JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

20th Biennial Lawasia Conference

Hong Kong, 6 June 2007

Justice Margaret Wilson

1. Chief Justices, Your Honours, Ladies and Gentlemen -

2. I am honoured to have been asked to address this session of the 20th Biennial Lawasia Conference.

3. Lawasia conferences afford rich opportunities for forging professional and business relations in the Asia Pacific region - the benefits of which are obvious and often immediate in the understanding and resolution of legal issues beyond the reach of our individual jurisdictions.

4. But their true import transcends the cut and thrust of daily practice and regional commerce. The commitment to the promotion of the rule of

law which permeates these conferences is both reaffirming and inspirational.

5. The law serves different functions in different cultures. Strong reliance on positive law is generally regarded as conducive to the maintenance of social order in the western tradition, but not so in the traditional legal thinking of China. To quote Confucius –

> "Lead the people by laws and regulate them by penalties, and the people will try to keep out of jail, but will have no sense of shame. Lead the people by virtue and restrain them by the rules of decorum, and the people will have a sense of shame, and moreover will become good."[1]

6. The constitutional structures of a sizeable number of nation States in the Asia Pacific region bear the imprint of the Westminster system - although they have mutated to accommodate the practices and traditions of their own peoples. My own country, Australia, carries this legacy – although its system is federal rather than unitary, and in this

---

[1] William Theodore De Bary & Irene Cohen (eds), *Sources of Chinese Tradition* (1964) 32. See also Sir Gerard Brennan, 'Joint Presentation with the Hon Mr Justice Yong Pung How, Chief Justice of Singapore' (Speech delivered at the Asia/Pacific Courts Conference, Sydney, 22 August 1997); Alice Tay, 'The Struggle for Law in China' (1987) 21 *University of British Columbia Law Review* 561.

regard the drafters of its Constitution were influenced by the American Constitution.

7. In the Anglo-Australian system, judicial review of administrative action has been described as -

> "...neither more nor less than the enforcement of the rule of law over Executive action; ...[as] 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."[2]

9. There is a clear distinction in principle between judicial review of the legality of administrative action and review of its merits. This distinction, although sometimes difficult to maintain in practice, is a reflection of the separation of powers. In Australia the prevailing view is that the Courts must be vigilant in confining their activities to reviewing the legality of administrative action; they have neither the expertise nor the right to decide upon the merits of administrative

---

[2] *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70-71 (Brennan J).

decisions, and if they trespass into the arena of merits review, respect for their role in upholding this aspect of the rule of law is likely to be lessened. They should be conscious, too, of the parts played by the Legislature, public opinion and the Executive itself in ensuring the legality of administrative action.[3]

10. There will always be some tension between the Judiciary and the Executive, and between the Legislature and the Judiciary. This is not necessarily unhealthy in a vibrant democracy. I am going to focus on one area of such tension - attempts to oust the jurisdiction of the Courts to review administrative action.

11. The starting point in any discussion of ouster clauses, or privative clauses as they are more commonly referred to in Australia, is the supremacy of Parliament. Absent any constitutional restrictions on the power of a Legislature to exclude judicial review, the effect of a clause purporting to do so is purely a matter of statutory interpretation.

---

[3] *AG (NSW) v Quin* (1990) 170 CLR 1, 36; Jaffe & Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345, 346.

12. Australian Courts approach the construction of privative clauses with caution, if not antipathy. They start with the presumption that the Legislature does not intend to deprive a person of access to the Courts, other than to the extent expressly stated or necessarily implied.[4] Given the lengths to which Parliaments sometimes go in trying to exclude judicial review, there is perhaps a certain unreality about describing this as a presumption of legislative intent. But importantly, it has the consequence that privative clauses are construed strictly.[5]

13. In theory, the supervisory jurisdiction of the courts may be impliedly excluded by statute, but as Mason J said in *Church of Scientology v Woodward*[6] -

> "...it is not too much to say that any suggestion that Parliament has impliedly excluded judicial review, especially for ultra vires, should be viewed with extreme caution, indeed healthy scepticism. If Parliament intends to take the radical step of ousting judicial review then it is reasonable to suppose that it

---

4 *Public Service Association (SA) v Federated Clerk's Union* (1991) 173 CLR 132, 160; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [32], [72].

5 *Plaintiff S157/2002* (2003) 211 CLR 476, [32], [72], [118].

6 (1982) 154 CLR 25, 55.

will express its intention with directness and clarity upon the topic, thereby taking the responsibility upon its own shoulders for that result rather than leaving the Court to spell it out from a series of provisions not specifically addressed to that question."

14. In the Australian context, if the privative clause is found in Federal legislation, questions of constitutional law have to be taken into account.

(a) The Federal Legislature cannot oust the jurisdiction of the High Court to review decisions and orders which exceed constitutional limits. While the Federal Parliament may lawfully prescribe the kind of duty to which an officer of the Commonwealth is subject and the way in which that duty is to be performed, it cannot deprive the High Court of jurisdiction to grant relief by way of mandamus, prohibition or an injunction where there has been jurisdictional error by such an officer. [7]

[7] Constitution of the Commonwealth of Australia, s 75(v).

(b) Nor can a privative clause operate so as to confer judicial power on a non-judicial body. Thus an administrative tribunal cannot be empowered to determine conclusively the limits of its own jurisdiction, and any privative clause that purports to have that effect is invalid.[8]

If there is a question of constitutional invalidity, and if there is an interpretation consistent with constitutional validity fairly open, that interpretation should be adopted.[9]

15. As I have said, a privative clause is strictly construed. It will usually consist of two parts – the first identifying the decision or event to which the restriction on review purports to apply, and the other specifying the restriction (for example, that the decision is final and conclusive, that it cannot be challenged, appealed against, quashed or called in question in any court, that it is not subject to prerogative relief in any court). Both parts are strictly construed.

---

8 *Plaintiff S157/2002* (2003) 211 CLR 476, [9], [73], [98] and [162]. See also *R v Drake-Brockman; Ex parte The Northern Colliery Proprietor's Association* [1946] ALR 106, 112.

9 *Plaintiff S157/2002* (2003) 211 CLR 476, 504.

16. This is illustrated by the decision of the High Court of Australia in *Plaintiff S157/2002 v Commonwealth*.[10] That case, which was concerned with privative clauses in the *Migration Act* 1958 (Cth), turned on the construction of the provision identifying decisions protected from review – namely, "decisions… made under this Act". The Court held that a decision tainted by jurisdictional error was a nullity, and not a "decision … made under this Act". It reached that conclusion not only as the result of constitutional analysis, but also as a matter of statutory interpretation. Words identifying the decision or event which triggers the application of a privative clause have many times been held not to encompass a decision infected by jurisdictional error, even in jurisdictions without the constitutional overlay of the Australian Federal jurisdiction.[11]

17. More than 60 years ago Sir Owen Dixon laid down the approach to the interpretation of privative clauses in *Hickman*[12] and subsequent decisions. His Honour explained that it is a two step process -

---

10 (2003) 211 CLR 476.

11 The Hon. James Spigelman, *AIAL National Lecture Series on Administrative Law No 2* (2004) 44. See also *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181, 197; *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 131; *Brown v Rezitis* (1970) 127 CLR 157, 172.

12 *R v Hickman; ex parte Fox & Clifton* (1945) 70 CLR 598.

(a) The first step is to resolve the apparent inconsistency between a provision defining and limiting the power of an administrative decision-maker and one which excludes all forms of review by construing the legislation as a whole and arriving at reconciliation between them; and

(b) the second step is to consider whether there are limitations on the power which are "essential to valid action", or inviolable as they have since come to be described.[13]

18. To ascertain the protection which the privative clause purports to afford, it is necessary to have regard to the terms of the particular clause in question.[14] Taking the first step, that protection will be inapplicable unless three provisos are satisfied - (i) that the decision involved a bona fide attempt to exercise the power; (ii) that it related to the subject-matter of the legislation; and (iii) that it was reasonably capable of reference to the power.

---

13 *Hickman* (1945) 70 CLR 598; *R v Murray; ex parte Proctor* (1949) 77 CLR 387, 400.

14 *S157/2000* (2003) 211 CLR 476, 502.

19. But, taking the second step, if, on the proper construction of the Act as a whole (including the privative clause), there is an inviolable limitation on Executive power, for example, procedural fairness[15] or the legal criteria governing visa applications,[16] the privative clause will not insulate it from judicial review. A clearly expressed specific intention to limit Executive power in that way could hardly give way to a general intention expressed in a privative clause.[17]

20. Whether a jurisdictional restraint can be categorised as inviolable for this purpose is a matter of statutory interpretation.[18] In other areas of administrative law the High Court of Australia has construed "jurisdictional error" very broadly, - as embracing errors of law such as identifying a wrong issue, ignoring relevant material, and relying on irrelevant material.[19] But the second step in the *Hickman* approach is itself part of the process of statutory construction and reconciliation of apparently conflicting provisions. Whether a restraint is inviolable will turn not on whether breach of it might be classified as jurisdictional

---

15 *Lesnewski v Mosman MC* (2005) 138 LGERA 207, [79].

16 *Re Minister for Immigration, etc; Ex parte Applicants S134/2002* (2003) 211 CLR 441.

17 *S157/2000* (2003) 211 CLR 476, 503; *Murray* (1949) 77 CLR 387, 400.

18 *Plaintiff S157/2000* (2003) 211 CLR 476, [21]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [49] – [51].

19 *Craig v South Australia* (1995) 184 CLR 163; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

error in another context, but rather upon its comparative significance in the particular statutory context. The very use of descriptors such as "essential",[20] "indispensable",[21] "imperative"[22] and "inviolable"[23] is an indication that jurisdictional restraint will be strictly construed in this area.[24]

20. Let me conclude by referring to a reflection of Spigelman CJ of NSW on the High Court's approach to privative clauses. [25] His Honour divined an unexpressed major premise in the reconciliation of such conflicting provisions being the starting point– namely, that there is no such thing as unlimited executive authority. As His Honour said -

> "The joint judgment in *Plaintiff S157* rejected the Commonwealth submission that the Parliament could confer an entirely open ended discretion. However difficult it may be to

---

20 *R v Murray; ex parte Proctor* (1949) 77 CLR 387, 400 (Dixon J).

21 *R v Murray; ex parte Proctor* (1949) 77 CLR 387, 399 (Dixon J)

22 *R v Metal Trades Employees' Association; ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248 (Dixon J); *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 632 (Gaudron and Gummow JJ).

23 *R v Metal Trades Employees' Association; ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248 (Dixon J); *R v Coldham; ex parte Ausralian Workers' Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J); *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 632 (Gaudron and Gummow JJ).

24 Caron Beaton-Wells, 'Restoring the Rule of Law – Plaintiff S157/2002 v Commonwealth of Australia' (2003) 10 *Australian Journal of Administrative Law* 125.

25 The Hon. James Spigelman , *AIAL National Lecture Series on Administrative Law No 2* (2004).

> identify the limits, there is a point where a parliament is delegating legislative power itself and that is not a proper exercise of legislative power. This important constitutional principle is the starting point for a *Hickman* analysis."[26]

And as His Honour said –

> "This is a rule of law assumption."

21. In contemporary Australia the average member of the community is touched by Executive decisions much more immediately and much more frequently than he or she is affected by Judicial decisions. Judicial review of the legality of administrative action is a safety valve that restores the equilibrium among the three branches of government and reasserts the rule of law as the flexible and resilient underpinning of our free society.

---

[26] The Hon. James Spigelman , *AIAL National Lecture Series on Administrative Law No 2* (2004) 47.