



Jurisdictional error, invalidity and the role of injunction in s 75(v) of the Australian Constitution

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This article looks at how recent legislation limiting the right to judicial review of administrative decisions has brought into focus the High Court's constitutionally entrenched jurisdiction under s 75(v) of the Australian Constitution to grant the remedies of prohibition, mandamus and injunction against officers of the Commonwealth. This has caused 'jurisdictional error' to re-emerge as a central concept in Australian administrative law, because prohibition and mandamus are only available for jurisdictional error and the courts have generally behaved as if injunction in s 75(v) is similarly limited. Despite much recent High Court litigation (especially in the field of migration law), many issues remain unresolved. Among them are: (1) How exactly does one differentiate between jurisdictional and non-jurisdictional errors? (2) Is the remedy of injunction in s 75(v) of the Constitution limited to jurisdictional error and, if not, why is the focus on jurisdictional error in s 75(v) jurisprudence not misplaced? (3) What is the relationship between the concepts of jurisdictional error and invalidity — are all decisions affected by jurisdictional error nullities? This article seeks use an exploration of question (3) as a means of proposing answers to questions (1) and (2).

In reply to this article are two comments. One is by Dr Melissa Perry that suggests that more emphasis might be placed upon the purpose of judicial review in the federal context to assist in distinguishing between jurisdictional and non-jurisdictional errors. It also comments, among other matters, upon the argument in this article that a decision may be invalid for certain purposes only.

The second is by Geoffrey Kennett who suggests that in light of the position occupied by the principle of ultra vires in Australian administrative law, issue is taken with some aspects of the argument advanced in this article.

A response by Benjamin O'Donnell follows these comments.

Introduction

Legislatures routinely give government officials powers to change people's rights and liabilities — for example, licensing powers, visa powers, subsidy

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entitlement decisions and decisions regarding discretionary taxation liabilities. Such powers come with conditions on when they are to be exercised and requirements on how the relevant officials are to exercise them. When those limits are not fully met, questions arise as to whether the people affected can seek relief from the courts; that is, whether they can seek judicial review of the relevant official's exercise or purported exercise of the power.¹

The common law empowers superior courts of record to grant the prerogative writs against officers exercising such powers, particularly the writs of certiorari, prohibition and mandamus. Courts of equity are empowered to grant the remedies of declaration and injunction. Various statutes, such as the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act), give courts even wider powers. But parliament has the power to take away any and all of these remedies.

However, as a result of s 75(v) of the Commonwealth Constitution, the Commonwealth Parliament cannot exclude the High Court's power to grant the remedies of prohibition, mandamus and injunction against officers of the Commonwealth.² With the possible exception of injunction (discussed below), the s 75(v) remedies are only available for 'jurisdictional error'. Remedies for errors that do not rise to the level of jurisdictional error (ie, 'errors within jurisdiction') may be available at common law or under a statutory judicial review scheme such as the ADJR Act but, as noted above, these can be taken away by parliament. Thus the 'entrenched minimum'³ for judicial review appears to be the High Court's power under s 75(v) to review Commonwealth decisions for jurisdictional error.

The resurgence of jurisdictional error

Until recently, jurisdictional error was not a major topic in Australian legal discourse — whether in the courts, the journals or the classroom. Indeed, in the eighties and early-to-mid nineties, questions of jurisdictional error were often seen as being of peripheral and diminishing importance.⁴ This view had two main bases.

First, the vast majority of judicial review was done under the ADJR Act, where questions of jurisdiction and jurisdictional error do not have the central importance they have under the common law and s 75(v) of the Constitution. At the State level, much judicial review occurred either under regimes that adopted the ADJR Act model,⁵ or in circumstances where the statutory

1 The exercise of prerogative powers is beyond the scope of this article. The grant of powers by legislatures to private individuals or bodies who are not government officers, and the reviewability of those powers, is also beyond the scope of this article. On the latter point, however, see generally S Gageler, 'The legitimate scope of judicial review: The prequel' (2005) 26 *Aust Bar Rev* 303.

2 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; 195 ALR 24 (*Plaintiff S157*).

3 *Ibid*, at [103] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

4 For a rough indication of the increased importance of the concept, compare the number of page references for the term 'jurisdictional error' in the index to M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, 3rd ed, Thomson Lawbook Co, Sydney, 2004 (over 50 references) with the same index entry in the 2nd edition: M Aronson and B Dyer, *Judicial Review of Administrative Action*, 2nd ed, LBC Information Services, 2000 (around 25 references).

5 Similar statutes exist in the Australian Capital Territory: the Administrative Decisions

versions of the common law writ of certiorari were widely available, in some cases even for errors of law not appearing on the face of the record.⁶

Secondly, the distinction between jurisdictional errors and errors within jurisdiction was (and largely still is) very difficult to draw. Many commentators saw this as an indication that it was, in reality, a distinction without a difference. There was a feeling that the High Court would eventually follow the House of Lords' decision in *Anisminic Ltd v Foreign Compensation Commission*⁷ and effectively abolish the distinction between jurisdictional and non-jurisdictional errors of law. Jurisdictional error, it was sometimes thought, was an anachronism, a holdover from the ancient origins of the prerogative writs, which would eventually fade away to extinction.⁸

This widely held view of the eighties and early-to-mid nineties has turned out to be very wrong. Jurisdictional error has returned with a vengeance to take a central place in Australian administrative law. This has been the result of the direct contradiction of the two factors that underlay the eighties and early-nineties view.

First, as the Commonwealth Parliament increasingly removed certain administrative decisions from the ambit of the ADJR Act, common law judicial review, as preserved and entrenched as part of the High Court's original jurisdiction by s 75(v) of the Constitution, took on a renewed practical significance. Perhaps the most litigated statute in Australian administrative law in recent years has been the Migration Act 1953 (Cth). In 1992 the Commonwealth Parliament removed most decisions under that Act (and particularly the often-litigated refugee decisions) from the ambit of the ADJR Act and took away the Federal Court's power to grant the prerogative writs under s 39B of the Judiciary Act 1903 (Cth) with respect to those decisions. Instead the Commonwealth inserted a kind of 'mini-ADJR Act' into the Migration Act — but this mini-ADJR Act lacked many of the grounds of review that were available under the real ADJR Act.⁹ Prominent among the

(Judicial Review) Act 1989 (ACT); Queensland: the Judicial Review Act 1991 (Qld); Tasmania: the Judicial Review Act 2000 (Tas) and, to much a lesser extent, Victoria: the Administrative Law Act 1978 (Vic) and New South Wales: Administrative Decisions Tribunal Act 1997 (NSW).

6 New South Wales, South Australia, Western Australia and the Northern Territory rely primarily on the common law prerogative remedies, or procedurally simpler statutory 'orders in the nature of' the relevant writ: see, eg, Supreme Court Act 1970 (NSW) s 69; Supreme Court Act 1986 (Vic) s 3(6). As to 'error of law on the face of the record', see below.

7 [1969] 2 AC 147 (*Anisminic*).

8 See, eg, S A de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action*, 5th ed, Sweet & Maxwell, London, 1995, p 256 [5-043]:

It is, however, doubtful whether any test of jurisdictional error will prove satisfactory. The distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand. Much of the superstructure has already crumbled. What remains is likely to quickly fall away as the courts rightly insist that all administrative action should be, simply, lawful, whether or not jurisdictionally lawful.

An echo of this view can be found today in Kirby J's reference to the distinction as 'chimerical' and his repeated calls for Australia to follow the *Anisminic* course: see, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; 179 ALR 238 at [212] (*Miah*), quoted below.

9 See the former Pt 8 of the Migration Act 1958 (Cth), as it existed prior to the commencement

few that remained were the ADJR Act equivalents of jurisdictional error.¹⁰ Moreover, while the Federal Court could no longer grant the prerogative writs with respect to migration decisions, parliament could not take away the High Court's power to grant the 'constitutional writs' under s 75(v) of the Constitution. After the High Court affirmed the validity of these amendments in *Abebe v Commonwealth*,¹¹ the High Court's original jurisdiction was flooded with refugee applicants seeking judicial review of the Refugee Review Tribunal's (RRT) decisions to reject their asylum claims.¹² As McHugh and Gummow JJ said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*:

Section 75(v) of the Constitution entrenches a minimum measure of judicial review. The parliament may legislate to provide in a broader measure for federal judicial review. In some respects, the parliament did so when enacting the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act) and conferring jurisdiction thereunder on the Federal Court. Subsequently, the parliament legislated to contract the scope of the ADJR Act, in particular as regards decisions under the [Migration] Act. . . . The contraction in the operation of the ADJR Act has attached added significance to s 75(v). *The decisions upon s 75(v), which extend across the whole period of the court's existence, may have been overlooked or discounted by administrative lawyers as being largely of immediate concern for industrial law. That, as this litigation illustrates, can no longer be so.*¹³

Secondly, the High Court has rescued jurisdictional error from its widely predicted fate as an historical anachronism. In 1995 in *Craig v South Australia*,¹⁴ the court in obiter affirmed the central place of jurisdictional error in the review of administrative decision-making. In 2001, the High Court adopted this obiter as part of its ratio in *Minister for Immigration and Multicultural Affairs v Yusuf*.¹⁵ The court made it clear that jurisdictional error was the central gatekeeper for the constitutional writs (though, as we shall see, there remains a question about the s 75(v) remedy of injunction). As failed

of the Migration Legislation Amendment (Judicial Review) Act 2001 (Cth) (No 134 of 2001). (This Part was originally introduced as Pt 4B 'Review of Decisions by Federal Court' by the Migration Reform Act 1992 (Cth) (No 184 of 1992) but the part and sections were later renumbered by the Migration Legislation Amendment Act 1994 (Cth) (No 60 of 1994).) In particular the former s 476 (as numbered after 1994) conferred jurisdiction on the Federal Court to review migration decisions, but restricted that court to a menu of grounds of review more limited than those in the ADJR Act; s 485(1) excluded the Federal Court's jurisdiction under s 39B of the Judiciary Act 1903 (Cth); and s 481(3) limited the powers exercisable by the Federal Court on the remittal of proceedings begun in the original jurisdiction of the High Court to those powers it had under Pt 8.

¹⁰ See former Migration Act ss 476(1)(b) and 476(1)(c); cf ADJR Act ss 5(c) and 5(d). See generally *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; 180 ALR 1.

¹¹ *Abebe v Commonwealth* (1999) 197 CLR 510; 162 ALR 1 (*Abebe*).

¹² See *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [7]–[15] per McHugh J (sitting alone) for a useful discussion of the amendments and their effects. As McHugh J pointed out, the High Court had been aware, and had even predicted, that this might occur.

¹³ (2003) 198 ALR 59; 77 ALJR 1165 at [27] (emphasis added) (*Applicant S20*).

¹⁴ (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; 131 ALR 595 (*Craig*).

¹⁵ (2001) 206 CLR 323; 180 ALR 1 at [82] per McHugh, Gummow and Hayne JJ; see also at [1] per Gleeson CJ (agreeing) (*Yusuf*).

refugee applicants increasingly ran parallel actions in both the Federal Court and in the High Court's original jurisdiction (or abandoned the Federal Court altogether and just litigated in the High Court) the High Court was given numerous opportunities to elaborate on the nature of jurisdictional error.¹⁶

Moreover, in 2001, the Commonwealth Parliament replaced the 'mini-ADJR Act' in the Migration Act with a privative clause purporting to deprive all courts of the jurisdiction to review many of the most litigated decisions under that Act.¹⁷ In *Plaintiff S157*,¹⁸ the court held that a decision infected by jurisdictional error was not a 'decision' for the purposes of the privative clause, and thus that the privative clause did not protect decisions infected by jurisdictional error from judicial review. Thus, paradoxically, the insertion of the privative clause resulted in the Federal Court once again becoming the primary venue for judicial review of refugee decisions — but subject to the limitation that review could only be granted where there was jurisdictional error.¹⁹ In the course of various Federal Court decisions and Full Court and High Court appeals, the concept of 'jurisdictional error' was thus further elaborated and developed.

The resulting statements of principle have thrown light on the meaning of jurisdictional error and the nature of judicial review generally. While most of this recent development has occurred in the context of migration law, the resulting jurisprudence has implications across the whole range of administrative law — that is, to the law governing the powers of government officials and bodies and the ability of private individuals and organisations to seek redress when they are aggrieved by a particular government decision or act.

Unresolved questions

Nevertheless, many issues remain unresolved. Among these are the three I address in this article:

(1) Jurisdictional vs non-jurisdictional errors

First, exactly how does one distinguish between jurisdictional error and errors within jurisdiction? The High Court has said that jurisdictional error may consist, *inter alia*, of identifying the wrong issue, asking the wrong question, relying on irrelevant material, ignoring relevant material, making an erroneous finding, breaching the rules of procedural fairness or (in some cases) reaching a mistaken conclusion.²⁰ Many of these are also grounds commonly relied on in applications for certiorari or review under the ADJR Act, which are not

16 See S Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Aust Bar Rev* 279 at 283.

17 Migration Legislation Amendment (Judicial Review) Act 2001 (Cth) (No 134 of 2001). See especially the new s 474, discussed in more detail below.

18 (2003) 211 CLR 476; 195 ALR 24.

19 The judicial review of migration decisions is now primarily the province of the Federal Magistrates Court, with the Federal Court largely restricted to appellate jurisdiction: see ss 476 and 476A of the Migration Act as inserted by the Migration Litigation Reform Act 2005 (Cth) (No 137 of 2005).

20 See *Craig* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; 131 ALR 595; *Yusuf* (2001) 206 CLR 323; 180 ALR 1 at [82] per McHugh, Gummow and Hayne JJ.

limited to jurisdictional error.²¹ Does this mean that any error that would justify an ADJR Act remedy or certiorari will also amount to jurisdictional error sufficient to justify the remedies of prohibition or mandamus? If not, how does one distinguish between, for example, a failure to take account of relevant material that would justify a grant of prohibition or mandamus, on the one hand; and a failure to take account of relevant material that could only be remedied by certiorari or ADJR Act review (if those remedies are available), on the other?

(2) Injunction

Secondly, what is the role of injunction in s 75(v) of the Constitution? The history of injunction in general, and High Court dicta on its role in s 75(v) in particular, indicate that injunction lies for all errors of law. Does this mean that the focus on jurisdictional error in the s 75(v) jurisprudence is misplaced, because what prohibition and mandamus cannot do, injunction can? If so, was Kirby J correct when he wrote in 2001 that:

The foundation for the availability of the constitutional writs, and the remedy of injunction, provided in s 75(v) of the Constitution, is not, in my opinion, finally settled. For example, in *Abebe v Commonwealth*, Gaudron J pointed out that 'it may well be' that an injunction, being a remedy mentioned in that paragraph, would lie 'to prevent an officer of the Commonwealth from giving effect to an administrative decision based on error, even if that error is not jurisdictional error'. If that is so, no rational foundation would exist for confining the constitutional writs, otherwise mentioned in the paragraph, to the provision of relief where jurisdictional error is demonstrated. . . .

. . . Once it is appreciated that the writs referred to in s 75(v) are distinct, are not confined to their historical provenance, have high constitutional purposes in Australia and may adapt over time within the limits of their essential characteristics, *the old insistence upon preserving the chimerical distinction between jurisdictional and non-jurisdictional error of law might be interred, without tears, in Australia as has happened elsewhere.*²²

(3) Validity and nullity

Finally, what exactly is the relationship between jurisdictional error and the concept of 'invalidity' or 'nullity'? Are all jurisdictionally flawed decisions invalid or nullities? Are there degrees of invalidity or nullity?²³

The argument of this article

My argument is, in essence, an attempt to use an exploration of question (3) as a means of proposing answers to questions (1) and (2). That is, I argue that the relationship between validity and jurisdictional error sheds light on both the distinction between jurisdictional and non-jurisdictional error and on the role of injunction in s 75(v).

21 Compare ADJR Act s 5 with *Craig* (1995) 184 CLR 163 at 175–6 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; 131 ALR 595.

22 *Miah* (2001) 206 CLR 57; 179 ALR 238 at [211]–[212] (emphasis added; footnotes omitted). See also Aronson, Dyer and Groves, above n 4, pp 27–8.

23 See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; 187 ALR 117 (*Bhardwaj*) and *Jadwan Pty Ltd v Secretary of the Department of Health and Aged Care* (2003) 145 FCR 1; 204 ALR 55 (*Jadwan*), discussed below.

The basic premise of my argument is that there is an intimate connection between the concepts of jurisdictional error and invalidity — in that all decisions affected by jurisdictional error will be invalid *in some sense*; whereas decisions affected by mere errors within jurisdiction will not be invalid in any sense, unless subsequently invalidated (ie, ‘quashed’) by a writ of certiorari or an equivalent order under a statutory judicial review scheme.²⁴

However, in so arguing, I agree with those who call for a more nuanced understanding of terms such as ‘validity’ or ‘nullity’. I argue that these terms are merely shorthands for the more subtle question: ‘For what purposes (if any) will a decision flawed in the relevant way be treated as a “decision” under the law that granted the relevant decision-making power?’ What we really mean when we speak of ‘invalidity’ is that the law typically attaches a bundle of consequences to administrative decisions and that a jurisdictional error is a slip in the decision-making process that causes some or all of those consequences to ‘fall out of the bundle’ — ie, to not attach to the jurisdictionally flawed decision as they would have to an unflawed decision. Jurisdictional error has this effect because it causes the decision-making process that actually occurred to fail to sufficiently resemble the process described in the statute as having the relevant legal consequences.

I argue that a useful means of drawing the vexed distinction between jurisdictional error and errors within jurisdiction may be to look at the problem ‘backwards’ — ie, to look at the *consequences* of the error, in terms of invalidity, as the litmus test for determining whether the error goes to jurisdiction. On this view, failure to comply with a given prerequisite or condition on the exercise of a decision-making power will only constitute jurisdictional error if it would also result in the decision being ‘invalid’, in the sense in which that term was used by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*.²⁵

That is to say, jurisdictional error will only occur where the legislature intended that a breach of the requirement at issue would result in invalidity (or, to be more precise, where it intended that a breach would cause the decision to not have some or all the legal consequences of an unflawed decision). To put the proposition in the pre-*Project Blue Sky* terminology, jurisdictional error is the breach of a ‘mandatory’ requirement on the exercise of a power; whereas errors within jurisdiction are breaches of ‘directory’ requirements.

Approaches similar to this have been urged upon the court by practitioners for some time and such an approach seems to have been adopted by McHugh, Kirby and Hayne JJ in the recent case of *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* — though their Honours there spoke of ‘imperative’ rather than ‘mandatory’ requirements.²⁶ On this view, leaving aside injunction for the moment, s 75(v) is the Constitution’s ‘guardian against

²⁴ See, eg, ADJR Act s 16(1)(a).

²⁵ (1998) 194 CLR 355; 153 ALR 490 (*Project Blue Sky*).

²⁶ (2005) 215 ALR 162; 79 ALJR 1009 at [72]–[78] per McHugh J, [173] per Kirby J, [205] per Hayne J (*SAAP*); see also *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171; 80 ALJR 367 at [70]–[72], [75]–[76], [85] per Kirby J, [140] per Callinan and Heydon JJ (*NAIS*).

invalidity', rather than illegality more broadly.²⁷

On this schema, the traditional administrative law 'grounds of review' will not always be enough to constitute jurisdictional error. The best way to understand the traditional grounds of review is as a checklist of requirements or conditions on the exercise of a decision-making power that are either readily implied into statutes or are imposed independently by the common law.²⁸ The traditional grounds of review will constitute requirements on the exercise of a power unless the enabling law evinces an intention to exclude them.²⁹ However, whether a breach of one of these requirements amounts to jurisdictional error, and thus whether the constitutionally protected remedies of prohibition or mandamus are available, depends on whether that requirement is 'mandatory' or 'imperative' — and this will depend upon whether it was intended that a breach of the requirement would render the decision invalid in some way. The general law may presume that some (or perhaps all) of the traditional grounds of review represent imperative requirements (and thus lead to invalidity) — the obligation to accord procedural fairness seems to be subject to a particularly strong presumption of this sort³⁰ — but that presumption can be displaced by evidence of a contrary legislative intention. Thus it is possible that, in a given statutory context, a failure to consider relevant material (for example) might be an error within jurisdiction justifying the remedies of certiorari or an order under the ADJR Act (if either has not been excluded by legislation); but not a jurisdictional error that would render the decision invalid and would justify the constitutionally entrenched remedies of mandamus and prohibition.

Furthermore, a focus on the intimate connection between the concepts of jurisdictional error and invalidity may also illuminate the role of injunction in s 75(v) of the Constitution. On the schema presented in this article, injunction serves a role analogous to that of the remedies for 'conduct' in s 6 of the ADJR Act, as a means of repairing errors within jurisdiction *before a decision is finalised*. If, as I argue, errors *within* jurisdiction do not result in any form of invalidity, then injunction cannot cure such an error once the decision has been finalised. This is because, unlike the remedy of certiorari, injunction cannot retrospectively invalidate ('quash') a previously valid decision; and if a decision is valid, it must be given all of its ordinary legal consequences. If this view is correct then, contrary to Kirby J,³¹ the presence of injunction in s 75(v) provides no basis for eliminating the distinction between jurisdictional and non-jurisdictional error.

Finally, a focus on the connection between jurisdictional error and invalidity may help to reconcile apparently contradictory decisions on the

27 See *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; 127 ALR 21 at 204–5 per Deane and Gaudron JJ (*Richard Walter*) — but note Deane and Gaudron JJ also spoke of 'illegality' in the same passage.

28 Gageler, above n 16, at 287.

29 For a clarification of this sentence, see the commentaries on this article and my response.

30 See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; 176 ALR 219 (*Aala*) at [41] per Gaudron and Gummow JJ, (Gleeson CJ agreeing at [5]) and [142] per Kirby J and the authorities cited there.

31 *Miah* (2001) 206 CLR 57; 179 ALR 238 at [211]–[212] per Kirby J, quoted above.

effect of privative clauses, such as *Plaintiff S157*³² and *Re Hickman; Ex parte Fox*,³³ on the one hand, and *Richard Walter*,³⁴ on the other. Privative clauses such as the ones in *Plaintiff S157* and *Hickman* attempt, in terms, to do the impossible by excluding the High Court's s 75(v) jurisdiction. Such clauses rely on the courts to radically re-interpret them as provisions expressing an answer to the 'Project Blue Sky question' of which requirements in the statute the legislature intended to be imperative. By contrast, the clause in *Richard Walter* — '[t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with'³⁵ — was an explicit, direct answer to the *Project Blue Sky* question. Such a direct 'Project Blue Sky clause' seems more likely to drive the courts back towards the 'Hickman three' than an indirect privative clause such as those examined in *Plaintiff S157* and *Hickman*.

Structure of this article

This article seeks to serve two differing (some might say conflicting) purposes. First, the 'Background' section attempts to provide a comprehensive but accessible survey of the current High Court authority on the concept of jurisdictional error and its role in Australian constitutional and administrative law. Secondly, the 'Argument' section seeks to build the argument outlined above.

Background

One of the difficulties in this area is that different judges and commentators often mean different things when they use the same terms. It is thus useful to be explicit about what is meant in this article by the following key terms:³⁶

32 (2003) 211 CLR 476; 195 ALR 24.

33 (1945) 70 CLR 598 (*Hickman*).

34 (1995) 183 CLR 168; 127 ALR 21.

35 Income Tax Assessment Act 1936 (Cth) s 175.

36 Another term, 'ultra vires', is not used in this article. Ultra vires literally means 'beyond power' or 'beyond powers'. Acts by a government agency or official done without legal authority are usually described as ultra vires. In Australia the term 'ultra vires' is most commonly used to describe purported exercises of legislative power by legislative bodies that go beyond the scope of their legislative power. The term is also used to describe unauthorised action by administrative bodies. It is rarely used to describe unauthorised action by courts, which are more commonly referred to as having acted 'outside jurisdiction': see R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary*, LexisNexis Butterworths, Australia, 2005, at [8.2.5]. However, in Australia, the reciprocal point cannot be made about the term 'jurisdictional error'. While a large part of the early development of the concept of jurisdictional error was in the context of ensuring courts remained within their jurisdiction (see the discussion on this issue in the main text below), its central role in the key prerogative writs of prohibition and mandamus and those writs' entrenchment in s 75(v) of the Constitution (also discussed below) means that the term 'jurisdictional error' is applied in Australia as much (if not more) to administrative as to judicial decision-making. As noted above, after *Anisminic* [1969] 2 AC 147, England has generally been thought to have abandoned the concept of jurisdictional error. Justice Basten, however, has argued that latter English cases can be interpreted as having replaced the term 'jurisdictional error' with 'ultra vires' and that the central organising role of the concept of 'ultra vires' in English public law may be seen as performing roughly the same function as 'jurisdictional error' in Australian administrative law: J Basten, 'Constitutional Elements of

- (1) *Power*: ‘Power’ generally refers to the legal authority of a government agency or official to do something. The principle of legality requires governments and their officers, employees and agencies to have legal authority for all their actions.³⁷ Often, but not always, ‘power’ is used to describe the legal authority to do something to or affecting another person in a coercive manner.³⁸
- (2) *Jurisdiction*: ‘Jurisdiction,’ wrote Gleeson CJ and McHugh J in *Abebe*, ‘is the authority to decide’.³⁹ A more explanatory, if somewhat less pithy, definition is that jurisdiction is the power to authoritatively decide an issue of fact or law in a final and determinative manner that has legal consequences in the sense that it changes people’s rights and liabilities.
- (3) *Jurisdictional error*: A good working definition of ‘jurisdictional error’ is an error that causes a decision-maker to act outside his or her jurisdiction — that is, an error that causes a decision-maker to:
 - (a) decide something that it had no power to decide; or
 - (b) decide something that it *did* have power to decide — but in a manner or using a method that breached an essential pre-requisite for or condition on its power to decide it, such that the decision-maker was not really exercising the granted jurisdiction at all.

I propose a more elaborate definition of jurisdictional error later in this article, linking the concept directly to the concept of validity, but the above is not incorrect and is useful for current purposes.

Judicial Review’ (2004) 15 *Public L Rev* 187 at 188. Nevertheless, while the doctrine of ultra vires may serve the same functional role in England as that served by jurisdictional error in Australia, the two countries’ approaches to administrative law have sufficiently diverged that English cases and texts more often confuse than clarify issues for Australian administrative lawyers. It is for this reason that I have deliberately eschewed the language of ultra vires in this article.

37 See, generally, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564 (the court); 145 ALR 96; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 417 per Lord Roskill; [1984] 3 All ER 935; *A v Haydon (No 2)* (1984) 156 CLR 532; 56 ALR 82; *Church of Scientology Inc v Woodward* (1982) 154 CLR 25; 43 ALR 587; *Connor v Sankey* [1976] 2 NSWLR 570; *Congreve v Home Office* [1976] QB 629; [1976] 1 All ER 697; *Entick v Carrington* (1765) 19 St Tr 1030. Note however, that the executive and its agencies always have the inherent capacity to act as a legal person: see, eg, *N MacDonald Pty Ltd v Hammence* (1984) 1 FCR 45 at 50 per Neaves J; 53 ALR 136 (a case involving the executive’s power to conduct public relations); *Johnson v Kent* (1975) 132 CLR 164; 5 ALR 201 (developing and managing property); *NSW v Bardolph* (1934) 52 CLR 455 (making contracts). Though statutory authorities, as pure creatures of statute, do not automatically have the capacity to act as a legal person, this power is almost always explicitly included in the body’s enabling statute and is readily implied.

38 See, eg, Gageler, above n 1, at 304:

A legislative provision limiting the freedom permitted by the common law may be absolute or conditional. . . . Where the imposition or removal of a limitation is conditional on some action on the part of another person, that other person in a very real sense exercises ‘power’ over the person whose freedom is thereby limited.

39 (1999) 197 CLR 510; 162 ALR 1 at [24]. See also *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087 at 1142 per Isaacs J; *Commonwealth v New South Wales* (1923) 32 CLR 200 at 206 per Knox CJ; *Johnstone v Commonwealth* (1979) 143 CLR 398 at 404 per Stephen J; 23 ALR 385.

The role of jurisdictional error

It is important to understand when it is necessary for an applicant for judicial review to show that a decision-maker has fallen into jurisdictional error. This depends on the remedy sought — and that raises the question of which remedies are available, and when.

Section 75(v) of the Constitution provides that:

In all matters: . . . in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction.⁴⁰

Section 39B(1) of the Judiciary Act gives the Federal Court jurisdiction in similar terms to s 75(v) of the Constitution, subject to certain exceptions relating to criminal prosecutions.⁴¹

The authors of the Australian Constitution were heavily influenced by the model of the Constitution of the United States. It seems that the insertion of s 75(v) was designed to prevent doubts and difficulties that had arisen in the US cases, most notably the famous case of *Marbury v Madison*,⁴² concerning the US Supreme Court's jurisdiction to grant mandamus.⁴³ The intent appears to have been to ensure that the High Court would have jurisdiction to grant the named remedies according to the ordinary common law principles associated with them.⁴⁴ For the most part, the High Court has held that the remedies mentioned in s 75(v) are governed by the same principles as they are at common law (for prohibition and mandamus) and in equity (for injunction), as those bodies of judge-made law have been developed by the courts over time.⁴⁵

Prohibition and mandamus are two of what are traditionally called the

40 The limitation that s 75(v) applies only to officers of the Commonwealth is beyond the scope of this article. It is worth noting, however, that federal judges are 'officers of the Commonwealth' for the purposes of s 75(v): *R v Commonwealth Court of Conciliation and Arbitration; Ex parte the Brisbane Tramways Co Ltd* (1914) 18 CLR 54.

41 The Federal Magistrates Court now has a s 75(v)-style jurisdiction over most migration decisions, with the Federal Court being largely restricted to appellate jurisdiction: see ss 476 and 476A of the Migration Act as inserted by the Migration Litigation Reform Act 2005 (Cth) (No 137 of 2005).

42 *Marbury v Madison* 1 Cranch 137; 2 L Ed 60 (1803).

43 See J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901 edition reprinted by Legal Books, Sydney, 1976, pp 778–84 (§325). See also *Aala* (2000) 204 CLR 82; 176 ALR 219 at [18] per Gaudron and Gummow JJ, [155] per Hayne J; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 544: '[s 75(v) was] inspired by the provisions of the United States Judiciary Act held invalid in *Marbury v Madison*'; D F Jackson, 'Development of judicial review in Australia over the last 10 years: The growth of the constitutional writs' (2004) 12 *Aust Jnl of Administrative Law* 22 at 23.

44 See Quick and Garran, *ibid*, pp 780–3. See also *Official Record of the Debates of the Australasian Federal Convention*, 1891–1898, Melbourne, 1898, vol V, p 1878 per Josiah Symon QC:

The right to mandamus or prohibition is not conferred one whit more than at present. The provision merely throws within the ambit of the jurisdiction of the federal tribunal the right to determine the question. That question will be determined by the ordinary law of England — by the principles of constitutional government and the prerogatives of the Crown.

45 See, eg, *Aala* (2000) 204 CLR 82; 176 ALR 219 at [34] per Gaudron and Gummow JJ: 'The doctrinal basis for the constitutional writs provided for in s 75(v) should be seen as

'prerogative writs'.⁴⁶ The others are habeas corpus (an order to a gaoler that she or he justify a person's detention), quo warranto (an order to a purported office holder requiring him or her to prove that he or she indeed holds the office claimed) and certiorari (see below). The prerogative writs are central to judicial review of administrative action at common law.⁴⁷

In recent years, the High Court has eschewed the term 'prerogative writs' for the s 75(v) remedies and has labelled prohibition and mandamus, along with injunction, as the 'constitutional writs' when they are sought as part of its s 75(v) original jurisdiction.⁴⁸ Nevertheless, the term 'prerogative writs' is still often used to describe prohibition and mandamus (as well as certiorari, habeas corpus and quo warranto) in contexts outside s 75(v).

Regardless of labels, the remedies entrenched by s 75(v) are only a subset of the standard administrative law remedies.

Mandamus and prohibition

At common law, prohibition and mandamus lie only for jurisdictional error and the High Court has repeatedly affirmed that this restriction also applies when they are sought pursuant to s 75(v).⁴⁹

Mandamus lies for a failure to exercise jurisdiction — that is, it lies to compel a court or an administrative officer to perform his or her duty. As such,

accommodating that subsequent development [of the common law] when it is consistent with the text and structure of the Constitution as a whole.' However, there have been some suggestions that the special constitutional nature of the writs may mean that different principles apply: see, eg, G Williams, 'Commentary on "The growth of the constitutional writs"' (2004) 12 *Aust Jnl of Administrative Law* 30 at 31. By contrast, in *Plaintiff S157* (2003) 211 CLR 476; 195 ALR 24 at [159], Callinan J seems to suggest that the writs in s 75(v) should be understood by reference to what would have founded an application for such a writ in 1901.

46 However, the label 'prerogative' may be misleading, in that it suggests the writs had either a necessary association with the Crown or some homogeneity in their nature: see B Selway, 'Of Kings and Officers — The Judicial Development of Public Law' (2005) 33 *Fed L Rev* 187 at 199–200; cf *Aala* (2000) 204 CLR 82; 176 ALR 219 at [20] per Gleeson CJ. The writs appear to have developed separately 'at different times and for different purposes' with the only commonality being that they were all issued by the Court of King's Bench: Selway, *ibid* at 200.

47 Note that in most jurisdictions, the prerogative writs have been replaced by procedurally less cumbersome 'orders in the nature of [the relevant writ]': see, eg, Supreme Court Act 1970 (NSW) s 69(4). Note also that the prerogative writs may not always have had the central place in the common law's supervision of the actions of government officers that they have had since the mid-nineteenth century: see Selway, above n 46, at 200 and generally at 195–205.

48 See *Aala* (2000) 204 CLR 82; 176 ALR 219 at [21] per Gaudron and Gummow JJ, [138], [144] per Kirby J and [165]–[166] per Hayne J; Aronson, Dyer and Groves, above n 4, pp 26–7.

49 See *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437 at 445–6 per Griffith CJ; *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242–3 per Rich, Dixon and McTiernan JJ; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 349 per Wilson, Deane and Gaudron JJ; *Darlington Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 633 per Gaudron and Gummow JJ; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 174 ALR 585 at [31]–[32] per Gleeson CJ, Gaudron and Hayne JJ; *McBain* (2002) 209 CLR 372; 188 ALR 1 at [19] per Gleeson CJ, [54] per Gaudron and Gummow JJ, [84] per McHugh J, [175] per Kirby J; *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 389 at [87] per Kirby J.

it only applies where a decision-maker is obliged to consider a decision. It does not apply where a decision-maker has a discretion whether or not to make a decision at all. Classically, where a decision-maker simply ‘sits on’ a decision he or she is obliged to make, mandamus lies to compel him or her to make the decision. Where a decision that has been made is held to have been a nullity (a ‘constructive failure to exercise jurisdiction’), mandamus will lie to compel the decision-maker to fulfil the duty and make the decision ‘for the first time’, as it were.⁵⁰ Similarly, where a decision has been quashed by certiorari (see below), mandamus will usually be ordered to require the decision-maker to decide it anew.

Prohibition lies to prevent an officer from acting outside his or her jurisdiction. It lies to prevent an officer from purporting to exercise a jurisdiction or to prevent the implementation (or further implementation) of a decision made without jurisdiction.⁵¹ Originally, prohibition only lay against inferior courts, but it has developed in Australia to apply to both superior courts and administrative officers.⁵²

Certiorari

Certiorari is the process by which a superior court removes the ‘record’ of the decision of an inferior court or administrative official or tribunal into the superior court and, if appropriate, ‘quashes’ or sets aside the decision. Historically, certiorari’s major role was as a means for superior courts to supervise the work of inferior courts. However, it has also long been used as a means for superior courts to supervise administrative decision-makers, and this is its primary role today.

By contrast with prohibition and mandamus, certiorari lies for both jurisdictional error and non-jurisdictional errors of law ‘on the face of the record’.⁵³ However, the ‘record’ for the purposes of certiorari does not include any reasons for decision, but simply the order itself and the application and pleadings (if any) or analogous documents.⁵⁴ This greatly reduces the scope of certiorari as a means of judicial review of non-jurisdictional error.

When granted, certiorari ‘quashes’ the decision, rendering it retrospectively ‘invalid’ in the sense of not having its usual legal effects — in other words,

50 See, eg, *Bhardwaj* (2002) 209 CLR 597; 187 ALR 117.

51 The latter use of prohibition, to prevent implementation of a decision where there was anything remaining to be done to implement it, is an Australian innovation, which appears to have been motivated by the absence of certiorari in s 75(v): see *R v Hibble*; *Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456; Jackson, above n 43, at 24.

52 See *Aala* (2000) 204 CLR 82; 176 ALR 219 at [159] per Hayne J. Indeed, in the early days after Federation, there was a persistent, but unsuccessful attempt to persuade the High Court that prohibition under s 75(v) lay only against Commonwealth administrative officers and did not lie against any courts: see *R v Commonwealth Court of Conciliation and Arbitration and the President thereof*; *Ex parte Whybrow & Co* (1910) 11 CLR 1; *R v Commonwealth Court of Conciliation and Arbitration*; *Ex parte Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 1.

53 *Craig* (1995) 184 CLR 163 at 174–5 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; 131 ALR 595.

54 See *ibid*, at CLR 175–83 per Brennan, Deane, Toohey, Gaudron and McHugh JJ and the authorities cited there. Note, however, that reasons may form part of the record if the decision-maker incorporates them into the record, usually by incorporating them into the final order or equivalent. However, as the result in *Craig* shows, this requires clear words.

certiorari can render invalid that which was valid before. However, unlike statutory judicial review remedies such as s 16 of the ADJR Act (discussed below), it seems certiorari necessarily renders a decision *retrospectively* invalid — that which was valid before being quashed is thereafter treated as if it had never been valid.⁵⁵

Where the decision-maker was under a duty to make the decision, certiorari is usually coupled with a writ of mandamus to order the decision-maker to remake the decision according to law.⁵⁶

While certiorari does not appear in s 75(v), the High Court has held that it has jurisdiction to grant certiorari as an ancillary remedy to the constitutional writs, where those writs are available.⁵⁷ However (leaving aside injunction for the moment), since the other writs require jurisdictional error, certiorari is effectively limited to jurisdictional error in the context of s 75(v).⁵⁸ The High Court often grants certiorari as an ancillary remedy to prohibition, presumably to clear away any vestigial part of the decision-making process that might nevertheless be valid despite the presence of the established jurisdictional error. It then usually grants mandamus to compel the decision-maker to remake the decision.

Injunction

Unlike prohibition and mandamus, injunction was never a prerogative writ. It was an equitable remedy granted by Chancery (and, prior to 1842, the Court of Exchequer in its equitable jurisdiction) to restrain unlawful or unauthorised acts and, at least in some circumstances, to compel the performance of legal duties.⁵⁹ The functional overlap between prohibition and injunction (not to mention the overlap between mandamus and the mandatory injunction) is illustrated by the fact that the procedural weapons used in the great battles between the common law and equity in the seventeenth century were prohibition for the common law and injunction for equity.⁶⁰

55 Prospective quashing was never considered as a possibility in *McBain* (2002) 209 CLR 372; 188 ALR 1 and the retrospective nature of the writ's quashing effect seems to have been used as an argument against granting the writ in the judgment of McHugh J at [118]; see Aronson, Dyer and Groves, above n 4, p 618 n 1.

56 See, eg, *NAIS* (2005) 223 ALR 171; 80 ALJR 367.

57 See *McBain* (2002) 209 CLR 372; 188 ALR 1 at [19] per Gleeson CJ, [176] per Kirby J; *Aala* (2000) 204 CLR 82; 176 ALR 219 at [14] per Gaudron and Gummow JJ, [142], [152] per Kirby J, [218] per Callinan J and the authorities cited there.

58 See *McBain* (2002) 209 CLR 372; 188 ALR 1 at [176] per Kirby J; *Aala* (2000) 204 CLR 82; 176 ALR 219 at [14] per Gaudron and Gummow JJ, [142] per Kirby J; *R v Bowen; Ex parte Federated Clerks Union* (1984) 154 CLR 207 at 211 per Mason, Murphy, Wilson, Brennan and Dawson JJ.

59 The common belief among administrative lawyers that, prior to the twentieth century, injunction was not a common remedy in public law may be mistaken: see Selway, above n 46, at 202–3; cf I Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions and Equitable Damages*, 6th ed, LBC Information Services, Sydney, 2001, pp 346–7. This impression seems to have arisen from Chancery's lack of an extensive practice in relation to public officers — a lack that Selway argues can be explained by the vital equitable jurisdiction over such officers exercised by the Court of Exchequer until that court's equitable jurisdiction was transferred to Chancery in 1842 by the Court of Chancery Act 1841 (UK) 5 Vict c 5: see Selway, *ibid*, at 202 and 205.

60 See Spry, *ibid*, Ch 1. These battles culminated in equity's victory in the *Earl of Oxford's Case* (1615) 1 Can Rep 1; 21 ER 485: see generally, R P Meagher, J D Heydon and

It seems that injunction lies for both jurisdictional errors and errors within jurisdiction.⁶¹ This seems to follow from injunction's well-accepted role at general law of restraining any unlawful conduct where it seems to the court, in its discretion, appropriate to do so. As noted above, the presence of injunction in s 75(v) has led to the suggestion that the distinction between jurisdictional and non-jurisdictional errors of law is otiose.⁶² I discuss this conundrum later in this article.

Declaration

Declaration does not appear in s 75(v). Like certiorari, declaration is only available in the High Court's original jurisdiction as an ancillary remedy where one of the s 75(v) remedies is enlivened.⁶³ Of course, in courts where the full arsenal of common law remedies are available, so too are declaration and injunction. Like injunction, declaration is an equitable remedy. However unlike either certiorari or injunction it has no mandatory or prohibitive effect but merely declares what the law is and requires in a given situation. Bare declarations are sometimes granted in public law because either the government is expected to obey the law when it has been clearly declared by the courts; or because various private law remedies would arise if the law as declared were not obeyed.⁶⁴

Statutory judicial review schemes

The various procedural difficulties and doctrinal obscurities attending judicial review at common law and under s 75(v) of the Constitution led the Commonwealth Parliament in 1977 to pass the ADJR Act.⁶⁵ That Act gives a wide judicial review jurisdiction to the Federal Court. The High Court has

M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed, Butterworths LexisNexis, Sydney, 2002, at [1-060]. Note also that in those battles the injunction was generally directed at the subject, not at the common law court. The injunction would generally restrain the victorious party in a common law court from exercising his or her rights as determined by the common law court. The Court of Kings Bench would then issue prohibition against Chancery, presumably on the basis that the decision to issue the injunction was infected by jurisdictional error: see Spry, *ibid*.

61 See *Muin v Refugee Review Tribunal* (2002) 190 ALR 601; 76 ALJR 966 at [47] per Gaudron J (*Muin*); *Miah* (2001) 206 CLR 57; 179 ALR 238 at [212] per Kirby J; *Abebe* (1999) 197 CLR 510; 162 ALR 1 at [105] per Gaudron J.

62 See *Miah* (2001) 206 CLR 57; 179 ALR 238 at [211]–[212] per Kirby J, quoted above; Aronson, Dyer and Groves, above n 4, pp 27–8.

63 See *Combet v Commonwealth* (2005) 224 CLR 494 at [165] per Gummow, Hayne, Callinan and Heydon JJ.

64 The availability of private law remedies where government action is considered to have been 'invalid' raises another litigious alternative that is often seen as a remedy in administrative law, 'collateral attack'. A 'collateral attack' is where a normal private law action or defence is premised on an government action being 'invalid'. The classic example is *Director of Public Prosecutions v Head* [1959] AC 83, in which a prosecution for having sexual relations with a woman who had been committed to a mental asylum was set aside when it was shown that the committal had been invalid. *Ruddock v Taylor* (2005) 222 CLR 612; 221 ALR 32 represents a recent, though ultimately unsuccessful, attempt at collateral attack. If the argument presented below is correct and jurisdictional error *is* validity, then collateral attack is effectively restricted to jurisdictional error.

65 See Parliament of the Commonwealth of Australia, *Commonwealth Administrative Review Committee: Report*, Parliamentary Paper No 144, August 1971, especially at Chs 10, 12 and 21; and the discussion in *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [69]–[72] per Kenny J.

treated the ADJR Act as largely granting a simpler procedure and wider remedies for the existing common law grounds of review.⁶⁶ However some of the grounds mentioned in s 5 of the Act (such as the ‘no evidence’ ground)⁶⁷ go further than the common law. Under the ADJR Act, there is no need to show jurisdictional error;⁶⁸ and no requirement that non-jurisdictional errors of law be evident on the face of the record.⁶⁹ Section 13 gives a right to persons affected by a decision to demand a statement of reasons from the decision-maker and the courts may look to those reasons to find a relevant error.

In a sense, the ADJR Act and its close State equivalents⁷⁰ provide a kind of ‘statutory certiorari’ with an obligation on decision-makers to give reasons for their decisions, and the capacity for applicants to use those reasons (and other documents) as a basis for challenge as part of an expanded ‘record’.

Moreover, s 16 of the Act gives the Federal Court wide remedial discretion. In particular, s 16(1)(a) gives the court the power to make ‘an order quashing or setting aside the decision . . . with effect from the date of the order or from such earlier or later date as the court specifies’. Thus, the court can not only render invalid that which was valid before (as it can with certiorari), but can do so without retrospective effect. Indeed, unless the court specifies a date from which the s 16(1)(a) quashing order takes effect, the court is assumed to have quashed the decision prospectively from the date of the order.⁷¹

Discretionary nature of administrative law remedies

All of the remedies just outlined are discretionary in nature.⁷² While subtly different principles may apply to each of the different writs, the High Court has indicated that, at least in the case of jurisdictional error, there is a presumption in favour of granting the constitutional writs unless there are good reasons to the contrary.⁷³ The same presumption seems to apply to applications for the prerogative writs outside of s 75(v).

66 See *Kioa v West* (1985) 159 CLR 550 at 566–7 per Gibbs CJ, 576–7 per Mason J, 593–5 per Wilson J, 625 per Brennan J and 630 per Deane J; 62 ALR 321.

67 ADJR Act s 5(1)(h); see *Australian Broadcasting Corporation v Bond* (1990) 170 CLR 321 at 355, 357–8 per Mason CJ; 94 ALR 11; *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 232–5 per Gleeson CJ, 240–1 per Gaudron and McHugh JJ; 190 ALR 402.

68 *Applicant S20* (2003) 198 ALR 59; 77 ALJR 1165 at [27] per McHugh and Gummow JJ; *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [44] per Gray and Downes JJ, [68] per Kenny J.

69 ADJR Act s 5(1)(f).

70 See, generally, Administrative Decisions (Judicial Review) Act 1989 (ACT); Judicial Review Act 1991 (Qld); Judicial Review Act 2000 (Tas).

71 *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253 at 256 per Sheppard and Wilcox JJ (with whom Fox J agreed); 70 ALR 300; *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [46] per Gray and Downes JJ and [79] per Kenny J.

72 There was some suggestion, now rejected, that certiorari and prohibition were remedies as of right when applied for by a person directly affected by the impugned decision but that they were discretionary when applied for by a third party: regarding prohibition see *Aala* (2000) 204 CLR 82; 176 ALR 219 especially at [43]–[54] per Gaudron and Gummow JJ; regarding certiorari see *McBain* (2002) 209 CLR 372; 188 ALR 1.

73 See, eg, *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; 169 ALR 400 at [56] per Gaudron J, cited with approval in *SAAP* (2005) 215 ALR 162; 79 ALJR 1009 at [211] per Hayne J (Kirby J agreeing at [174]).

Jurisdictional error and errors within jurisdiction

It is often difficult to tell whether a particular error is a jurisdictional error or an error within jurisdiction. However, the High Court has not seen this difficulty as a reason to abandon the distinction. As Hayne J said in *Re Refugee Review Tribunal; Ex parte Aala*:

The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.⁷⁴

Courts and administrative decision-makers

As the discussion above reveals, some of the prerogative writs began life as a means of supervising the activities of inferior courts. For an Australian lawyer brought up on the doctrine of the separation of powers, it may seem strange to be discussing the jurisdiction of courts in a paper about the judicial review of *administrative* action. It is important to remember, however, that the concept of jurisdictional error and the associated prerogative writs developed in England — a country with no strict constitutional separation of judicial from executive and legislative power.⁷⁵ In the English constitution there is no bright line between a court and an executive agency. Indeed ‘courts’ were originally criminal trials or disputes between subjects brought before the King or a noble and his ‘court’, or even a local assembly.⁷⁶ It is also worth remembering that there is no strict separation of powers doctrine applying in the States, which are, in this respect, ‘little Englands’ in their constitutional structure.⁷⁷

⁷⁴ *Aala* (2000) 204 CLR 82; 176 ALR 219 at [162].

⁷⁵ Until the creation of the planned Supreme Court of the United Kingdom, the highest court in the United Kingdom is the House of Lords, which is also the upper house of the UK legislature. Indeed, the early development of the doctrine of jurisdictional error and the prerogative writs pre-dates the modern formulation of the doctrine of the separation of powers by Montesquieu in 1748: see Baron de Montesquieu, *The Spirit of the Laws*, trans T Nugent, Hafner Press, 1949; originally published in French as *L'Esprit de Lois* in 1748, extracted in T Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 3rd ed, Federation Press, 2002, p 603. Montesquieu’s ideas were particularly influential on the founders of the US Constitution, which was promulgated (with a strict separation of the executive, legislature and judicature) in 1787. While the separation of powers in the Australian Constitution is not nearly as strict as in the US document (and, unlike in Australia, extends to the separation of legislative and executive power), an illustration of the influence of the US model on the Australian Founders can be seen in the fact that the structure of the first three chapters of the Australian Constitution (Ch I — the Parliament, Ch II — the Legislature and Ch III — the Judicature) echoes the structure of the first three Articles of the US Constitution.

⁷⁶ See, generally, J H Baker, *An Introduction to English Legal History*, 2nd ed, Butterworths, London, 1979, Chs 1 and 2.

⁷⁷ See *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146; 206

Courts generally have the power to authoritatively decide questions of law — and, at least in the case of superior courts of record, this includes the question of the scope of their own jurisdiction.⁷⁸ However, there is a very strong statutory presumption against administrative bodies having such a power;⁷⁹ and at the Commonwealth level, this presumption becomes a constitutional prohibition because of the doctrine of the separation of judicial power implied from Ch III of the Constitution.⁸⁰ This means that there is generally a much greater scope for administrative decision-makers to fall into jurisdictional error than for courts. As we shall see, this presumption has a specific manifestation in the doctrine of jurisdictional facts.

Jurisdictional facts

The most obvious way in which jurisdictional error may occur is if the decision-maker's jurisdiction depends on the objective existence of a particular fact and that fact does not exist. Such facts are generally called 'jurisdictional facts'.⁸¹

Unlike most forms of judicial review, jurisdictional fact review is not limited to the material that was before the decision-maker. The existence of a jurisdictional fact is ultimately a matter for the courts. The decision-maker

ALR 315; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; 210 ALR 50 and *Kable v Director of Public Prosecutions (NSW)* (1986) 189 CLR 51; 138 ALR 577. Note however, that the States are not entirely unshackled in the extent to which they can mix executive and judicial functions. State Supreme Courts must be appropriate vehicles for federal jurisdiction and any State law that would make a State Supreme Court an inappropriate vehicle will be invalid: *Kable*. Other State and Territory courts can only exercise federal jurisdiction if they are appropriate vehicles: *NAALAS v Bradley*.

78 See *Craig* (1995) 184 CLR 163 at 179–80 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; 131 ALR 595. On the special position of courts and jurisdictional error, see *Berowra Holdings Pty Ltd v Gordon* (2006) 228 ALR 387 at [11] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, [87]–[88] per Kirby J (*Berowra Holdings*); *Residual Asco Group Ltd v Spalvins* (2000) 202 CLR 629; 172 ALR 366; *Re Macks*; *Ex parte Saint* (2000) 204 CLR 158; 176 ALR 545.

79 *Craig* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; 131 ALR 595; *Berowra Holdings* (2006) 228 ALR 387 at [11] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, [87]–[88] per Kirby J.

80 The doctrine of the separation of judicial power prohibits the Commonwealth Parliament from conferring judicial power on a Commonwealth administrative officer or body: see, eg, *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *Victorian Stevedoring & General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 97, 98 per Dixon J; *R v Davidson* (1954) 90 CLR 353 at 364–5 per Dixon CJ and McTiernan J, 380–1 per Kitto J; *R v Kirby*; *Ex parte Boilermakers*; *Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *R v Humbly*; *Ex parte Rooney* (1973) 129 CLR 231 at 249–50 per Mason J; *Chu Kim Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26 per Brennan, Deane, Dawson JJ, 54–5 per Gaudron J, 66 per McHugh J; 110 ALR 97. Thus, Commonwealth administrative officers cannot be given jurisdiction to authoritatively decide questions of law: *Craig* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; 131 ALR 595.

81 In one of the many frustrating terminological ambiguities common in administrative law, jurisdictional prerequisites that are not matters of objective fact, but are matters of law or of someone's opinion, are sometimes referred to as 'jurisdictional facts' (in the sense that the 'fact' is that the opinion has been formed in the required manner). For clarity, in this article I shall only refer to those jurisdictional prerequisites that are matters of objective fact as 'jurisdictional facts'.

must, of course, make an initial assessment as to whether the jurisdictional fact exists. However if the issue ever comes before a court it is for the court to determine the existence or otherwise of the jurisdictional fact on the basis of evidence not limited to the material that was before the decision-maker.⁸²

With respect to courts, there is a strong statutory presumption that a court's jurisdiction either: (a) does not depend on jurisdictional facts; or (b) extends to determining authoritatively whether a jurisdictional fact exists.⁸³ It would require clear statutory language for the contrary to be the case. By contrast, whether the jurisdiction of administrative decision-makers depends on a jurisdictional fact will depend on the application of the ordinary principles of statutory construction.

Jurisdictional opinions

It is largely to avoid vulnerability to jurisdictional fact review that many statutory powers granted to administrators are premised, not on a fact, but on an *opinion* by the decision-maker — not 'if A is X' but 'if, in the decision-maker's opinion, A is X' or 'if the decision-maker is satisfied that A is X'.⁸⁴ With this common formulation the question for the court on a judicial review application is not 'Does A fit the description of X?', but 'Did the decision-maker form the opinion that A fit the description of X?' or 'Was the decision-maker satisfied that A was X?' Such an enquiry is necessarily limited to the materials that were before the decision-maker at the time he or she made the decision under challenge.

However, setting up such a 'jurisdictional opinion' as a prerequisite does not entirely remove the courts from the equation. As Latham CJ said as long ago as 1944 in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*:

It is therefore well settled that if a statute provides that a power may be exercised if a person is of a particular opinion, such a provision does not mean that the person may act upon such an opinion if it shown that he has misunderstood the nature of the opinion which he is to form. Unless such a rule were applied legislation of this character would mean that the person concerned had an absolutely uncontrolled and unlimited discretion with respect to the extent of his jurisdiction and could make orders which had no relation to the matters with which he was authorised to deal. It should be emphasised that the application of this principle now under discussion does not mean that the court substitutes its own opinion for the opinion of the person

⁸² *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; 169 ALR 400; see also *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 (CA); *Minister for Immigration and Ethnic Affairs v Naumovska* (1983) 88 ALR 589 (FCAFC).

⁸³ See *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, especially at 391 per Dixon J. However, this later presumption may only apply to superior courts of record: see *Berowra Holdings* (2006) 228 ALR 387 at [11] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, [87]–[88] per Kirby J.

⁸⁴ In reality, almost all grants of power contain an element of jurisdictional fact. The creation of a jurisdictional opinion merely transforms the issues most likely to be controversial into matters for the decision-maker's opinion. For example, under the Migration Act, the Minister may only decide if a person is entitled to a protection (refugee) visa if the person is a non-citizen and the person has applied for asylum. These are both jurisdictional facts, but they are rarely controversial. The most usually controversial 'fact' is whether the applicant has a well founded fear of persecution for a Convention reason, and that is a matter for the Minister's opinion.

or authority in question. *What the court does do is to enquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed.* In that event the basis for the exercise of the power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.⁸⁵

The distinction drawn by Latham CJ in *Hetton Bellbird Collieries* between a court replacing the decision-maker's opinion with its own (which is impermissible) and a court ensuring that the decision-maker engaged in the enquiry the statute required of it (which is legitimate), is what modern administrative lawyers would call the distinction between merits review and judicial review.⁸⁶

Thus, where the exercise of a decision-making power (ie, 'jurisdiction') depends on the decision-maker reaching a certain opinion, the question for the court is whether the decision-maker went about the enquiry in the manner required by parliament when it created the power. On this view, the various 'grounds of review' developed by the courts over the years are simply the 'default position to be applied in the absence of a contrary legislative intention' in determining what parliament intended to be the limits and conditions of the decision-maker's jurisdiction.⁸⁷

Nevertheless, the precise relationship between the grounds of review and jurisdictional error is a vexed issue even today.

The modern 'grounds' of jurisdictional error

The 1995 decision of the High Court in *Craig* dealt with an application for certiorari and mandamus against a decision of a court, the District Court of

85 (1944) 69 CLR 407 at 432 (emphasis added); see also at 430 (*Hetton Bellbird Collieries*). See also *Buck v Bavone* (1976) 135 CLR 110 at 118 per Gibbs CJ; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 188–9 per Kitto J. See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J.

86 See *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 at 35–6 per Brennan J; 93 ALR 1; Gageler, above n 16, at 280. In a sense, all judicial review is a species of jurisdictional fact review: see generally Gageler, above n 16, and Gageler, above n 1. It is just that in the most commonly litigated cases, the 'fact' is whether the decision-maker went through the required mental process in order to come to the prescribed opinion or state of satisfaction. In those cases, the only relevant evidence for determining the facts of the nature of the decision-maker's opinion formation process is the material that was before the decision-maker at the time. Far from being an anomalous exception, jurisdictional fact review is the often forgotten paradigm for judicial review.

87 Gageler, above n 16, at 287. Gageler sees the traditional grounds of review as being 'all aspects of jurisdiction'. However, this does not explain the role of the traditional grounds in identifying errors *within* jurisdiction, whether in the context of the writ of certiorari for error of law on the face of the record or under a statutory scheme that allows judicial review for non-jurisdictional errors, such as the ADJR Act. On the view presented in this article, the traditional grounds of review are a 'default position' for identifying the way in which parliament intended the power to be exercised; but whether a failure to fulfil such a requirement will amount to jurisdictional error will depend on the additional question of whether parliament intended such a failure to lead to invalidity: see the discussion relating to the relationship between jurisdictional error and invalidity in the 'Argument' section below.

South Australia. However, in obiter, the unanimous judgment of the court laid out what would constitute jurisdictional error by an administrative decision-maker:

If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, *and the tribunal's exercise or purported exercise of power is thereby affected*, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.⁸⁸

In 2001, a majority of the High Court adopted this passage in *Yusuf* — a case that *did* concern an administrative decision-maker, the RRT.⁸⁹ The joint judgment in *Yusuf* went on to say that the kinds of error listed in *Craig* were not exhaustive of what may constitute jurisdictional error. A footnote linked this statement to *Aala*, which was a case where a failure to accord procedural fairness was held to go to jurisdiction.⁹⁰ The joint judgment in *Yusuf* then went on:

The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying the wrong issue, asking the wrong question, ignoring relevant material or relying on irrelevant material *in a way that affects the exercise of power* is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have the jurisdiction to make it.⁹¹

This was said (in a sentence linked by a footnote to *Craig*) to be the case because the RRT did not have ‘authority to authoritatively decide questions of law or to make decisions otherwise than in accordance with the law’.⁹² These passages have been cited as authoritative statements of the current law on numerous occasions since.

To a lawyer accustomed to the ADJR Act, some of the kinds of error listed in *Craig*, *Aala* and *Yusuf* as amounting to jurisdictional error — relevant and irrelevant considerations, failure to accord procedural fairness, etc — may seem very familiar. Since *Plaintiff S157*⁹³ restricted the scope of Federal Court judicial review of migration decisions to jurisdictional errors, the High Court (and the Federal Court) has often behaved as if most or all of the traditional grounds of review will amount to jurisdictional error, at least under the

88 (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ (emphasis added); 131 ALR 595.

89 (2001) 206 CLR 323; 180 ALR 1 at [82] per McHugh, Gummow and Hayne JJ; see also at [1] per Gleeson CJ (agreeing).

90 (2000) 204 CLR 82; 176 ALR 219 at [5] per Gleeson CJ, [41] per Gaudron and Gummow JJ, [142] per Kirby J.

91 (2001) 206 CLR 323; 180 ALR 1 at [82] per McHugh, Gummow and Hayne JJ (emphasis added).

92 Ibid, at [82] per McHugh, Gummow and Hayne JJ.

93 (2003) 211 CLR 476; 195 ALR 24.

Migration Act.⁹⁴ Yet the High Court has also indicated that both ADJR Act review and certiorari are wider than jurisdictional error.⁹⁵ This raises a number of questions:

- (1) Does jurisdictional error encompass most of the grounds in s 5 of the ADJR Act? Will an error that would found a right to review under one of the ADJR Act grounds of review that are merely reflective of the common law always amount to jurisdictional error for the purposes of prohibition and mandamus?
- (2) If so, then the only way in which it is appropriate to speak of the ADJR Act as a 'broader measure of federal judicial review'⁹⁶ than that available under s 75(v) is with respect to those ADJR Act grounds that expand the common law and the wider remedial flexibility provided by s 16. That may be so, but then how then does one identify a sense in which certiorari is a broader measure of review? What is an error within jurisdiction for an administrative decision-maker? Has the High Court, despite its protestations to the contrary, in reality followed *Anisminic*⁹⁷ by effectively eliminating the distinction between jurisdictional error and errors within jurisdiction, at least with respect to administrative decisions?
- (3) If not, then how does one tell the difference between a failure to consider a relevant consideration (or any other ground of review) that amounts to jurisdictional error (which could be remedied by prohibition or mandamus) and a failure that is merely an error within jurisdiction (which could only be remedied under ADJR Act or by a writ of certiorari)?

As argued later in this article, the key may be in the phrases I have emphasised in the quotations from *Craig* and *Yusuf* above — 'and the tribunal's exercise or purported exercise of power is thereby affected' and 'in a way that affects the exercise of power'. Thus asking the wrong question, identifying the wrong issue, ignoring relevant material, relying on irrelevant material, making an erroneous finding, reaching a mistaken conclusion, failing to accord procedural fairness, etc must rise to the level of jurisdictional error by amounting to a failure to fulfil a jurisdictional pre-condition or failure to exercise the jurisdiction in a manner that the statute granting the jurisdiction made essential to the decision making power.⁹⁸ Errors falling short of being jurisdictional may still be reviewable through the common law writ of certiorari or the ADJR Act, but the writs of prohibition and mandamus will not be available because there has been no jurisdictional error. Moreover, where parliament has exercised its power to exclude all judicial review except that

94 See C Beaton-Wells, 'Judicial Review of Migration Decisions: Life after *S157*' (2005) 33 *Federal L Rev* 141, especially at 157–60 and the cases cited therein.

95 Regarding the ADJR Act being broader than jurisdictional error, see *Applicant S20/2002* (2003) 198 ALR 59 at [27] per McHugh and Gummow JJ; see also *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [44] per Gray and Downes JJ, [68] per Kenny J. Regarding certiorari being broader than jurisdictional error, see *Craig* (1995) 184 CLR 163 at 175–6 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; 131 ALR 595.

96 *Applicant S20/2002* (2003) 198 ALR 59 at [27] per McHugh and Gummow JJ.

97 [1969] 2 AC 147.

98 See *Bhardwaj* (2002) 209 CLR 597; 187 ALR 117 at [162]–[163] per Callinan J.

entrenched in s 75(v) of the Constitution, an error within jurisdiction is unreviewable. If correct, this conclusion makes it all the more important to find a way to differentiate between jurisdictional error and mere errors within jurisdiction.

Jurisdictional error and invalidity

Another difficult issue is the relationship between jurisdictional error and invalidity or nullity. Are all decisions infected by jurisdictional error invalid or nullities in the sense that they have no legal consequences and are treated by the law as if they never occurred? There is much judicial and academic discussion over whether jurisdictional error necessarily leads to ‘nullity’, whether nullity is a relative or absolute concept and whether there are ‘degrees of nullity’.⁹⁹ In some cases the courts have given the impression that a decision infected by jurisdictional error is always invalid or a nullity and is ‘in law, no decision at all’;¹⁰⁰ but in others they have seemed to hold that not all jurisdictional errors lead to nullity of some sort and/or that there are degrees of nullity.

Plaintiff S157 and Bhardwaj

That all jurisdictional errors necessarily lead to invalidity or nullity certainly seemed to have been the view of the joint judgment in *Plaintiff S157* when it held that the privative clause in s 474 of the Migration Act does not apply to decisions infected by jurisdictional error:

Once it is accepted, as it must be, that s 474 is to be construed conformably with Ch III of the Constitution, specifically, s 75, the expression ‘decision[s] . . . made under this Act’ must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. This court has clearly held that an administrative decision which involves jurisdictional error is ‘regarded, in law, as no decision at all’. Thus, if there has been jurisdictional error because, for example, of a failure to discharge ‘imperative duties’ or to observe ‘inviolable limitations or restraints’, the decision in question cannot properly be described in the terms used in s 474(2) as ‘a decision . . . made under this Act’ and is, thus, not a ‘privative clause decision’ as defined in ss 474(2) and (3) of the Act.¹⁰¹

The quote that a decision infected by jurisdictional error is ‘regarded, in law, as no decision at all’ was from the decision of Gaudron and Gummow JJ in *Bhardwaj*:

There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless or until set aside. A decision that involves jurisdictional error is a

⁹⁹ See, generally, Aronson, Dyer and Groves, above n 4, Ch 10 and the cases and articles cited there. M Aronson, ‘Nullity’ (2004) 40 *AIAL Forum* 19 deserves particular attention. Many of the tangled threads in the debate can be traced back to the seminal article by H W R Wade, ‘Unlawful Administrative Action; Void or Voidable?’ published in two parts in (1967) 83 *LQR* 499 and (1968) 84 *LQR* 95 — see also the discussion of these articles in *Bhardwaj* (2002) 209 CLR 597; 187 ALR 117 at [144]ff per Hayne J.

¹⁰⁰ *Bhardwaj* (2002) 209 CLR 597; 187 ALR 117 at [51] per Gaudron and Gummow JJ.

¹⁰¹ (2003) 211 CLR 476; 195 ALR 24 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ (footnotes omitted).

decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged. A fortiori in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition.¹⁰²

However, the reasoning in *Bhardwaj* does not appear to be as clear-cut as the passage cited in *Plaintiff S157* might suggest.

In *Bhardwaj*, through administrative oversight the Immigration Review Tribunal (IRT) had denied the applicant a hearing and had then purported to deliver a decision that he was not entitled to a protection visa. When the tribunal member realised the oversight, the member held a hearing and issued a new decision, this time granting Mr Bhardwaj a protection visa. The Minister sought judicial review of the second decision on the basis that it was unauthorised and ineffective because the member had already made the first decision. The majority of the High Court held that,¹⁰³ because of the breach of procedural fairness, the first decision was infected by jurisdictional error and was a nullity. As a result it was perfectly permissible for the member to issue the second decision, because the first decision was, in law, no decision at all.

Nevertheless, there are several passages in *Bhardwaj* that portray the relationship between jurisdictional error and nullity as not quite the one of equality suggested in *Plaintiff S157*. Immediately before the passage from *Bhardwaj* cited in *Plaintiff S157* (quoted above),¹⁰⁴ Gaudron and Gummow JJ wrote that 'only if the general law so requires or the Act impliedly so directs, are decisions involving jurisdictional error to be treated as effective unless and until set aside'.¹⁰⁵ Similarly, immediately after the passage in which Gaudron and Gummow JJ wrote that 'a decision which involves jurisdictional error is regarded, in law, as no decision at all'¹⁰⁶ (the passage relied upon in *Plaintiff S157*),¹⁰⁷ their Honours wrote:

There being no provision of the Act which, in terms, purports to give any legal effect to decisions of the tribunal which involve jurisdictional error, as did the September decision, it is necessary to consider whether, nevertheless, the Act should be construed as impliedly having that effect.¹⁰⁸

The passage from the joint judgment in *Plaintiff S157* quoted earlier¹⁰⁹ also cited a passage from the decision of Hayne J in *Bhardwaj*, which was similarly

102 (2002) 209 CLR 597; 187 ALR 117 at [51] per Gaudron and Gummow JJ (footnotes omitted). The same footnote in the joint judgment in *Plaintiff S157* also cited *Bhardwaj* at [63] per McHugh J (expressing general agreement with Gaudron and Gummow JJ) and [152] per Hayne J (quoted below).

103 Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ (Kirby J dissenting).

104 (2002) 209 CLR 597; 187 ALR 117 at [51] per Gaudron and Gummow JJ.

105 *Ibid*, at [50].

106 *Ibid*, at [53].

107 (2003) 211 CLR 476; 195 ALR 24 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

108 *Bhardwaj* (2002) 209 CLR 597; 187 ALR 117 at [54] per Gaudron and Gummow JJ.

109 (2003) 211 CLR 476; 195 ALR 24 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

equivocal on the relationship between jurisdictional error and invalidity:

This is not to adopt what has sometimes been called a ‘theory of absolute nullity’ or to argue from an a priori classification of what has been done as being ‘void’, ‘voidable’ or a ‘nullity’. It is to recognise that, if a court would have set the decision aside, what was done by the tribunal is not to be given the same legal significance as would be attached to a decision that was not liable to be set aside. In particular, it is to recognise that if the decision would be set aside for jurisdictional error, the statutory power given to the tribunal has not been exercised. . . .

Nothing in the Act requires (or permits) the conclusion that despite the jurisdictional error, some relevant legal consequence should be attributed to the September decision. In particular, the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect. Once it is recognised that a court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences.¹¹⁰

Similarly equivocal comments can be found in *Bhardwaj* in the judgment of Gleeson CJ.¹¹¹ McHugh J relevantly agreed with Gaudron and Gummow JJ.¹¹² Callinan J seemed to make a more clear cut equation between jurisdictional error and nullity, but his Honour’s conception of what constitutes jurisdictional error was also narrower than that of the other judges.¹¹³

Jadwan — an attempt to resolve the tension

The Full Federal Court faced the apparent difficulty of reconciling *Plaintiff S157* and *Bhardwaj* in *Jadwan*.¹¹⁴ The case also acts as a salutary illustration of how these apparently esoteric issues, which can sometimes seem to resemble medieval theological disputes over how many angels could fit on the head of a pin, can have very real, practical consequences in litigation.

Nursing homes that were approved under the relevant legislation were subsidised by the Commonwealth. *Jadwan Pty Ltd* operated an approved nursing home under the National Health Act 1953 (Cth), which regulated nursing homes in Australia until it was replaced by the Aged Care Act 1997 (Cth). However, before the new Act came into effect, the Minister revoked the approval for *Jadwan*’s nursing home. The decision was based on the advice of a Standards Review Panel that, it turned out, had not been properly constituted as required under the relevant regulations.

In previous litigation, the Federal Court had granted ADJR Act review of the Minister’s decision. At first instance, the trial judge in the previous proceedings held that the Minister had not complied with procedures required by the Act to (the ground of review in s 5(1)(b) of the ADJR Act) and declared the decision to revoke the nursing home’s approval to be ‘void’. On appeal, the Full Court granted review on a different basis — that taking into account the views of the panel as a panel (rather than as just three persons) was an improper exercise of power on an irrelevant/relevant consideration basis (the

110 (2002) 209 CLR 597; 187 ALR 117 at [152]–[153] (footnotes omitted); see also at [144].

111 *Ibid.*, at [13]–[15].

112 *Ibid.*, at [63].

113 *Ibid.*, at [162]–[163]; but see the characterisation of the judgment of Callinan J by Gray and Downes JJ in *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [40].

114 (2003) 145 FCR 1; 204 ALR 55.

grounds of review in ss 5(1)(e) and 5(2)(a) and (b) of the ADJR Act). The Full Court set aside the trial judge's order declaring the revocation 'void' and instead 'set aside' the revocation decision pursuant to s 16(1)(a) of the ADJR Act.

To understand the second round of *Jadwan* litigation, one must know that under the new Aged Care Act, subsidy monies were allocated to approved providers, rather than to homes as under the National Health Act. However, transitional provisions deemed the proprietors of approved homes under the previous National Health Act regime to be approved providers under the new Aged Care Act system.

In the second round of litigation in *Jadwan*, the applicant argued that it was entitled to back-pay for subsidy monies on the basis that it had *always* been the proprietor of an approved home under the old legislation and thus was deemed to be an approved provider under the new regime. Its argument was that:

- (a) in the previous proceedings, the Federal Court had held that the Minister had taken into account an irrelevant consideration and/or failed to take into account a relevant consideration and these grounds that amounted to jurisdictional: *Craig* and *Yusuf*; and
- (b) a decision infected by jurisdictional error is a nullity: *Bhardwaj*.¹¹⁵

The trial judge dismissed *Jadwan*'s application and the Full Court dismissed its appeal. In the Full Court, Gray and Downes JJ dismissed the appeal on two bases:

- (1) First, their Honours held that decisions infected by jurisdictional error are not necessarily nullities, in the sense of having no legal effect whatsoever. The effect to be given to a decision infected by jurisdictional error is to be determined as a matter of statutory construction, according to the test propounded by the High Court in *Project Blue Sky*.¹¹⁶ The relevant Acts did not evince the intention that a revocation decision infected by jurisdictional error would not have the effect of disentitling an approved home/approved provider to subsidy payments.¹¹⁷
- (2) Secondly, and in any case, the previous Federal Court decision should not be construed as holding that the revocation decision was infected by jurisdictional error or was invalid or a nullity. The previous application was pursuant to the ADJR Act and jurisdictional error is not a necessary condition for relief under that Act. Moreover, the replacement of the trial judge's order declaring the revocation decision void with an order setting it aside, which operated prospectively from the Full Court order not retrospectively,¹¹⁸ indicates that the previous Full Court did not hold the revocation decision to have been void *ab initio*.¹¹⁹

115 See *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [28] per Gray and Downes JJ.

116 (1998) 194 CLR 355; 153 ALR 490 at [91] per McHugh, Gummow, Kirby and Hayne JJ.

117 *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [40]–[43] and [49] per Gray and Downes JJ.

118 See *Wattmaster Alco Ltd v Button* (1986) 13 FCR 253 at 256; 70 ALR 300.

119 *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [44]–[47] per Gray and Downes JJ.

The reasoning of Kenny J concentrated on the second basis above, though her Honour did preface her judgment by saying that she agreed with the reasoning of Gray and Downes JJ.¹²⁰

Thus the Full Federal Court in *Jadwan* took the view that the relationship between jurisdictional error and invalidity is that some but not all jurisdictional errors result in invalidity and that the way to tell the difference is to apply the *Project Blue Sky* test. Yet the court also held that a judicial decision to make an order under s 16 of the ADJR Act on the basis that an administrative decision involved the consideration of irrelevant material (a traditional ground of review under both the common law and the ADJR Act) did not necessarily imply a finding of jurisdictional error. This would seem to imply *three* categories of error:

- (a) considering irrelevant material that amounts to jurisdictional error and results in invalidity;
- (b) considering irrelevant material that amounts to jurisdictional error but does not result in invalidity; and
- (c) considering irrelevant material that neither amounts to jurisdictional error nor results in invalidity.

The Full Court saw the error in *Jadwan* as being in category (c).

The Full Court's schema in *Jadwan* envisions the *Project Blue Sky* test as the means of differentiating between categories (a) and (b). The only guidance for differentiating categories (b) from (c) is the majority's comment that, '[t]here is no suggestion that the Minister's delegate failed to understand the task to be performed'.¹²¹ However, given the discussion of the relevant/irrelevant consideration grounds in classic authorities such as *Minister for Aboriginal Affairs v Peko Wallsend Ltd*,¹²² there must be real doubt as to whether taking into account an irrelevant consideration or failing to take into account a relevant consideration are not merely specific examples of ways in which a decision-maker can '[fail] to understand the task to be performed'.

Argument

As noted by Gaudron and Gummow JJ in *Bhardwaj*, there is a 'certain illogicality' to the idea that a decision infected by jurisdictional error might nevertheless be valid.¹²³ Jurisdiction is the power to decide.¹²⁴ A jurisdictional error is an error that causes a decision-maker to make a decision outside its jurisdiction¹²⁵ — that is, to make a decision outside its power to decide. How, then, can a decision made without the power to decide be valid?

Jurisdictional error as invalidity

With respect to the *Jadwan* Full Federal Court, perhaps a better way to analyse the relationship between the concepts may be that jurisdictional error always

120 Ibid, especially at [62] and [64] per Kenny J.

121 Ibid, at [45] per Gray and Downes JJ.

122 (1986) 162 CLR 24, especially at 39–47 per Mason J.

123 (2002) 209 CLR 597; 187 ALR 117 at [51] per Gaudron and Gummow JJ (quoted above).

124 See, eg, *Abebe* (1999) 197 CLR 510; 162 ALR 1 at [24] per Gleeson CJ and McHugh J (quoted above).

125 See, eg, *Aala* (2000) 204 CLR 82; 176 ALR 219 at [162] per Hayne J (quoted above).

results in some sort of invalidity — that is that there are only two categories: jurisdictional errors (which always result in invalidity) and non-jurisdictional errors (which do not). If true, this would mean that the way to determine the difference between jurisdictional error and errors within jurisdiction is to look at the problem ‘backwards’: a jurisdictional error is the breach of a requirement on the exercise of a decision-making power that the legislature intended would result in the decision being invalid.¹²⁶ Instead of being the means of determining which jurisdictional errors lead to invalidity, as suggested by Gray and Downes JJ in *Jadwan*, on this view the test in *Project Blue Sky*¹²⁷ would be the test for differentiating between jurisdictional and non-jurisdictional errors.

This scheme would still leave the problem of explaining the apparently equivocal dicta in *Bhardwaj* and elsewhere — but I will propose a method of doing so later in this article.

SAAP — Project Blue Sky as the test for jurisdictional error?

Something like this approach of using *Project Blue Sky* as the test for distinguishing between jurisdictional and non-jurisdictional errors appears to have been adopted by McHugh, Kirby and Hayne JJ in the recent decision in *SAAP*.¹²⁸

In *SAAP*, an Iranian woman and her younger daughter entered Australia and applied for refugee status on the basis of a fear of persecution due to her membership of a minority Christian sect in Iran. Her older daughter was already in Australia on a protection visa. The RRT disbelieved the applicant’s claims on the basis of evidence taken from her older daughter. The RRT did not give the applicant written particulars of this evidence.

The majority of the Court (McHugh, Kirby and Hayne JJ) held that s 424A of the Migration Act required the RRT to give the applicant written particulars of the information it had obtained from the daughter where the RRT considered that information would be the reason or part of the reason for rejecting the applicant’s claim. The majority further held that the breach of s 424A amounted to jurisdictional error (the minority, Gleeson CJ and Gummow J, did not have to consider this issue).

In analysing whether the breach of s 424A was a jurisdictional error, all three members of the majority seemed to assimilate the concept of jurisdictional error to the concept of invalidity. McHugh J reasoned thus:

Jurisdictional error may arise where a decision-maker fails to discharge ‘imperative duties’ or to observe ‘inviolable limitations or restraints’ found in the Act. To determine whether a decision under the Act involves a jurisdictional error, it is necessary to take two steps. First, it is necessary to determine the limitations and restraints found in the Act. Secondly, it is necessary to attempt, through statutory construction, to reconcile them with s 474 of the Act [the privative clause] to ascertain whether failure to observe any particular procedural or other requirement in the Act constitutes an error which has resulted in the decision-maker failing to exercise or exceeding its jurisdiction.

126 For a clarification of this sentence, see the commentaries on this article and my response.

127 (1998) 194 CLR 355; 153 ALR 490.

128 (2005) 215 ALR 162; 79 ALJR 1009.

Section 424A is a statutory formulation of the obligation to accord procedural fairness in the conduct of a review. The question is whether failure to comply with that section gives rise to jurisdictional error *such that the decision of the tribunal is invalidated*. To answer this question, it is necessary to have regard to ‘the language of the relevant provision and the scope and object of the whole statute’ [quoting *Project Blue Sky*]¹²⁹ in order to *ascertain whether the parliament intended that an act done in breach of s 424A is invalid*. The question is not easy to answer. In the joint judgment in *Project Blue Sky Inc v Australian Broadcasting Authority*, Gummow, Kirby and Hayne JJ and I said . . . [His Honour then quoted a well known passage from *Project Blue Sky*, which is set out later in this article].¹³⁰

. . . If the requirement to give written particulars is mandatory, then failure to comply means that the tribunal has not discharged its statutory function. There can be no ‘partial compliance’ with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not. Given the significance of the obligation in the context of the review process (the obligation is mandated in every case), it is difficult to accept the proposition that a decision made despite the lack of strict compliance is a valid decision under the Act. . . . Parliament has made the provisions of s 424A one of the centrepieces of its regime of statutory procedural fairness. Because that is so, the best view of the section is that failure to comply with it goes to the heart of the decision-making process. Consequently, a decision made after a breach of s 424A is *invalid*.¹³¹

Hayne J reasoned in similar terms:

The focus in the inquiry about jurisdictional error must be upon the combined operation of s 414(1) (which obliges the tribunal to review the decision) and s 415 (which gives the tribunal the same powers and discretions as are conferred by the Act on the primary decision-maker). *It is the validity of the act done that is in issue*. The question is, having regard to ‘the language of the relevant [provisions] and the scope and object of the whole statute’, [quoting *Tasker v Fullwood*]¹³² as cited in *Project Blue Sky*]¹³³ is it ‘a purpose of the legislation that an act done in breach of [s 424] should be invalid’? [quoting *Project Blue Sky*]¹³⁴ *That is, is the tribunal’s decision to affirm the refusal of protection visas to the appellants invalid for want of compliance with s 424A?*¹³⁵

Most interestingly, given his previous scepticism on the ‘chimerical’ distinction between jurisdictional and non-jurisdictional errors, Kirby J wrote:

Nevertheless, is a breach of s 424A sufficient to establish jurisdictional error necessary for relief in this case? Because of the mandatory language of s 424A (‘must’) and the provisions of Pt 7, Div 4, *I agree with Hayne J* [cites passages from the judgments of Hayne and McHugh JJ,¹³⁶ quoted in part above] *that the breach is sufficient to constitute jurisdictional error, as that opaque expression has been interpreted*. An imperative obligation for the conduct of a review by the tribunal has

129 (1998) 194 CLR 355; 153 ALR 490 at [91] per McHugh, Gummow, Kirby and Hayne JJ.
130 *Ibid*, at [91] and [93] per McHugh, Gummow, Kirby and Hayne JJ.

131 SAAP (2005) 215 ALR 162; 79 ALJR 1009 at [72]–[73], [77] (emphasis added; footnotes omitted).

132 [1978] 1 NSWLR 20 at 24 per Hope, Glass and Samuels JJA.

133 (1998) 194 CLR 355; 153 ALR 490 at [92].

134 *Ibid*, at [93].

135 SAAP (2005) 215 ALR 162; 79 ALJR 1009 at [205] (emphasis added; footnotes omitted).

136 His Honour cited passages from the reasons of Hayne J at [204]–[208], including that quoted above, and referred ‘see also’ to [77] of the reasons of McHugh J, also quoted above.

not been complied with. The will of parliament must be obeyed. The resulting decision of the tribunal is not, therefore, one protected by the Act from judicial review in the Federal Court.¹³⁷

Thus McHugh, Kirby and Hayne JJ have held that, at least with respect to explicit statutory requirements on the exercise of a decision-making power, the test for whether a breach of such a requirement amounts to jurisdictional error is the test for invalidity propounded in *Project Blue Sky*.¹³⁸

Broadly similar comments linking jurisdictional error and validity can be found in the judgment of Kirby J and in the joint judgment of Callinan and Heydon JJ in the later case of *NAIS*,¹³⁹ which related to obligations arising out of the common law duty to accord procedural fairness.

***Project Blue Sky* — validity and legislative intention**

While advocates before the High Court had been arguing for a link between jurisdictional error and *Project Blue Sky*¹⁴⁰ for some time, the phrase ‘jurisdictional error’ does not appear in the judgments in that case — indeed the word ‘jurisdiction’ appears only once.¹⁴¹

In *Project Blue Sky*, the High Court examined the circumstances in which a failure to fulfil a statutory requirement will cause a decision to be invalid. The Broadcasting Services Act 1992 (Cth) gave the Australian Broadcasting Authority (the ABA) the power to implement and enforce program standards, which had to be obeyed by holders of broadcasting licences. Section 160 of the Act also required the ABA to ‘perform its functions in a manner consistent with . . . Australia’s obligations under any convention to which Australia was a party or any agreement between Australia and a foreign country’. The ABA promulgated a program standard requiring a minimum percentage of shows broadcast in Australia to have been produced in Australia. However, Australia was a party to the *Protocol on Trade in Services to the Australia-New Zealand Closer Economic Relations Trade Agreement*, which required that New Zealand producers of services should be treated no less favourably in Australia than Australian producers. *Project Blue Sky*, representing New Zealand television producers, challenged the program standard on the basis that it did not comply with s 160 of the Act.

The High Court held that the program standard was in breach of s 160 of

137 *SAAP* (2005) 215 ALR 162; 79 ALJR 1009 at [173] (emphasis added; footnotes omitted).

138 (1998) 194 CLR 355; 153 ALR 490. The dissenting judges in *SAAP* (2005) 215 ALR 162; 79 ALJR 1009 per Gleeson CJ and Gummow J, having held that s 424A had not been breached, did not address the issue of jurisdictional error; but see the use of the ‘inviolable limitation’ and ‘imperative duty’ language in obiter at [136] per Gummow J.

139 (2005) 223 ALR 171; 80 ALJR 367 at [70]–[72], [75]–[76], [85] per Kirby J, [140] per Callinan and Heydon JJ.

140 (1998) 194 CLR 355; 153 ALR 490.

141 *Ibid.*, at [92] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ (emphasis added):

Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the *jurisdiction* of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory.

the Act because it treated New Zealand producers less favourably than their Australian counterparts. However, the court held that this breach did not invalidate the standard. In a passage quoted by McHugh J in *SAAP* in the passage quoted in part above,¹⁴² the court pointed out that:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

. . . A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to ‘the language of the relevant provision and the scope and object of the whole statute’ [quoting *Tasker v Fullwood*¹⁴³].¹⁴⁴

The court drew on and clarified a long line of authority distinguishing between mandatory statutory requirements, breaches of which lead to invalidity because they are regarded as ‘going to the jurisdiction of the person or body exercising the power or authority’; and directory requirements, a breach of which does not result in invalidity.¹⁴⁵

If jurisdictional error always results in some form of invalidity, then it makes sense, as suggested in *SAAP*, that the test for invalidity laid down in *Project Blue Sky* is the key to distinguishing jurisdictional errors from errors within jurisdiction. The reference in *Project Blue Sky* to a failure to accord with a mandatory requirement ‘going to jurisdiction’ certainly supports this view.¹⁴⁶

While the court in *Project Blue Sky* emphasised that the matter turned on the construction of each statute and that ‘there is not even a ranking of relevant factors or categories to give guidance on the issue’,¹⁴⁷ the factors relied on by the court to conclude that s 160 was not a mandatory requirement included that the widespread public inconvenience that would result from invalidation of a standard — affecting not just the parties but the wider community — militated against the conclusion invalidity would have been the intended consequence of non-compliance with a statutory requirement.¹⁴⁸

142 (2005) 215 ALR 162; 79 ALJR 1009 at [73] per McHugh J, quoted in part above.

143 [1978] 1 NSWLR 20 at 24 per Hope, Glass and Samuels JJA.

144 (1998) 194 CLR 355; 153 ALR 490 at [91] and [93] per McHugh, Gummow, Kirby and Hayne JJ.

145 *Ibid.*, at [92]–[93] per McHugh, Gummow, Kirby and Hayne JJ. However the court cautioned that the mandatory/directory labels merely ‘record a result’ and were the ‘end of the enquiry, not the beginning’: *ibid.* at [93].

146 *Ibid.*, at [92] per McHugh, Gummow, Kirby and Hayne JJ, quoted at n 139 above.

147 *Ibid.*, at [91].

148 *Ibid.*, at [94]–[100].

On this basis, it could be said that the more ‘polycentric’¹⁴⁹ a power — the more widespread its direct effect on the wider community — the greater the decision-maker’s jurisdiction was intended to be and the less likely that decision-maker is to fall into jurisdictional error. On the other hand, the more a power can be seen as affecting just one person, body or defined group — perhaps, the more ‘court like’ or quasi-judicial the decision-maker’s jurisdiction — the narrower the jurisdiction is likely to be and the more likely the decision-maker is to fall into an error that goes to jurisdiction.

Jurisdictional error and the grounds of review

It might be objected that *SAAP* was only concerned with an *explicit* requirement in a statute and was not concerned with a breach of one of the traditional grounds of review.¹⁵⁰ As previously discussed, it might thus be argued, on the basis of the often-quoted statements in *Craig* and *Yusuf*, that identifying the wrong issue, asking the wrong question, relying on irrelevant material, ignoring relevant material, making an erroneous finding, breaching the rules of procedural fairness or (in some cases) reaching a mistaken conclusion always result in jurisdictional error.

However, as noted above, in both *Craig* and *Yusuf* the court used a qualifying phrase — ‘and the tribunal’s exercise or purported exercise of power is thereby affected’ in *Craig* and ‘in a way that affects the exercise of power’ in *Yusuf* — with respect to its often-quoted list of jurisdictional errors.¹⁵¹ Moreover, the courts have repeatedly said that both certiorari and ADJR Act review are wider than review for jurisdictional error.¹⁵²

If the grounds of review can be seen as a set of limits that are implied into a statute or imposed by the common law as a ‘default position’ to be applied in the absence of a contrary legislative intention’, then perhaps a way of reconciling these two apparently conflicting themes might be that the grounds of review should be treated in the same way as explicit limits on jurisdiction.

149 On polycentricity see Administrative Review Council, *The Scope of Judicial Review: Discussion Paper*, 2003, pp 36–8; J Kirk, ‘Rights, Review and Reasons for Restraint’ (2001) 23 *SydLRev* 19 at 26 and L L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard L Rev* 353 at 394–8. Ironically, one of the hypothetical examples given by Fuller of a function singularly unsuited to the ‘adjudicative method’ — the setting of wages by courts — bears a remarkable resemblance to Australia’s unique system of ‘conciliation and arbitration . . . of industrial disputes’ (see the Constitution s 51(xxxv)) as it existed prior to the reforms beginning in the late 1980s.

150 *NAIS* (2005) 223 ALR 171; 80 ALJR 367 concerned common law procedural fairness, but the passages in the judgments of Kirby J at [70]–[72], [75]–[76], [85] and a Callinan and Heydon JJ at [140], while strongly linking jurisdictional error with invalidity, do not cite *Project Blue Sky*.

151 (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; 131 ALR 595 and *Yusuf* (2001) 206 CLR 323; 180 ALR 1 at [82] per McHugh, Gummow and Hayne JJ, both quoted above. Of courses, these two phrases may just refer to the *de minimis* requirements that the statute implicitly required the decision-maker to comply with the requirement implicit in the ground of review (eg, that the statute required, rather than merely allowed the decision-maker to consider the relevant consideration) and that the failure to do so result in a loss of the possibility of a favourable decision: see, eg, *Minister for Aboriginal Affairs v Peko-Walsend Ltd* (1986) 162 CLR 24, especially at 37–48 per Mason J; *Lu v Minister for Immigration, Multicultural and Indigenous Affairs* [2004] FCAFC 340.

152 *Applicant S20* (2003) 198 ALR 59; 77 ALJR 1165 at [27] per McHugh and Gummow JJ; *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [44] per Gray and Downes JJ, [68] per Kenny J.

That is to say, one determines whether the breach of a particular ground of review is a jurisdictional error by applying the *Project Blue Sky* test.¹⁵³

Of course, if the grounds of review are implied into statutes (or, a fortiori, if they are imposed directly by the common law), determining whether it was a purpose of the legislature that a breach of one would result in invalidity may seem to be an artificial task. One solution may be that there is a rebuttable presumption that the traditional grounds of review go to jurisdiction. This certainly seems to have been the case with respect to the requirement to accord procedural fairness, at least with respect to the Migration Act.¹⁵⁴ Also, given the discussion of *Project Blue Sky* above,¹⁵⁵ it may be that the more polycentric the power, the less likely it is that a breach of the limitation contained in a particular ground of review will amount to a jurisdictional error.

On this scheme, the decision in *Jadwan* is explicable on the second of the two bases given by Gray and Downes JJ — the Minister's cancellation decision (which had been in error because it had taken into account an irrelevant consideration) was not infected by jurisdictional error and thus had not been void ab initio. This was illustrated by the fact that the previous Full Court had quashed the decision pursuant to s 16(1)(a); rather than merely declaring it void (as the trial judge would have done). The particular relevant consideration was one which it would be an error to consider, but only a non-jurisdictional error that did not result in invalidity.

Validity as a bundle of legal consequences

However, if this notion of an identity between jurisdictional error and invalidity is correct, how does one explain the dicta in *Bhardwaj* and comments in other judicial and academic sources discussed above that speak of 'degrees of nullity', 'validity for different purposes' and determining whether the legislature intended jurisdictional error to result in particular types of invalidity?

It may be that much of the confusion generated by these apparently contradictory statements is a result of the use of terms like 'nullity' or 'void' or 'invalid' themselves. The problem with these terms, the reason why they are merely labels of conclusion rather than tools of analysis, is that they divert discussion to general and abstract statements about what is really a very specific and concrete enquiry. When we speak of 'validity', the question we are really addressing is: What consequences does the statute give to a decision, and how many (if any) of those consequences does the statute intend to give to a jurisdictionally flawed decision? As Hayne J wrote in *Bhardwaj*:

The questions that must now be considered do not arise in the abstract. The Federal Court was, and this court now is, required to consider the *legal consequences* that are to be attached to certain events that have happened . . . To ask whether the tribunal has 'power to reconsider its decision' makes no reference to the circumstances in which the September decision was made. It obscures the fact that

¹⁵³ For a clarification of this paragraph, see the commentaries on this article and my response.

¹⁵⁴ See, eg, *Aala* (2000) 204 CLR 82; 176 ALR 219 at [41] per Gaudron and Gummow JJ (Gleeson CJ agreeing at [5]) and [142] per Kirby J and the authorities cited there. But see *Bhardwaj* (2002) 209 CLR 597; 187 ALR 117 at [162]–[163] per Callinan J.

¹⁵⁵ (1998) 194 CLR 355; 153 ALR 490.

it is necessary to examine what, if any, *legal significance* should be attached to those circumstances. In particular, it poses the issue in a way that hides the existence of the question whether what happened in September 1998 should be found to be an exercise of the powers given to the tribunal under the Act, and a performance of the duties imposed on the tribunal by the Act. That is, asking whether the tribunal has power to reconsider its decision hides the necessity to ask whether the events which happened in September constituted the tribunal making a decision to which *legal consequences* should be attributed.¹⁵⁶

Similarly, Gaudron and Gummow JJ wrote:

In our view, it is neither necessary nor helpful to describe erroneous administrative decisions as ‘void’, ‘voidable’, ‘invalid’, ‘vitiating’ or, even, as ‘nullities’. To categorise decisions in that way tends to ignore the fact that the real issue is whether the rights and liabilities of the individual to whom the decision relates are as specified in that decision. And, perhaps more importantly it overlooks the fact that an administrative decision has only so much force and effect as is given to it by the law pursuant to which it was made.¹⁵⁷

We care when statutes give decision-makers powers to make decisions because statutes attach *legal consequences* to those decisions. For example, a licensing statute prohibits selling a particular product and then attaches the consequence of a relaxation of that prohibition to the decision of a licensing board to grant a license. If the licensing board decides to grant a ‘licence’ in circumstances where:

- (a) a jurisdictional pre-condition for the decision has not been satisfied — perhaps because the applicant was not qualified according to a statutory criterion (eg, the statute requires the applicant have no criminal record, and he or she did); or
- (b) the board failed to come to its opinion in the manner required of it by the statute (eg, the board was required to consider the impact of the application, if successful, on other licensees) and that error is sufficient to amount to jurisdictional error;

then the process undertaken by the board does not fully fit the description in the statute of the process that will result in the legal consequence that the prohibition is relaxed. The question that the theoreticians would cast as ‘Is the “licence” granted by the board a nullity?’ is more profitably cast as, ‘What consequences does the statute give to a decision to grant a license that is jurisdictionally flawed in this manner?’ Validity and nullity are in fact abstract shorthands for what is really a very practical enquiry about specific legal consequences.¹⁵⁸

In my view, it is best to think of validity as a ‘bundle’ of legal consequences that flow from a jurisdictionally unflawed decision. Jurisdictional error can then be seen as a flaw in the decision-making process that causes some or all of those consequences to drop out of the bundle.

¹⁵⁶ (2002) 209 CLR 597; 187 ALR 117 at [142] (emphasis added).

¹⁵⁷ Ibid, at [46].

¹⁵⁸ See *ibid*, at [58] per Gaudron and Gummow JJ:

When an administrative decision is challenged in judicial proceedings, the question that is ultimately decided is not whether the decision was affected by error but whether the rights of the party to whom the decision relates are determined by that decision, which they will not be, if the decision must be set aside.

It may be that in most cases and under most statutes, *all* of the consequences fall away and we have what the theoreticians would call an ‘absolute nullity’ — a decision with none of the legal consequences that would follow from an unflawed decision. But, in many cases, some of the consequences will stay in the bundle. For example, if a statute sets up ‘appeals’ from an administrative decision-maker to some merits review body like the RRT or the Administrative Appeals Tribunal (AAT), then a jurisdictionally flawed decision must at least retain the legal consequence that it can form the foundation for the review tribunal to step into the shoes of the decision-maker and re-make his or her decision.¹⁵⁹ If such a jurisdictionally flawed decision were an ‘absolute nullity’, then there would be no decision for the review tribunal to review — one cannot ‘re-make’ a decision that in legal terms, never occurred.¹⁶⁰

However, the High Court’s statements indicating a necessary connection between jurisdictional error and some level of invalidity are sufficiently strong and frequent that it seems safe to say that a jurisdictionally flawed decision cannot retain *all* the consequences that would attach to an unflawed decision. As discussed above, strict logic would seem to support this conclusion.

Moreover, the court’s apparent equivocations on this relationship are fully explicable if one takes this ‘bundle of consequences’ approach. Phrases such as ‘degrees of nullity’, ‘invalid for some purposes’ and ‘determining when jurisdictional error results in invalidity’ are far less vexing when understood as shorthands for the statement that it is possible that some but not all legal consequences will fail to follow from a decision infected by jurisdictional error.

It might be asked against me that, if validity is really a plural question about a bundle of consequences, why do courts usually treat it as a binary question? My answer is that, in most cases, litigants are only interested in a particular consequence of a given decision-making process — for example, whether the seller has a licence sufficient to found a defence to a charge of selling the product without a licence. Other consequences (such as whether the decision is sufficient to found a right to appeal to an administrative review body) are simply not before the court in most cases. From a practical point of view, because only one legal consequence of the impugned decision is at issue, it is natural and convenient for courts to treat the issue of validity as if it were a binary question. Issues of ‘degrees of validity’ generally only arise in cases that examine multiple consequences of a decision — often where other consequences have been ‘invalidated’ in previous proceedings (such as in *Jadwan*).¹⁶¹

It follows that, where more than one legal consequence of a jurisdictionally flawed decision-making process is at stake, it may be necessary to apply a

¹⁵⁹ *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307. See Aronson, above n 99, at 21. Note that the judgments in *Brian Lawlor* largely analysed the issue in terms of the Administrative Appeals Tribunal Act 1975 (Cth) giving the AAT jurisdiction over ‘purported decisions’, rather than the decision having the consequence of triggering the AAT’s jurisdiction; but, in my view, these are just two ways of saying the same thing.

¹⁶⁰ *Bhardwaj* (2002) 209 CLR 597; 187 ALR 117.

¹⁶¹ (2003) 145 FCR 1; 204 ALR 55.

more fine-grained version of the *Project Blue Sky* test: Was it a purpose of the legislation that an act done in breach of the provision should not have legal consequence X? (X being one of the legal consequences at issue in the proceedings that would normally flow from a jurisdictionally unflawed decision.)

Invalidity and the role of injunction

As noted above, one of the great conundrums about s 75(v) of the Constitution is that it seems clear that injunction lies for non-jurisdictional errors; yet the court has usually behaved as though all s 75(v) relief is limited to where there has been jurisdictional error. Kirby J has suggested that the presence of injunction in s 75(v) renders the distinction between jurisdictional and non-jurisdictional errors otiose because review for errors within jurisdiction will be available under s 75(v) through injunction.¹⁶² Yet the other members of the High Court continue to insist on the central place of jurisdictional error to the constitutional writs. It is possible that this apparent tension can be resolved if one accepts the view of the relationship between jurisdictional error and invalidity posited in this article.

If that view is correct, a decision infected by jurisdictional error will be invalid in some sense (ie, will fail to have at least one of its usual consequences), but a decision infected by an error within jurisdiction remains entirely valid (ie, retains all its legal consequences). Certiorari cures errors within jurisdiction (appearing on the face of the record) by quashing the decision — that is, by rendering invalid that which was previously valid.¹⁶³ Section 16 of the ADJR Act similarly gives the Federal Court power to retrospectively render a decision invalid — though, unlike certiorari, s 16 can render a decision invalid from a nominated date rather than render it void ab initio.¹⁶⁴ By contrast, injunction has no such power to invalidate a heretofore valid decision. It lies merely to enforce compliance with a legal requirement and, as a discretionary remedy, will not lie when the issue has become moot.

Perhaps the role of injunction in s 75(v) is to act as a kind of common law version of s 6 of the ADJR Act, by getting at conduct made towards a decision. On this analysis, injunction would lie for non-jurisdictional error, but in very limited circumstances. For example, if a decision to cancel a non-citizen's visa was made in breach of a merely directory requirement, that would not invalidate the decision. Thus the legal consequence attaching to a visa cancellation — removal and, often, detention pending removal — would flow from the decision, despite the error. If the applicant had become aware of the breach before the decision was made, the applicant might have been able to get an injunction to compel the decision-maker to observe the requirement. But once the decision to cancel the visa was made, it was valid and the breach could not prevent the usual legal consequence from flowing. An injunction requiring the decision-maker to abide by the breached requirement would be

¹⁶² See, eg, *Miah* (2001) 206 CLR 57; 179 ALR 238 at [211]–[212], quoted above.

¹⁶³ See, eg, *McBain* (2002) 209 CLR 372; 188 ALR 1 at [118] per McHugh J; see Aronson, Dyer and Groves, above n 4, p 618 n 1.

¹⁶⁴ *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253 at 256 per Sheppard and Wilcox JJ (with whom Fox J agreed); 70 ALR 300; *Jadwan* (2003) 145 FCR 1; 204 ALR 55 at [46] per Gray and Downes JJ, [79] per Kenny J.

moot, because the decision has been made, is valid and has all its usual legal consequence. The applicant's only means of curing non-jurisdictional error would be certiorari for error of law on the face of the record (if such could be shown on the limited definition of 'record') or some statutory version of certiorari, such as s 16 of the ADJR Act — but neither remedy is guaranteed under the Constitution and both have been excluded by the Migration Act.¹⁶⁵

There is a flavour of this reasoning in the judgment of Gaudron J in *Muin v Refugee Review Tribunal*:

There is, in my view, no reason why injunctive relief pursuant to s 75(v) of the Constitution should be confined by notions of jurisdictional error [cites *Abebe*].¹⁶⁶ Thus, for example, were an applicant for review to seek an injunction *restraining the tribunal from proceeding to a decision* until the documents referred to in s 418(3) of the Act were provided, it would be unnecessary to establish that the making of a decision would, in the absence of those documents, constitute jurisdictional error. Rather, it would be sufficient to establish that the documents had not been provided, that they might affect the decision and, perhaps, that they could not otherwise be obtained. *However, that is not what the plaintiffs seek. Rather, they seek an injunction to restrain the secretary and the Commonwealth from acting on the tribunal's decisions by reason of the secretary's non-compliance with s 418(3).*

To obtain injunctive relief based solely on the secretary's non-compliance with s 418(3) of the Act the plaintiffs must establish that the tribunal's decisions were, on that account, *without legal effect*. Once it is accepted, as, in my view it must be, that the secretary's compliance with s 418(3) is not a precondition to the tribunal's exercise of its review functions, it is necessary, at the very least, to show that the tribunal was required to consider the documents described in s 418(3) of the Act as part of the review process before it could be said that the tribunal's decisions were without legal effect.¹⁶⁷

It is true that there are other High Court dicta that can be read as saying that injunction is available to restrain persons from acting on a decision that has been infected with 'illegality'.¹⁶⁸ However, it may be possible to read many of these statements as merely acknowledging the availability of injunction to be granted as a remedy ancillary to the grant of prohibition to prevent persons from acting on an invalid decision.

One such example is in *Project Blue Sky*.¹⁶⁹ In examining the consequences

¹⁶⁵ It might also be argued against me that if certiorari can be granted as an ancillary remedy to a s 75(v) remedy, then certiorari should be available to quash a decision infected by a non-jurisdictional error that would entitle the applicant to an injunction. I think that in most situations this objection is not to the point. First, if the decision has been made, and it is not infected by jurisdictional error, then it is valid, has all usual consequences and it is lawful to act upon it. Thus there would be no basis for injunction to prevent anyone acting on the decision and an injunction to perform the directory requirement that had been ignored would be either futile or impossible or both. Secondly, if the decision is still at a preliminary stage where injunction might be available to require a decision-maker to fulfil a directory requirement, there would be no decision for certiorari to bring before the court or quash.

¹⁶⁶ (1999) 197 CLR 510; 162 ALR 1 at [107]–[108] per Gaudron J.

¹⁶⁷ (2002) 190 ALR 601; 76 ALJR 966 at [47]–[48] (emphasis added; footnotes omitted).

¹⁶⁸ See, eg, *Project Blue Sky* (1998) 194 CLR 355; 153 ALR 490 at [100] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441; 195 ALR 1 at [47] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

¹⁶⁹ (1998) 194 CLR 355; 153 ALR 490.

of the breach of a requirement that did not lead to invalidity, the majority wrote:

Although an act done in contravention of s 160 is not invalid, it is a breach of the Act and therefore unlawful. Failure to comply with a directory provision 'may in particular cases be punishable'. That being so, a person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.¹⁷⁰

It is unclear what the court meant by an 'injunction restraining that body from taking any further action based on its unlawful action': Does this mean that the ABA could be restrained from acting in the future *as if* the standard were valid? Does it mean that the ABA could be restrained from taking action against a broadcaster that had previously acted in breach of the standard? Or does the passage refer only to future standards, in the sense that an injunction would lie to restrain the ABA from making future standards that did not include New Zealand programs in the minimum quota of Australian broadcasting content? In my view, the first two possibilities tend to defeat the purposes of the distinction set up in the rest of the *Project Blue Sky* judgment. Moreover, such readings would effectively give injunction the power to invalidate a decision prospectively in a manner similar to s 16(1) of the ADJR Act. This seems highly implausible. In my view, the passage quoted from *Project Blue Sky* on injunction means that injunction lies to compel a decision-maker to comply with directory requirements (ie, requirements a breach of which does not result in invalidity and does not amount to jurisdictional error) in *future* decisions.

However, some of the contrary High Court dicta cannot be so easily explained. One of the most commonly quoted of these passages is that of Gaudron J in *Abebe*:

Given the potential for administrative decisions to impact on existing rights and interests, and, also, on important and valuable statutory rights to which the individual might otherwise be entitled, it may well be that an injunction will lie to prevent an officer of the Commonwealth from giving effect to an administrative decision based on error, even if that error is not jurisdictional error. It is, however, unnecessary to explore that issue . . .¹⁷¹

This is the paragraph cited by Kirby J in his famous 'chimerical distinction' passage in *Miah*,¹⁷² quoted at the beginning of this article.

What is interesting is that *Abebe* is also the case cited in the first sentence of the passage from the judgment of Gaudron J in *Muin* quoted above — a passage which seems unequivocally to adopt the position that injunction cannot cure non-jurisdictional errors.¹⁷³ It seems reasonable to suppose that in *Muin* Gaudron J was abandoning her previous position in *Abebe* (which

170 (1998) 194 CLR 355; 153 ALR 490 at [100] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ (footnotes omitted).

171 (1999) 197 CLR 510; 162 ALR 1 at [105].

172 (2001) 206 CLR 57; 179 ALR 238 at [211]–[212].

173 (2002) 190 ALR 601; 76 ALJR 966 at [47]–[48] per Gaudron J, quoted above. Indeed it may be that *Abebe* (1999) 197 CLR 510; 162 ALR 1 at [105] was the passage Gaudron J meant to cite in *Muin* (2002) 190 ALR 601 at [47]. The passage actually cited (*Abebe* at

Kirby J relied upon in *Miah*) that injunctions might be available to restrain the implementation of decisions affected by non-jurisdictional error. It seems that Gaudron J, at least, came to support the view that injunction could only restrain illegal action and that injunction could not restrain action taken to implement a *valid* decision, even if that decision was marred by non-jurisdictional error.

It might be objected that a scheme such as I propose here would encourage pre-emptive litigation as applicants rush to court before decisions in order to correct non-jurisdictional errors. There are two responses to this objection. First, it will be rare that an applicant will have evidence sufficient to found such a pre-emptive strike with any prospect of success. Secondly, the prospect of such strikes may be the price parliament has to pay when it chooses to reduce the scope of judicial remedies to the constitutional minimum of s 75(v). Where the full range of ADJR Act remedies are available, courts would be highly likely to reject such applications on the discretionary ground that the applicant will have a post-decision remedy and pre-emptive challenges of this sort are deleterious to efficient administration. But where a pre-emptive challenge is the only remedy available, the courts are unlikely to decline to exercise jurisdiction on discretionary grounds.

Invalidity and privative clauses

While the focus of this article has been on the relationship between jurisdictional error, invalidity and the role of injunction in s 75(v) of the Constitution, some of the conclusions argued for above have consequences for reading the cases on privative clauses.

In *Plaintiff S157*,¹⁷⁴ the High Court held that the privative clause in s 474 of the Migration Act did not prevent the High Court or Federal Court from granting prohibition and mandamus with respect to decisions infected by jurisdictional error. Section 474(1) of the Migration Act provided:

A privative clause decision:

- (a) is final and conclusive; and
- (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

Various decisions under the Act were nominated as ‘privative clause decisions’.

As the Minister’s Second Reading Speech made clear,¹⁷⁵ this provision was consciously based on the clause examined by the High Court in *Hickman*¹⁷⁶ — reg 17 of the National Security (Coal Mining Industry Employment) Regulations 1941 (Cth) — and it was the parliament’s clear intention that the

[107]–[108]) seems to have nothing to do with injunction. Its citation in *Muin* at [47] may have been a typographical or transcriptional error.

174 (2003) 211 CLR 476; 195 ALR 24.

175 Commonwealth, House of Representatives, *Parliamentary Debates*, 26 September 2001, p 31,561 (Philip Ruddock MHR); see D Bennett, ‘Privative Clauses: An Update on the Latest Developments’ (2002) 37 *AIAL Forum* 20.

176 (1945) 70 CLR 598.

clause be interpreted according to the ‘*Hickman* provisos’ set out in the famous judgment of Dixon J in that case:

The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary Constitution, the interpretation of provisions of the general nature of reg 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. 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.¹⁷⁷

Dixon J went on in *Hickman* to say that where a statute contained both a clause in terms of reg 17 and limits on a decision-maker’s power, it is necessary to reconcile the provisions through a process of statutory interpretation.¹⁷⁸ Later cases appeared to expand the ‘*Hickman* provisos’ (bona fide attempt to exercise its power, which relates to the subject matter of the legislation, and which is reasonably capable of reference to the power given to the body) to include the breach of ‘imperative duties or inviolable limitations or restraints’ on a decision-making power.¹⁷⁹

As noted above, the High Court in *Plaintiff S157* held that the word ‘decision’ in s 474 did not include a purported decision that was in law no decision at all and that a decision infected by jurisdictional error was such a purported decision. Indeed, the court went so far as to say that ‘so much is required as a matter of general principle’.¹⁸⁰

Some have seen this validity-based approach to privative clauses as ‘deflating the *Hickman* myth’ while paying lip-service to the prestige of the judgment of Dixon J.¹⁸¹ Given these claims, and given this article’s focus on validity, it is worth setting out the paragraph in the judgment of Dixon J in *Hickman* which immediately preceded the famous one quoted above:

177 Ibid, at 614. Regulation 17 of the National Security (Coal Mining Industry Employment) Regulations 1941 (Cth) provided that a decision of the Local Reference Board ‘shall not be challenged, appealed against, quashed or called into question, or subject to prohibition, mandamus or injunction, in any court on any account whatsoever’.

178 Ibid, at 616.

179 See *R v Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 per Dixon J; *R v Coldham; Ex parte Australian Workers’ Union* (1982) 153 CLR 415 at 419 per Mason ACJ, Brennan J. It is worth remembering that the Commonwealth lost *Hickman*. Prohibition issued because the Local Reference Board’s jurisdiction was over the coal industry and the prosecutors, who were haulage contractors who sometimes carried coal, were held not to be in the coal industry and thus to be outside the board’s jurisdiction. The board’s decision did not relate to the subject matter of the legislation: see *Hickman* (1945) 70 CLR 598 at 618 per Dixon J. Thus the issue of whether there were any imperative requirements in the relevant legislation did not arise.

180 *Plaintiff S157* (2003) 211 CLR 476; 195 ALR 24 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ, quoted above.

181 D Kerr, ‘Deflating the *Hickman* Myth: Judicial Review after *Plaintiff S157/2002 v The Commonwealth*’ (2003) 37 *ALAL Forum* 1.

... The presence of this provision in the regulations makes it necessary to say whether and to what extent it is ineffectual to protect the decision of the board from *invalidation*. . . . [A] writ of prohibition is a remedy that lies only to restrain persons acting judicially from exceeding their power or authority. It is therefore necessary to ascertain before issuing a writ whether the persons or body against which it is sought are acting in excess of their powers; and that means whether their determination, when made, would be *void*. The board derives its power from regulations of which reg 17 [the privative clause] forms a part, and that regulation must be taken into account in ascertaining what are the true limits of the authority of the board, and whether its decision is *void*.¹⁸²

And in a later passage:

It is . . . impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means *invalidity*, and yet, at the same time, to deprive this court of authority to restrain the *invalid* action of the court or body by prohibition. But where the legislature confers authority subject to limitations, and at the same time enacts such a clause as is contained in reg 17, it becomes a question of interpretation of the whole legislative instrument whether transgression of the limits, so long as done bona fide and bearing on its face every appearance of an attempt to pursue the power, necessarily spells *invalidity*. In my opinion, the application of these principles to the regulations means that any decision given by a Local Reference Board which upon its face appears to be within power and is in fact a bona fide attempt to act in the course of its authority, shall not be regarded as invalid.¹⁸³

When looked at through the lens of the validity-based analysis presented earlier in this article, it seems a privative clause can exclude judicial review for everything except jurisdictional error because s 75(v) of the Constitution exists to prevent illegalities in the sense of preventing Commonwealth officers from behaving as if certain legal consequences (such as the right to deport) obtain when then do not; but (except in the limited sense provided by an injunction before a decision is finalised) s 75(v) does not guard against illegalities in the sense of errors in the decision-making process that do not go to jurisdiction.

However, the presence of such a clause is also one of the factors to take into account in answering the ‘*Project Blue Sky* question’ of which limits on a decision-maker’s powers are ‘imperative’ such that a breach of them will render a decision invalid. This is what Dixon J meant by legislation that ‘impose[s] limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity’.¹⁸⁴ The presence of a privative clause is an implicit indication that the legislature intended fewer of the limits on power to result in invalidity if breached than would otherwise be the case. On this analysis, the ‘*Hickman* three’ — a bona fide attempt to exercise the power, that relates to the subject matter of the legislation, and is reasonably capable of reference to the power given to the body — would appear to be the logical minimum jurisdictional requirements on the exercise of any power, within which all exercise of power are constrained and beyond which any purported exercise of power will be

182 (1945) 70 CLR 598 at 614 (emphasis added).

183 *Ibid.*, at 616 (emphasis added).

184 *Ibid.*, at 616, quoted above.

invalid. Whether a privative clause removes all jurisdictional/imperative except these minima is a matter of statutory construction through the reconciliation process.

What is interesting here is that there is another model of privative clause, different to that examined in *Hickman* and *Plaintiff S157*, which purports to explicitly answer the *Project Blue Sky* question. Section 175 of the Income Tax Assessment Act 1936 (Cth) provides that: 'The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.' In *Richard Walter*, this clause was held to reduce the scope for s 75(v) review back to the 'Hickman provisos' (including inviolable limitations).¹⁸⁵ If jurisdictional error is the non-compliance with a decision-making requirement that leads to invalidity, then the *Richard Walter* clause operates by reducing the number of decision-making requirements with respect to which non-compliance will be jurisdictional error.¹⁸⁶

Of course, even with a *Richard Walter* clause, it is still necessary to reconcile the privative clause's general statement that requirements are not meant to be imperative or inviolable with indications that particular requirements were intended to be imperative or inviolable (in the sense that a breach of it will result in some form of invalidity). Further, it is true that the Income Tax Assessment Act contains extensive provisions for merits review to the AAT and 'appeals' to the Federal Court on questions of law; and this 'makes it relatively easy for a court to give wide-ranging effect to s 175'.¹⁸⁷ Nevertheless, the concise, explicit, even blunt answer to the *Project Blue Sky* question contained in s 175 of the Income Tax Assessment Act must surely have had some role in it having a wider effect in insulating income tax decisions from judicial review than s 474 of the Migration Act.

The course of decisions after *Plaintiff S157* seems to indicate that a *Hickman*-style 'shall not be challenged' clause will not transform many imperative jurisdictional requirements into directory ones — at least with an Act as non-polycentric and containing as many specific decision-making constraints as the Migration Act.¹⁸⁸ 'Project Blue Sky clauses' on the *Richard Walter* model probably provide the Commonwealth with more hope of success in reducing the scope of judicial review. Perhaps the only omnibus method safer than a *Richard Walter* clause might be a clause that explicitly listed the *Hickman* three as the *only* available grounds of review, such as:

185 (1995) 183 CLR 168; 127 ALR 21.

186 By contrast, on the *Jadwan* analysis (under which only some jurisdictional errors lead to invalidity), it would still be necessary to identify those 'category (b)' requirements in the Income Tax Act with respect to which non-compliance would amount to jurisdictional error even though non-compliance would not result in invalidity.

187 Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney-General*, Report No 47, April 2006, p 20; see also on the same page:

Where, however, a provision of this kind is included in an Act with no scheme of review and appeal rights, the same result is not assured. It might become necessary to try to reconcile an apparently general provision of this kind with an express and specific constraint apparently imposed by the Act. This would be done in accordance with the normal rules of statutory construction — in which specific provisions usually prevail over general ones.

188 See Beaton-Wells, above n 94, especially at 157–60 and the cases cited therein.

The exercise, attempted exercise or purported exercise of any power under this Act shall be valid and have all the legal consequence assigned to the exercise of the power by this Act, unless the action taken:

- (a) was not a bona fide attempt to exercise the power;
- (b) did not relate to the subject matter of the legislation; or
- (c) was not reasonably capable of reference to the power.

However, probably the only way parliament can be *certain* that it has reduced the scope of judicial review all the way back to the *Hickman* three is for it to meticulously provide, in clear and explicit terms, with respect to *each* constraint on decision-making power, that it does not go to jurisdiction.¹⁸⁹ This would involve a sub-provision on *each* explicit constraint that would answer the *Project Blue Sky* question, perhaps in a form such as ‘the validity of a decision shall not be affected by reason that this provision has not been complied with’. With respect to the requirements implied by the traditional grounds of review, this would probably require a provision in a form such as ‘the validity of a decision shall not be affected by reason that decision-maker acted in breach of the rules of procedural fairness, took into account irrelevant considerations, [list the traditional grounds of review]’.¹⁹⁰

Conclusion

Stripped to its epistemological core, legal argument is about putting things into categories. In that sort of discourse, before one can sensibly argue about whether a particular thing fits into a particular category, it is necessary to take the first step of deciding on what the relevant categories are, their boundaries and how they relate and overlap. If the first step is not taken, any attempt at the second can quickly degenerate into a dialogue of the deaf.

As Australian lawyers, we prefer ‘bottom-up’ to ‘top-down’ legal reasoning.¹⁹¹ But that does not free us from taking the first step, it simply means that our judges only determine so much of the relevant categories as is strictly necessary to work out what category the particular thing before them belongs in. One advantage of the bottom-up method is that top-downers do not propound ‘grand unified theories’ in earlier cases that force judges into unforeseen and impractical decisions in later ones. However, the bottom-up method has the disadvantage that it can be messy, producing fragmented statements of principle that are sometimes difficult to reconcile. Eventually, the courts have to engage in a ‘tidying-up exercise’ to fit as many of the pieces as possible together (and discard or explain away the others).¹⁹² If not, the cost to the community in uncertainty eventually outweighs the benefits in terms of flexibility.

¹⁸⁹ ARC, above n 187, p 20.

¹⁹⁰ For a clarification of this paragraph, see the commentaries on this article and my response.

¹⁹¹ See K Mason, ‘What is Wrong with Top-Down Legal Reasoning?’ (2004) 78(9) *ALJ* 574 and the cases cited therein. For an account of Judge Posner’s classic analysis of top-down vs bottom-up legal reasoning, see R A Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up’, Ch 5 in his *Overcoming Law*, Harvard University Press, USA, 1995, pp 171ff.

¹⁹² President Mason argues that such tidying up exercises are really exercises in top-down legal reasoning; *ibid*. This may be correct; but if so, the vices of top-down reasoning are greatly ameliorated when it is employed as a tidying up tool after a large amount of bottom-up work has taken place.

The distinction between jurisdictional and non-jurisdictional error is a notoriously difficult concept to understand or explain and an even harder concept to apply. Many of us have at times been tempted to agree with Kirby J that it is a 'chimerical distinction' that would be better 'interred, without tears, in Australia as has happened elsewhere'.¹⁹³ It is clearly in need of a tidying-up exercise.

Like many administrative lawyers, I had long assumed that the problem was with the vagueness of the term jurisdictional error itself. But, prompted by the links between jurisdictional error, invalidity and the *Project Blue Sky* test drawn in *SAAP*, I have come to think that the culprit is not the phrase jurisdictional error, but a term we all think we understand, 'invalidity'.

The 'Argument' section of this article has been an attempt to use a nuanced understanding of the concept of validity as a 'bundle of legal consequences' to show how we might fit together the pieces we have on the concepts of jurisdictional error, invalidity and injunction (the pieces having been laid out in the 'Background' section). That understanding has led me to propose the following scheme:

- (1) Statutes commonly attach a bundle of legal consequences to decision-making procedures described in that statute. When we say that a decision is 'valid', what we mean is that the decision-making procedure that was actually undertaken sufficiently resembles the 'platonic ideal' described in the statute such that it has the legal consequences that the statute says will flow from the described procedure.
- (2) 'Errors' are departures from the description in the statute of the relevant decision-making process. The traditional grounds of review are certain required or prohibited procedural steps ('dos and don'ts') that are generally implied into the statute (or imposed externally by the common law), unless the contrary intention appears.¹⁹⁴
- (3) A jurisdictional error is a departure from the platonic ideal of the statutory description of the relevant decision-making procedure that is sufficiently substantial to prevent the procedure that was actually undertaken from having some or all of the legal consequences that the statute says would flow from an unflawed procedure. Prohibition will lie to prevent further action based on the invalid decision and mandamus will lie to compel the decision-maker to undertake the procedure in the manner described in the statute (if the decision-maker was under a duty to consider the decision in the first place). Certiorari will lie as an ancillary remedy to quash any vestigial legal consequences that may have survived the jurisdictional error.
- (4) An error within jurisdiction is a departure from the statutory description of the relevant decision-making procedure that does *not* prevent the procedure that was actually undertaken from having all the legal consequences that the statutes say flow from the described procedure. The procedure actually undertaken is sufficiently similar

¹⁹³ *Miah* (2001) 206 CLR 57; 179 ALR 238 at [212].

¹⁹⁴ For a clarification of this paragraph, see the commentaries on this article and my response.

to the platonic ideal described in the statute to be treated as if it were that described ideal procedure. Despite an error within jurisdiction, the decision is ‘valid’ in the sense that it has all the legal consequences that an unflawed decision would have. This proposition has two consequences:

- (a) If an error within jurisdiction is caught before the procedure is complete, injunction will lie to compel the decision-maker to go through the missed procedural step or to refrain from the relevant procedural misstep.
 - (b) However, once the procedure is complete, even though it involved an error within jurisdiction, it will have all the consequences of an unflawed procedure, unless a remedy is available that can quash it, such as certiorari or s 16 of the ADJR Act — and such remedies will not be available if the scope of judicial review has been pared back to the constitutionally entrenched minimum of s 75(v) of the Constitution.
- (5) Since, in a sense, jurisdictional error *is* ‘invalidity’, the test for whether failure to comply with a particular requirement on the exercise of a power is a jurisdictional error is the test for invalidity propounded in *Project Blue Sky*. The cases indicate that a particular procedural step that is implied or imposed by common law as one of the traditional grounds of review will be presumed to be a requirement that goes to jurisdiction unless there are clear indications of a contrary legislative intent. This presumption seems to be especially strong with respect to the obligation to accord procedural fairness.

This scheme is almost certainly wrong — in the sense that it almost certainly differs, to a greater or lesser extent, from what will be the results of the tidying-up exercise that the High Court will sooner or later have to undertake. But I submit that the issues that the Argument section of this article attempts to address — and in particular the question of how to justify the distinction between jurisdictional errors and errors within jurisdiction if injunction is available for the latter — are the same issues that any eventual tidying-up exercise will have to face.



Comments

The riddle of jurisdictional error: Comment on article by O'Donnell*

Dr M A Perry QC†

1 Introduction

There is many a slip betwixt cup and lip — so says the ancient proverb, expressing a sentiment with which, no doubt, many decision-makers would sympathise today. But when is the cup broken, or merely chipped but still functional. In a metaphorical sense, this is the riddle posed by Mr O'Donnell's paper.

The thrust of Mr O'Donnell's argument is that the riddle of jurisdictional error is to be answered by reference to the concept of invalidity. The starting point, he argues, should be to identify the consequence of breach. Building upon the High Court's approach in *Project Blue Sky*,¹ he argues that a breach will involve jurisdictional error where the parliament *intended* that it should deprive the decision of some or all of the consequences of an unflawed decision.

It is not the purpose of this paper to provide a detailed commentary to Mr O'Donnell's comprehensive and lucid paper. Instead it is intended to suggest a different approach to certain issues addressed by Mr O'Donnell for the purposes of debate. In contrast, then, to Mr O'Donnell's approach, this paper starts at the opposite end of the issue by looking briefly at the function of judicial review in the federal context in order to identify certain foundational principles. The commentary then builds upon those principles to explain how they might inform the understanding of jurisdictional error and its limitations, looking first at the classic grounds of judicial review identified in *Craig v South Australia*² and *Minister for Immigration and Multicultural and Indigenous Affairs v Yusuf*.³ Consideration is also given to the question of whether those principles are implied grounds of review, as Mr O'Donnell suggests, or perhaps more in the nature of tools by which jurisdictional error might be revealed. A question also arises as to whether these foundational principles might provide a means of refining the process of statutory construction so as to distinguish between jurisdictional and non-jurisdictional error in some cases. Finally, the paper poses a possible alternative explanation

* A short commentary on the paper by B O'Donnell, 'Jurisdictional error, invalidity and the role of injunction in s 75(v) of the Australian Constitution', which appears in this part of the *Journal*.

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1 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490.

2 (1995) 184 CLR 163; 131 ALR 595 (*Craig*).

3 (2001) 206 CLR 323; 180 ALR 1 (*Yusuf*).

for the tension which Mr O'Donnell identifies in the authorities and which underpins his conclusion that jurisdictional error may not lead to complete or unqualified invalidity.

2 Foundational principles

(a) The roles of the institutions of government

The respective roles of the institutions of federal government under the Constitution is important as this provides the framework within which judicial review of administrative decisions in the federal sphere takes place. The function of the courts on judicial review is to determine the legality of executive action and, thereby, to maintain the rule of law. As, for example, Brennan J (as he then was) explained:

It would mock the will of parliament if the functions which it has defined may be exceeded without restraint by the courts. Judicial review is neither more nor less than the enforcement of the rule of law over executive action.⁴

This jurisdiction is constitutionally guaranteed by s 75(v) of the Constitution.⁵ On the other hand, subject to constitutional limitations,⁶ it is parliament, in enacting laws, which defines the extent of executive authority. This includes defining the extent to which compliance with the rules of procedural fairness is required, albeit that those rules presumptively apply and an intention to derogate from them must be expressed in clear and unmistakable terms.⁷ These twin principles — parliamentary supremacy and the rule of law — have been aptly, and somewhat colourfully, described by the Commonwealth Solicitor-General as the 'irresistible force' and the 'immovable object'.⁸

(b) Limitations on judicial intervention

The fact that courts are concerned with determining only the legality of executive action, in turn, reveals limitations upon the extent to which courts

⁴ *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70; 43 ALR 587. See also, eg, *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 at 35 per Brennan J; 93 ALR 1.

⁵ *S157/2002 v Commonwealth* (2003) 211 CLR 476; 195 ALR 24 at [5] per Gleeson CJ, [54] and [73] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.

⁶ The High Court has recently observed that there may be constitutional limitations upon the capacity of the parliament to delegate a completely open-ended discretion to the executive, suggesting that such a provision 'would appear to lack that hallmark of the exercise of legislative power . . . namely, the determination of "the content of a law as a rule of conduct or a declaration as to power, right or duty"': *S157/2002 v Commonwealth* (2003) 211 CLR 476; 195 ALR 24 at [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ (quoting Latham CJ in *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82).

⁷ Eg, *Minister for Immigration and Multicultural and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 311–12; 128 ALR 353; *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; 179 ALR 238 at [126] per McHugh J; *Re Refugee Tribunal; Ex parte Aala* (2001) 204 CLR 82; 176 ALR 219 at [41] per Gaudron and Gummow JJ; *S157/2002 v Commonwealth* (2003) 211 CLR 476; 195 ALR 24 at [30] per Gleeson CJ. See also *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 89 per Mason CJ and Brennan J; 93 ALR 435.

⁸ 'Privative clauses — an update on the latest developments': AIAL Forum No 37, 20 at 21.

can legitimately interfere with administrative decisions. This is reflected in the principle affirmed on innumerable occasions that it is not the function of the courts to revisit the merits of an administrative decision, that is, to determine whether a decision made within lawful boundaries was preferable or correct.⁹ As, for example, Brennan J stated in *Attorney-General (NSW) v Quinn*:

If the courts were to assume a jurisdiction to review administrative acts or decisions which are unfair in the opinion of the court — not the product of procedural unfairness, but unfair on the merits — the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ . . . If judicial review were to trespass on the exercise of administrative power, it would put its own legitimacy at risk.¹⁰

The end result is that the decision on the merits remains with the administrative decision-maker and not with the courts, reflecting the constitutional separation of judicial power.

Equally it has been said that '[t]he constitutional jurisdiction [in s 75(v)] does not exist for the purposes of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration'.¹¹ This, in turn, reflects judicial restraint as to the degree to which the courts should become involved in determining the appropriateness of procedures applied in administrative decision-making. In other words, the function of the courts is not to determine what might have been a preferable procedural course for the administrative decision-maker to adopt, as opposed to ensuring that those procedures which are required by law to be observed have in fact been observed.

3 The relationship between the grounds of judicial review and its function

The question then arises as to how the court's function on judicial review of administrative decisions might affect the process of judicial review in a practical sense and, in particular, how it might assist in identifying errors of a jurisdictional kind. In order to address this question, it is necessary to start with the classic statement of the grounds of judicial review in *Craig v South Australia* that:

If such an administrative tribunal falls into error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise

⁹ See, eg, *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 at 35–6; 93 ALR 1; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 629 per Gleeson CJ and McHugh J; 162 ALR 577; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ, 291 per Kirby J; 136 ALR 481.

¹⁰ (1990) 170 CLR 1 at 37–8; 93 ALR 1.

¹¹ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; 195 ALR 502 at [32] per Gleeson CJ.

of power is thereby affected, it exceeds its authority or powers. Such an error in law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.¹²

First, as this passage makes clear (and as Mr O'Donnell accepts in his paper), the process in which the court engages on judicial review does not simply involve the identification of error, but the identification of error which affects the exercise of power so that that the decision-maker exceeds his or her powers. This means that those considerations relevant to the decision-maker's task are, as stated in *Yusuf*:

to be identified primarily, or perhaps even entirely, by reference to the Act rather than the particular facts of the case that the tribunal is called on to consider.¹³

The important distinction drawn in this passage can be illustrated by contrasting the majority's decision in *Yusuf* with its reasons in *Israeli* which was determined at the same time. On the one hand, Ms Yusuf had complained that, in refusing her application for a protection visa, the Refugee Review Tribunal had made no finding on one of the three principal incidents which she said demonstrated that she had a well-founded fear of persecution for a Convention reason (ie, a reason within the Refugees Convention). One of the statutory criteria for the grant of a protection visa under the Migration Act 1958 (Cth) is, of course, that the Minister (or her delegate) is satisfied that the applicant has a well-founded fear of this nature, including by reason of his or her political opinion or membership of a particular social group. The incident in question had involved a serious attack at the applicant's home in Somalia by members of another clan resulting in her husband being obliged to flee. However, the majority in *Yusuf* held that the tribunal's error could be put no higher than an error of fact, namely, that there had been only two and not three attacks.¹⁴ Accordingly, no error of a jurisdictional kind was established. On the other hand, Mr Isrealian alleged that the tribunal had failed to make a finding about one of the two bases on which he claimed to have a well-founded fear of persecution. He had claimed that he was a refugee both on the basis of his political opinions and on the basis of his membership of a social group.¹⁵ The majority considered that this omission would have established jurisdictional error. However, the tribunal's decision was ultimately sustainable on other grounds.¹⁶

Secondly, it will be recalled that Mr O'Donnell's thesis is that jurisdictional error is to be approached by reference to the question of whether parliament intended that the error result in invalidity. This leads him to reject the view that the classic grounds of judicial review identified in *Craig* will always result in jurisdictional error.¹⁷ Rather, as such grounds must affect the exercise of the power to result in invalidity, he argues that they are merely a 'default

12 *Craig* (1995) 184 CLR 163 at 179 (the court); 131 ALR 595. See also, eg, *Yusuf* (2001) 206 CLR 323; 180 ALR 1 at [82] per McHugh, Gummow and Hayne JJ (with whose reasons Gleeson CJ agreed at [1]).

13 *Yusuf* (2001) 206 CLR 323; 180 ALR 1 at [73] per McHugh, Gummow and Hayne JJ.

14 *Ibid*, at [92] per McHugh, Gummow and Hayne JJ.

15 *Ibid*, at [93] per McHugh, Gummow and Hayne JJ.

16 *Ibid*, at [96]–[97] per McHugh, Gummow and Hayne JJ.

17 O'Donnell, text following the heading 'Jurisdictional error and the grounds of review'.

position' implied into a statute in the absence of a contrary legislative intention.¹⁸ However, a different analysis might also be open, that (aside from factual errors of a jurisdictional kind) the classic grounds of review are ultimately the *tools* by which jurisdictional error may be revealed once the provision in question has been construed as imposing a particular jurisdictional requirement. On this view, the so-called grounds of review are not in themselves substantive or procedural requirements which must be complied with. Those are determined by the statutory provisions in question. If this analysis is correct, then these so-called 'grounds of review' are not grounds which the parliament might exclude although their relevance, that is, the extent to which they will assist in exposing a relevant error, will depend upon the particular case. This alternative analysis might also explain why members of the High Court in *Yusuf* did not regard the *Craig* list of jurisdictional errors as exhaustive.¹⁹

In the third place, the foundational principles earlier identified not only inform the concept of jurisdictional error, but may also affect the process of statutory construction by which it is determined whether breach of a particular requirement will give rise to jurisdictional error. Again the decision in *Yusuf* provides an example of this point.

It may be recalled that the decision in *Yusuf* concerned the construction of s 430 of the Migration Act 1958 (Cth). That section required the Refugee Review Tribunal to set out its findings on any material questions of fact. The High Court rejected the proposition that that provision imposed a duty on the tribunal *to make* and set out findings on all matters of fact which were objectively material to the decision, as the Full Court of the Federal Court had earlier held in *Singh*.²⁰

In rejecting that proposition, the High Court took into account the fact that that construction would require the court to embark upon a process of inquiry as to the correctness of the tribunal's decision, and not merely as to the process of proper decision-making.²¹ The majority also considered that:

the facts about which findings must be made are said to be those which, on later judicial inquiry, are found to be objectively material, not those which the tribunal considered to be material. It follows that inquiring whether the duty has been performed would require examination of the whole of the tribunal's fact-finding process. The function of fact-finding would no longer be left to the tribunal.²²

Thus the proper limits of judicial review can be seen to have played a significant role in determining whether s 430 imposed requirements which were essential to the making of a valid decision.

18 Ibid.

19 *Yusuf* (2001) 206 CLR 323; 180 ALR 1 at [82].

20 *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469; 175 ALR 503.

21 *Yusuf* (2001) 206 CLR 323; 180 ALR 1 at [64] per McHugh, Gummow and Hayne JJ.

22 Ibid, at [65] per McHugh, Gummow and Hayne JJ. See also *ibid*, at [8] per Gleeson CJ.

4 Degrees of invalidity or a distinction between two different kinds of consequences?

As Mr O'Donnell acknowledges, in cases such as *Plaintiff S157*, the High Court has held that 'an administrative decision which involved jurisdictional error is "regarded, in law, as no decision at all"'."²³ Nonetheless, he contends, based upon his consideration of the High Court's decision in *Bhardwaj*²⁴ and of the Full Federal Court in *Jadwan*,²⁵ that the position may be less 'clear-cut'. Instead, he argues that there may be degrees of nullity or invalidity for some purposes only, and validity for other purposes, depending upon the consequences which the statute might give to a decision which is jurisdictionally flawed in a particular way. The example given by Mr O'Donnell is of a decision which is jurisdictionally invalid, but which nonetheless provides the foundation on which the review tribunal may step into the shoes of the decision-maker and 'remake his/her decision'.²⁶

However, the unqualified statement in *Plaintiff S157/2002* quoted above might be reconciled with the example given by Mr O'Donnell by distinguishing between the decision insofar as it can potentially affect substantive rights and obligations (the decision on the merits), on the one hand, and the bare fact that a purported decision has been made, on the other hand. Thus, for example, a decision by the Minister's delegate that he or she is satisfied that an applicant is a person to whom Australia owes protection obligations is the factum upon which a visa permitting that person to remain in Australia is granted. Similarly, an assessment by the Commissioner of Taxation that an amount of taxation is owed is the factum by which the liability to pay the taxation is attracted. If, however, that decision is tainted by jurisdictional error, the purported decision will not *decide* anyone's rights and obligations. In fact, it *decides* nothing at all. Nonetheless, the bare fact that a purported decision has been made may provide the factum on a valid decision may be made by another which does affect substantive rights and liabilities. This does not amount to giving effect to the jurisdictionally flawed decision as if it were valid in any sense, but simply treats it as part of the factual criteria on the basis of which a valid decision may be made by another.

5 Conclusion

Mr O'Donnell's paper is undoubtedly a valuable and significant contribution to this complex area of debate even though it cannot yet be said that the riddle of jurisdictional error is wholly solved. Nonetheless, it is suggested that whatever approach is taken, the purpose of judicial review, which derives from the constitutional requirement of the separation of judicial power, ultimately provides the reference point against which any theory of jurisdictional error in the federal context must be tested.

23 *S157/2002 v Commonwealth* (2003) 211 CLR 476; 195 ALR 24 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

24 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; 187 ALR 117.

25 *Jadwan Pty Ltd v Secretary of the Department of Health and Aged Care* (2003) 145 FCR 1; 204 ALR 55.

26 O'Donnell, text accompanying n 159.



Comment on article by O'Donnell*

Geoffrey Kennett†

Mr O'Donnell's article reminds us, if we needed reminding, that the answer to many questions depends why one is asking. Courts have to decide cases, and cases turn on whether a particular applicant is entitled to particular relief. Questions of nullity, or jurisdictional error, arise in that context.

If the issue is whether an administrative tribunal had jurisdiction to review something done by an officer, there is a question of statutory construction as to whether what the officer did was a 'decision' within the meaning of the particular provision that gives the tribunal its jurisdiction. The courts have commonly held that, in this context, a 'decision' is 'a decision in fact, purported to be made under the Act'.¹ The officer may have fallen into some fundamental error, so that his or her decision would for some other purposes be 'no decision at all';² but, for obvious and sensible reasons, that is not regarded as taking it outside the purview of administrative review (or, indeed, outside the statutory review jurisdiction of a federal court which may be defined in terms of 'decisions').³

Issues of jurisdictional error and possible nullity may also arise by way of 'collateral attack'. In most cases what will be in issue will be whether the decision has had the effect that it purports to have on people's rights or status. Thus, when Mr Head was charged with carnal knowledge of a woman who had been placed in an institution as a 'moral defective', he was able to escape conviction by showing that her original placement in the institution had been illegal.⁴ But, depending on statutory context, the issue may be whether a decision (even though not having the effect on rights it purported to have) provided legal authority or justification for some further step that was taken. When Mr Taylor sued Minister Ruddock for false imprisonment the Minister

* A short commentary on the article by B O'Donnell, 'Jurisdictional error, invalidity and the role of injunction in s 75(v) of the Australian Constitution', which appears in this part of the *Journal*.

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1 *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed* (2005) 143 FCR 314 at [34]. At first instance Driver FM had taken a contrary, and unorthodox, view by extending the traditional footwear metaphor: (2004) 182 FLR 83 at [27].

2 The language of *Minister for Immigration and Multicultural and Indigenous Affairs v Bhardwaj* (2002) 209 CLR 597; 187 ALR 117 at [51] per Gaudron and Gummow JJ.

3 The Federal Court and the Federal Magistrates Court have jurisdiction under s 8 of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) in applications made to them under that Act, most importantly under s 5, which permits an application for review of a 'decision to which this Act applies'. The word 'decision' has been said to have the same meaning in that Act as in the Administrative Appeals Tribunal Act 1975: *Barbaro v McPhee* (1981) 42 ALR 147. Part 8 of the Migration Act 1958 has in past incarnations conferred jurisdiction on the Federal Court by reference to classes of 'decisions'; but no-one ever suggested that that jurisdiction would suddenly evaporate if the decision under review were found to be affected by jurisdictional error. (Section 476 now gives the Federal Magistrates Court jurisdiction in relation to 'migration decisions', which are defined to include 'a purported privative clause decision'.)

4 *Director of Public Prosecutions v Head* [1959] AC 83; [1958] 1 All ER 679.

argued, ultimately successfully, that the cancellation of Mr Taylor's visa had provided sufficient authority for his detention under s 189 of the Migration Act even though the cancellation had been set aside as invalid.⁵

In the High Court's s 75(v) jurisdiction and its direct analogues (s 39B of the Judiciary Act 1903 and the Federal Magistrates Court's migration jurisdiction),⁶ 'nullity' is, as Professor Aronson puts it, 'both a remedy and a legal consequence'.⁷ He is right to describe it as a legal consequence in that, having ascertained that an administrator has fallen into 'jurisdictional error', we conclude that his or her decision is not in law an exercise of the relevant power and does not have the effect on rights that it purports to have.⁸ He is right to describe 'nullity' as the remedy in that the constitutional writs of prohibition and mandamus, together with certiorari in its ancillary role and possibly declaratory relief, do no more than conclusively establish that nullity and provide for its consequences.⁹

Various writers, including Mr O'Donnell, have pointed out that expressions like 'void', 'nullity' and 'jurisdictional error' express conclusions rather than providing tools of analysis.¹⁰ They are sometimes a helpful shorthand, sometimes not.

In the strange quasi-collateral attack case that was *Bhardwaj*, Gaudron and Gummow JJ pronounced such expressions unnecessary and unhelpful.¹¹ There the question was whether the Immigration Review Tribunal, having made what looked like a decision adverse to Mr Bhardwaj, had power to look at his case again and make a decision favourable to him. It had done this having realised that in the first decision he had been denied a hearing because of an administrative error. The first 'decision' would clearly have been set aside if Mr Bhardwaj had sought judicial review of it; but did the tribunal have power to treat its own decision as invalid, and continue on the basis that the statutory task of review was not complete? The majority held that it did, and thus refused the Minister's application to set aside the tribunal's second decision. The critical issues in *Bhardwaj* are thus outside the mainstream of

5 *Ruddock v Taylor* (2005) 222 CLR 612; 221 ALR 32. This was not strictly a case of collateral attack, as the flaw in the cancellation decision had already been established in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; 182 ALR 657. Interestingly, the logical consequence of Mr Taylor's successful argument there (that he was not an 'alien') was that he did not need a visa at all, and the cancellation was simply otiose; but the case was treated as a dispute about whether the cancellation was authorised. Framing the earlier dispute differently would presumably have made no difference to the result of his false imprisonment claim, which failed because the *purported* cancellation gave the relevant officers a reasonable basis for thinking that he was an unlawful non-citizen.

6 Presently s 476(1).

7 M Aronson, 'Nullity' (2004) 40 *AIAL Forum* 19 at 20.

8 In the case of a statutory review tribunal, that means that the obligation to 'review' the primary decision remains unperformed. If the tribunal's decision is set aside and it reconsiders the matter, it is actually completing that process of review — a consideration which may have implications for the operation of statutory procedural obligations: see *SZEPZ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 107 (unreported, 30 June 2006, BC200604915).

9 See also S Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Aust Bar Rev* 279 at 284.

10 Eg, Aronson, above n 7, at 21.

11 (2002) 209 CLR 597; 187 ALR 117 at [46].

constitutional writ jurisprudence, and more akin to *Ruddock v Taylor*, in that they are subtle questions about the legal effect of a flawed decision (ie, whether despite its flaws it authorised or precluded some particular later action), rather than the more familiar issues as to whether a particular error ‘goes to jurisdiction’.

That familiar, but often difficult, question reflects the closest thing we have to an organising principle of Australian administrative law: *ultra vires*. The constitutional writs are concerned with the identification and enforcement of *limits on power*. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*,¹² McHugh and Gummow JJ distinguish this position from the current position in England, where the notion of ‘abuse of power’ appears to provide the rationale for all the ‘general principles of public law’.¹³

‘Abuse of power’ appears, to Australian eyes, to be a rather nebulous standard that encourages courts to intervene wherever they perceive some unfairness in process or outcome. The observation that the English common law courts ‘always disowned judicial review for error of fact’, which has been said to have added significance in Australia,¹⁴ may be receding into history in England, where the courts have at least flirted with factual misconception as a ground for judicial review.¹⁵ We are told that this is the result of the absence of a ‘distinct concept of the state to which distinct principles could be attached’.¹⁶ It may also be a consequence of the absence of a rigid separation of powers in the English constitution¹⁷ — an absence which sees courts sitting without embarrassment on ‘appeal’ from administrative decisions.

In Australia, on the other hand, as McHugh and Gummow JJ put it:

An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory force or the executive function of administration.¹⁸

That demarcation is ‘manifested in the distinction between jurisdictional and non-jurisdictional error which informs s 75(v)’.¹⁹

It would be going too far, of course, to say that the separation of powers means federal courts can *only ever* conduct review for jurisdictional error. The

12 (2003) 214 CLR 1; 195 ALR 502 at [70]–[77].

13 It would appear, though, that *ultra vires* has not disappeared from English thinking: see, eg, W Wade and C Forsyth, *Administrative Law*, 9th ed, Oxford University Press, 2004, p 35, citing *Boddington v British Transport Police* [1999] 2 AC 143 at 164, 171; [1998] 2 All ER 203.

14 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [59] per McHugh and Gummow JJ (quoting M Aronson and B Dyer, *Judicial Review of Administrative Action*, 2nd ed, LBC Information Services, 2000, p 205).

15 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; [1976] 3 All ER 665; *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330.

16 *Lam* (2003) 214 CLR 1; 195 ALR 502 at [75], quoting Thomas, ‘Continental Principles in English Public Law’ in Harding and Öricü (Eds), *Comparative Law in the 21st Century*, 2002, pp 121, 133.

17 A feature referred to in Mr O’Donnell’s article, text accompanying n 77.

18 *Lam* (2003) 214 CLR 1; 195 ALR 502 at [76].

19 *Ibid.*, at [77].

successful operation of the ADJR Act indicates that a federal court can be empowered by statute to grant relief of a particular kind when particular grounds — which may or may not equate with traditional grounds of jurisdictional error²⁰ — are made out. In *Abebe v Commonwealth*,²¹ the High Court upheld the validity of a truncated version of that scheme which expressly excluded some of the ADJR grounds, and thus empowered the Federal Court to deal with something less than the whole of the potential controversy surrounding a ‘judicially reviewable decision’ under the Migration Act.

However, there is much to be said for the view that one aspect of ‘the rule of law under the Constitution’ is that the courts keep to their proper place. Statutory review schemes aside, the proper role of Chapter III courts is the identification and enforcement of limits on the powers of the legislature and the executive.²² It is not the correction of things done in the course of exercising those powers which seem to the judges to be misconceived or unfair. Thus, Australian courts have (as the article explains)²³ resisted the temptations of *Anisminic*²⁴ and (in their prerogative or constitutional writ jurisdiction) held fast to the distinction between jurisdictional and non-jurisdictional errors, even though it can be hard to draw.

(Non-jurisdictional errors of law do occur. In a case recently decided by Emmett FM,²⁵ the applicant (Mr Chintala) had applied for a visa and the decision-maker (relevantly the Migration Review Tribunal) had to decide whether he met the relevant criteria. One of the criteria was that, if he had had an earlier visa cancelled, he had to meet some further requirements. There was on the file an earlier departmental decision cancelling a visa held by Mr Chintala, and the tribunal assessed his application on the footing that he had indeed had a visa cancelled. He did not meet the additional requirements, and so failed. On review, it emerged that there were problems with the cancellation decision and it might well have been ‘invalid’ (in the sense that a court would have set it aside). Her Honour rejected (correctly) Mr Chintala’s submission that, therefore, the tribunal had fallen into jurisdictional error. The tribunal had addressed the correct issue (‘was his earlier visa cancelled?’) even though, at least arguably, it had come to the wrong conclusion.)

The proposition that the concept of ‘jurisdictional error’ reflects an adherence to *ultra vires* as the fundamental principle of judicial review brings me to the arguments of the article. I suggest that the classical statement about jurisdictional error in *Craig v South Australia*,²⁶ adopted in *Minister for Immigration v Yusuf*,²⁷ reflects this principle. It describes circumstances in which a tribunal fails to perform its statutory task, by failing to consider the matters which the statute requires or permits it to consider. It is closely allied

20 Such as the ground in s 5(1)(f), which includes all errors of law.

21 (1999) 197 CLR 510; 162 ALR 1.

22 Cf, eg, Gageler, above n 9, at 280, 287.

23 O'Donnell, text accompanying nn 1–8, 36.

24 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

25 *Chintala v Minister for Immigration* [2006] FMCA 999 (unreported, 13 July 2006, BC200605437).

26 (1995) 184 CLR 163 at 179; 131 ALR 595.

27 (2001) 206 CLR 323; 180 ALR 1 at [82] per McHugh, Gummow and Hayne JJ.

to the statements of principle found in the *Hetton Bellbird Collieries* case²⁸ and many others,²⁹ concerning the proper scope of judicial review where the existence of a power or duty depends on the decision-maker forming an opinion about something: the exercise of power miscarries, not if the court thinks the opinion is wrong, but if it is an opinion about the wrong issue.

The *Craig* statement is, like most classical statements, somewhat Delphic. There are at least three difficulties:

- (a) What do their Honours mean by ignoring ‘relevant material’?
- (b) How do an ‘erroneous finding’ or a ‘mistaken conclusion’ constitute jurisdictional error?
- (c) What is added by ‘and the tribunal’s exercise or purported exercise of power is thereby affected’?

As to the first problem, I suggest that ‘material’ should be taken to mean ‘considerations’ or ‘issues’. That is consistent with the actual result in *Yusuf*’s case and with the observation in that case that the ‘considerations’ grounds of review are concerned with ‘whether the decision-maker has applied the law’, rather than with particular findings of fact.³⁰

As to the second problem, it does not seem likely that their Honours intended to endorse the approach to review for factual error that is seen in the *Tameside* case and other English authorities.³¹ It may have been intended to refer to a mistaken finding about the existence of a ‘jurisdictional fact’; or possibly to a finding which, by its lack of any supporting material, betrays an absence of real attention to the issues.³² The mistaken findings that are said to be relevant are those by which the tribunal’s ‘exercise or purported exercise of power is . . . affected’ — whatever that means.

That brings us to the third problem: what does this phrase mean? At least on one view, it makes the entire statement of principle circular. All that can safely be said is that there is more to be said — especially in the light of *Applicant S20* — about the circumstances in which substandard fact-finding can amount to, or lead to, a decision-maker exceeding jurisdiction.³³

My first point of departure from the article’s argument is that I doubt whether the grounds of review derived from the *Craig* statement are properly seen as supplied by a presumption of statutory construction, and liable to be

28 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, 432.

29 See, eg, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651–4 per Gummow J; 162 ALR 577.

30 (2001) 206 CLR 323; 180 ALR 1 at [74]. See also *Applicant WAE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [46].

31 Especially given what was said by Gummow J in *Eshetu* (1999) 197 CLR 611 at 655–7; 162 ALR 577 and by McHugh and Gummow JJ in *Applicant S20* (2003) 198 ALR 59 at [36].

32 Cf *Applicant S20* (2003) 198 ALR 59 at [36], citing the *Melbourne Stevedoring* case.

33 In *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 (where issues about irrational conclusions did not arise), Gummow and Hayne JJ cited [37], [52] and [173] of *Applicant S20* for the proposition that ‘the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds’: at [38]. Reference to the particular paragraphs of *Applicant S20* reveals that this ‘critical question’ reflected the criterion proposed by the applicant in that case ((2003) 198 ALR 59 at [34]), rather than one adopted or applied by the court. It is thus not clear whether their Honours intended to suggest that the proposition was established.

excluded by statute.³⁴ One simple point against such a conclusion is that exercises of prerogative power (or perhaps more accurately the executive power of the Commonwealth) are in principle amenable to review in the same way as exercises of statutory power (although, given their subject-matter, such review will often be difficult).³⁵

More substantially, as I have argued, the *Craig* statement describes a decision-maker failing to perform the task required of it by law. If s 75(v) is to have any worthwhile role in maintaining the rule of law, it must provide a remedy when a Commonwealth decision-maker steps outside his or her legal role by failing to do what is required or purporting to do what is not permitted. The *Craig* grounds are thus, I would argue, part of the 'entrenched minimum provision of judicial review'³⁶ which s 75(v) provides.

That is not to say that parliament may not affect to a large degree the availability of the *Craig* grounds from case to case. The statute defines the breadth of the decision-maker's discretions, powers and duties, and hence the chances of success of an applicant who wants to contend that the boundaries have been transgressed.³⁷ The statute may, as we know, exclude the obligation to provide procedural fairness. So too, statutes may (and often do) include lists of considerations to be taken into account or specify matters that are to be ignored.³⁸ Prior to *Plaintiff S157* one would have said with confidence that parliament could, through a privative clause, define matters so that the decision-maker was entitled to consider (or not consider) anything at all, within the very wide limits of the so-called *Hickman* provisos. Whether that is still the case, if the privative clause is more cleverly drafted,³⁹ is presently unclear.

For essentially similar reasons, I doubt whether the 'test' posed in *Project Blue Sky Inc v Australian Broadcasting Authority*⁴⁰ can serve as the determinant for jurisdictional error in *all* circumstances. Again, the reviewability in principle of decisions made in exercise of prerogative powers — where a search for legislative intention would be even more unfulfilling than usual — tends against this hypothesis.

It can readily be accepted that, where the flaw is non-compliance with an express statutory requirement, the key question must be whether the legislature intended compliance with that requirement to be a prerequisite for the validity of a decision of the relevant kind. Sometimes that question is answered by express provision, as in s 175 of the Income Tax Assessment Act 1936, or s 501G(4) of the Migration Act.⁴¹ *SAAP v Minister for Immigration*

³⁴ Cf O'Donnell, text accompanying n 98.

³⁵ *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1986) 15 FCR 274 at 277–8, 302–4; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 219–21.

³⁶ *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476; 195 ALR 24 at [103].

³⁷ Cf Gageler, above n 9, at 287.

³⁸ Eg, Migration Act s 91R(3).

³⁹ The provision considered in *S157* appears to have failed to have its intended effect because of three little words: 'under this Act' ((2003) 211 CLR 476; 195 ALR 24 at [76]). Taken at face value, that means that the result would have been different if the provision had referred to a decision 'made or purporting to be made under this Act'.

⁴⁰ (1998) 194 CLR 355; 153 ALR 490 at [93].

⁴¹ Considered in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212.

and *Multicultural and Indigenous Affairs*,⁴² like *Project Blue Sky* itself, is an example of a case where legislative intention is not quite so clear and more analysis is required.

That analysis is much more difficult to apply when the asserted flaw in a decision is of the kind referred to in *Craig* or *Hetton Bellbird Collieries*. Indeed I would question whether it is useful even to use the same terminology ('jurisdictional error') for the breach of a statutory procedure as for a failure to make a decision of the requisite kind. Take, for example, ss 36 and 65 of the Migration Act which provide, in effect, that an applicant is to be granted a protection visa if (and only if) the Minister is satisfied that he or she is within the Convention definition of a refugee.⁴³ The intention of these provisions is clearly that the Minister's decision to grant or refuse a visa will be legally effective if he or she applies that criterion (including all the relevant learning on the construction of the Convention); and it will not be legally effective if he or she applies some other criterion or criteria. Absent some express provision, such as a privative clause, it is hard to see how the result could be otherwise. Jurisdictional limits of the *Craig* or *Hetton Bellbird* kind are inherent in the conferral of the statutory task; they apply with more or less stringency depending on how the task is defined.

Finally, I should say something about injunctions.

In their commentary on s 75(v), Quick and Garran observed that an injunction 'is a remedy of an equitable nature'. Evidently their understanding, and that of the framers, was that the remedy being referred to was that granted by courts of Equity according to established principles.⁴⁴ While the issue may never arise, it seems unlikely that s 75(v) jurisdiction is enlivened by a claim for a *statutory* 'injunction' under, for example, the Trade Practices Act 1974 (Cth).⁴⁵ Quick and Garran went on to express some bemusement as to why the injunction was included in s 75(v), it being 'an ordinary remedy in private suits between party and party'.⁴⁶

Injunctions constitute a large topic in themselves, and one which a public lawyer approaches with some trepidation. However, the critical point appears to be that injunctions lie in aid of legal rights or equitable interests.⁴⁷ Conduct will not be restrained by injunction unless it is in some sense unlawful. A mandatory injunction will not lie to require things to be done unless some right is established whose vindication requires those things to be done.

Hence, while it may well be right that the injunction is not tied to a concept of 'jurisdictional error',⁴⁸ its role in public law does appear to be limited. The majority in *Project Blue Sky* observed that a person with a sufficient interest might obtain an injunction to restrain the ABA from taking 'further action

42 (2005) 215 ALR 162.

43 The Convention meaning is tweaked to some degree by ss 91R and 91S, but that can be ignored for present purposes.

44 J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1901, p 783.

45 See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [28]–[29].

46 Quick and Garran, above n 44, p 83.

47 The class of interests that may be so protected is under development; but some 'legal or equitable rights' do seem to be necessary: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1 at [90].

48 Eg, *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [47].

based on its unlawful action';⁴⁹ but what, with respect, was 'unlawful'? Their Honours had held, in the previous paragraph, that the ABA's determination of a program standard was 'not invalid'. That must mean that it took effect as a standard according to the terms of the Act. It is difficult to see how acts done in reliance on the statutory effectiveness of the ABA's standard could be restrained in those circumstances.

Gaudron J recognised reality in *Muin* when she observed that, for the plaintiffs to obtain an injunction to restrain reliance on the tribunal's decisions, they would need to show that those decisions were 'without legal effect'.⁵⁰ That observation should be regarded as putting an end to her Honour's flirtation (in *Abebe*)⁵¹ with the notion that implementation of an administrative decision might be restrained, notwithstanding that the decision was not affected by jurisdictional error. If a statute requires or permits some action to be taken (such as the removal of a non-citizen from Australia) in particular circumstances, and those circumstances are present (because a 'valid' decision has been taken under the statute), it is very difficult to see how an equitable remedy would lie to prevent that action being taken. This appears to be the view taken in the article.⁵²

However, there are two, or maybe three, respects in which the role of injunctions in public law may be broader than that allowed by the article (as a non-statutory version of s 6 of the ADJR Act).⁵³ One is that there is a long history of use of the injunction in the control of public trusts and the enforcement (usually by the Attorney-General) of public duties.⁵⁴ It is a history that has played out in the English courts and State courts, but may yet have some resonance in s 75(v) (even if, for reasons I have indicated, injunction may only be available in the same circumstances as prohibition or mandamus).

The second is that an injunction may lie to restrain the commission of a tort;⁵⁵ and the law of tort has been, at times, an important avenue for the vindication of public law rights. If conduct is threatened that is prima facie tortious (such as trespass) but purports to be authorised by the exercise of a statutory power, then an application for an injunction to restrain the tort may become the vehicle by which the effectiveness of the purported authorisation is tested.

The third aspect is that, if Mr O'Donnell is right to see 'validity' as a 'bundle' of consequences, it is conceivable that a flawed administrative decision might provide authority for some acts but not others, and the acts which were not authorised might be enjoined.

Mr O'Donnell is no doubt correct to conclude that some form of

49 (1998) 194 CLR 355; 153 ALR 490 at 393 [100].

50 (2002) 190 ALR 601 at [47]–[48].

51 (1999) 197 CLR 510; 162 ALR 1 at [105].

52 A view which accords with the analysis of older case law in E Sykes, 'The Injunction in Public Law' (1954) 2 *UQLJ* 114 at 127.

53 O'Donnell, text accompanying n 165.

54 See *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247 at 257–60.

55 See, eg, R P Meagher, J D Heydon and M J Leeming, *Equity Doctrines and Remedies*, 4th ed, Butterworths LexisNexis, Sydney, 2002, pp 720–9.

'tidying-up' exercise is in prospect. One might say that it is going on around us, although we do not yet see where it will end. At least one very large issue, which I have not touched on, requires resolution: the effect that may or should be given to a decision that is affected by jurisdictional error but has not been the subject of any order by a court. *Bhardwaj* has something to say about that, as does *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*.⁵⁶ It is a question which arises every time a court exercises its discretion not to grant relief (for example because of delay), even though the decision under review is or might be affected by an error going to jurisdiction. The resolution of that question will involve quite deep consideration of the nature of the s 75(v) remedies. It is an issue for another day.

⁵⁶ (2005) 145 FCR 1; 204 ALR 55.



Response

A response to Dr Perry and Mr Kennett's commentaries

*Benjamin O'Donnell**

I agree with much of what Dr Perry and Mr Kennett have written. Much of the apparent disagreement between us is just that, apparent. Often we are using different words to describe very similar, perhaps identical, conceptual connections and relationships. In many cases, the words used by my commentators are clearer than my own. Nevertheless, there are some real differences between us. In the limited space available, all I propose to do is distinguish some apparent from real disagreements, and then sketch the beginnings of my response to the latter.

The nature of the grounds of review

Both commentators express concern over my characterisation of the traditional grounds of review, as listed in *Craig* and *Yusuf*, as a default list of requirements on power implied into statutes or imposed by the common law. Mr Kennett expresses concern over the idea that they might be excluded by statute, though he agrees that their content can be determined by statute. Dr Perry characterises the traditional grounds of review as tools by which error may be revealed. For the most part, I see these comments as different ways of expressing the idea I was attempting to express in my article. In part, the apparent disagreement is the result of an unwise use of terminology on my part.

When statutes give powers, they impose limits and conditions on the exercise of those powers. Some of those limits and conditions are explicit, others are implicit. The primary question on judicial review is always whether those limits or conditions have been met. However, over time it has been observed that most administrative failures to comply with these limits and conditions fall into certain categories — failures to consider material the statute required the decision-maker to consider, considering material the statute prohibited the decision-maker from considering, failures to address the correct question, failures to comply with the rules of procedural fairness, etc. The traditional grounds of review are thus a collection of these categories of common errors. But since a judicially reviewable error is, by definition, the transgression of a limit or condition on a power, the grounds of review are also a checklist for identifying the limits and conditions that may apply to a power. When attempting to enumerate the limits or conditions on a power it is thus useful to ask: What is the statutorily required question? What are the considerations the statute requires the decision-maker to consider? What

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considerations does the statute prohibit the decision-maker from considering? Does the statute require the decision-maker to comply with the rules of procedural fairness? If so, what is the content of those rules in this particular circumstance? And so on.

Abebe demonstrates that certain grounds of review may be excluded from the jurisdiction of courts other than the High Court.¹ However, this is not what I meant when I suggested that a ground of review could be excluded by statute. That was a perhaps unwise piece of shorthand for the proposition that a statute may be drafted in such a way that there are few or no limits of the sort pointed to by the particular ground of review in question. For example, a statute might provide that a Minister may consider any matter in coming to a particular decision. It might be said (adopting my language from the article) that this statute thus excludes the ground of taking into account an irrelevant consideration. This, however, would be to use language a little loosely. A more precise characterisation would be to say that the ground has been deprived of all (or most) of its usual content because the limit to which it points has been set at naught (or very little).²

***Project Blue Sky* and the grounds of review**

Mr Kennett questions whether the *Project Blue Sky* test (perhaps better described as the '*Project Blue Sky* approach') is appropriate for determining when a breach of a particular ground of review rises to the level of jurisdictional error.³ He seeks to draw a distinction between explicit limits on power, where the *Project Blue Sky* approach is well established, and the implicit limits pointed to by the traditional grounds of review. Here we have a real disagreement.

In my view, a failure to consider a matter that the statute explicitly lists as a relevant consideration is, in principle, no different from a failure to consider a relevant consideration that is implied through the well-know *Peko-Walsend* process.⁴ In the latter circumstance, the courts infer from the structure and subject matter of the statute that parliament intended that the decision-maker be required to consider a particular matter. Once that is done, what remains is to determine whether a failure to consider such a matter results in invalidity. This was precisely the question addressed by the Full Federal Court, using the *Project Blue Sky* approach, in *Jadwan*.⁵

I acknowledged in my article that where the grounds of review are referring to implied limits on power, 'determining whether it was a purpose of the legislature that a breach of one would result in invalidity may seem to be an artificial task'.⁶ I proposed as one solution that there may well be rebuttable

1 *Abebe* (1999) 197 CLR 510; 162 ALR 1.

2 I include the alternatives in parentheses to indicate that, even with such a statutory provision, it might still be implied that certain extreme considerations are irrelevant — if, for example, the Minister made the decision by reference to considerations of racial prejudice or personal financial advantage.

3 *Project Blue Sky* (1998) 194 CLR 355; 153 ALR 490.

4 *Minister for Aboriginal Affairs v Peko-Walsend Ltd* (1986) 162 CLR 24.

5 *Jadwan* (2003) 145 FCR 1; 204 ALR 55.

6 Text accompanying nn 154–155 in article.

presumptions on the issue with respect to the grounds of review, and cited the High Court's approach to the requirement of procedural fairness as an example.

However, another possible solution is implicit in the article. Perhaps the question of whether parliament 'intended' that a breach would result in invalidity is itself a shorthand for a more subtle question. Limits and conditions on power are part of the way a statute describes (explicitly or implicitly) a given decision-making process. The reason why we care is that the statute attaches particular legal consequences to that described process. As discussed in my article, the validity question is really a question about whether the process actually undertaken sufficiently resembles the 'platonic ideal' of the process described in the statute such that the process actually undertaken will have the legal consequences that the statute attaches to the described process. Perhaps to speak of whether parliament 'intended' that a failure to comply with a particular limit would result in invalidity is really to ask whether an actual process that fails to comply with the given limit sufficiently resembles the process described in the statute to be given the statutorily described legal consequences. The question is not so much one of intention as one of resemblance of an actual process to a described one. Looked at in this way, perhaps it does not seem quite so artificial to ask whether a decision-making process that fails to comply with an implicit limit causes that process to sufficiently diverge from the decision-making process (albeit implicitly) described in the statute that it cannot be said to have the consequences that the statute says attach to the described decision.

Distractions, revelations and further issues

In his commentary, Mr Kennett says:

The critical issues in *Bhardwaj* are thus outside the mainstream of constitutional writ jurisprudence, and more akin to *Ruddock v Taylor*, in that they are subtle questions about the legal effect of a flawed decision (ie, whether despite its flaws it authorised or precluded some particular later action), rather than the more familiar issues as to whether a particular error 'goes to jurisdiction'.⁷

By contrast, it is implicit in the view I present in my article that *Bhardwaj* (and, to a lesser extent, collateral attack cases such as *Ruddock v Taylor*) exposes something very important about 'the mainstream of constitutional writ jurisprudence'. The unusual circumstances of *Bhardwaj* required the court to look at jurisdictional error from a different angle. The court was required to determine, not the particular legal consequence usually at issue in migration proceedings (whether Mr Bhardwaj had a right to stay in Australia or was liable to be removed), but the seldom-litigated legal consequence on a decision-maker's power to 're-make' a decision that is jurisdictionally flawed. In doing so, the High Court revealed something significant about what it means to say that a particular error 'goes to jurisdiction'.

This exploration has brought to light many tensions in the case law. One tension — the apparent relativism of statements that decisions can be invalid for some purposes and not others, compared to the absolutism of statements

⁷ Text following n 11.

such as those in *Plaintiff S157*⁸ — is a focus of my article. For example, to say that an administrative decision may be invalid but still found the jurisdiction of an administrative review tribunal may be to say that it does not have most of its usual consequences, but still resembles the statutorily described procedure sufficiently to have the consequence of founding a review tribunal's jurisdiction. I suspect that Dr Perry's 'factum' analysis of this old problem is, like the Federal Court's solution to the problem in *Brian Lawlor*,⁹ another way of expressing the same idea.

Mr Kennett identifies another key tension arising out of *Bhardwaj*: 'the effect that may or should be given to a decision that is affected by jurisdictional error but has not been the subject of any order by a Court.'¹⁰ This is a thorny issue indeed because, if I am right about the direction in which the High Court is headed, I think it may find itself on a collision course with a central proposition of one of the founders of modern administrative law thinking: Sir William Wade. Despite the high regard in which Wade is held by some members of the court,¹¹ judgments such as *Bhardwaj*, *McBain* and *Craig* (not to mention *Jadwan*) seem to me to imply that there really is a distinction between decisions that are void and decisions that are voidable — the very distinction deprecated in Wade's famous papers in 1967–68.¹² But that, to steal Mr Kennett's useful phrase, is an issue for another day.

8 *Plaintiff S157* (2003) 211 CLR 476; 195 ALR 24.

9 Text accompanying n 56.

10 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307.

11 See, eg, the extensive and approving quotations in *Bhardwaj* (2002) 209 CLR 597; 187 ALR 117 at [144]ff per Hayne J.

12 H W R Wade, 'Unlawful Administrative Action; Void or Voidable?' published in two parts in (1967) 83 *LQR* 499 and (1968) 84 *LQR* 95.