such a case, the jurisdictional fact is the opinion of that body, although for reasons identified below, that approach can lead to confusion. In *Parisienne Basket Shoes Pty Ltd v Whyte*,[13] Dixon J said:

> "It cannot be denied that, if the legislature see fit to do it, any event or fact or circumstance whatever may be made a condition upon the occurrence or existence of which the jurisdiction of a court shall depend. But, if the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed."

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[12] *Minister for Immigration v Eshetu* [1999] HCA 21; 197 CLR 611

[13] [1938] HCA 7; 59 CLR 369 at 391.

That approach reflects, it might be thought, practical good sense. However, a local court constituted by a magistrate, although at the bottom of the judicial hierarchy, nevertheless exercises judicial power and can determine the scope of its powers. The superior courts have been much less willing to accord similar autonomy to officers of the Executive arm of government, absent a clear expression of legislative intention. What is worse, inadequate attention has been paid to the identity of administrative decision-makers. As we know, decision-makers may be departmental officers, often exercising delegated powers, or political institutions, including Cabinet. Further, they may be tribunals with varying degrees of independence, openness of procedures and obligations to give reasons for their decisions; some may be required to be constituted by lawyers, others not.

Similarly, the subject-matter may be important. A decision as to the release of an individual on parole, the entitlement of a person to a social security benefit or the grant of a protection visa to a refugee, have little in common with the broader functions of levying a rate or zoning land by a local government authority. In a different category again are powers with respect to the settlement of labour disputes.

On some exposition of principle, a standard of review with respect to jurisdictional fact could be described as engaging a “correctness” test. This would, in our taxonomy, be considered a misconception. There is no review of the decision-maker’s fact finding as to a jurisdictional fact: rather, there is a separate exercise in judicial fact-finding. That means that the necessary evidential basis for the fact (or the absence of it) must be established by the party challenging the validity of the decision.

What, on the other hand, is the test where the jurisdictional fact is within the power of the tribunal to determine? Judicial review is available, but on traditional grounds, as with any other aspect of the exercise of power.

Where the legislature conditions the exercise of a power on the satisfaction of the decision-maker as to a particular state of facts, the existence or otherwise of those facts are not jurisdictional: their determination falls within the legal limits of the power conferred on the administrative decision-maker. Although the language is somewhat awkward, Gummow J has referred to the state of satisfaction of the decision-maker

as the "jurisdictional fact".[14] The use of such language focuses attention on that which may be the subject of judicial review, namely the state of satisfaction. It is precisely in this area that a "standard of review" may be identified. In other words, review is not on a correctness standard (whether or not the fact exists objectively) but on a "reasonableness standard" (namely, whether the state of satisfaction formed by the administrative decision-maker was unreasonable). The language of unreasonableness, when used in this context, does not of course permit a mere difference of opinion on the part of the reviewing court to attract relief. Review will be available where the tribunal has acted "arbitrarily or capriciously", or has –

> "misdirected itself in law … has failed to consider matters it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it".[15]

This language reflects the concept of manifest unreasonableness, sometimes identified as *Wednesbury* unreasonableness, after the decision of the English Court of Appeal of that name. However, Gummow J in *Eshetu* was at pains to use different language to emphasise that what was in issue was not the exercise of a discretionary power, but an exercise in fact-finding, albeit one involving evaluative judgment.

There is another reason for eschewing that terminology. In relation to *Wednesbury* unreasonableness, the older cases uniformly emphasised the high hurdle to be jumped by the applicant seeking to challenge a decision on that basis; it was assumed that success would be achieved only in very rare cases. More recent case law dealing with "unreasonableness" suggests a lowering of that hurdle and an increased willingness to intervene. Often the language of intervention in fact avoids the impressionistic test of reasonableness and prefers identification of error by inference, such as that, although the tribunal correctly stated the legal test, the outcome suggests that the correct test was not applied.

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[14] *Eshetu*, at [130] (GummowJ).

[15] *Buck v Bavone* , p 118 (Gibbs J). See also *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407, 429-431 (Latham CJ).

Procedural fairness

A second area where the court is the factual decision-maker is in relation to procedural fairness. Breach of rules of procedural fairness entails invalidity, with limited scope for considering the materiality of the breach or the consequence for the decision. Assessment of materiality, it is believed, would require the court to consider the merits of the claim before the tribunal, or its determination.

Somewhat illogically, on one view, courts exercising supervisory jurisdiction have not been reluctant to review procedural steps taken by a tribunal, to ascertain whether there has been any want of procedural fairness. That willingness to assess the procedural steps is not diminished by statutory provisions providing, for example, that a tribunal is to "act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms".[16] Similarly, a tribunal is commonly freed from compliance with the rules of evidence (although it might be doubted whether they would operate absent such exclusion) and empowered to "inquire into and inform itself on any matter in such manner as it thinks fit".[17] Either expressly, or implicitly, such provisions are treated as "subject to the rules of procedural fairness".[18]

Further, where Parliament seeks to provide guidance as to the appropriate, or necessary, procedural steps, there is a tendency to see those provisions as imposing mandatory obligations, compliance with which is to be assessed by the supervising court, rather than standard procedures compliance with which, even if expressed to be mandatory, may not necessarily give rise to invalidity if not complied with.

Although the High Court has on occasion reiterated the importance of distinguishing between the procedures which may be expected in a tribunal and those which may

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[16] See, eg, *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW), s 28(3); *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26.
[17] Ibid, s 28(2).
[18] Ibid.

be expected in a court of law, there is a tendency on the part of judges to expect tribunals to operate according to curial standards, which they see as immutable.

The imperial march of procedural fairness in Australia commenced in 1985 with the decision of the High Court in *Kioa v West*.[19] However, the impetus for the change almost certainly derived from the statutory reforms of 1977, which provided, amongst other things, a statutory regime for judicial review in Commonwealth jurisdictions.[20] That legislation was by no means comprehensive, and its limitations are becoming more apparent over time. The major practical consequence of the Act was, however, to provide a statutory entitlement of those obtaining administrative decisions made under an enactment, to reasons.[21]

For present purposes, the notable feature of procedural fairness jurisprudence is that it purports to establish a uniform regime, albeit of variable content. In other words, there is either a breach of the requirements of procedural fairness, or there is not: breach leads to invalidity.

Whilst accepting that it was not ever so, the present law in Australia was expressed by Gaudron and Gummow JJ in *Aala's Case* in the following terms:[22]

> "We conclude that (i) the denial of procedural fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction in respect of which prohibition will go under s 75(v) [of the Constitution]; (ii) if there has been a breach of the obligation to accord procedural fairness, the consequences of the breach were not gainsaid by classifying the breach as 'trivial' or non-determinative of the ultimate result – the issue is whether there has or has not been a breach of the obligation; (iii) the practical content of the obligation, and thus the issue of breach, may turn upon the circumstances of the particular case; and (iv) the remedy of prohibition under s 75(v) does not lie as of right, but is discretionary."

It is arguable that the rigidity of this approach has taken Australian administrative law down an unfortunate path. Procedural unfairness, being a form of jurisdictional error, cannot be removed by a privative clause. Attempts to codify procedural fairness so

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19 [1985] HCA 81; 159 CLR 550.

20 *Administrative Decisions (Judicial Review) Act 1977* (Cth).

21 In a cultural sense, the legal profession may have found the statutory procedures more attractive than the general law forms of prerogative relief, thereby encouraging claims in federal jurisdiction which remained less common in state jurisdictions, until statutory reforms occurred.

22 *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; 204 CLR 82 at [17].

as to prevent unwanted intervention by a court exercising judicial review have frequently been unsuccessful, largely because it is difficult to write a comprehensive code, absent which there will be room to import general law principles.[23] (This is a problem encountered in Canada, it seems, even in relation to the statutory form of federal judicial review.[24])

That situation may be contrasted with the principles applied in appellate jurisdiction, where error will not lead to an appeal being upheld unless the appellant can demonstrate a substantial miscarriage of justice.[25] Justification for a different approach may, no doubt, be found in the difference between an appeal from a court exercising judicial power and review of an administrative decision-maker. Nevertheless, the distinction is not always clear cut in practice and, in any event, why should the courts be more tolerant of error in another court, and less tolerant of procedural error on the part of an administrative tribunal?

The "no evidence" principle

Administrative law turns on highly contestable distinctions, such as between law and fact, and error within jurisdiction and jurisdictional error. Further distinctions arise from the proposition that it is an error of law to find a fact in the absence of evidence or other supportive primary material.

In clear cases, the principle is simple: a tribunal cannot find that the claimant's husband died of mesothelioma in the absence of medical evidence which would support such a conclusion. One might be content with that conclusion where the tribunal member sought to draw an inference from scans taken of the lungs of the deceased, which no expert witness had so interpreted. However, if the finding were that death was caused by an asbestos-related condition, or, even more problematically, that the claimant in another kind of case had a well-founded fear of persecution in his or her country of nationality, the simple proposition becomes

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[23] See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; 206 CLR 57.

[24] See, eg, the comments of Rothstein J in *Minister of Citizenship and Immigration v Khosa* [2009] 1 SCR 339 at [126]-[128] as to the construction of the *Federal Courts Act,* RSC 1985, c F-7 s 18.1(4).

[25] See, eg, *Balenzuela v De Gail* [1959] HCA 1; 101 CLR 226.

clouded. For example, there are statements in Australian cases that "want of logic is not synonymous with error of law" and that, so long as a particular inference is open, the fact that the inference appears to have been drawn as a result of illogical reasoning, gives rise to no error of law.[26] Self-evidently, the statement that there is "no evidence" to support a particular finding is based upon a view as to the kind of logic which might allow the challenged inference to be drawn from a particular primary fact. The process becomes more fraught when it is the initial finding of primary fact which is said to be unsupported, or where there are steps in a process of reasoning, which are said to be unsupported.

Although dealing with a statutory no evidence ground, which had its particular difficulties of interpretation, the High Court considered whether a decision was "based on" a particular fact in a protection visa case, known as *Rajamanikkam*.[27] As is usual with refugee claims, the claimant identified a number of incidents as justifying his claim of a fear of persecution. In rejecting his claim, the Refugee Review Tribunal had identified a set of eight factors which provided reasons for disbelieving the claimant's story. The High Court rejected the challenge to the Tribunal's decision. Gleeson CJ stated:[28]

> "The requirement is to 'base [a] decision on evidence'; a requirement as to the way the decision-maker is to go about the task of decision-making. The distinction between judicial review of administrative decision-making upon the ground that there has been an error of law, including a failure to comply with the requirements of procedural fairness, and comprehensive review of the merits of an administrative decision, would be obliterated if every step in a process of reasoning towards a decision were subject to judicial correction. The duty to base a decision on evidence, which is part of a legal requirement of procedural fairness, does not mean that any administrative decision may be quashed on judicial review if the reviewing court can be persuaded to a different view of the facts."

His Honour later concluded:[29]

> "The Act required the Tribunal to decide that visas should be refused if it was not satisfied that the first respondent satisfied the criteria for refugee status. The Tribunal's lack of satisfaction related to whether he could return to Sri

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[26] *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 at 356 (Mason CJ), quoting *R v District Court; Ex parte White* [1966] HCA 69; 116 CLR 644 at 654 (Menzies J).
[27] *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2002] HCA 32; 210 CLR 222.
[28] At [26].
[29] At [42].

> Lanka without being persecuted. There was nothing in the evidence or other material that compelled a conclusion that the first respondent would be persecuted if he returned to Sri Lanka. There may be cases in which it could be said that there is no evidence or other material to warrant a lack of satisfaction that a person will be persecuted if returned to a particular country. … I find it impossible to conclude that there was no evidence or other material to justify the decision which was required by law in the event of such lack of satisfaction."

That reasoning, which is reflected in other judgments in part at least, suggests a move away from a rigid, and perhaps technical, position that one cannot plead a no evidence ground in respect of a negative conclusion.[30] However, it also provides no clear delineation as to the level at which a no evidence ground may be asserted.

In the United Kingdom recent years have shown an unravelling of the tight constraints on merit review which were affirmed in earlier years. As noted in our standard text, by Professor Mark Aronson and his co-authors:[31]

> "The trend towards overt recognition of fact review, albeit limited to exceptional cases, started life with an English judgment saying that it would be a breach of natural justice to base a finding of fact upon material which did not logically support it."

The authority to which the authors were referring was the 1965 decision of *Ex parte Moore*.[32] More recently, that approach received support in the House of Lords in *Ex parte A*.[33]

The conventional approach in Australia was that wrong fact-finding did not demonstrate error of law and, "[e]ven if the reasoning whereby the Court reached its conclusion were demonstrably unsound, this would not amount to an error of law on the fact of the record. To establish some faulty (eg illogical) inference of fact would not disclose an error of law".[34]

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[30] That may, of course, in part be because administrative decision-making is not subject to a formal placement of a burden of proof on a claimant.

[31] Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009) at [4.405].

[32] *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456 at 488.

[33] *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330.

[34] *R v District Court; Ex parte White* [1966] HCA 69; 116 CLR 644 at 654 (Menzies J), quoted with approval by Mason CJ in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 at 356.

More recently, doubt has been cast on that principle by references in later judgments to the need for findings or inferences of fact to be supported by "logical grounds".[35]

This reworking of earlier truths is not entirely surprising. 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 relationship inherent in the concept of "relevance", on which the laws of evidence depend. The relationship depends on a process of reasoning which must be logical or rational.

The difficulty in the current Australian jurisprudence is not that earlier statements of principle are being exposed as glib or inadequate, but that we have failed so far to find a clear alternative statement of principle.

A comparative note

The foregoing comments are intended to provide a thumbnail sketch of aspects of Australian administrative law which may provide the point of intersection with what in Canada are identified as "standards of review". To venture further may seem presumptuous. However, it may be of some assistance to provide a brief illustration of how in Australia a court might be expected to approach the circumstances revealed, for example, in the recent decision of the Supreme Court in *Khosa*.[36]

We would expect the applicant (the respondent before the Supreme Court) to identify the statutory ground upon which he sought judicial review. In this case it would appear to be s 18.1(4)(d) of the *Federal Courts Act*, namely that the Immigration Appeal Division (the IAD) had based its decision "on an erroneous finding of fact that it made in a perverse or capricious manner [and] without regard for the material before it". If there were no statutory ground, the likely formulation would assert that the decision of the IAD was "manifestly unreasonable". It is possible that the applicant might seek to frame a ground on the basis that the decision was

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[35] 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] HCA 16; 84 ALJR 369 at [40] (Gummow ACJ and Kiefel J, dissenting as to the outcome); cf [113], [119] and [129]-[130] (Crennan and Bell JJ).

[36] Above at footnote 24.

unsupportable in the sense that there was no evidence or other material available to support it, but that ground would probably fail because he was asserting an affirmative case, namely that the IAD "must be satisfied that … sufficient humanitarian and compassionate considerations warrant special relief …".[37] Failure to be so satisfied, or an absence of satisfaction, would depend upon lack of sufficient evidence, in the opinion of the IAD. It would be a matter for the IAD to satisfy itself as to the humanitarian and compassionate considerations relied upon.

So far as manifest unreasonableness is concerned, I would not understand there to be any difference between that standard and the standard of "patent unreasonableness" accepted by Desjardins JA in the Court of Appeal but abandoned subsequently by the Supreme Court as a separate standard in *Dunsmuir v New Brunswick*.[38]

I think an Australian court would be puzzled by aspects of the reasoning in *Dunsmuir*, but would be further puzzled by the application in *Khosa* of the principles stated in *Dunsmuir*, which involved an appeal from the Court of Appeal for New Brunswick, to a different statutory context, involving the *Federal Courts Act*. (In Australia, there is a tendency for the courts to work in the opposite direction, namely from a statutory regime to a readjustment of general law principles.) In this respect, we would probably sympathise with the reasoning of Rothstein and Deschamps JJ in *Khosa*.

As you will recall, a second aspect of the development of "standards of review" in Canada was described by Rothstein J in *Khosa*:[39]

> "Standard of review developed as a means to reconcile the tension that privative clauses create between the rule of law and legislative supremacy …. 'Full' or 'strong' privative clauses that purport to preclude the judicial review of a question brought before a reviewing court give rise to this judicial-legislative tension, which deference and standard of review were developed to resolve …."

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[37] *Immigration and Refugee Protection Act,* SC 2001, c 27, s 67(1)(c).
[38] [2008] 1 SCR 190.
[39] [2009] 1 SCR 339 at [74].

We, of course, experience the same tension, although we have identified it, at least at one stage of our history, as a tension between those provisions of the statute which appear to impose preconditions on the exercise of a power and the privative clause which appears to free the repository of the power from judicial control. At least in federal jurisdiction, a privative clause was unable to protect an invalid decision because of the constitutional conferral of power on the High Court to grant prohibition against officers of the Commonwealth in such circumstances. Although the areas of its operation are now somewhat muted, one conceptual basis for reconciling a privative clause with the constitutional jurisdiction conferred on the Court was to treat the privative clause as expanding the scope of valid exercise of the power.[40] A second approach, known as the *Hickman* principle after the judgment of Dixon J in the case of that name, was to treat the protection afforded by the privative clause as follows:[41]

> "Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."

As explained in the recent joint judgment in *Plaintiff S157*:[42]

> "It follows from *Hickman*, and it is made clear by subsequent cases, that the so-called '*Hickman* principle' is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions. Once this is accepted, as it must be, it follows that there can be no general rule as to the meaning or effect of privative clauses. Rather, the meaning of a privative clause must be ascertained from its terms; and if that meaning appears to conflict with the provision pursuant to which some action has been taken or some decision made, its effect will depend entirely on the outcome of its reconciliation with that other provision."

Until quite recently there has been doubt in Australia as to whether this approach to a privative clause operated at the State level. The doubt arose from the fact that

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[40] *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* [1995] HCA 23; 183 CLR 168 at 194 (Brennan J).

[41] *The Queen v Hickman; Ex parte Fox and Clinton* [1945] HCA 53; 70 CLR 598 at 615 (Dixon J).

[42] *Plaintiff S157/2002 v The Commonwealth* [2003] HCA 2; 211 CLR 476 at [60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

there was no strict separation of powers entrenched in State Constitutions, providing a point of departure from the analysis which operated in the federal sphere. However, that concern was recently resolved by the High Court, noting that pursuant to Chapter III of the Constitution, which prescribed the jurisdiction of the High Court, it was necessary that there be bodies known as "Supreme Courts" of the States from which appeals could lie to the High Court. The Court held that the supervisory role of the Supreme Courts was thereby constitutionally protected.[43] Furthermore, the High Court affirmed the distinction between jurisdictional and non-jurisdictional error as marking the boundary of State legislative power. In other words, legislation which would take from a State Supreme Court "power to grant relief on account of jurisdictional error is beyond State legislative power".[44]

These recent cases in the High Court of Australia, may be seen to affirm two principles. The first is the primacy of statutory interpretation as the means for determining powers of judicial review. The second is the constitutional limit to legislative power, a point which illustrates the potential tension between the rule of law and legislative supremacy, to use the language of Rothstein J in *Khosa*. Thus, in *Plaintiff S157*, Gleeson CJ noted that "the Australian Constitution is framed upon the assumption of the rule of law",[45] calling upon the high authority of Dixon J in *Australian Communist Party v The Commonwealth*.[46]

Inherent in that proposition is the conclusion that it is beyond legislative competence to confer on an officer of the Executive undefined power. In the passage in the *Australian Communist Party Case* to which Gleeson CJ referred in *Plaintiff S157*, Dixon J, after noting that the Constitution was based on an assumption as to the rule of law continued:

> "In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to

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[43] See *Kirk v Industrial Relations Commission* [2010] HCA 1; 239 CLR 531 at [98]-[100].
[44] At [100].
[45] At [31].
[46] [1951] HCA 5; 83 CLR 1 at 193.

> the execution and maintenance of the *Constitution* and the laws of the Commonwealth."

In short, we have struggled with precisely the same conflicts and tensions which are identified in Canadian jurisprudence, the striking difference being that there has been no adoption of a concept of "deference". Indeed, there is at least a ripple of concern running in the other direction. In *Kirk*, Heydon J, writing separately from the rest of the Court, noted that there were advantages in creating specialised jurisdictions, but also disadvantages. He stated:[47]

> "Thus a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. … Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up. …. [C]ourts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are 'preoccupied with special problems', like tribunals or administrative bodies of that kind, are 'likely to develop distorted positions.'"

How widely that view is shared is not clear; it is certainly a view which runs counter to the tendency of the legislatures (probably in most jurisdictions) to provide specialist tribunals to deal with particular matters and to protect their decisions, with varying degrees of intensity, from review by a superior court. The advantages of specialist tribunals are thought to include the development of specialist expertise, particularly under novel statutory schemes, and the reduction of formality and technicality, with a concomitant reduction in the need for legal services and therefore the promotion of affordable justice, especially in relation to small claims.

This is neither the time nor the place to comment on such matters, except to say that broad statements of warning tend to obscure the balance of advantage and disadvantage in particular cases. Importantly, that balance may change over time, as, for example, when a novel area of statutory control is assimilated into the general understanding of government, business, the community and the legal profession.

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[47] At [122].

A final comparative note on which others will be better able to comment, is the degree of commonality between the language of deference in Canada and the *Chevron* doctrine in the United States.[48] The common point of departure in both doctrines is the willingness to accord deference to an agency's construction of the statute it administers. On one view, that approach is designed to allow flexibility and to avoid the imposition of judicial thinking, beyond an appropriate limit. In Australia, however, we seek to achieve a similar result by reliance upon principles of statutory construction to determine whether the correct interpretation of the law was an essential condition of the validity of the administrative decision, or whether the decision-maker was entitled to form his or her own view as to the applicable principle.[49] Commentary on American law has also noted the way in which the courts have developed general law principles which do not necessarily fit well with the statutory scheme, in the case of the US, being the *Federal Administrative Procedure Act*.[50]

Conclusions

Australian administrative law is squarely focused upon the grounds of review. Rather than adopt a set of standards, relevant to particular grounds, it asks upon whom has the power to determine a particular matter been conferred, (usually) by statute. If the power to determine the matter authoritatively is conferred upon the supervising court, the court must be so satisfied on the basis of the evidence before it and upon its assessment of the legal argument. If the power is conferred on the tribunal, and involves satisfaction as to facts, the court will not intervene unless satisfied that the tribunal has reached its conclusion by misapprehending the relevant legal principles or by answering a question different from that which was committed to it for determination.

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[48] See *Chevron, USA Inc v National Resources Defense Council, Inc* 467 US 837 (1984).

[49] That distinction may be differently worded, but it is essential to the dichotomy between jurisdictional and non-jurisdictional error.

[50] 5 USC § 551: see, eg, Kevin M Stack, "The Statutory Fiction of Judicial Review of Administrative Action in the United States", in Forsyth et al *Effective Judicial Review: A Cornerstone of Good Governance* (OUP, 2010) Chapter 19.

The focus on ‘authority to decide’ is valuable in maintaining clarity of thinking. However, the failure to establish principles guiding the circumstances in which the court will intervene, except by reference to concepts like jurisdictional error, leaves the law in a state of uncertainty and permits a degree of manipulation of concepts in order to permit or deny intervention in situations where the correct result is unclear, but justice appears to favour a particular outcome.

Canadian experience may suggest that no formula will achieve an entirely satisfactory level of certainty in the administration of judicial review. Indeed, on one view, there are too many semantic distinctions relied on in administrative law; certainty would be enhanced by acknowledging a brief list of underlying principles and also acknowledging the weaknesses of conceptual rigidity.

I think that we in Australia have, in recent years, departed from reliance upon underlying principles. That is probably because there has been a substantial increase in the use of tribunals, the range of administrative decision-making and attempts by statute to prescribe procedures. This process is unlikely to stop, let alone backtrack. The courts may, however, need to adjust their approach. We should not lose sight of the benefits of doctrinal simplicity, transparency and coherence.