AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW NATIONAL LECTURE SERIES

Thursday, 2 September 2004, 6pm
Banco Court
Chief Justice's commentary on paper by Spigelman CJ

The Hon P de Jersey AC

I congratulate Chief Justice Spigelman on an interesting and helpful paper.

The criminal and family law streams account for the most significant day-to-day work of the courts of law, for obvious reasons. But for its capacity to impact on people's lives, administrative law follows a close second or third. The point of great distinction, of course, is that courts exercising an administrative law jurisdiction, unlike the criminal and family courts, do not make the decision of primary significance.

When a court becomes involved on the administrative side, the important decision has already been made, and the dye very often, most often, cast. Then it is that courts not infrequently confront the ingenuity of Counsel dressing-down what is in truth merit review, as being an issue of legality.

And history shows how a perceived yielding by courts in those situations, can foment nothing short of white rage in executive governments, that itself of course an illustration of the significance of the administrative law jurisdiction. The exercise of that jurisdiction has over recent decades, I believe, done more than any other feature to engender distrust, to some extent possibly disrespect, on the part of the executive government of the United Kingdom, for example, towards its

courts of law: to a lesser extent here, perhaps, in relation to our Federal Court. The national arena provides a very recent example of the strength of this jurisdiction, with the Federal Court overturning the decision of the Immigration Minister in relation to Mr Clark. And perceptions of that strength have sometimes persuaded governments to resort to privative clauses.

Our speaker has this evening, in exploring this subject, displayed his characteristic scholarship and jurisprudential experience and wisdom.

I recently experienced that scholarship when I read his “Becket lectures”, delivered in Sydney to the Selden Society and the St Thomas More Society. When Becket was able to leave the secular grandeur of his role as Henry II’s Chancellor, his spiritual purview as Archbishop of Canterbury had its own administrative handle, although he took considerable trouble to ensure that it was not reviewable in the courts of the king.

As a matter of desirable social policy, the existence of the mechanism for the judicial review of administrative decisions which we do have in these Australian jurisdictions is undoubtedly a good thing, though inevitably sometimes abused. I have been bemused by some of the cases which come before courts in this jurisdiction, for example reconsidering prisoners’ security classifications, but the caselaw has vindicated our having that particular power. Other judicial review challenges have been less obviously meritorious, like the case in which a prisoner challenged the State’s refusal to pay for the removal of his tattoos.

Central to the exercise of an administrative law jurisdiction, necessary to maintain the rule of law, is recognition of the supremacy of parliament, and acknowledgment of the separation of powers. When parliament commits the making of a decision to a public entity, it does not expect a court to usurp that

entity's power and make the decision itself. Yet legislatures generally accept the court's legitimate role as, in effect, the custodian of legality, a role eloquently confirmed by Chief Justice Marshall in *Marbury v Madison* (1803) 5 US 87, 111. Hence the distinction between a primary merits determination, and the secondary review of the legality of that determination – but not its utility or worth.

In earlier lectures in this series, and this evening, Chief Justice Spigelman has described this judicial role as falling within an "integrity" reach for government, a term he has likened to Chief Justice Gleeson's references to "judicial legitimacy". In an area where drawing the line between strict legality, and merit or worth, can sometimes be difficult, the offer of a new over-arching criterion may attract, although it probably signifies the objective more than a delineator. Nevertheless, it may be helpful in discerning, as it is put, where twilight becomes night, to recall an objective described that way.

The jurisdiction provides an interesting example of interplay between the legislatures and the courts, with the courts sometimes taxing the drafting skills of parliaments bent on curtailing it. Even the ingenious drafting considered by the High Court in *Plaintiff* S157/2002 (2003) 211 CLR 476 did not avail the Commonwealth.

It is a universal truth that privative clauses will be strictly construed by courts jealous of their jurisdiction. Parliaments expect that, and while perhaps not welcoming it, accept it – in this stable democracy – as a legitimate reflection of the rule of law.

I again congratulate Chief Justice Spigelman on his valuable contribution to the learning on this subject.