Environment and Planning Law in the Age of Statutes

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The search for meaning and coherence in the formulation and application of the principles of statutory construction remains one of the key tasks facing Australian courts. This article examines the contribution of Justice John Basten to the continued development of the principles that inform this debate, by reference to environmental and planning law. That area of law provides an especially useful vehicle to consider questions of statutory construction because planning statutes and instruments are often expressed at a high level of generality and confer broad discretionary powers upon decision-makers. The legacy of Justice Basten has illuminated the pathways of this law.

I. The Rise and Rise of the Statute

It is a near impossible task of any festschrift such as this to capture the magnitude of the contribution of its subject. The Hon Justice John Basten's influence on environment and planning law in New South Wales is no exception in this endeavour. In particular, his Honour's deep reflection and intellectual rigour upon that most fundamental aspect of environment and planning law, namely, the interpretation of the very legislation underpinning it, has been immeasurable.

Much has been written in this issue, and elsewhere, of Justice Basten's distinguished contribution to various aspects of administrative law, both in practice and in principle. But because of the centrality of statutory construction that informs much of the work of any planning and environment court, such as the Land and Environment Court of New South Wales (the LEC), it is the impact of Basten JA's corpus of endeavour in this field of law that this article is directed to.

Whether the LEC is engaging in merits review, judicial review, or determining criminal liability for the alleged commission of an environmental offence, at the core of almost all disputes demanding resolution before it is embedded a question of statutory interpretation. This is because the regulation of land use is almost wholly governed by statute.[1]

The primacy of statutory construction to the work of the Supreme Court of New South Wales (the Supreme Court of NSW) – and by extension the LEC – was recognised by his Honour as early as 2005 when, upon the occasion of his swearing-in as a judge of appeal and judge of the Supreme Court of NSW, Basten JA remarked that "the relevant principles [of statutory interpretation] are of general application within our national legal system".[2]

This theme became a constant throughout Justice Basten's curial and extra-curial career, along with a search for meaning and coherence in the formulation and application of the principles of statutory construction. The influence of his Honour's industry cannot be under-estimated because statutory interpretation is, as Basten JA has observed, "an area of immense importance in the current operation of the law. Some areas of law are almost entirely governed by statute; others in part, and few not at all. The pervasive reach of statutes should carry with it an expectation that principles of statutory interpretation will differ in their application if not in their content, depending on their subject matter."[3]

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[1] *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, [64]–[65]; [2017] HCA 30, as noted by the Hon J Basten, "Statutes and the Common Law" (2019) 93 ALJ 985, 985.

[2] *Swearing in Ceremony of John Basten QC as a Judge of the Supreme Court of NSW* (Banco Court, 2 May 2005) [42].

[3] Hon J Basten, "Statutory Interpretation" (2017) 91 ALJ 414, 414.

That legislation now governs most administrative decision-making has had significant implications for the processes by which the judiciary reviews those decisions. As a consequence, there has been a marked shift in the approach to judicial review. From privileging common law grounds of review to expressing those same grounds as legal norms, albeit the product of legislative intention embedded within a specific statutory context, there has been a "profound reorientation" in judicial review.[4] While the LEC has not been burdened with the navigation of common law writs or the conduct of judicial review based upon codified grounds, such as those contained in the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the rise and rise of statute law is pervasive across almost all aspects of environment and planning law in New South Wales. For example, the LEC owes its existence to statute; from its inception to its jurisdiction, no aspect of its work is untouched by legislative intrusion.

II. The Constitutional Dimension of Statutory Interpretation

As Justice Basten identified in 2005,[5] the importance of statutory interpretation is, and remains, essentially two-fold: to demarcate the boundary between the legislature and the executive on the one hand; and the executive, the Parliament and the courts on the other. It is this constitutional tension that the principles of statutory construction seek to regulate. The role of the judiciary in relation to statutory construction is to apply principles that are "accepted by the other arms of government in a system of representative democracy", not to stand in the shoes of a legislator.[6] Viewed in this manner, "judicial findings as to legislative intention are" no more and no less than "an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws".[7] The boundaries of judicial interpretation proscribe the limits of the court's role within a system of representative democracy.[8] This is so notwithstanding the absence of any doctrine of separation of powers formally applying to State constitutional frameworks. Thus, as was explained in that aptly described "canonical statement"[9] in *Attorney-General (NSW) v Quin* (*Quin*), to permit judicial review to examine the merits of administrative action, and not merely question its legality, is to impermissibly encroach upon the functions of the executive. As Brennan J (as he then was) famously declared, the "jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power".[10]

III. The Complexity of Reviewing Environmental Planning Action

The focus on the importance of the principles of statutory interpretation in reviewing government action is in large part about ensuring that the constitutional role of statutory construction remains pivotal to the judicial process. This centrality is paramount because the "principles of statutory interpretation are common law principles rooted in values which include the rule of law".[11] To reiterate, in applying these principles the "democratic legitimacy" of judicial review is maintained,[12] both in the sense that the will of Parliament is enforced and that the separation between the three branches of government is observed.

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[4] W Bateman and L McDonald, "The Normative Structure of Australian Administrative Law" (2017) 45(2) FLR 153, 153.

[5] *Swearing in Ceremony of John Basten QC as a Judge of the Supreme Court of NSW*, n 2, [42].

[6] *Momcilovic v The Queen* (2011) 245 CLR 1, [545] (Crennan and Kiefel JJ); [2011] HCA 34.

[7] *Zheng v Cai* (2009) 239 CLR 446, [28]; [2009] HCA 52.

[8] Hon J Basten, "Human Rights and the Rule of Law" (Speech delivered at the Sir Ninian Stephen Lecture, University of Newcastle, 3 April 2008) 5; Hon J Basten, "Separation of Powers – Dialogue and Deference" (2018) 24 AJ Admin L 91, 94.

[9] *Swearing in Ceremony of John Basten QC as a Judge of the Supreme Court of NSW*, n 2, [44]; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

[10] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–36 (Brennan J).

[11] Hon MJ Beazley, "Administrative Law and Statutory Interpretation: Room for the Rule of Law?" (2018) 93 AIAL Forum 1, 7–8. See generally *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34.

[12] Bateman and McDonald, n 4, 176.

Nowhere does this constitutional balancing act find expression more acutely than in the process of judicial review of environmental and planning decisions. Often made pursuant to a complex and intertwined web of primary and secondary legislation, including a plethora of environmental planning instruments, the interpretative task can be demanding having regard to the inherently polycentric nature of this form of decision-making, balancing, as it does, a range of competing interests. It is therefore not uncommon when assessing environmental or planning outcomes for there to exist economic and social incentives upon decision-makers to circumnavigate onerous regulatory requirements.[13] This can, and does, contribute to the opaqueness of administrative environmental action and has a very real tendency to undermine public confidence in the proper administration of environmental planning laws.[14] It is beyond doubt that recourse to judicial review of such decisions by the orthodox application of principles of statutory interpretation assists in the maintenance of transparent environmental processes and encourages more robust decision-making.[15]

This is not an abstract aspiration. The case law is replete with examples of decisions by the courts exercising their powers of review over contentious developments.[16] Two paradigm illustrations suffice. First, in 2017 the New South Wales Court of Appeal (NSWCA) construed and applied a law that required "a consent authority to refuse to grant consent to a development application relating to any part of the Sydney drinking water catchment unless satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on the quality of the water".[17] In *4nature Inc v Centennial Springvale Pty Ltd* (*4nature*) the NSWCA, and Basten JA in particular, explicitly rejected any suggestion that there was some generally accepted practice requiring laxity or flexibility in construing delegated legislation such as environmental planning instruments.[18] The primary judge was held to be in error for adopting such an approach.

In doing so, the NSWCA distinguished an earlier decision of that Court in *Tovir Investments Pty Ltd v Waverly Council*.[19] While basic principles of statutory construction demanded that the language of the relevant instrument be read in context having regard to the purpose that it was designed to achieve, the primary focus had to be on the text. Applying the instrument, the NSWCA overturned the NSW Planning Assessment Commission's approval of an extension of an existing coal mine because it had applied an incorrect standard in assessing the environmental effect of the operation of the mine on water quality in the Sydney catchment. The approval had purported to permit the mine to discharge highly saline water containing various contaminants into the Cox's River that flowed into Warragamba Dam.

Second, in *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* (*KEPCO*),[20] the NSWCA (Basten and Payne JJA and Preston CJ in LEC) dismissed an appeal by KEPCO Bylong Australia Pty Ltd from a decision of the LEC upholding the Independent Planning Commission's (IPC) decision to refuse state significant development approval for a greenfield open-cut coalmine in the Bylong Valley. The IPC essentially rejected the project because the proposal failed to provide measures to minimise Scope 3 greenhouse gas emissions. At first instance, and on appeal, the case turned upon the proper construction of cl 14 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW).[21]

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[13] Hon B Preston, "The Enduring Importance of the Rule of Law in Times of Change" (2012) 86 ALJ 175, 175.

[14] Preston, n 13, 175.

[15] C McGrath, "Myth Drives Australian Government Attack on Standing and Environmental 'Lawfare'" (2016) 33 EPLJ 3, 6.

[16] See, eg, the cases referred to in G Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 10th ed, 2019) 866–917.

[17] *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011* (NSW) Pt 2 cl 10(1).

[18] *4nature Inc v Centennial Springvale Pty Ltd* (2017) 95 NSWLR 361, [45] (Basten JA); [2017] NSWCA 191.

[19] *4nature Inc v Centennial Springvale Pty Ltd* (2017) 95 NSWLR 361, [46] (Basten JA); [2017] NSWCA 191; *Tovir Investments Pty Ltd v Waverly Council* [2014] NSWCA 379.

[20] *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* (2021) 250 LGERA 39; [2021] NSWCA 216.

[21] *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* (2021) 250 LGERA 39, [14]–[20]; [2021] NSWCA 216.

While some commentators have championed the results in *4nature*[22] and *KEPCO* as a demonstration by the courts of an "increasing willingness to regulate public and private actors, cognisant of the environmental impact of climate change",[23] in truth both represent no more, and no less, than a demonstration of the entirely orthodox application of principles of statutory interpretation within the context of a routine judicial review challenge, albeit within in an environmental context.

It is Justice Basten's disciplined adherence to principle that has been a significant legacy of his contribution to the law of statutory interpretation. With Brennan J's remarks in *Quin* as his lodestar, his Honour has sought to delimit the metes and bounds of judicial activity in any administrative challenge by faithful observance to the constitutional constraints on the court's function.

Consistent with this orthodoxy, Justice Basten was therefore an early proponent of the criticism of the much maligned "proper, genuine and realistic consideration" epithet[24] as sanctioning trespass into merits review. To review a decision on the ground that there has been a failure to properly take into account a mandatory relevant consideration arises frequently in environment and planning law. Accordingly, in *Kindimindi Investments Pty Ltd v Lane Cove Council* Basten JA sounded this note of caution:[25]

> 74 … the appellant cast its argument in terms that they were required to give "proper, genuine and realistic consideration to the merits of the case". That terminology is taken from the judgment of Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, reiterated in *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 at 483. However, this terminology should not be turned into an assessment of the adequacy of the consideration accorded in a particular case. That kind of challenge must be assessed on manifest unreasonableness grounds: see *Minister for Aboriginal Affairs v Peko Wallsend Ltd* at 41 (Mason J) and see now *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165.
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> 75 The dangers in giving too much weight to qualifying terminology in this area of judicial review were noted by Spigelman CJ in *Bruce v Cole* (1998) 45 NSWLR 163 at 186E:
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> These particular formulations must be treated with care, so that the relevant/irrelevant considerations ground is not expanded to permit review of the merits. That ground is restricted in accordance with the now classic judgment of Mason J in [*Peko Wallsend*], to matters which the decision maker was obliged to take into account.

This was reiterated by his Honour in *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (*Belmorgan*).[26] In that case, a determination by the general manager of Wollongong City Council to approve a development application pursuant to a delegation was found to be invalid. The NSWCA held that the only function capable of being validly delegated to the general manager was that of determining the application, unfettered by any direction to determine it a particular way (ie, by granting consent conditionally or unconditionally or by refusing consent, having taken into consideration the matters prescribed by s 79C(1) (as it then was) of the *Environmental Planning and Assessment Act 1979* (NSW) (*EPAA*)). A delegation to determine a development application only by way of approval was invalid because it removed from the delegate the option of refusing the consent, and moreover, it unlawfully confined the discretion of the general manager insofar as he had failed to address the considerations as required under s 79C(1) of the Act.

In agreeing with the reasoning of Tobias JA, Basten JA expressly repudiated reliance upon the legal formulation of "proper, genuine and realistic consideration" on the basis that it represented a gloss on the statutory requirement to take certain prescribed matters into account and was contrary to the approach

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[22] N Graham, "Undermining Sydney's Water Catchment" (2020) 35(2) AER 38.

[23] D Le Breton and J Pettit, "Emerging Climate Law Jurisprudence in NSW – A Case Note on the Bushfire Survivors Decision" (2021) 20(8) LGOVR 106, 106.

[24] R Lancaster and S Free, "The Relevance Grounds in Environmental and Administrative Law" in N Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 241, 247–248.

[25] *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277, [74]–[75] (Basten JA); [2006] NSWCA 23.

[26] *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450; [2007] NSWCA 171.

identified by Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.[27] His Honour remarked as follows:[28]

> 77 By way of explication, it may be noted that use of the word "proper" may be understood to invoke the requirement that a power can only be used for the purpose or purposes for which it is conferred and not for some extraneous purpose: see, eg*, Sydney Municipal Council v Campbell* [1925] AC 338 and *The Queen v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 232–233 (Aickin J). Similarly, the word "genuine" may be understood to reflect the well-established principle that the decision-maker must undertake his or her function in good faith, a requirement bound up in the concept of "improper purpose", as explained by Aickin J in *Ex parte Northern Land Council.* Nevertheless, both those obligations are properly related to the exercise of power, rather than some discrete aspect of the exercise, namely taking into account a particular mandatory consideration. The third limb of the trinity, "realistic" finds no ready referent in the language of judicial review.
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> 78 That is not to say that to give grossly inadequate weight to a matter of some importance may not provide a basis for review; however, to qualify as a ground of judicial review, such conduct must satisfy the test of manifest unreasonableness as applied to the exercise of the power: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 (Mason J). It is not helpfully reflected in a supposed obligation to give "realistic" consideration to a particular matter.

The critique is well founded. The "unworkable elasticity"[29] between that which may permissibly be taken into account and that which cannot is often difficult to discern and can turn on contestable matters of fact and degree. And in any event, as is discussed below, to afford a matter proper, genuine and realistic consideration arguably means no more than to exercise the power reasonably and consistent with the statutory purpose.

IV. Moving from the Grounds to the Statute

The overly malleable application of grounds of review is no doubt why Justice Basten has questioned whether they ought to be abandoned. A failure to take into account a mandatory consideration can equally be characterised as a failure to inquire, and an absence of proper, genuine and realistic consideration of a matter that a decision-maker must take into account can also be described as the imposition of a standard of reasonableness from which it is perceived that there has been deviation.[30]

Take, as a practical example, s 4.15 (1) of the *EPAA* which concerns the evaluative matters that a consent authority must consider in determining a development application:

> (1) **Matters for consideration – general** In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application –
>
> (a) the provisions of –
>
> (i) any environmental planning instrument, and
>
> (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
>
> (iii) any development control plan, and
>
> (iii) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and
>
> (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),
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> (v) (Repealed)
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> that apply to the land to which the development application relates,

[27] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

[28] *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450, [77]–[78] (Basten JA); [2007] NSWCA 171.

[29] A Poukchanski, "Considering 'Proper, Genuine and Realistic'" (2014) 21 AJ Admin L 201, 204.

[30] Hon J Basten, "Judicial Review: Can We Abandon Grounds?" (2018) 93 AIAL Forum 22, 26.

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
(c) the suitability of the site for the development,
(d) any submissions made in accordance with this Act or the regulations,
(e) the public interest.

Several of the mandatory considerations referred to in this section are provisions of different planning instruments.[31] In some instances, a failure to apply the criteria specified in those instruments will depend on whether they are applicable, which will invariably give rise to a question of statutory construction.[32] By contrast, a requirement to consider the likely impacts of a development will demand an examination of the facts and circumstances of the case, many of which may be highly contestable. Nowhere is this more starkly illustrated than the duty to consider the public interest in assessing any development proposal. This obligation – a discretionary value judgment writ large – amounts to an invitation to a consent authority to take into account whatever it considers relevant.[33] If this does not invite a seemingly verboten foray into the merits of a decision made by a consent authority, then it is difficult to conceive of what will. That the consent authority must ("is to take") these matters into account in s 4.15(1) of the *EPAA* offers scant judicial succour.

Perhaps it does not matter? This is because all of these mandated considerations are informed by the statutory context within which any enquiry must take place and the label of "mandatory consideration" adds little to the exercise that the court undertakes. This is because it is the legislative framework that is paramount. As was noted in *Belmorgan*, a power can only be used for the purpose or purposes for which it is conferred as determined by the text and context conferring it (in that case, to determine a development application having regard to the factors contained in s 79C(1) of the *EPAA*) and not to serve some extraneous objective.[34]

While the categories of jurisdictional error are not exhaustive and any attempt at taxonomy ought to be eschewed,[35] there is much to recommend the proposition that the content of each ground of review "in each case depends from the first to the last on the statute".[36] The resolution of questions of power therefore demand careful attention to the legislation from which that power derives.

However, this reorientation from a "grounds approach" to judicial review to that of a "statutory approach",[37] premised upon established tenets of statutory construction, may, as Justice Basten has argued, be too neat and ultimately serve only limited utility in the search for some "meta" unifying concept of judicial review.[38] The contention is that either or both approaches provide finite guidance on the scope and function of judicial review. Rather, "the normative structure of judicial review must depend upon the identification and application of public law values and standards in relation to particular areas of decision-making."[39] These basal values and standards include reasonableness, rationality, and procedural fairness.[40] Values against which almost all exercises of power ought to be measured. Whether the genesis of these values is the common law or the Commonwealth Constitution does not matter.[41]

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[31] To similar effect is *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136.

[32] For example, in *Zhang v Canterbury City Council* (2001) 51 NSWLR 589; [2001] NSWCA 167 it was held that a development control plan had to be taken into account as a fundamental focal point in the decision-making process.

[33] See the description given in *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

[34] *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450, [77] (Basten JA); [2007] NSWCA 171.

[35] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [82] (McHugh, Gummow and Hayne JJ); [2001] HCA 30; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [71]–[73]; [2010] HCA 1.

[36] G Kennett, "Duties to Consider" (2019) 26 AJ Admin L 60, 62.

[37] Bateman and McDonald, n 4, 153.

[38] Basten, n 8, 4.

[39] Hon J Basten, "The Foundations of Judicial Review: The Value of Values" (2020) 100 AIAL Forum 32, 34.

[40] Described by Mason CJ in *Kioa v West* (1985) 159 CLR 550 as a "fundamental rule".

[41] Hon J Basten, "Constitutional Elements of Judicial Review" (2004) 15 PLR 187.

Conceived of in this manner, however, is there a risk that the statutory approach to judicial review, and with it the almost mystical divination of legislative intent,[42] amounts to no more than a "fig leaf" in the quest to identify the juridical basis of judicial review?[43] Arguably not.

By way of illustration, the central importance of exercising power impartially was at issue in *McGovern v Ku-ring-gai Council* (*McGovern*).[44] The validity of a consent granted by the relevant council, a collegiate body, was challenged by neighbours to the development on the ground of apprehended bias on the part of two of the councillors. The councillors had expressed the view, in negative and derogatory terms with respect to several of the objectors, that the development ought to be approved, prior to the final determination by the Council. In the result, the votes of the tainted councillors were not decisive. The question was how the test for apprehended bias (the so-called "double-might" test[45]) operated in relation to a local government authority constituted by elected councillors, which has a variety of functions conferred upon it, including those of an administrative nature to grant approval for development in conformity with specified legislative criteria.[46] After discussing the knowledge ascribed to the fair-minded observer having regard to the proper institutional role and operation of local councils,[47] Basten JA opined that a court ought not refuse relief where apprehended bias has been established because to do so would generally require an assessment of the merits of the case.[48] Upon partiality being established on the part of any member of the consent authority considering the development application, this would be sufficient having regard to the objective nature of the test for apprehended bias.[49] This did not mean, however, that the content of procedural fairness remains uniform in its application across all bodies. The judicial branch of government is distinguishable from other branches of government, including local government. The application of the rules of natural justice are therefore shaped by the nature of the institution to which they apply across all bodies. Of significance in *Mcgovern* was the fact that the appellants were not parties to a civil dispute but had exercised a statutory right to object.

Having regard to the considerations alluded to above and the matters that the councillors were obliged to take into account in exercising their discretion in determining the development application pursuant to s 79C(1) of the *EPAA*, including the suitability of the site for the development and the public interest, Basten JA held that the evidence was not sufficient to give rise to a finding of bias thereby invalidating the decision.[50]

To answer the question posed earlier, the statutory approach to judicial review is more than mere judicial camouflage for unwarranted intervention in government action. While the transmogrification from general law statements framed as available grounds of review to the application of general law principles of statutory construction may not provide a complete, or even necessarily uniformly coherent, theory of the breadth and purpose of judicial review, it nevertheless imposes a simpler and more accessible structure within which judges can operate.[51]

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[42] The Hon John Basten, "Statutory Interpretation" (2019) 93 ALJ 367, 367; J Basten, "Legislative Purpose and Statutory Interpretation" in J Barnes (ed), *The Coherence of Statutory Interpretation* (Federation Press, 2019) 134, 147–156. Legislative intention was described as a "state…which serves no useful purpose" by the plurality in *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573, [43]; [2011] HCA 10.

[43] Basten, n 39, 33, quoting J Laws, "Law and Democracy" [1995] PL 72, 79.

[44] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; [2008] NSWCA 209.

[45] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [8], [30]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, [72] (Gleeson CJ and Gummow J); [2001] HCA 17; *Charisteas v Charisteas* (2021) 95 ALJR 842, [11]; [2021] HCA 29.

[46] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [151], [161] (Basten JA); [2008] NSWCA 209.

[47] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [78]–[83] (Basten JA); [2008] NSWCA 209.

[48] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [97] (Basten JA); [2008] NSWCA 209.

[49] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [98]–[99], [102] (Basten JA); [2008] NSWCA 209.

[50] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [161] (Basten JA); [2008] NSWCA 209.

[51] Basten, n 39, 34.

One manifestation of this analysis is that while the function of judicial review for jurisdictional error cannot be wholly abrogated,[52] its scope can nevertheless be curtailed. The rules of procedural fairness are accordingly mutable – not all exercises of power will attract an obligation to afford it,[53] and the availability of review for non-jurisdictional error of law can be ousted.[54] That said, attempts by the legislature to rein in challenges based on procedural fairness have been as ineffective as attempts to promulgate broad privative clauses.[55]

The statutory approach does not result in unconstrained exercises of review because the rules of statutory interpretation are themselves grounded in entrenched general law precepts. Legislation is neither drafted nor construed in a legal vacuum. In an environmental context it would be demonstrably wrong for a court to cure what it perceived to be deficiencies in legislation by "making, unmaking or remaking the law to promote or better implement environmental goals, however worthy, such as achieving ESD [environmentally sustainable development]".[56] Even the seemingly plenary discretionary power conferred upon the LEC by s 9.46(1) of the *EPAA* to grant relief (the court "may make such order as it thinks fit to remedy or restrain the breach" of the Act) is applied against a framework of existing law that fetters the scope of the power notwithstanding the evaluative judgment inherent within it. Even what has been referred to as the "unhelpfully labelled"[57] somewhat amorphous principle of legality,[58] which states that a legislature will not be taken to have intended to abrogate or curtail fundamental principles, infringe rights and freedoms, or depart from the general system of law, without an intention to do so being expressed with irresistible clearness,[59] can be readily displaced.[60]

It must be accepted, however, that the statutory approach has permitted a loosening of the traditional restraints afforded to the judicial review of the merits of a decision (that is, fact-finding). This is particularly so in the area of planning and environmental controls.[61] Courts, such as the LEC, accommodate the interpretation of statutory criteria as factual preconditions (so-called "jurisdictional facts") to the engagement of administrative power, thereby permitting the court to determine for itself, on the evidence before it, whether the necessary fact or circumstance existed, and therefore, whether or not the power purportedly exercised was properly engaged. Examples include, *Timbarra Protection Coalition Inc v Ross Mining NL* (whether a development was "likely to significantly affect threatened species" thereby requiring a species impact statement to accompany the development application[62]), *City of Enfield v Development Assessment Commission* (whether a proposed development was "special industry" or "general industry", and therefore, whether or not it was prohibited development under s 33(1)(a) of the *Development Act 1993* (SA)[63]) and *Woolworths Ltd v Pallas Newco Pty Ltd* (*Pallas*

[52] See *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1.

[53] See, eg, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ); [2012] HCA 31.

[54] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4.

[55] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.

[56] Hon B Preston, "Leadership by the Courts in Achieving Sustainability" (2010) 27 EPLJ 321, 325.

[57] Hon J Basten, "The Principle of Legality – An Unhelpful Label?" in D Meagher and M Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 74, 74.

[58] Which Justice Basten has described as a label that "is unhelpful, not to say misleading": Basten, n 8, 97.

[59] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, [19]–[20] (Gleeson CJ); [2004] HCA 40; *Lee v NSW Crime Commission* (2013) 251 CLR 196, [312]–[313] (Gageler and Keane JJ); [2013] HCA 39; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [158] (Kiefel J); [2013] HCA 29 (as she then was).

[60] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [81] (Gageler J); [2015] HCA 41.

[61] Basten, n 8, 95.

[62] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, [22] (Spigelman CJ); [1999] NSWCA 8.

[63] *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5.

Newco) (concerning the characterisation of the use nominated in a development application as permissible with consent under the *Ashfield Local Environmental Plan 1985* (NSW)[64]).

By contrast, in *Trives v Hornsby Shire Council* (*Trives*), the NSWCA held that a private certifier's determination that a development was "complying development" for the purpose of s 76A of the *EPAA* was not a jurisdictional fact and could not be subject to challenge.[65] The NSWCA (Basten JA, with whom Macfarlan and Meagher JJA agreed) noted that preconditions to the engagement of power come in different forms, but that in each case the question was one of statutory construction.[66] The statutory scheme with respect to complying development certificates under s 85A of the *EPAA* in *Trives* was materially different to that applying to grants of development approvals by consent authorities under the Act at issue in *Pallas Newco*. In the former, the characterisation of the development as complying development was a final subjective determination by the certifier and not a precondition to the exercise of power to grant a complying development certificate. Once the certifier arrived at the opinion that the development was complying development, the certifier could not refuse to issue a certificate. Whereas in *Pallas Newco*, the characterisation of the development being evaluated under s 80 of the *EPAA* was preliminary or ancillary to the exercise of power to grant consent, and therefore, was amenable to review.

In *Trives* Basten JA opined that the moniker of "jurisdictional fact" was "unhelpful" and "potentially confusing".[67] There is no doubt an "awkwardness"[68] in identifying a factual judgment as a statutory precondition to the exercise of administrative power, but the language of "jurisdictional fact" remains a practical acknowledgment of a core tenet of statutory interpretation, namely, that the scrutiny of judicial review "will depend first upon the statutory regime".[69] To engage in this level of review of the actions of a particular administrative decision-maker is not to erode the judicial restraint urged upon courts by *Quin.* On the contrary, it is to observe the proper limits of statutory power enacted by the legislature and to ensure that they are not transgressed. Such an approach conforms with the strident rejection of the concepts of comity and deference to other branches of government in undertaking judicial review,[70] and recognises that the outer limits of judicial review are explicable by reference to the separation of powers.[71]

It was therefore with ease that the High Court of Australia in *Forrest & Forrest Pty Ltd v Wilson* held that an application for a mining lease that was not accompanied by a mineralisation report as stipulated by the words of the statute rendered invalid the Mining Warden's report and the subsequent recommendation to the relevant Minister (the report was furnished but not at the time the application was made).[72] Having regard to the text and context of the *Mining Act 1978* (WA), the Court determined that the requirement for a mineralisation report was expressed in specific terms as a statutory precondition to the exercise of jurisdiction by the Mining Warden. Applying *Project Blue Sky Inc v Australian Broadcasting Authority*,[73] the Court held that because the very persons who would be impacted by the consequence of invalidity had been responsible for it, a declaration of invalidity ought to be made.

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[64] *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 422.

[65] *Trives v Hornsby Shire Council* (2015) 89 NSWLR 268; [2015] NSWCA 158.

[66] *Trives v Hornsby Shire Council* (2015) 89 NSWLR 268, [12], [17] (Basten JA); [2015] NSWCA 158.

[67] *Trives v Hornsby Shire Council* (2015) 89 NSWLR 268, [10], [52] (Basten JA); [2015] NSWCA 158.

[68] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, [130] (Gummow J); [1999] HCA 21.

[69] Hon J Basten, "Judicial Review: Intensity of Scrutiny" (Speech delivered at the Land and Environment Court Conference, 9 May 2008) 10.

[70] *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 eschewing the doctrine espoused in *Chevron USA Inc v Natural Resources Defence Council Inc*, 467 US 837 (1984).

[71] Hon J Basten, "Judicial Review: Grounds, Standards & Intensity of Review or 'Who Is Miss Behavin?'" (Speech delivered at the Land and Environment Court Conference, 6 May 2011) 5.

[72] *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 (Kiefel CJ, Bell, Gageler and Keane JJ, Nettle J in dissent); [2017] HCA 30.

[73] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28.

Trives is also significant because of Basten J's observations as to the effect of s 101 of the *EPAA*, which imposed a three month time limit on the bringing of judicial review proceedings in the LEC. The question was whether s 101, as a form of privative clause, impermissibly limited the function of superior State courts, contrary to s 73 of the *Constitution*, to engage in review given the exclusive jurisdiction of the LEC with respect to that Act.[74] While the imposition of time limits serves to minimise "uncertainty with respect to the valid operation of a relevant consent or certificate", which is plainly in the public interest,[75] his Honour noted that the effect of a time limitation was not discussed in *Kirk v Industrial Court (NSW)* (*Kirk*), and moreover, that in *Bodruddaza v Minister for Immigration and Multicultural Affairs*,[76] it was stated that there can be significant practical difficulties with limitation periods expressed in absolute terms which deny discretion to a court to extend time.[77]

This question is indeed "large"[78] given that environment and planning legislation is replete with uncompromising time bars. His Honour's consideration of time limitations as privative clauses in the context of planning and environmental law has been cited and applied in a number of cases.[79] In *WaterNSW v Harris (No 3)*, Robson J relied upon Basten JA's *obiter dicta* in *Trives* to hold that the time limitation contained in s 47 of the *Water Management Act 2000* (NSW) operated to exclude the respondents' challenge to the *Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012*.[80]

A further issue arises in respect of Parliament's ability to allocate what would otherwise be the jurisdiction of a State supreme court to another judicial forum, such as the LEC. In New South Wales judicial review of decisions made pursuant to a number of environmental and planning laws is vested in the LEC (a superior court of record) to the exclusion of the Supreme Court of New South Wales.[81] It is at least arguable that such allocation is valid because rights of appeal exist from decisions of single judges of the LEC to the NSWCA. Nonetheless, as Justice Basten has observed, the existence of a right of appeal from a single judge of the Industrial Court to the NSWCA made no difference in *Kirk*.[82]

Not dissimilarly, the legitimacy of other types of privative clauses that exist in an environmental and planning context, such as s 8.6(3)(a) of the *EPAA*, which precludes judicial review of an IPC decision made consequent upon a public hearing, remains uncertain. The question is more than one of academic interest, having very real implications for access to justice, a core component of sustainable development.[83]

V. WHAT LEVEL OF SCRUTINY?

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[74] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [55]; [2010] HCA 1, cited in *Trives v Hornsby Shire Council* (2015) 89 NSWLR 268, [45] (Basten JA); [2015] NSWCA 158.

[75] *Trives v Hornsby Shire Council* (2015) 89 NSWLR 268, [41] (Basten JA); [2015] NSWCA 158.

[76] *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; [2007] HCA 14.

[77] *Trives v Hornsby Shire Council* (2015) 89 NSWLR 268, [48]–[49] (Basten JA); [2015] NSWCA 158.

[78] *Trives v Hornsby Shire Council* (2015) 89 NSWLR 268, [49] (Basten JA); [2015] NSWCA 158.

[79] See also M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 7th ed, 2022) 1074.

[80] *WaterNSW v Harris (No 3)* [2020] NSWLEC 18, [216]–[221] (Robson J).

[81] *Land and Environment Court Act 1979* (NSW) s 71.

[82] *Land and Environment Court Act 1979* (NSW) s 58. See J Basten, "The Supervisory Jurisdiction of the Supreme Courts" (2011) 85 ALJ 273, 295.

[83] Preston, n 56, 326.

The fact that most questions of power demand close attention to the statute conferring it gives rise to a multiplicity of issues,[84] especially when dealing with environmental legislation which is often drafted as a scheme of rules expressed at a high level of generality.[85]

As discussed above, any expansion of the scope of judicial review has a tendency to usurp the role of the executive and the legislature and risks erosion of the rule of law. While the words of the statute conferring power provide a constraint on judicial power, the principles of statutory construction should not be conflated with obligations that condition the exercise of that power. As Justice Basten has pointed out, to focus exclusively on the statute in judicial review proceedings means that, over time, there has been an increasing justification and reliance upon judicially expounded principles of statutory interpretation.[86] The resultant circularity is obvious.

If, however, the development and application of principles of statutory construction take place within the rubric of accepted public law values (comprising procedural fairness, reasonableness and rationality, as explained above),[87] this should mitigate against judicial overreach, especially in the face of clear and unambiguous statutory language conferring administrative power.[88] For these "'rule of law' values"[89] contain an irreducible minimum against which all administrative decision-making must be measured and which are largely immune from legislative circumcision.

While the level of scrutiny to which a court can permissibly descend in any challenge to government action is plainly governed by the statute, sometimes the text of the legislation will yield no reference to the precision with which the judicial task is to be carried out. It is these touchstone general law values, together with an examination of the text and context of the statutory framework, that can guide the court in its review.

Adoption of a general values-based approach to judicial review has the additional benefit of enabling the abandonment of "the fiction of statutory implication".[90] Statutory implications are notoriously slippery, both in scope and slope, and are apt to override limitations on the judicial review function derived from the fabric of our system of representative democracy. By grounding review of administrative action, and the canons of construction used to engage in that process, in enduring values of fairness, reasonableness and rationality, any conflict between the text used to confer power on a decision-maker and the curial supervision and possible restraint of the exercise of that power, becomes more transparent in both its identification and its resolution.

VI. THE WORK BEGINS WHERE THE STATUTE BEGINS

It is no longer the case that the courts "are working where the statute runs out".[91] On the contrary, at least in respect of any environment and planning court, it is where the works begins.

The ascendent paramountcy of legislation in almost all aspects of environment and planning law is now entrenched. Concomitant with this acceptance has been a recognition that the construction of statutes must be carried out in a principled and structured manner by courts to ensure that its supervisory function

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[84] Hon J Basten, "Construing Statutes Conferring Powers – A Process of Implication or Applying Values?" in J Boughey and L Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 54, 54.

[85] Such as the need to take into account the "the public interest" in *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(1)(e).

[86] Basten, n 84, 54, 54.

[87] Hon J Basten, "Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?" in N Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 35, 39–40.

[88] See, eg, Basten, n 69; Hon J Basten, "Modern Judicial Review – An Overview" (Speech delivered at the Western Australian Bar Association CPD Conference, 4 November 2015); Basten, n 71; Basten, n 30; Basten, n 78, 54, 61–67; Basten, n 87, 35, 39–49; Basten, n 39.

[89] Basten, n 84, 54, 66.

[90] Basten, n 84, 54, 66–67.

[91] Basten, n 88, 18.

does not subvert the doctrine of the separation of powers. This is particularly important when regard is had to the increasing proliferation of environmental planning enactments and instruments, often stated at high levels of generality, that confer broad discretionary powers upon executive decision-makers.

It is recourse to fundamental public law values of fairness, reasonableness and rationality that can provide an appropriate foundational basis to guide the content and application of the principles of statutory interpretation, thereby guarding against a judiciary acting in a manner antithetical to its constitutional mandate. In articulating this doctrinal vision, Justice Basten seeks to institute coherence and discipline on what may otherwise be rightly described as “an incoherent jumble of maxims and presumptions and no clear priority for their application in particular circumstances”.[92] There is much to commend this course.

[92] *Swearing in Ceremony of John Basten QC as a Judge of the Supreme Court of NSW*, n 2, [42].