Australian Institute of Administrative Law National Forum
Thursday, 22 June 2006, 1:15pm
Marriott Surfers Paradise Resort
Keynote address

The Hon P de Jersey AC,
Chief Justice

I am very pleased to add my welcome to all of you who are visitors to this jurisdiction, and of course to my fellow Queenslanders.

I wish to speak for a short time this morning on three aspects of administrative law: its broad significance, and the significance of the courts' judicial role in applying it; in a contrasting and rather curious way, the administrative role increasingly being committed to judicial officers – curious in one respect for the determinations being virtually unchallengeable; and briefly in conclusion, the comparative public contribution in these times of courts of law and tribunals. First, the focus of the conference, administrative law, and, with your indulgence, the role of the courts in judicial review.

The role of the courts of law reserved by administrative law functions as an interesting "check or balance" within the governmental system. While assuming the supremacy of parliament, that system also assumes the desirability of according the courts of law, in particular, the power to ensure the non-elected bureaucracy acts lawfully.

When I say the administrative law system assumes the supremacy of parliament, that is, in the first place, a system of law statutorily based. But secondly, there is always the power of the legislature to intervene to limit the approach of a court considered unduly robust, as illustrated in recent years in our federal arena. The ultimate voice of course remains with the electors, as the controlling democratic force.

A healthily operating system of administrative law is primarily significant for its protection of the rights of individual citizens. It is incidentally interesting, however, as exemplifying the substantial power and sway of the courts of law, and the fundamental respect in which they are held by the other arms of government.

It is on one view remarkable, albeit plainly responsible, that, for example, the legislature and the executive should countenance leaving, with a court, the power to declare unlawful the decision of a minister of State, or to declare legislation unconstitutional, or to suffer a court's determining the lawfulness or otherwise of a decision of an executive agency which reflects the combined wisdom of perhaps many very experienced public servants. Therein rests an important illustration of the difference between democracy and despotism.

The interplay of the respective judicial and administrative roles has traditionally been sanctioned in this arena by confining any legitimate intrusion by the courts to the lawfulness, rather than the merits, of an administrative decision; whether for example there has been so-called "jurisdictional error". That has though inevitably given rise to assertions, from time to time, that courts have only thinly disguised, as error in law, what is in truth the result of a merits review. That contention will sometimes, and unsurprisingly, lurk around the overturning of a decision made bureaucratically in good faith. The court system contains its own mechanism to guarantee, so far as practicable, that the courts are seen to respect the constraints upon them in this area of law, and that is the appeal process. I say "are seen to" because plainly they would not consciously trespass beyond their jurisdiction.

Dissatisfied with the extraordinary extent of appeal in migration cases, the federal parliament moved in recent years to enact the privative provision in s 474 of the *Migration Act* 1958. In a pivotally important decision three years ago, *Plaintiff S157 of 2002 v Commonwealth of Australia* (2003) 211 CLR 476, the High Court held that provision not apt to exclude appeal in the case of jurisdictional error, for there was then no valid decision, and s 474 was premised on there being "a decision…made…under this Act". In short, "decision" did not encompass "purported decision". The High Court's judgment contains a number of important reflections about this field of law.

As to the significance of the review process, Gleeson CJ quoted (p 492) observations of Brennan J (*Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70):

> "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."

A consequence of the severe restriction on the Federal Court's review powers in relation to decisions of the Refugee Review Tribunal has been recourse by some applicants to the constitutionally entrenched s 75(v) jurisdiction of the High Court. The volume of additional work has raised concern whether the High Court is not thereby deflected unduly from its application to other important areas of work.

The role of the courts under the current system of administrative law is starkly limited, by contrast, to offer a topical example, with the power which would be, and is, accorded judiciaries under some existing and model bills of rights, where courts are or would be left to delineate the shape and bounds of amorphous and elusive concepts, going on to determine whether rights have in fact been respected in particular situations.

But while in the field of administrative law the role of the courts is starkly limited, it remains of central importance in checking the unlawful or arbitrary exercise of executive power, and rectifying decisions fundamentally wrong. It is a lively jurisdiction, increasingly characterized in this State by self-representation.

The mechanisms of administrative law are, regrettably, not always employed productively. A December 2005 discussion paper of the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament, entitled "The Accessibility of Administrative Justice", includes these observations borne out by judicial experience:

> "Some people make frequent and persistent use of administrative justice mechanisms in Queensland. This may be because they:

- have a genuine grievance which is not being addressed;
- have an ulterior motive causing waste and inconvenience; and/or
- suffer from a mental illness or a personality disorder."

The current Queensland legislation, the *Judicial Review Act* 1991, was modelled on the *Commonwealth Administrative Decisions (Judicial Review) Act* 1977. It was provoked by recommendations of the Fitzgerald Commission of Inquiry and the Electoral and Administrative Review Commission. It was joined a year later by the *Freedom of Information Act* 1992. Also of administrative law significance are the *Ombudsman Act* 2001 and the *Whistleblowers Protection Act* 1994.

Recent reported determinations in Queensland under the *Judicial Review Act* include *Childs v Crompton* (2003) 2 Qd R 26, where the court considered the validity of the election of a local government councillor, and in the process itself examined the disputed ballot papers; *York v General Medical Assessment Tribunal* (2003) 2 Qd R104, concerning the need for a medical board to alert a party before it to the prospect it might not accept a substantial body of evidence favouring that party's cause; and *Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal* (2004) 1 Qd R 346, where the court re-examined the factual basis for orders made in consequence by a tribunal – setting aside residents' contracts – and found the pre-requisite "jurisdictional fact" not established. The Supreme Court in this jurisdiction has given some decisions of great importance on issues relating to prisoners especially, like parole, release on licence and remissions (eg *McCasker v Queensland Corrective Services Commission* (1998) 2 Qd R 261); although it may be added the court has had to refuse a lot of applications seeking the review of essentially managerial decisions, such as denying a prisoner full-time study and requiring him to work in the fruit shed (*Bartz v Chief Executive, Department of Corrective Services* (2002) 2 Qd R 114).

Mr Bartz has made extensive use of the judicial review process. He is a prisoner serving 18 years for armed robbery. My search unearthed six applications since the year 2000. They mounted diverse challenges: his security classification and transfer from one jail to

another, in particular, but extending to payment of postage costs for "privileged mail" – that is, letters to persons like the Ombudsman, the Minister, the Anti-Discrimination Commissioner. The high water mark was his challenge to the decision of the Chief Executive not to authorize surgery for the removal of his facial tattoos until two years prior to his release, and to require a financial contribution from the prisoner. That application for review was, incidentally, dismissed.

At the national level, in *Griffith University v Tang* (2004-5) 221 CLR 99, the High Court overruled the Queensland courts' preparedness to review a university's exclusion of a party from PhD candidature on the ground of academic misconduct, because the decision was not relevantly made "under an enactment"; and in *Jarratt v Commissioner of Police for New South Wales* (2005) 79 ALJR 1581, the High Court considered whether the Governor's removal from office of the New South Wales Deputy Commissioner of Police amounted to an exercise of the Crown prerogative to dismiss at pleasure, so that the requirements of procedural fairness did not apply.

I mention those few cases to illustrate the quite remarkable variety of issues coming before the courts in this part of their jurisdiction, and accordingly its utility.

I mentioned earlier judicial contribution to the elucidation of statutory provisions about parole and remissions. Amendments to the *Queensland Corrective Services Act* 2000, to commence on 1 July 2006, will remove a prisoner's right to challenge, by way of judicial review, decisions about security classification and placement. It was apparently considered that other avenues for review were sufficient.

There is for example a general statutory complaint mechanism available to Queensland prisoners to the Ombudsman. During the year 2002-3, the Ombudsman received as many as 1,501 prisoner complaints, mostly about sentence management decisions. Of those 1,501 complaints, 23 were upheld following an investigation on the merits. That figure of 1,501 may be put into a broader context: the next highest number of complaints relating to

a single agency was only 324 (Department of Corrective Services "Prisoner review and complaint mechanisms consultation paper", November 2004). There will be facility for merits review of decisions about security classification, but not judicially.

In the last reporting period, 2004-5, prisoners made 35 applications for judicial review. In that year, the Supreme Court heard 18 applications, of which three succeeded.

In this country, judicial intrusion into what I will term the validity of administrative decision-making has been generally respected by the other arms of government. It is important that the power remain with the courts of law which, for their incorruptibility and competence, retain the undoubted confidence of the people.

There is consequently no suggestion of any need in this country to create a body such as the French Consiel d'Etat. In the French regime, there is as you know rigid separation between the judiciary and bodies which determine administrative appeals. The Consiel d'Etat is a highly effective and respected institution. It enjoys enormous prestige within the French governmental system, partly because of an unabashedly elite approach to its membership. The members of its organs are the absolute cream of the universities and the Ecole Nationale d'Administration. It was borne, as your President Professor Creyke recorded in an article some years ago ("Tribunals and Access to Justice", QUT Law and Justice Journal (2002) Vol 2 No 1), of "historical antipathy between the (French) parliament and the courts (which) resulted in post-1789 revolution times in a decree forbidding the courts from exercising jurisdiction over administrative matters. The decree created the Consiel d'Etat…the Consiel being at the apex of administrative bodies responsible for deciding complaints about matters of administration."

There has been no revolution here, and also fortunately no occasion for historical antipathy between the courts of law and the other arms of government.

It is both convenient, and efficacious, that our courts of law, by training and experience so well equipped to discharge the role, continue to exercise this greatly important part of their jurisdictions, rather than its being reserved to some other supposedly more "specialist" tribunal.

Of course in making determinations about the validity of administrative decisions, judges act judicially. It is topical I mention at this conference a developing trend of some arguable concern, and that is for the legislature to repose in the judiciary, increasingly, the power – and duty, themselves to make decisions which are purely administrative in character.

There has over recent decades been some departure from the traditional assumption that courts exist for the sole purpose of the judicial determination of cases within the courtroom, a departure fed by actions of the executive, in requiring from courts what are essentially administrative rulings.

A number of cases have emphasized the primacy of the strictly judicial function, in the context of legislative and executive attempts to embellish it. *Grollo v Palmer* (1995) 184 CLR 348, 364-5 affirmed that no non-judicial function can be conferred which is incompatible with the performance of the judicial function. The High Court spoke there of maintaining the "integrity" and "legitimacy" of the judicial arm. Two of the justices adopted the United States Supreme Court's reference to courts' "reputation for impartiality and non-partisanship", warning that that reputation "may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action" (*Mistretta v US* (1989) 488 US 361, 407).

In two important judgments a decade ago, the High Court stopped governments from infringing in that way upon the institutional integrity of the courts. The first case was *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. The Minister had under legislation nominated a Federal Court Judge to enquire into whether certain land was a significant Aboriginal area deserving of protection, and to report to the

Minister. The court held that the function of reporting to the Minister was incompatible with the judicial function under Chapter 3 of the Constitution: discharging that function would place the Judge into the echelons of administration, with the Judge effectively a ministerial adviser.

The second instance was the celebrated case of *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51, where the High Court struck down New South Wales legislation empowering the Supreme Court of that State to order the detention of a specific, named person beyond the expiration of a previously imposed finite term of imprisonment, in order to protect the community.

Notwithstanding *Kable*, State legislatures plainly remain alive to the utility of invoking the reputations of their Supreme Courts to lend authority to what could be described broadly as administrative decisions in controversial areas. In recent decades, legislation has broadened the jurisdiction of State judges to authorize covert police operations. *Grollo* confirms the legitimacy of such authority. Politically, it is obviously attractive to have those potentially controversial decisions made by Supreme Court Judges, and in fairness, I note that governments have been ready to ensure that judges, acting administratively, have the necessary immunity.

But as anti-terrorism legislation, especially, will increase the frequency of such interventions, one may query whether there is risk of eroding the "public confidence" in the judicial process rightly and so often proclaimed as central to the legitimacy of the courts of law. One sees in *Wilson* and *Kable* frequent reference to the need for the courts to be seen to be "acting openly, impartially and in accordance with fair and proper procedures" (eg *Wilson*, p 22). In issuing those warrants, judges invariably act behind closed doors and ex parte, a process most judges would not relish.

My point is not to criticize governments for casting these potentially controversial jurisdictions onto courts. Governments have power to do so, and courts have an

undoubted reputation for the independent discharge of all their jurisdictions. It is unsurprising governments see courts as attractive decision-makers in those areas. My point is simply to urge the need for circumspection. Governments must be astute to the inherent fragility of public confidence, and also, to the pivotal importance to society of a judiciary considered "legitimate". Governments must be careful not to embellish the core judicial function in such a way as to blur it, and thereby erode the confidence on which its authority depends.

I make it clear that my reservation does not extend to the jurisdiction judicially to review administrative decision-making. If carried out within the strictures delineated by the legislation, with its focus on lawfulness not merit, the discharge of that jurisdiction undoubtedly enhances, not diminishes, perceptions of the authority of courts, in their role as custodians of legal rights as between citizen and State.

I conclude by referring to one other recent trend with an administrative flavour. I raise whether the proliferation of tribunals, especially in the States, might not reflect some change in executive regard for the courts of law, perhaps fed by the evolution of the judicial role of which I earlier spoke.

Is it really the case that sophisticated modern society, and the intricacy of the problems it spawns, have warranted the establishment of so many specialist tribunals? I am unconvinced that the capacity of courts and judges, demonstrated over many decades, to embrace effectively a wide range of decision-making, has waned; or that the public would be more confident in having contentious issues on sensitive subjects determined by tribunals rather than by courts. It is also moot, I think, whether other features presented as being the advantages of tribunals, are necessarily being achieved: relative informality, greater expedition and comparative lack of expense.

In this jurisdiction we have in recent years experienced an attempt to improve access to justice through the creation of a so-called super tribunal, the Commercial and Consumer

Tribunal, which the government intends to expand over time to embrace more and more roles through empowering legislation. One hopes it does lead to more accessible, quicker and less expensive dispute resolution. We all fear the "undisciplined proliferation of tribunals" (Hon Jan Wade MP, Attorney-General of Victoria in a 1996 discussion paper), and the collection of many within a single over-arching structure or umbrella does seem sensible. I notice there is increasing sharing of resources among tribunals at the Federal level.

But I urge the need for caution in any expansion in the work of tribunals, and a renewed recognition that the courts over many decades established their capacity to carry out such work competently. The streamlined character of contemporary litigation, with its substantial focus on case management including alternative dispute resolution, should render the courts of law attractive repositories for much of the work now diverted elsewhere.