"THE *ANISMINIC* REVOLUTION" IN AUSTRALIA

THE RECEPTION OF THE DOCTRINE OF EXTENDED JURISDICTIONAL ERROR IN AUSTRALIA

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CERTIFICATE

I certify that this thesis has not already been submitted for any degree and is not being submitted as part of candidature for any other degree.

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PREFACE

I first became interested in the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission* in 1974 when I was a second year Arts/Law student at the University of Sydney. The subject was "Public Law" and the Lecturer one Leslie Katz, Barrister-at-Law. At that time the full ramifications of the case were not apparent. In the years that followed it soon became clear that *Anisminic* was not just another case on jurisdictional error.

I wish to thank my Examiners, the eminent S D Hotop, Associate Professor of Law, Faculty of Law, University of Western Australia, and Professor Roman Tomasic of the University of Canberra, for their insightful comments and encouragement. Sincere thanks are also due to my supportive and capable academic colleagues Dr Stephen Smith, Lecturer in Law, Faculty of Law, University of Technology, Sydney, and Associate Professor David Barker, Dean of the Faculty of Law, University of Technology, Sydney - my Supervisor and Co-supervisor, respectively - for their comments, suggestions and other assistance. I also wish to thank Associate Professor Alexis Goh, formerly of the Faculty, and now at the University of Western Sydney, for believing in me and motivating me to embark on the project.

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ABSTRACT

The thesis investigates the so-called "*Anisminic* revolution" in Australia, that is, the reception of the doctrine of extended jurisdictional in this country, and explores the reasons why a case which has had such a profound impact upon English law - a "legal landmark" - has been almost totally ignored by Australian superior courts.

The seeds of the *Anisminic* revolution were sown long before it was held that the Foreign Compensation Commission had exceeded its jurisdiction in not treating as established the Anisminic company's claim for compensation. If, as things turned out, the House of Lords in *Anisminic Ltd v Foreign Compensation Commission & Anor* [1] widened the field of judicial review for jurisdictional error, their Lordships did so in the sense of preferring one of two long competing lines of judicial authority to the other.

The traditional doctrine of jurisdictional error which, in its modern form, can be traced from the 17th century, is first explored. A jurisdictional error, in traditional terms, is of three kinds:

1. A want (or lack) of jurisdiction: that is, there is an absence of power or authority on the part of the decision-maker to made the decision.

2. An excess of jurisdiction: that is, the decision is within the general power or authority of the decision-maker, but there is a lack of jurisdiction occurring somewhere throughout the decision-making process itself.

3. A wrongful failure or refusal to exercise jurisdiction: that is, there is no lack or excess of jurisdiction, but simply no exercise of it.

A non-jurisdictional error of law (being an error made *within* jurisdiction), in traditional terms, is any other error of law. Errors made with respect to matters *within* jurisdiction - whether of fact or law - were always seen as unreviewable (in the absence of some statutory right of appeal) *unless* the original decision-maker

[1] [1969] 2 AC 147.

had made an error of law which was apparent "on the face of the record".

In England, the distinction between jurisdictional and non-jurisdictional errors of law was, for all practical purposes, abolished as a result of the House of Lords decision in *Anisminic.* The effect of the majority's reasoning in that case was to "extend" the traditional concept of jurisdictional error so as to embrace errors of law not traditionally thought to go to jurisdiction, namely, errors of law of the kind subsumed within broad or extended ultra vires (eg the taking into account of irrelevant considerations, manifest unreasonableness).

The result of the *Anisminic* decision in England - which, interestingly, was not immediately apparent when the decision was first handed down - was that *every* error of law, even in the absence of a statutory right of review or appeal, became prima facie reviewable at common law. The decision has conferred upon a reviewing court, purportedly exercising "supervisory jurisdiction", such wide powers of judicial review that its role arguably has become more appellate than supervisory.

In Australia, despite some intermittent enthusiasm for the *Anisminic* doctrine of "extended jurisdictional error", the fact is that most Australian superior courts continue to maintain, or at least pay lip-service to, a distinction between jurisdictional and non-jurisdictional errors of law.

There would appear to be a number of reasons why the Australian courts generally have been reluctant to *formally* embrace the *Anisminic* doctrine of extended jurisdictional error.

Perhaps the main reason is that, for the most part, Australian courts have found the decision unnecessary, having already developed their own liberal interpretation of the traditional doctrine of jurisdictional error.

Using their own "local" version of the *Anisminic* principle - which was well in place before the House of Lords decision in *Anisminic* - and drawing on much the same line of authority relied upon by the majority Lords in *Anisminic,* Australian superior courts have been able to categorise virtually every error of law as jurisdictional and intervene and strike down any exercise of power which they deem to be an abuse

of power just as easily as their British counterparts.

The Australian courts, for the most part, have been content to proceed on a case-by-case basis, guided only by such nebulous and self-serving parameters as "misconstruing the statute the source of jurisdiction", "misconceiving one's duty", "failing to comply with some requirement essential to its valid or effectual performance", "not applying oneself to the question which the law prescribes", "misunderstanding the nature of the opinion to be formed" and "being actuated by extraneous considerations", all of which are readily capable of manipulation and therefore uncertain in their application.

The thesis traces the development and promulgation of this distinctively Australian approach to jurisdictional error through four pre-*Anisminic* Australian cases[2] and attests to the judicial reality that there is a considerable body of case law to support the proposition that *Anisminic* has, in fact, been *impliedly* accepted by most Australian superior courts.

The writer submits that since:

* no satisfactory test has ever been devised for distinguishing between jurisdictional and non-jurisdictional errors of law;

* a reviewing court can quite easily transmute an error of law in its mind into one of jurisdiction if of the opinion that the error is a "serious" one justifying judicial intervention, whether using the traditional doctrine or otherwise; and

* abolition of the distinction arguably would have little or no practical impact on the existing practice of most Australian superior courts,

no useful purpose is served in continuing to pay lip-service to the traditional doctrine of jurisdictional error with its hair-splitting distinction between jurisdictional and non-jurisdictional errors of law.

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[2] *R v War Pensions Entitlement Appeal Tribunal & Anor; Ex parte Bott* (1933) 50 CLR 228; *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416; *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100.

However, the then almost irresistible temptation to fully embrace the *Anisminic* doctrine needs to be resisted, since it too easily invites a reviewing court, whose proper role is supervisory only, to impose its own view in respect of a particular matter upon a specialised tribunal which was established by the legislature for the express purpose of dealing with such matters.

Nevertheless, the writer is of the opinion that no inferior court or tribunal *ought* to be able to make a "serious" error of law, that is, an error of law on which the decision of the particular case depends, and that what is needed is the adoption of a realistic, pragmatic and *honest* approach to the question of judicial review in which the reviewing court would enquire as to whether or not the particular decision, or the view of the law made by the inferior court or tribunal, could be *rationally* supported on a construction which the empowering legislation may *reasonably* be considered to bear.

The test would then become more one of "reasonableness" rather than legal "correctness", with the reviewing court having regard to a number of policy and discretionary considerations similar to those presently applied by the courts in determining whether a duty of care exists in the context of a common law negligence action and whether equitable relief ought to be granted on the facts of a particular case.

The reviewing court would need to be guided by the form and subject-matter of the relevant legislation. Where, for example, it was clear that the legislature had intended to concede a wide area to the inferior court or tribunal, the court should, it is submitted, exercise considerable restraint. Other "pragmatic" factors which might be relevant to the exercise of the reviewing court's discretion as to whether or not to intervene in a particular case would include:

* whether the alleged irregularity is incidental, as opposed to fundamental, to the actual decision;

* whether the matter in question in one on which reasonable persons might reasonably arrive at divergent conclusions;

INTRODUCTION

"... a change so radical, a revolution so quiet and yet so total ..."[1]

The Arab-Israeli conflict of 1956-57, in particular the events known as the Suez Crisis[2], "marked the end of Great Britain's position as the dominant 'Great Power' in the Middle East".[3] In many respects, it marked the end of Britain's position as any form of "World Power".[4] In the words of one historian, it was:

> the bitter demonstration that Britain was no longer a Colossus that bestrode the world but ... only a small island on the shoulder of Europe ... the unwelcome proof that an era had ended".[5]

It was also the setting for an event which was the beginning of a new era in British law that would, some twelve years later, "revolutionise the law of judicial review".[6]

The House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission & Anor* [7] has been described by one eminent jurist as a "legal landmark"[8] and by a prominent legal academic as just "another instances of the

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1 Edward Heath, Speech, Conservative Party Conference, October 1970, cited in N Rees, *A Dictionary of Twentieth Century Quotations* (Fontana/Collins, London, 1987), p 219.

2 Or "Suez Incident": see [1968] 2 QB 862 at 863; [1969] 2 AC 147 at 151.

3 L Piggott,S D Rutland & Ors, *One Land: Two Peoples - A Concise History of the Arab-Israeli Conflict* (Harcourt Brace & Company, Sydney,1994), p 122.

4 Richard Nixon wrote that "[t]he most tragic result was that Britain and France were so humiliated and discouraged by the Suez crisis that they lost the will to play a major role on the world scene": see R Nixon, *RN: The Memoirs of Richard Nixon* (Macmillan, Melbourne, 1978), p 179.

5 H Van Thal, *The Prime Ministers: From Sir Robert Walpole to Edward Heath* (Stein and Day, New York, 1975), p 729. "The effects on Britain were far-reaching. Britain's decline was now plain to see": I J Bickerton & M N Pearson, *The Arab-Israeli Conflict: A History* [3rd ed] (Longman Cheshire, Melbourne, 1993), p 121. See also A Nutting, *No End of a Lesson* (Constable, London, 1967).

6 H W R Wade "Anisminic Ad Infinitum" (1979) 95 *L Q Rev* 163 at 165. "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly ... ": *Church of Scientology v Woodward* (1982)154 CLR 25 per Brennan J at 70.

7 [1969] 2 AC 147.

8 *Re Racal Communications Ltd* [1981] AC 374 per Lord Diplock at 382.

familiar phenomenon - a hard case making bad law".[9]

Bad law or not, it is necessary to enquire as to the reasons why a case which has had such a profound impact upon English law - a "legal landmark"[10] - appears to have had "little or no impact in Australia ... [having] been almost totally ignored by Australian appellate courts".[11]

Chapter 1 of this thesis examines the traditional doctrine of jurisdictional error in its three forms: a lack (or want) of jurisdiction, an excess of jurisdiction, and a wrongful failure or refusal to exercise jurisdiction. That doctrine, which can be traced from the seventeenth century, came to be used by superior courts as a means of controlling the activities of inferior courts and statutory administrative tribunals. The doctrine is similar to the doctrine of ultra vires which, in the context of administrative law, developed in the mid-nineteenth century as a means by which superior courts could control the activities of administrative bodies such as local councils and other public authorities. The two doctrines, although similar, were, however, distinguishable, with the doctrine of ultra vires generally allowing a superior court to be more interventionist.

In Chapter 2 of the thesis, the *Anisminic* case is critically discussed in order to show that if, as things turned out, the House of Lords widened the field of judicial review for jurisdictional error, so that *every* error of law is, even in the absence of a statutory right of review or appeal, prima facie reviewable at common law, their Lordships did so in the sense of preferring one of two long competing lines of judicial authority to the other. In England, since *Anisminic*, the two doctrines of ultra vires and jurisdictional error have, for all practical purposes, merged and become interchangeable, making possible "the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires".[12]

Chapters 3 and 4 of the thesis examine the impact of the *Anisminic* case in the High Court of Australia and in other Australian superior courts (particularly New

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9 D M Gordon "What Did the Anisminic Case Decide?" (1971) 34 *Mod L Rev* 1 at 11.

10 *Re Racal Communications Ltd* [1981] AC 374 per Lord Diplock at 382.

11 *Darkingung Local Aboriginal Land Council v Minister for Natural Resources [No 2]* (1987) 61 LGRA 218 per Stein J at 228.

12 *Re Racal Communications Ltd* [1981] AC 374 per Lord Diplock at382.

South Wales courts) respectively. The flexibility of the traditional doctrine of jurisdictional error as espoused by the High Court in a number of decisions over the years is revealed in Chapter 3. It is then submitted that the High Court appears to be close to accepting the reality that there is little *conceptual* basis for distinguishing between jurisdictional and non-jurisdictional errors of law and that, even in its traditional form, the concept of "excess of jurisdiction" can be stretched to embrace virtually every error of law made by an inferior court or tribunal in the course of exercising its jurisdiction.

It will be seen in Chapter 4 that whilst the *Anisminic* doctrine has been explicitly endorsed in several State and Territory decisions, the preponderance of judicial authority attests to the fact that most Australian superior courts continue to maintain, or at least pay lip-service to, a fairly traditional distinction between jurisdictional errors of law on the one hand and non-jurisdictional errors of law on the other.

In Chapter 5 of the thesis, it will be shown that the Australian courts, whilst purporting to maintain faithful adherence to the traditional doctrine of jurisdictional error, nevertheless have *implicitly* accepted the *Anisminic* doctrine of extended jurisdictional error. Using their own "local" version of the *Anisminic* principle - which pre-dates the House of Lords decision in *Anisminic* - Australian courts are able to categorise virtually every error of law as jurisdictional and intervene and strike down any exercise of power which they deem to be an abuse of power just as easily as their British counterparts. The development and promulgation of this distinctively Australian approach to jurisdictional error are traced through four pre-*Anisminic* Australian cases.

Finally, in Chapter 6 of the thesis it is submitted that there would appear to be little merit in continuing to pay lip-service to the traditional doctrine of jurisdictional error and an alternative, pragmatic approach to judicial review - in place of jurisdictional error, whether in its traditional or extended form - is suggested.

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CHAPTER 1

THE TRADITIONAL DOCTRINE OF JURISDICTIONAL ERROR

"It is one thing to show a man that he is in an error,
and another to put him in possession of truth."[1]

Preview

1. A jurisdictional error, in traditional terms, is of three kinds: a want (or lack) of jurisdiction, an excess of jurisdiction, and a wrongful failure or refusal to exercise jurisdiction.

2. A non-jurisdictional error of law (being an error made *within* jurisdiction), in traditional terms, is any other error of law.

3. Errors made with respect to matters *within* jurisdiction - whether of fact or law - are unreviewable (in the absence of some statutory right of appeal) under the traditional doctrine of jurisdictional error *unless* the original decision-maker has made an error of law which is apparent "on the face of the record".

Introduction

The doctrine of jurisdictional error, in its modern form, can be traced from the 17th century when it came to be used to control the activities of inferior courts and

[1] John Locke, *An Essay concerning Human Understanding* (1690), bk iv, ch 7, sec 11.

statutory tribunals.[2] The doctrine is very similar to the doctrine of ultra vires[3] which, in the mid-19th century, became a means of ensuring that executive and administrative authorities (particularly local government authorities) acted within their powers.[4] One doctrine speaks in terms of "jurisdiction"[5], the other in terms of "power".[6]

A jurisdictional error, in traditional terms, is of three kinds[7]:

1. A "want" (or "lack") of jurisdiction: that is, there is an absence of power or authority on the part of the decision-maker to make the decision.[8]

2. An "excess" of jurisdiction: that is, the decision is within the general power or authority of the decision-maker, but there is a lack of jurisdiction occurring somewhere throughout the decision-making process itself.[9]

3. A wrongful failure or refusal to exercise jurisdiction: that is, there is no

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2 S A de Smith, *Judicial Review of Administrative Action* [3rd ed] (Stevens & Sons, London, 1973), p 95.

3 The grounds of ultra vires and jurisdictional error have been said to be "conceptually indistinguishable": see S D Hotop, "Judicial Control over Local Government Authorities", Ch 4, *Local Government Legislation Service (New South Wales)*, vol 2 [Commentary] (Butterworths, Sydney, 1976), p 26. However, the distinction between the two grounds of review is not merely terminological; each ground has a different historical basis and the bulk of the case law in Australia (if no longer in England) continues to treat them as distinguishable. In addition, judicial review by way of jurisdictional error (particularly in relation to decisions of inferior courts) generally has tended to be more restrained than that carried out pursuant to the doctrine of ultra vires.

4 The concept and language of jurisdictional error are occasionally invoked in a local government context (see, eg, *Permanent Trustee Co of NSW Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401), even though the doctrine is, for historical and jurisprudential reasons, more commonly invoked in the context of inferior courts and statutory tribunals.

5 "Jurisdiction means authority to decide": S A de Smith, *Judicial Review of Administrative Action* (1959) 66. " 'Jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context": *Anisminic Ltd v Foreign Compensation Commission & Anor* [1968] 2 QB 862 per Diplock LJ at 889.

6 "When considering judicial control of tribunals and similar bodies whose function is to decide the outcome of a dispute, rather than exercise a specific power, it is more appropriate to talk in terms of jurisdiction": S A de Smith, *Constitutional and Administrative Law* (H Street & R Brazier, eds) [5th ed] (Penguin Books, London, 1985), p 578.

7 A non-jurisdictional error of law (being an error made *within* jurisdiction), in traditional terms, is any other error of law.

8 See, for example, *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Ltd* (1953) 88 CLR 100; *Ex parte Wurth; Re Tully* (1954) 55 SR (NSW) 47; *Potter v Melbourne and Metropolitan Tramways Board* (1957) 98 CLR 337. Lack of jurisdiction more-or-less corresponds to so-called "substantive ultra vires".

9 See, for example, *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407.

lack or excess of jurisdiction, but simply no exercise of it.[10]

As McHugh J pointed out in *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch*[11] the phrases "want of jurisdiction" and "excess of jurisdiction" are "not terms of art".[12] His Honour went on to say that it is not uncommon for superior courts to use the phrases interchangeably.[13] Thus, "acting without jurisdiction" may connote either that the inferior tribunal had no power or authority at all to embark upon making a decision *ab initio* or that, although it had such power or authority, it went further than it ought to have gone.

In *Baldwin & Francis Ltd v Patents Appeal Tribunal*[14] Lord Denning said in obiter:

> But an *excess* of jurisdiction in this sense is very different from *want* of jurisdiction altogether which is, of course determinable at the commencement and not at the conclusion of an inquiry (see *R v Bolton* [(1841) 1 QB 66; 113 ER 1054]). Whereas an excess of jurisdiction is determinable in the course of, or at the end of the inquiry.[15]

In *Parisienne Basket Shoes Pty Ltd v Whyte*[16] Latham CJ had this to say:

> It cannot be said that, whenever a court makes an erroneous decision, it acts without jurisdiction. An order made without jurisdiction - as if a court of petty sessions purported to make a decree of divorce - is not an order at all. It is completely void and has no force or effect.[17]

Lack of jurisdiction

Lack of jurisdiction can occur where, for example, a tribunal with limited power purports to deal with some subject-matter outside that power. In the 1680 case of *Terry v Huntington*[18] it was held that a decision tainted by a so-called jurisdictional

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10 See *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132; *Ex parte Minister for Corrective Services* (1993) 9 WAR 534.
11 (1991) 173 CLR 132.
12 (1991) 173 CLR 132 at 164.
13 (1991) 173 CLR 132 at 164.
14 [1959] AC 663.
15 [1959] AC 663 at 695. Lords Reid and Tucker regarded the terms as synonymous.
16 (1938) 59 CLR 369.
17 (1938) 59 CLR 369 at 375.
18 (1668) Hardres 480; 145 ER 557.

error was void and that an action in trespass could be brought against any person purportedly acting under the authority of the decision. Hale CB spoke of some of the ways in which jurisdiction could be circumscribed:

> And it is to be considered that special jurisdictions may be circumscribed 1. with respect to the subject matter of their jurisdictions; 2. with respect to place; 3. with respect to persons ... and therefore if they give judgment in a cause arising in another place or betwixt private persons or in other matters all is void.[19]

In *Potter v Melbourne and Metropolitan Tramways Board*[20] the High Court (per Dixon CJ, Webb, Kitto and Taylor JJ) similarly said :

> It is evident that the appeal board has a limited power and wherever those limits may be drawn it seems impossible to suppose that it was intended that by its own authority the appeal board should exceed them.[21]

The appeal board, which had been constituted to hear appeals against "dismissals, fines, deductions from wages, reductions in rank, grade or pay, or other punishments", lacked jurisdiction to hear the appellant's purported appeal in respect of his re-classification which was found not to be in the nature of a "punishment".[22]

In *Welch v Nash*[23] Lord Ellenborough similarly spoke in terms of a misconstruction of the source of jurisdiction:

> This is a question of jurisdiction ... Increasing the width of one old highway is neither diverting another old highway nor making a new one: and the justices cannot make facts by their determination in order to give to themselves jurisdiction, contrary to the truth of the case.[24]

However, errors of law came to be classified according to whether or not they went to jurisdiction. In that regard the reviewing court traditionally has drawn a distinction between:

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19 145 ER 557 at 559. See also *Groenvelt v Burwell* (1700) 1 Ld Raym 454 at 469; 91 ER 1202 at 1212; *R v Inhabitants in Glamorganshire* (1700) 1 Ld Raym 580; 91 ER 1287 at 1288.

20 (1957) 98 CLR 337.

20 (1957) 98 CLR 337 at 343-4.

22 (1957) 98 CLR 337 at 344. See also *Ex parte Wurth; Re Tully* (1954) 55 SR (NSW) 47; *Ex parte Wurth; Re Flanagan* (1958) 58 SR (NSW) 51.

23 (1807) 8 East 394; 103 ER 394.

24 103 ER 394 at 402-3.

* unreviewable[25] matters of fact or law which are *within* the original decision-maker's jurisdiction (commonly referred to as matters "going to the merits" or "within jurisdiction"), that is, those matters which the decision-maker alone is to decide; and

* reviewable[26] matters of fact or law which are *outside* the original decision-maker's jurisdiction (so-called jurisdictional matters), that is, those matters which have to be established either as a condition precedent for the decision-maker to exercise its jurisdiction or which otherwise have to be satisfied in the course of exercising jurisdiction.

Thus, in the 1668 case of *Terry v Huntington*[27] Hale CB spoke of the reviewing court's limited role in the following terms:

> But if they should commit a mistake in a matter that were within their power, that would not be examinable here.[28]

In *Parisienne Basket Shoes Pty Ltd v Whyte*[29] Dixon J (as he then was) pointed out that:

> ... the clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari or appeal. But, if there be want of jurisdiction, then the matter is coram non judice. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable: compare *Case of the Marshalsea* (1612) 10 Co Rep 68b at 76a, 76b; 77 ER 1027.[30]

The rationale for the distinction between want or lack of jurisdiction and the manner of its exercise is that if the distinction were not made judicial review for excess of jurisdiction would be tantamount to administrative review on the merits.[31]

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25 In the absence of some statutory right of appeal or review.

26 Irrespective of the existence of some statutory right of appeal or review.

27 (1668) Hardres 480.

28 (1668) Hardres 480 at 483.

29 (1938) 59 CLR 369.

30 (1938) 59 CLR 369 at 389.

31 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 389 per Dixon J.

Thus, in *R v Bolton*[32] Lord Denman stated:

> The inquiry before us must be limited to this, whether the magistrates had jurisdiction to inquire and determine, supposing the facts alleged in the information to be true ... we must not constitute ourselves into a Court of Appeal where the statute does not make us such.[33]

Similarly, in *R v Wakefield*[34] Lord Mansfield spoke in terms of a lack of jurisdiction arising out of a consideration of certain disputed facts:

> This part of the case depends on the facts, for if the title actually came in question ... then the justices had no jurisdiction. It appears on the affidavits that the title was not in question.[35]

In *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia*[36] Fullagar J pointed out that:

> ... the important point is that the decision or finding with regard to the existence of jurisdiction, whether it be affirmative or negative, stands in a radically different position from a decision or finding given or made within jurisdiction on the merits of the case. The latter is conclusive and binding subject only to any appeal that may be given: if no appeal is given, it is absolutely conclusive and binding. The former is not conclusive or binding at all. It is open, if it be affirmative and wrong, to prohibition. It is open, if it be negative and wrong, to mandamus.[37]

Errors made with respect to jurisdictional matters have always been reviewable for "jurisdictional error". This includes errors made with respect to so-called

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[32] (1841) 1 QB 66; 113 ER 1054.

[33] 113 ER 1054 at 1058.

[34] (1758) 2 Kenny 164; 96 ER 1143.

[35] 96 ER 1143 at 1144.

[36] (1950) 82 CLR 54.

[37] (1950) 82 CLR 54 at 91. In this case it was suggested (at 92) that more weight ought to be accorded to a decision of a tribunal where the collateral issue determinative of jurisdiction depends for its answer upon a finding of fact (as opposed to some conclusion of law).

"jurisdictional facts".[38] A jurisdictional fact is some fact which has to exist as a condition precedent, or essential prerequisite, for the decision-maker to exercise its jurisdiction.[39] The position was very clearly put by Coleridge J in *Bunbury v Fuller*[40]:

> Suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; and on its being presented, the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not proceed with the principal subject matter according as he finds on that point; but this decision must be open to question, and if he has improperly either foreborne or proceeded on the main matter in consequence of an error, on this the Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake.[41]

Thus, in *Weaver v Price*[42] the question whether certain land was within a particular parish was held to be a jurisdictional fact. A wrong decision on that matter would result in the invalidity of the rate levy. Similarly, the question of whether or not a person was an occupier of land was also held to be a jurisdictional fact in *Bristol v Waite*.[43]

In *White and Collins v Minister of Health*[44] a local authority was empowered by

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38 Also referred to as "collateral" or "preliminary" facts, issues or questions. Judicial review in relation to such matters is often referred to as "collateral attack". See D M Gordon "The Relation of Facts to Jurisdiction" (1929) 45 *L Q Rev* 459; "The Observance of Law as a Condition of Jurisdiction" [Pt 1] (1931) 47 *L Q Rev* 386, [Pt 2] 47 *L Q Rev* 557; "Excess of Jurisdiction in Sentencing or Awarding Relief" (1939) 55 *L Q Rev* 521; "Conditional or Contingent Jurisdiction of Tribunals" (1960) 1 *UBC L Rev* 185; "Jurisdictional Fact: An Answer" (1966) 82 *L Q Rev* 515. Gordon attacks the whole doctrine of jurisdictional or collateral fact, asserting that the distinction between so-called jurisdictional or collateral facts and the main issue or question to be decided is a false one. Admittedly, there appears to be no logical or conceptual basis for deciding which facts, issues or questions are preliminary or collateral (and, thus, "jurisdictional") and which are not. In many cases, where the criteria to be met are specifically and categorically laid down by the enabling legislation, and there is nothing else to be determined by the particular tribunal, the so-called collateral, preliminary or jurisdictional facts *are* the supposedly unreviewable "merits" of the case. See also H W R Wade "Anglo-American Administrative Law" (1966) 82 *LQ Rev* 226.

39 Professor Wade asserts that the distinction between jurisdictional facts and facts going to the merits is necessary because a tribunal has the power to decide facts correctly or incorrectly within the jurisdiction entrusted to it: see H W R Wade, *Administrative Law* (4th ed, 1977), pp 237-8.

40 (1853) 9 Ex 111; 156 ER 47.

41 (1853) 9 Ex 111 at 140-1.

42 (1832) 3 B & Ad 409; 110 ER 147.

43 (1834) 1 Ad & El 264; 110 ER 207.

44 [1939] 2 KB 838.

statute to compulsorily acquire land provided it did not form part of any "park, garden or pleasure ground". A purported exercise of the power was struck down as having been made without jurisdiction on the basis that the subject land did form part of a park.[45]

In *Byron Shire Businesses for the Future Inc v Byron Council & Anor*[46], a decision of the Land and Environment Court of New South Wales, the development consent granted by the council was declared null and void because, at the time the council purported to grant consent, no fauna impact statement (as required by the Environmental Planning and Assessment Act 1979 (NSW)) had been lodged with the council. In the opinion of Pearlman J, the council "started off with at least the possibility of significant effect" and was "then bound by the [Act] to determine whether or not that was so".[47] In respect of one species of endangered fauna, namely, the comb-crested jacana, "the only reasonable conclusion was that its environment was likely to be significantly affected", and as to other species of endangered fauna the council "was required to make a determination one way or the other as to significant effect on environment".[48] The legal consequence of her Honour's conclusion that the council's decision on the fauna question was "not reasonably open" to it was the invalidation of "the very foundation of the development consent process".[49] A fauna impact statement was an essential prerequisite for the council to make a determination of the development application.[50]

However, the position is more complicated where the inferior body is vested with a jurisdiction which includes a jurisdiction to determine whether, in effect, there *is* jurisdiction (in the sense of authority to act) in a particular case, that is, a power to decide not only matters going to the merits but also jurisdictional matters. In *R v Commissioners for Special Purposes of the Income Tax*[51] Lord Esher said:

> Where an inferior court or tribunal or body which has to exercise the power

[45] See also *Hall v Manchester Corporation* (1915) 84 L J Ch 732; *Permanent Trustee Co of NSW Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401.

[46] (1994) 84 LGERA 434.

[47] (1994) 84 LGERA 434 at 446.

[48] (1994) 84 LGERA 434 at 446.

[49] (1994) 84 LGERA 434 at 447. See also *Helman v Byron Shire Council & Anor* (1995) 87 LGERA 349.

[50] See also *Minister for Immigration and Ethnic Affairs v Teo* (1995) 57 FCR 194 at 209.

[51] (1888) 21 QBD 313 at 319.

> of deciding facts is first established by Act of Parliament the legislature has to consider what powers it will give that tribunal or body. It may in effect say that if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist to proceed further or do something more. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts including the existence of the preliminary facts on which the further exercise of their jurisdiction depends.[52]

A common way of conferring upon an inferior tribunal jurisdiction to, in effect, determine its own jurisdiction (at least with respect to preliminary matters) is to provide, in the empowering legislation, that the exercise of jurisdiction is conditional upon the tribunal being "of the opinion" or "satisfied" that a certain state of affairs exists. However, despite what Lord Esher said about it being erroneous to say that a tribunal cannot give itself jurisdiction (even wrongly) in such circumstances, the courts have displayed a preparedness to intervene in appropriate cases. For example, in *Ex parte Wurth; Re Tully*[53] Street CJ said:

> It would be an extraordinary interpretation to put upon the section that the Board was to have unfettered and unchallenged power to define the extent of its own jurisdiction, and to give any decision or embark upon any proceeding without any liability to correction. It is unlikely that the legislature would have conferred upon this tribunal, two of whose members might have no knowledge of law whatever, the right to determine questions of law and by such determination to extend indefinitely the limits of the Board's jurisdiction.[54]

In *R v Shoreditch Assessment Committee*[55] Farwell LJ had this to say about the matter:

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[52] (1888) 21 QBD 313 at 319. See also *Ex parte Silk; Re Chapman Engine Distributors Pty Ltd* (1939) 39 SR (NSW) 42 at 66; 56 WN 13 at 14 per Jordan CJ; *Ex parte Redgrave; Re Bennett* (1945) 46 SR (NSW) 122 at 125 per Jordan CJ; *R v Ludlow; Ex parte Barnsley Corporation* [1947] 1 KB 634; *Ex parte Moss; Re Board of Fire Commissioners of New South Wales* (1961) 61 SR (NSW) 597 per Kinsella J; cf *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391-2.

[53] (1954) 55 SR (NSW) 47.

[54] (1954) 55 SR (NSW) 47 at 53.

[55] [1910] 2 KB 859.

> Subjection in this respect to the ... [c]ourt is a necessary and inseparable incident to all tribunals of limited jurisdiction; for it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure - such a tribunal would be autocratic, not limited - and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact.[56]

Accordingly, if, for example, the existence of jurisdiction or the exercise of jurisdiction (or both) is conditional upon the existence of the formation of a subjective discretion in the form of some opinion, if the opinion actually formed is incorrectly based in law, then the necessary opinion does not exist.[57] In *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*[58] Latham CJ, with whom the other members of the High Court agreed, said:

> Where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts.[59]

In addition, a tribunal's decision on such a matter can still be reviewed for jurisdictional error where the tribunal either rejects evidence, or makes a decision unsupported by the evidence, *in such a way* as to indicate that the tribunal misunderstood the test it had to apply in determining matters going to jurisdiction.[60] For example, in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* [61] the board was empowered to cancel or suspend the registration of an employer if after an inquiry it was satisfied that the employer was "unfit to continue to be registered as an employer" or had "acted in a manner whereby the proper performance of stevedoring operations ha[d] been interfered

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56 [1910] 2 KB 859 at 880.

57 A reference to subjective criteria ("opinion", "satisfied", etc) is usually one directed to the ultimate question to be decided rather than to collateral or threshold issues: see, for example, *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407.

58 (1944) 69 CLR 407.

59 (1944) 69 CLR 407 at 430.

60 The rejection of evidence, or the reaching of a conclusion unsupported by the evidence, is not *per se* an error of law: see *Azzopardi v Tasman UEB Industries Ltd* [1985] 4 NSWLR 139. Nevertheless, inadequacy of material to support the formation of some necessary "opinion" may support an inference that the tribunal is applying the wrong test or is not in reality "satisfied" of the requisite matters: *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Ltd* (1953) 88 CLR 100 at 120.

61 (1953) 88 CLR 100.

with". The High Court (per Dixon CJ, Williams, Webb and Fullagar JJ, Taylor J delivering a concurring judgment) found that there were no grounds for saying that the company was unfit or that it had acted in a manner whereby the proper performance of stevedoring operations had been interfered with.[62] In short, the power to cancel or suspend had not arisen "because the conditions for its exercise [did] not exist in law and in fact".[63]

Excess of jurisdiction

Excess of jurisdiction can occur in any one or more of several ways. In particular, the tribunal may purport to enlarge the ambit of its authority in a manner not referable to its legal source[64] by, for example, extending the criteria regulating the use of power[65] or purporting to make an order not provided for by the empowering legislation[66] . In addition, excess of jurisdiction can occur where the inferior tribunal misconstrues the statute investing it with jurisdiction[67] leading it to misunderstand the nature of the jurisdiction which it is to exercise and to:

* "apply a wrong and inadmissible test"[68];

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62 (1953) 88 CLR 100 at 120.

63 (1953) 88 CLR 100 at 120. Similarly, in *Byron Shire Businesses for the Future Inc v Byron Council & Anor* (1994) 84 LGERA 434 it was held that where there is only one conclusion reasonably open to the tribunal on the facts and a contrary opinion has been reached as to some matter in the nature of a pre-condition for the exercise of a power, the exercise of the power is null and void. (See also *Hope v Bathurst City Council* (1980) 144 CLR 1.)

64 See, for example, *Port Arthur Shipbuilding Co v Arthurs* (1968) 70 DLR (2d) 693 at 702, per Judson J.

65 See, for example, *Holroyd Municipal Council v Allis Spares & Equipment Pty Ltd* (1968) 16 LGRA 265.

66 See, for example, *Blackwoods Beverages Ltd v Dairy Employees, Truck Drivers and Warehousemen, Local No 834 (No 1)* (1956) 3 DLR (2d) 529 at 535.

67 In *Dickinson v Perrignon* [1973] 1 NSWLR 72 Street CJ made (at 85) a clear distinction between a misconstruction of the empowering statute and a misconstruction of another statute; the latter would not, in his Honour's opinion, constitute a constructive refusal to exercise jurisdiction (cf *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 per Jordan CJ at 420). Other matters such as the erroneous application of the law to the situation in hand and misapprehension of general principles of law do not necessarily constitute errors of law affecting the basis of jurisdiction: see, for example, *R v Small Claims Tribunal and Syme; Ex parte Barwiner Nominees Pty Ltd* [1975] VR 831, and *Walker v Industrial Court of New South Wales & Anor* (1994) 53 IR 121. The mere fact that an inferior court or tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute a jurisdictional error: see *R v Minister of Health* [1939] 1 KB 232 at 245-6; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Aickin J at 268; *Re Coldham & Ors; Ex parte Brideson* (1989) 166 CLR 338 at 349.

68 See *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898 at 917.

* "misconceive its duty, or function, or the nature of its task"[69];

* "not apply itself to the question which the law prescribes" or "ask the wrong question"[70]; or

* otherwise "misunderstand the nature of the opinion which it is to form"[71].

However, an error made because of a failure in the decision-making process to take into account a relevant consideration, or by reason of the taking into account of an irrelevant or extraneous consideration, has *ordinarily* been seen to be an error within, and not outside or in excess of, jurisdiction.[72]

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69 See *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242; *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Re Coldham & Ors; Ex parte Brideson* (1989) 166 CLR 338.

70 See *Board of Education v Rice* [1911] AC 179; *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-3; *Toronto Newspaper Guild v Globe Printing Co* (1953) 3 DLR 561; *R v Minister of Housing and Local Government; Ex parte Chichester RDC* [1960] 1 WLR 587; *Metropolitan Life Insurance Co v International Union of Operating Engineers* [1970] SCR 425; *R v Dunphy; Ex parte Maynes* (1978) 139 CLR 482; *R v Booth; Ex parte Administrative and Clerical Officers' Association* (1978) 141 CLR 257.

71 See *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432. Latham CJ pointed out (at 432) that if the opinion was in fact formed "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 ... just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide". See also *Ex parte St Vincent & Ors; Medical Board of WA* (1989) 2 WAR 279.

72 See *R v Paddington and St Marylebone Rent Tribunal; Ex parte Kendal Hotels Ltd* [1947] 1 All ER 448; *Davies v Price* [1958] 1 WLR 434; *R v Agricultural Land Tribunal; Ex parte Bracey* [1960] 1 WLR 911; *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 per McHugh J at 165. See also *Re Shaw; Ex parte Shaw* (1981) 55 ALJR 12; cf *Seereelall Jhuggroo v Central Arbitration and Control Board* [1953] AC 151 at 161 ("whether [the board] took into consideration matters outside the ambit of its jurisdiction and beyond the matters which it was entitled to consider"), cited with approval in *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147 per Lord Wilberforce at 210. The concept of taking into account irrelevant or extraneous considerations has, however, been invoked in many mandamus cases (in cases of an actual or constructive wrongful failure or refusal to exercise jurisdiction, as opposed to excess of jurisdiction): see, eg, *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228; *R v Industrial Commission of South Australia; Ex parte Minda Homes Inc* (1975) 11 SASR 333; *Murphyores Inc Pty Ltd v Commonwealth of Australia* (1976) 136 CLR 1; *Falkirk Assurance Society Ltd v Life Insurance Commissioner* (1976) 50 ALJR 324 (see Gibbs J at 329, who included "extraneous considerations" in his three tests for exceeding jurisdiction); *Re Coldham & Ors; Ex parte Brideson* (1989) 166 CLR 338. Relief in the nature of prohibition has also been granted in some cases involving extraneous considerations: see, eg, *Estate and Trust Agencies (1927) Ltd v Singapore Investment Trust* [1937] AC 898; *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407. As to "reasonableness", see *Bognor Regis UDC v Boldero* [1962] 2 QB 448.

The reason why these phrases, variously describing what has been called a "constructive jurisdictional error"[73], are popular is not difficult to see, given the extreme difficulty often encountered in attempting to pin down the exact nature of the error or errors committed by the tribunal or court whose decision is being scrutinised by the superior reviewing court. The overlapping and conceptual vagueness of the expressions "conveniently cloaks the thinness of reasoning that, if stated with precision, could not escape detection".[74] They are "figurative expressions that [have] little relation to reality".[75] What *is* the "right and admissible test"? What *is* the tribunal's "duty"? What *is* the "right" question to be asked? All these expressions assume that there is only one right test, duty or question in every case. As Murphy J pointed out in *R v Dunphy; Ex parte Maynes*[76]:

> "The interpretation placed on the ... provisions by the Australian Industrial Court was fairly open to it. At the most, it has made some error in interpreting them. It stretches the concept of jurisdiction too far to treat the decision as having been made without jurisdiction. This converts prohibition into appeal. If an error of law by a federal court can be so easily treated as a misconception of its own jurisdiction and therefore an absence of jurisdiction, this Court assumes a freewheeling power to interfere by way of prohibition whenever it appears to it that some error of law has been made by a federal court.[77]

"Answering the right question wrongly", traditionally regarded as being an error *within* jurisdiction - if it be an error at all - can all too easily be manipulated into the jurisdictional error of "asking the wrong question".[78] Further, as D M Gordon has pointed out:

> The phrase implies that it is an inherent part of the judicial process for tribunals to adjudicate by self-questioning and self-answering. That is simply untrue as often as it is true. Many tribunals will listen to evidence and reach conclusions of fact and law without asking themselves a single question. ... Even with those who question and answer themselves it is obviously untrue to say that excess of jurisdiction is inherent in asking wrong questions. Any question must be thought "wrong" that does not help to bring the tribunal to

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[73] *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 per Jordan CJ at 420. An attempt made to argue this form of jurisdictional error failed in *Attorney-General (NSW) v Hunter* [1983] 1 NSWLR 366. See also *Ex parte Howells; Re McCulloch* (1949) 49 SR (NSW) 238.

[74] D M Gordon "What Did the Anisminic Case Decide?" (1971) 34 *Mod L Rev* 1 at 10.

[75] D M Gordon "What Did the Anisminic Case Decide?" (1971) 34 *Mod L Rev* 1 at 10.

[76] (1978) 139 CLR 482.

[77] (1978) 139 CLR 482 at 497.

[78] J A Smillie "Judicial Review of Administrative Action - A Pragmatic Approach" (1980) 4 *Otago L Rev* 417 at 422.

its goal. But it is apparent that no amount of unhelpful questions can affect jurisdiction which does not take the tribunal outside its province. Even when self-questioning does take the tribunal outside, it does not in the least follow that jurisdiction is imperilled.[79]

Wrongful failure or refusal to exercise jurisdiction

The third type of traditional jurisdictional error is a wrongful failure or refusal to exercise jurisdiction. Brennan J (as he then was) spoke of this type of jurisdictional error in these terms:

> Judicial review on the ground of excess or want of jurisdiction is available when a body purportedly acting in exercise of jurisdiction has no jurisdiction to act in a particular way. Judicial review on that ground stands in contrast with judicial review on the ground of a wrongful failure or refusal to exercise jurisdiction. In the former case, there is no jurisdiction to exercise; in the latter, there is jurisdiction but no exercise of it.[80]

However, a purported exercise of jurisdiction has also been descibed in terms of a failure to exercise jurisdiction. In *Sinclair v Mining Warden at Maryborough* [81] Barwick CJ had this to say about the matter:

> It is settled law that if the person having a duty to hear and consider misconceives what is his relevant duty, he will have failed to perform that duty and may be compelled by mandamus to perform it according to law.[82]

Expressed in that way, the error is similar to the "constructive" type of jurisdictional error (in the form of an "excess" of jurisdiction) discussed in *Ex parte Hebburn Limited; Re Kearsley Shire Council*.[83]

However, in other cases there may have been an *outright* failure or refusal, and not just a *constructive* failure, to exercise jurisdiction. Dawson and Gaudron JJ spoke of this type of situation in *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch*[84]:

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79 D M Gordon "What Did the Anisminic Case Decide?" (1971) 34 *Mod L Rev* 1 at 10.

80 *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 at 142.

81 (1975) 132 CLR 473.

82 (1975) 132 CLR 473 at 478.

83 (1947) 47 SR (NSW) 416.

84 (1991) 173 CLR 132.

> Had it been necessary for the Commission to determine whether leave to appeal should be granted to enable a different decision to be reached, the Commission's failure to make that determination would also have amounted, to that extent, to a failure to exercise the jurisdiction conferred by ... the Act.[85]

Error of law on the face of the record

Error of law on the face of the record is a ground of review (first developed in Britain in the 17th century) recognised as being an exception to the traditional doctrine of jurisdictional error which states that only errors going to jurisdiction are reviewable by a superior court at common law. This ground of review fell into desuetude in the 19th century and its existence was denied by the English Court of Appeal in 1944.[86] It was, however, revived in 1951 by the English Divisional Court.[87]

Under this exception to the traditional doctrine, *any* error of law appearing on the face of the record of an inferior court or tribunal is reviewable, regardless of whether or not the error is jurisdictional.[88]

In the case of a non-jurisdictional error, however, the error must be one of law and must appear plainly "on the face of the record".[89] Where an inferior court or tribunal makes an error of law on a matter *within* its jurisdiction[90], and that error is apparent on the face of the record of the court or tribunal, the decision is not void but

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85 (1991) 173 CLR 132 at 163.

86 See *Racecourse Betting Control Board v Secretary of State for Air* [1944] Ch 114.

87 *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1951] 1 KB 711; affirmed by the Court of Appeal [1952] 1 KB 338.

88 In England, however, relief in the nature of certiorari is now available to correct any error of law, regardless of whether or not the error appears on the face of the record: see *R v Hull University Visitor; Ex parte Page* [1993] AC 682.

89 In *Yadle Investments Pty Ltd v Roads and Traffic Authority of NSW; Roads and Traffic Authority of NSW v Minister for Planning* (1989) 72 LGRA 409 Stein J had this to say in the context of manifest jurisdictional error or ultra vires: "I understand manifest jurisdictional error or ultra vires to mean one which is readily understood or perceived by the eye. Such error must be evident and obvious. It must appear plainly on the face of the instrument."

90 For example, an error as to the admission or rejection of evidence or the disallowance of cross examination (not involving any otherwise actionable denial of procedural fairness).

voidable, and relief in the nature of certiorari[91] lies to quash the decision.[92]

At first, "the record" was held to comprise only the document or documents initiating the subject proceedings, the pleadings (if any) and the adjudication, but not the evidence or the reasons for the decision (unless the tribunal actually chose to incorporate them).[93] Subsequently, the record came to also include "not only the formal order, but all those documents which appear therefrom to be the basis of the decision - that on which it is grounded".[94]

In England, the record later came to embrace the transcript of the proceedings (in particular, the reasons contained in the transcript). Thus, in *R v Knightsbridge Crown Court; Ex parte International Sporting Club (London) Ltd* [95], the Divisional Court held that the reasons contained in the transcript of an oral judgment of a court were part of the record of that court, for the purpose of granting certiorari for

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[91] Relief in the nature of certiorari (and prohibition) will lie "[w]henever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority": *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 per Atkin LJ at 205. "Excess of ... legal authority" embraces cases of jurisdictional error, error of law on the face of the record, ultra vires, denial or procedural fairness, and fraud. Lord Atkin's dictum is still the *locus classicus* for the availablity of the two remedies, but over the years there have been some judicial refinements. The requirement as to "rights" was relaxed quite early to allow the remedies to lie where rights in the strict legal sense (eg proprietary rights) were not actually being determined by the body in question. However, it is still necessary that the determination create or affect rights and obligations in some substantive way (see *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 8 ALR 691; *Greiner v ICAC/Moore v ICAC* (1992) 28 NSWLR 125), even if the particular decision is not the final or ultimate one. Thus, in *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 relief in the nature of certiorari was granted to quash a decision of the board (for denial of natural justice) notwithstanding that the decision had no legally operative effect until confirmed by the governor in council. In contrast, in *Hot Holdings Pty Ltd v Creasy & Ors* (1996) 134 ALR 469 it was held that a preliminary decision or recommendation, if it is one to which regard must be paid by the final decision-maker, would have the requisite legal effect upon rights to attract certiorari. The duty to act "judicially" must now, in the light of *Ridge v Baldwin* [1964] AC 40 and subsequent developments in relation to procedural fairness, be interpreted as a duty to act "fairly": see *Kioa v West* (1985) 159 CLR 550.The reference to the body having "legal authority" was held to exclude relief where the body in question was a private or domestic body or where the matter complained of was a private law matter of a public body: see *R v BBC; Ex parte Lavelle* [1983] 1 WLR 23. However, the courts now appear to be moving to a position where the essential question is not the formal source of power to determine rights but whether the authority being exercised is sufficiently "public" in nature: see *R v City Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] 1 All ER 564. In any event, it is not necessary for the body in question to have a statutory basis: see, eg, *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864, in which it was held that a body which was established not by statute but by the executive government pursuant to an exercise of prerogative power was still amenable to relief in the nature of certiorari.

[92] *DPP v Head* [1959] AC 83; *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 WLR 226.

[93] See *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338.

[94] *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663 per Lord Denning at 690.

[95] [1982] QB 304.

error of law on the face of the record. The Divisional Court, in an oft-cited dictum, said:

> If we were now to hold that the practice of the Divisional Court over the past 40 years was wrong and that the court could look only at the order dismissing the appeal, we should be putting the clock back to the days when archaic formalism too often triumphed over justice. ...
>
> It seems to us that it would be a scandalous state of affairs that, if having given a manifestly erroneous judgment, a judge could defeat any review by this court by the simple expedient of refusing a request to make his judgment part of the order. That would indeed be formalism triumphant.
>
> It may be said that the same end can be achieved by the court refusing to give any reasons ... However, it is the function of professional judges to give reasons for their decisions ... This court would look askance at the refusal by a judge to give his reasons for a decision particularly if requested to do so by one of the parties. ... [I]t may well be that if such a case should arise this court would find that it had power to order the judge to give his reasons for his decision.[96]

This view was followed by various Australian superior courts, in particular the NSW Court of Appeal.[97] The position of the High Court of Australia as regards the question of whether the record included the transcript of the earlier proceedings was, until recently, quite confused, although in a number of cases certain High Court judges had been prepared to accept or assume that a transcript of oral reasons for a decision formed part of the record.[98] However, in *Hockey v Yelland* [99] Wilson J expressed the view[100] that there was no fixed rule which required that the same answer be given in every case as to what constituted the record. With

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96 [1982] QB 304 at 314-5. In the absence of an express or implied statutory obligation, it has been held that there is generally, at common law, no duty to give reasons for administrative decisions: see *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656. However, failure to give reasons (or adequate reasons) may invite a reviewing court to infer that the decision maker had no good reason for the decision and had therefore acted in abuse of power: see *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997; *Congreve v Home Office* [1976] 1 QB 629; *Osmond*.

97 See, for example, *G J Coles & Co Ltd & Ors v Retail Trade Industrial Tribunal & Ors* (1987) 7 NSWLR 503; *Commissioner of Motor Transport v Kirkpatrick* (1987) 11 NSWLR 427; *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368; *Commissioner of Police v District Court of New South Wales & Anor* (1993) 31 NSWLR 606.

98 See, for example, *R v District Court of the Metropolitan District; Ex parte White* (1966) 116 CLR 644 at 649, 651 and 657-8; *R v District Court of the Queensland Northern District; Ex parte Thompson* (1968) 118 CLR 488 at 496 and 501; *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 27-8; *Re Moodie; Ex parte Emery* (1981) 55 ALJR 387; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

99 (1984) 157 CLR 124.

100 (1984) 157 CLR 124 at 143.

respect, such an approach is far too uncertain. As Brennan J (as he then was) said in *Bryan v Maloney*[101] in the context of the law of negligence:

> the law ... should be capable of application in solicitors' offices. It should not have to await definition in litigation.[102]

In *Craig v South Australia*[103] the High Court rejected expansive formulations of the record for the purposes of certiorari and concluded that the record (at least of an inferior court, as opposed to an administrative tribunal) ordinarily did not include the transcript of the earlier proceedings, nor the reasons for the decision, unless they were actually incorporated in the tribunal's formal order or decision. In a joint judgment[104] the court said:

> One finds in some recent cases in this country support for the adoption of an expansive approach to certiorari which would include both the reasons for decision and the complete transcript of proceedings in the "modern record" of an inferior court ... . As Priestley JA pointed out in *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368 at 389-390, that approach is not precluded by any direct decision of this Court. Nonetheless, it should, on balance, be rejected. For one thing, it is inconsistent with the weight of authority in this Court which supports the conclusion that, in the absence of some statutory provision to the contrary, the record of an inferior court for the purposes of certiorari does not ordinarily include the transcript, the exhibits or the reasons for decision ... . More importantly, the approach that the transcript of proceedings and the reasons for decision constitute part of "the record" would, if accepted, go a long way towards transforming certiorari into a discretionary general appeal for error of law ... upon which the transcript of proceedings and the reasons for decision could be scoured and analysed in a search for some internal error: see *Hockey v Yelland* (1984) 157 CLR 124 at 142, per Wilson J: "a roving commission through the materials." ...
>
> The fact that the transcript of proceedings and reasons for decision do not, of themselves, constitute part of "the record" does not preclude incorporation of them by reference. ...
>
> The determination of the precise documents which constitute "the record" of the inferior court for the purposes of a particular application for certiorari is

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101 (1995) 182 CLR 609.

102 (1995) 182 CLR 609 at 653.

103 (1995) 69 ALJR 873.

104 Brennan, Deane, Toohey, Gaudron and McHugh JJ.

ultimately a matter for the court hearing the application.[105]

Sadly, the High Court's return to "formalism triumphant" is inconsistent "with the whole trend of local and overseas developments of the common law ... [and] with the abolition of the old writs and the provision of new remedies for judicial review".[106] In the words of Sir Anthony Mason, the decision in *Craig* "opens no doors to the availability of judicial review through an expanded view of error of law on the face of the record".[107]

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[105] (1995) 69 ALJR 873 at 879. The High Court did, however, acknowledge that from time to time it may be necessary to examine the transcript in order to ascertain the nature of the application that was made. Be that as it may, it was also pointed out that although it was possible for reasons to be incorporated, incorporation would not be effected merely by the use of prefatory words such as "accordingly" or "for these reasons".

[106] *Commissioner of Police v District Court of New South Wales & Anor* (1993) 31 NSWLR 606 per Kirby P at 617. To the suggestion that an expansive approach to what constitutes "the record" produces a remedy in the nature of a de facto right of appeal on a question of law, it needs to be remembered that the error of law must still appear plainly on the face of the record, so defined. To that extent alone, it is narrower than an appeal on an error of law, not so confined: see *Commissioner of Police v District Court of New South Wales & Anor* (1993) 31 NSWLR 606 per Kirby P at 617. In addition, the decision is only voidable, and not void.

[107] The Hon Sir Anthony Mason, "Life in Administrative Law Outside the ADJR Act" [Seminar Paper], *Life in Administrative Law Outside the ADJR Act,* Australian Institute of Administrative Law, NSW Chapter, Sydney NSW, 17 July 1996, p 7. In the case of *Kriticos v State of New South Wales & Anor* (NSW Court of Appeal, Kirby P, Priesley and Powell JJA, 2 February 1996, unreported) the NSW Court of Appeal followed *Craig v South Australia,* although Kirby P - somewhat ironically, just before his appointment to the High Court - made it clear that he regarded the decision in *Craig* to be a most unfortunate one for judicial review and one which was "manifestly unsatisfactory". The NSW Parliament has since acted to amend the Supreme Court Act 1970 (NSW) so as to ensure, for the purposes of relief in the nature of certiorari, that "the record" in New South Wales includes the reasons expressed by the court or tribunal for its decisions.

CHAPTER 2

THE *ANISMINIC* REVOLUTION IN ENGLAND

"If this be error ..."[1]

Preview

1. In England, the distinction between jurisdictional and non-jurisdictional errors of law was, for all practical purposes, abolished as a result of the House of Lords decision in *Anisminic.*

2. The effect of the majority's reasoning in that case was to "extend" the traditional concept of jurisdictional error so as to embrace errors of law not traditionally thought to go to jurisdiction, namely, errors of law of the kind subsumed within broad or extended ultra vires.

3. The result of the *Anisminic* decision in England is that *every* error of law, even in the absence of a statutory right of review or appeal, became prima facie reviewable at common law.

4. The decision has conferred upon a reviewing court, purportedly exercising "supervisory jurisdiction", such wide powers of judicial review that its role arguably has become more appellate than supervisory.

Introduction

On 23 July 1956, Gamal Abd al-Nasser, who had become president of Egypt in 1954, outraged that the United States, Great Britain and other Western countries had cancelled their offer of financial support for the construction of the Aswan Dam,

[1] William Shakespeare, *Sonnets,* no 116.

nationalised the Anglo-French Suez Canal Company.[2] Israel, Great Britain and France had secretly devised a plan - an "amazing conspiracy"[3] - whereby Israel would invade the Sinai Peninsula whereupon the other two nations would occupy the Suez Canal Zone under the pretext of protecting it.[4] Without warning, on 29 October 1956, Israel invaded the Sinai Peninsula.[5] On 31 October 1956 Israeli armed forces attacked the Egyptian-occupied Gaza Strip. By 5 November 1956, Israel controlled all of Sinai and the Gaza Strip.

Anglo-French paratroops then invaded Egypt to seize (and, ostensibly, protect) the canal, but "[t]heir military planning was feeble".[6] The USSR threatened to intervene. A United States-backed resolution in the United Nations[7] called for a ceasefire and an international force was sent to Egypt to enforce the resolution. Anglo-French forces subsequently caved in and withdrew[8], in the wake of the pressure of world opinion led by the United States[9]:

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2 The action taken by Nasser was, in the opinion of Sir Robert Menzies, "a high-handed repudiation of an international contract which had the essential character of an international law": see R G Menzies, *Afternoon Light* (Cassell, Melbourne, 1967), p 180. Nasser (who planned to use funds raised from the canal tolls to help finance the construction of the dam) took the view that the Western users of the Canal "had been exploiting Egypt for almost a century": see L Piggott,S D Rutland & Ors, *One Land: Two Peoples - A Concise History of the Arab-Israeli Conflict* (Harcourt Brace & Company, Sydney, 1994), p 121.

3 I J Bickerton & M N Pearson, *The Arab-Israeli Conflict: A History* [3rd ed] (Longman Cheshire, Melbourne, 1993), p 119.

4 See L Piggott,S D Rutland & Ors, *One Land: Two Peoples - A Concise History of the Arab-Israeli Conflict* (Harcourt Brace & Company, Sydney, 1994), p 122. See also H Van Thal, *The Prime Ministers: From Sir Robert Walpole to Edward Heath* (Stein and Day, New York, 1975), p 717.

5 "Although Israel acted in collusion with Britain and France, it had its own different reasons for becoming involved. Israel saw a favourable opportunity to attack its enemy, Egypt, and seized the chance": I J Bickerton & M N Pearson, *The Arab-Israeli Conflict: A History* [3rd ed] (Longman Cheshire, Melbourne, 1993), p 117.

6 I J Bickerton & M N Pearson, *The Arab-Israeli Conflict: A History* [3rd ed] (Longman Cheshire, Melbourne, 1993), p 119. Australia was not apparently consulted by the United Kingdom government despite the interests of the country in the Middle East: see K Tennant, *Evatt: Politics and Justice* (Angus & Robertson, Sydney, 1970), p 339.

7 2 November 1956. On 30 October 1956 a UN Security Council resolution, critical of Israel's invasion, was moved by the United States. The Commonwealth was split over the crisis: see I J Bickerton & M N Pearson, *The Arab-Israeli Conflict: A History* [3rd ed] (Longman Cheshire, Melbourne, 1993), p 121.

8 *The Book of Key Facts* (Paddington Press/Cassell Australia (The Queensbury Group), Sydney, 1978), p 208.

9 The United States pressure included organising a "run" on Britain's dollar and gold reserves, and restricting vital oil imports: see I J Bickerton & M N Pearson, *The Arab-Israeli Conflict: A History* [3rd ed] (Longman Cheshire, Melbourne, 1993), p 120. Richard Nixon wrote that, in retrospect, the public pressure put by the United States on Britain and France was a "serious mistake"; "Nasser became even more rash and aggressive than before, and the seeds of another Mideast war were planted": see R Nixon, *RN: The Memoirs of Richard Nixon* (Macmillan, Melbourne, 1978), p 179.

> Britain and France, together with Israel, had been branded throughout the world as aggressors for their gunboat diplomacy and were obliged to withdraw without achieving any of their objectives.[10]

For all three countries, it was a "massive and public humiliation".[11] Nasser was represented as the innocent victim of unprovoked aggression, but he achieved much more from the fiasco than a public relations coup. In the words of Sir Robert Menzies:

> he got the Canal; he humbled two of the world's great powers; he spread his prestige and his authority over a great part of the Arab world. He had defied the United Nations over the Israeli shipping issue; he got its backing over the Canal; and had profited from both. The whole series of events, disastrous though they have been for the Western World, were a tribute to Nasser's talent, boldness, and force of character.[12]

The Sinai Mining Co Ltd - later to be known as Anisminic Ltd ("Anisminic")[13] - was an English company which had been incorporated in 1913. Before and on 31 October 1956, the date on which Israeli forces attacked the Gaza Strip, the company carried on the business of mining manganese in the Sinai Peninsula under mining leases or concessions granted by the Egyptian government. Anisminic's property was said to be worth about £4,500,000 as at 31 October 1956. On 1 November 1956 the Egyptian government issued a proclamation[14] by which sequestrators were appointed to take over and manage the assets of British and French nationals. Anisminic's property was sequestrated. Subsequently, Israeli forces destroyed, damaged or removed about £500,000 worth of the property.[15]

It was not until March 1957 that Israel agreed to withdraw its forces from Sinai and

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10 H Van Thal, *The Prime Ministers: From Sir Robert Walpole to Edward Heath* (Stein and Day, New York, 1975), p 717. Australia's Dr H V Evatt condemned the British plan to take over the Canal as a "naked exercise of military power": see K Tennant, *Evatt: Politics and Justice* (Angus & Robertson, Sydney, 1970), p 340.

11 I J Bickerton & M N Pearson, *The Arab-Israeli Conflict: A History* [3rd ed] (Longman Cheshire, Melbourne, 1993), p 120.

12 R G Menzies, *Afternoon Light* (Cassell, Melbourne, 1967), p 172. "This was in some ways a remarkable recovery, for he had, after all, lost the war": I J Bickerton & M N Pearson, *The Arab-Israeli Conflict: A History* [3rd ed] (Longman Cheshire, Melbourne, 1993), p 121.

13 The company's name changed on 30 January 1958: see [1968] 2 QB 862 at 865; [1969] 2 AC 147 at 152.

14 Proclamation No 5 of 1956.

15 See [1968] 2 QB 862 at 865; [1969] 2 AC 147 at 151.

Gaza.[16] The Israeli forces withdrew in April 1957[17] and on 29 April 1957 the Egyptian government, by a special decree[18], granted the Custodian General of property of British, French and Australian nationals authority to sell and to liquidate the establishments and other property subject to sequestration. Anisminic's property was subsequently sold to an Egyptian organisation known as The Economic Development Organisation ("TEDO").[19]

The Egyptian government, as lessor, purported to terminate Anisminic's mineral leases.[20] Anisminic refused to recognise the sale of its property to TEDO and threatened legal action to recover the products of its mines exported from Egypt.[21] As a result of pressure which Anisminic was able to bring on former customers not to deal with TEDO[22], the Egyptian authorities eventually agreed to "buy" the company's property. Anisminic received some £500,000 for the sale of its property, but this was not to include any claim which the company might have against any government authority other than the Egyptian government.[23]

By an agreement[24] dated 28 February 1959[25] between the governments of the United Kingdom and the United Arab Republic the latter agreed to pay to the British government the sum of £27,500,000 in full and final settlement of claims by United Kingdom nationals for certain property in Egypt, including that of Anisminic. The

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16 L Piggott, S D Rutland & Ors, *One Land: Two Peoples - A Concise History of the Arab-Israeli Conflict* (Harcourt Brace & Company, Sydney, 1994), p 122.

17 See [1968] 2 QB 862 at 865; [1969] 2 AC 147 at 151.

18 Decree No 387 of 1957.

19 See [1968] 2 QB 862 at 865; [1969] 2 AC 147 at 151. The dispute over the Suez Canal Company itself was resolved in 1958, with compensation being paid to its shareholders: see I J Bickerton & M N Pearson, *The Arab-Israeli Conflict: A History* [3rd ed] (Longman Cheshire, Melbourne, 1993), p 121.

20 See [1968] 2 QB 862 at 901.

21 See [1968] 2 QB 862 at 901.

22 See B C Gould "Anisminic and Jurisdictional Review" [1970] *Pub L* 358. In the House of Lords, Lord Pearce had this to say about the matter ([1969] 2 AC 202): "[Anisminic] achieved this by establishing a nuisance value. They wrote round to American and European customers pointing out that the Egyptians had unlawfully supplanted them in their mining business. From the Egyptian point of view this was bad for business. The appellants' mining leases were cancelled and threats of legal action were made against them by the Egyptians. The appellants persisted, however, until an agreement was made whereby, in effect, they received £500,000 for their nuisance value ... ."

23 Anisminic, when it entered into agreement with the sequestrator and TEDO, apparently assumed that it would get nothing more as a result of any treaty, having decided to "go it alone": see [1968] 2 QB 862 per Russell LJ at 913. It "seized an early opportunity and made a bargain direct with the Egyptian authorities which [it] thought at the time would preclude [it] from any further relief": [1968] 2 QB 862 per Sellers LJ at 886.

24 The Egyptian Compensation Agreement.

25 The terms of the Agreement were revised on 7 August 1962.

sum of money, and other moneys provided by the British government, formed the Egyptian Compensation Fund and, pursuant to the Foreign Compensation Act 1950[26], and certain Orders in Council, the Foreign Compensation Commission ("the Commission") was empowered to make provisional determinations as to whether applicants had made out their claims to be entitled to participate in the compensation fund.[27]

Anisminic made an application to the Commission on 15 September 1959. On 8 May 1963 the Commission provisionally determined that the company had failed to establish a claim under the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962 in respect of its sequestrated property but its claim for certain property damaged by the Israeli forces was fit for registration.[28]

Article 4 (1) in Part III of that Order provided as follows:

> The commission shall treat a claim under this Part of the Order as established if the applicant satisfies them of the following matters: - (a) that his application relates to property in Egypt which is referred to in Annex E; (b) if the property is referred to in paragraph (1) (a) or paragraph (2) of Annex E - (i) that the applicant is the person referred to in paragraph (1) (a) or in paragraph (2), as the case may be, as the owner of the property or is the successor in title of such person; and (ii) that the person referred to as aforesaid and any person who became successor in title of such person on or before February 28, 1959, were British nationals on October 31, 1956, and February 28, 1959; (c) if the property is referred to in paragraph (1) (b) of Annex E - (i) that the applicant was the owner on October 31, 1956, or, at the option of the applicant, on the date of the sale of the property at any time before February 28, 1959, by the Government of the United Arab Republic under the provisions of Egyptian Proclamation No. 5 of November 1, 1956, or is the successor in title of such owner; and (ii) that the owner on October 31, 1956, or on the date of such sale, as the case may be, and any person who became successor in title of such owner on or before February 28, 1959, were British nationals on October 31, 1956 and February 28, 1959.[29]

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[26] Section 3 of the Act provided that if the British government contracted with a foreign government for compensation from the latter, an order in council could provide: "(b) for the determination of such claims [for compensation] by the Commission". This was reinforced by the express exemption of the Commission from the provisions of s 11 of the Tribunals and Inquiries Act 1958.

[27] See [1968] 2 QB 862 at 865-866; [1969] 2 AC 147 at 152. However, under the Act, the Commission had no power to decide the actual question of entitlement to compensation.

[28] See [1968] 2 QB 862 at 866; [1969] 2 AC 147 at 152.

[29] See [1968] 2 QB 862 at 863; [1969] 2 AC 147 at 148.

Anisminic's name appeared in Annex E "(subject to a special arrangement)".[30]

Lord Pearce in the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission & Anor*[31] summarised the article as enacting that:

> If the applicant satisfies them of certain listed matters, the Commission shall treat the claim as established. The only listed matters, so far as relevant to the present claim were ... (1) the fact that the property referred to in Anex E was in Egypt; (2) the identity of the claimant as referred to in Annex E; and (3) the nationality of the claimant on certain dates.[32]

Article 5 provided:

> (1) The Commission shall assess the amount of loss with respect to each claim established under this Part of the Order.
>
> (2) The amount of loss so assessed shall be such amount as seems just and equitable to the Commission having regard to all the circumstances.[33]

In the House of Lords, Lord Reid saw the task of the Commission as being as follows:

> The task of the Commission was to receive claims and to determine the rights of each applicant. It is enacted that they shall treat a claim as established if the applicant satisfied them of certain matters.[34]

On 21 June 1963 the Commission, by a further provisional determination, ordered that Anisminic's claim for damage should be registered[35] in the sum of £532,773. The Commission released to the company its minute of adjudication which disclosed, among other things, that the Commission considered that TEDO, which was not a British national, was Anisminic's successors in title.[36] The fullest reported account of the Commission's minute is that from Diplock LJ who said:

> It is apparent from their minute of adjudication that the Commission were of opinion that T.E.D.O. which never was a British national became "the

30 See [1968] 2 QB 862 at 866; [1969] 2 AC 147 at 152.

31 [1969] 2 AC 147 at 201.

32 [1969] 2 AC 147 at 201.

33 See (1971) 34 *Mod L Rev* 1 at 5.

34 [1969] 2 AC 147 at 173.

35 Under Article 8 of the Order.

36 See [1968] 2 QB 862 at 866; [1969] 2 AC 147 at 152.

> successor in title" to the plaintiffs before February 28, 1959, and that accordingly the requirement of Article 4 (1) (b) (ii) was not satisfied in the case of Anisminic's claim under Part III of the order. It is less apparent but said to be discernible on a close analysis of the minute of adjudication, that the Commission were of opinion that no applicant could establish a claim under Article 4 or Article 6 unless he had a claim against the Egyptian Government on February 28, 1959. These are the two "errors" which it is contended the Commission made.[37]

The Commission considered that TEDO, which was not a British national, was Anisminic's successor in title.[38] Anisminic then brought an action against the Commission and its legal advisor for declaratory relief to the effect that the Commission's provisional determination was wrong in law and was either invalid or a nullity.[39] In particular, Anisminic contended, among other things, that TEDO was not its successor in title and that it (Anisminic) had proved that it was a person entitled to participate in the compensation fund.[40]

On 29 July 1966 Browne J in the Queen's Bench Division of the High Court of Justice found for Anisminic and declared that the Commission's provisional determination of 8 May 1963 was made without or in excess of jurisdiction and was a nullity, that the Commission's further provisional determination of 21 June 1963 was also a nullity, and that the Commission was under a statutory duty to treat Anisminic's claim for compensation as established under Part III (Article 4) of the Order.[41]

The Commission then appealed to the Court of Appeal[42] on the grounds, among other things, that Browne J had erred in law in holding that he had jurisdiction to entertain Anisminic's claim and that the Commission's provisional determination was a nullity, and that the Commission had no jurisdiction to construe the

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37 [1968] 2 QB 862 at 902-903. (Article 6 of the Order of 1962 dealt with the making of claims in respect of property lost or damaged; further, the claimant under it had to prove that the loss or injury was the result of Egyptian measures. "Egyptian measures", as defined by Article 1 (2), did not include war damage.)

38 See [1968] 2 QB 862 at 866; [1969] 2 AC 147 at 152.

39 See [1968] 2 QB 862 at 866; [1969] 2 AC 147 at 152.

40 See [1968] 2 QB 862 at 866; [1969] 2 AC 147 at 152. By its amended defence, the Commission contended, among other things, that the High Court of Justice had no jurisdiction to entertain the proceedings.

41 See [1968] 2 QB 862 at 866. A note of the judgment of Browne J appears at [1969] 2 AC 223 at the end of the report of the House of Lords.

42 See [1968] 2 QB 862.

provisions of the Order.[43]

The Court of Appeal unanimously reversed the decision of Browne J[44], finding that the Commission had not acted in excess of jurisdiction. Two members of the Court[45] agreed with the view of the Foreign Compensation Commission that TEDO was a "successor in title". All members of the Court held that *even if* the Commission had erred in holding that Anisminic had lost its entitlement to claim compensation by reason of the sale to TEDO, such an error would not have amounted to a jurisdictional error. In the Court's view, jurisdiction was simply a matter of whether the particular case was one of a kind into which the Commission was entitled to inquire.

Anisminic then appealed to the House of Lords by leave of the Court of Appeal. Their Lordships, by a majority of 3 to 2 [46], held that the Foreign Compensation Commission had exceeeded its jurisdiction in misconstruing the phrase "successor in title" and in taking an irrelevant consideration (namely, the nationality of TEDO) into account.[47]

Anisminic finally won after a case in which:

> the rights of other traders to obtain compensation for their losses were delayed for six years while Anisminic went from court to court to overturn a decision which Parliament had intended to be final.[48]

If the unanimous views of the Court of Appeal and the minority Lords had prevailed

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43 See [1968] 2 QB 862 at 864. Section 4(4) of the Foreign Compensation Act 1950 provided that: "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law."

44 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1968] 2 QB 862.

45 Diplock and Russell LJJ.

46 Lord Reid, Lord Pearce and Lord Wilberforce; Lord Morris of Borth-y-Gest and Lord Pearson dissenting. (Lord Pearson, although holding that the Commission had not made any jurisdictional error, was nevertheless of the view that an error of the kind found by the majority to have been made by the Commission would have gone to jurisdiction.)

47 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147.

48 V Bath "The Judicial Libertine - Jurisdictional and Non-jurisdictional Error of Law in Australia" (1983) 13 *FL Rev* 13 at 39.Further, after the House of Lords decision in Anisminic, legislation (the Foreign Compensation Act 1969) was passed by the British Parliament to nullify, with prospective effect, the House of Lords' interpretation of s 4(4) of the Foreign Compensation Act 1950 by enabling an Order in Council to be made giving finality to any purported determination by the Foreign Compensation Commission: see S A de Smith "Judicial Review in Administrative Law: The Ever-Open Door?" (1969) 27 *Camb L J* 161 at 164-5.

then:

> Anisminic would have been deprived of compensation for loss of £4,400,000 (less £500,000) because they were rash enough (no doubt despairing of governmental help) to realise what they could out of their shattered business by making a deal with a satellite of the Egyptian Government. That rashness invited doubt whether they had not lost their claim by selling it. The majority lords saved them from paying the penalty of rashness and went a long way to save them. One may well conclude that this case supplies another instance of the familiar phenomenon - a hard case making bad law.[49]

The trial judge's decision

As mentioned above, the trial judge, Browne J[50] had found that the Foreign Compensation Commission had exceeded its jurisdiction in not treating as established Anisminic's claim for compensation under the Foreign Compensation Act 1950. His Honour said:

> ... [T]he question whether "successors in title" are relevant when the claimant is the original owner has answered itself; they are not. At any given moment there can only be in existence either the original owner or his successor in title but not both. This view is perfectly consistent with article 4 (1) *(b)* (i) which refers to the owner *or* the successor in title. The commission's view that even where the claimant is the original owner he has to prove either that he has no successor in title or that any successor in title was at the relevant time a British national seems to have been based entirely on the use of the word "and" in article 4 (1) *(b)* (ii) ... . Reading article 4 (1) *(b)* (i) and (ii) together, I think they mean that when the applicant claims as the original owner he must prove that he was a British national on the relevant dates and that when he claims as successor in title he must prove this and also that he himself was then a British national.[51]

His Honour found for Anisminic and declared that the Commission's provisional determinations of 8 May 1963 and 21 June 1963 were null and void, and that the Commission was obliged to treat Anisminic's claim for compensation as established.

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49 D M Gordon "What Did the Anisminic Case Decide?" (1971) 34 *Mod L Rev* 1 at 11.

50 *Anisminic Ltd v Foreign Compensation Commission & Anor:* noted in [1969] 2 AC 223.

51 [1969] 2 AC 223 at 253.

The Court of Appeal decision

However, the seeds of the "*Anisminic* revolution"[52] were sown long before the trial judge's decision. If, as things turned out, the House of Lords widened the field of judicial review for jurisdictional error, it did so in the sense of preferring one of two long competing lines of judicial authority to the other.[53]

The Court of Appeal, in unanimously vacating the judgment of Browne J, had largely based its decision[54] on the jurisdictional fact doctrine, reasoning that:

> since the [Foreign Compensation] Commission had not erred as to the existence of any facts upon which its jurisdiction depended, its subsequent error was an error as to the legal consequences of a fact and therefore an error within jurisdiction.[55]

The Commission was required[56] to treat a claim as established if it was satisfied of the following matters:

1. That the application related to property which was situated in Egypt and included in a list which formed an Annex to the Order.[57]

2. That the applicant had been the owner or successor in title to the owner of such property at the relevant times.

3. That the owner "and any person who became successor in title" were

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52 H W R Wade "Visitors and Error of Law" (1993) 109 *L Q Rev* 155 at 157.

53 *New Zealand Engineering and Associated Trades Union v Court of Arbitration* [1976] 2 NZLR 283 per Cooke J at 301. Before the 19th century, the English courts were prepared to assume that virtually every error of law was a jurisdictional error: see D G Benjafield & H Whitmore, *Principles of Australian Administrative Law* [4th ed] (Law Book Co, Sydney, 1971), p 176 (fn 1). Although a more restrained approach later emerged, by the 1950s and '60s the courts were again becoming more interventionist: see, eg, *Seereelall Jhuggroo v Central Arbitration and Control Board* [1953] AC 151; *R v Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Hierowski* [1953] 2 QB 147; *Maradana Mosque Trustees v Mahmud* [1967] 1 AC 13.

54 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1968] 2 QB 862.

55 R D McInnes "Jurisdictional Review after Anisminic" (1977) 9 *Vict U Well L Rev* 37 at 41.

56 See Article 4 (1) in Part III of the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962. The Commission was satisfied of the first two matters but was not satisfied of the third, holding that TEDO was a "successor in title" and not a British national.

57 Annex E.

British nationals at the relevant times.[58]

The Court[59] held that *even if* the Commission had been wrong in holding that Anisminic lost its claim for compensation by reason of the sale to TEDO, that was only a non-jurisdictional error. Two members of the Court[60] in fact agreed with the Commission's view that TEDO was an assignee and "successor in title".

The leading judgment was that of Diplock LJ[61] who adopted what can only be described as a rather narrow traditional approach to the doctrine of jurisdictional error. His Lordship said:

> "Jurisdiction" is an expression which is used in a variety of senses and takes its colour from its context. In the present appeal ... we are concerned only with statutory jurisdiction in the sense of an authority conferred by statute upon a person to determine, after inquiry into a case of a kind described in the statute conferring that authority and submitted to him for decision, whether or not there exists *a situation, of a kind described in the statute, the existence of which is a condition precedent* to a right or liability of an individual who is party to the inquiry, to which effect will or may be given by the executive branch of Government. *[Emphasis added]* [62]

His Lordship clearly saw the issue in terms of whether a "jurisdictional fact" situation existed. That is confirmed by such passages in his judgment as the following:

> The person authorised to make the determination must necessarily form an opinion as to whether each of [the statutory] conditions is complied with, in order to embark upon and to proceed with the inquiry and to make the determination ... . If it is "wrong" in the opinion of a person to whose opinion as to whether or not any of the conditions are complied with effect will be given by the executive branch of Government, the error is an "error going to the jurisdiction" of the inferior tribunal, and the purported determination is a nullity. ... This is [to be distinguished] from the case of a determination made where all these conditions are complied with, and to which effect would be

58 Article 4 (1) (b) (ii). The Commission's view was that even where the claimant was the original owner it still had to prove either that it had no successor in title or that any successor in title was at the relevant time a British national. The trial judge (Browne J) rejected that construction of the Order, as well as the Commission's finding that an applicant could not establish a claim under the Order unless it could establish that immediately before 28 February 1959 it had a relevant claim against the United Arab Republic: see [1969] 2 AC 147 at 252-3.

59 Sellers, Diplock and Russell LJJ.

60 Diplock and Russell LJJ.

61 See [1968] 2 QB 862 at 886-912.

62 [1968] 2 QB 862 at 889.

> given by the executive branch of Government but for the fact that the determination contains a statement as to the legal consequences of particular facts which in the opinion of the maker exist, and such statement is "wrong" in the opinion of some other person to whose substituted opinion as to the legal consequences of particular facts effect will be given by the executive branch of Government. The error is then an "error within jurisdiction."[63]
>
> It is for the commission to decide whether in the case of any applicant they are of opinion that facts exist which give rise to those legal consequences, but, whether they state such facts or not, it is their opinion that the applicant's claim to participate in the compensation fund is established or is not established to which effect will be given by the executive branch of Government, and the High Court has no jurisdiction to substitute its own contrary opinion for it.[64]
>
> ... it is the commission who have to be satisfied that the particular facts are of the kind described, and ... it is to their opinion on this matter and not to any substituted opinion of the High Court that effect will be given by the executive branch of the Government.[65]

Interestingly, and somewhat curiously, his Lordship said on more than one occasion in his judgment that the question whether or not facts, fully found, fall within a statutory description was a question of law.[66] Could not an error of law involving such a question go to jurisdiction?[67] His Lordship's answer to that question involved drawing a distinction:

> between the description in the statute of the kind of case into which an inferior tribunal has jurisdiction to *inquire,* and the description in the same statute of the kind of situation the existence or non-existence of which that tribunal has jurisdiction to *determine. [Emphasis added]*[68]

But surely, with respect, such a distinction allows too much scope for an inferior tribunal to err in a fundamental way with respect to the threshold question? His Lordship's response was simply:

> If they [the Commission] have formed the opinion that an expression used in

63 [1968] 2 QB 862 at 891.

64 [1968] 2 QB 862 at 895-6.

65 [1968] 2 QB 862 at 902.

66 See, for example, [1968] 2 QB 862 at 889, 900 and 904. See also *Farmer v Cotton's Trustees* [1915] AC 922 per Lord Parker at 932; *Hope v Bathurst City Council* (1980) 144 CLR 1; *cf Federal Commissioner of Taxation v Miller* (1946) 73 CLR 93.

67 Whether the primary facts, fully found, were *capable* of falling within the statutory description was certainly a question of law: see, eg, *Federal Commissioner of Taxation v Miller* (1946) 73 CLR 93.

68 [1968] 2 QB 862 at 904.

> the description such as "successor in title" of a particular person includes an assignee of that person, and the High Court is of opinion that it does not, the error is nevertheless an "error of law within the jurisdiction" of the inferior tribunal.[69]

It would appear to be the case that his Lordship, although acknowledging that "misconstruing the statutory description of the kind of case into which [the Commission had] jurisdiction to inquire" could lead to a determination which was a nullity[70], simply could not entertain the possibility that a misconstruction of the empowering statute - whether in the form of "asking the wrong question"[71] or otherwise - could, at least in *this* case, amount to an error outside of jurisdiction. Ultimately, his Lordship resorted to the question:

> "Is this a case of the kind described in the statute?"[72]

The answer to that question depended, in his Lordship's opinion, for all practical purposes on whether Anisminic's name appeared in Annex E to the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962 and on whether the other requirements of the Order were *ostensibly* satisfied:

> But it is not suggested that the plaintiffs' application was not a case of the kind into which the commission had jurisdiction to inquire.[73]

A proper case, in his Lordship's opinion, required four things: a quorum, a proper inquiry, an application of the kind described in the statute or Order in Council, and a determination stating whether a situation of the kind described in the statute existed or not in the case of the applicant.[74]

Further, his Lordship was:

> far from satisfied that the commission did misapply these articles in determining the plaintiff's application, although their minute of adjudication

69 [1968] 2 QB 862 at 905.

70 [1968] 2 QB 862 at 904.

71 His Lordship stated, at 906, that the "character" of the question was not altered by describing its consequence as the Commission "asking itself the wrong question". In so doing, his Lordship dismissed such authorities as *R v Shoreditch Assessment Committee* [1910] 2 KB 859; *Ex parte Bradlaugh* (1878) 3 QBD 509; *R v Fulham, Hammersmith and Kensington Rent Tribunal* [1953] 2 QB 147; and *Board of Trustees of the Maradana Mosque v Badiuddin Mahmud* [1967] 1 AC 13.

72 [1968] 2 QB 862 at 904.

73 [1968] 2 QB 862 at 905.

74 [1968] 2 QB 862 at 896. See also [1968] 2 QB 862 per Sellers LJ at 884.

> may not express their reasons in precisely the same terms as those which I should myself have chosen.[75]

Perhaps it was simply a question of whether the Commission's interpretation of the Order in Council was "reasonably open" to it, even though his Lordship was "far from satisfied" that the commission did misapply the Order:

> The judge [Browne J], as I have said, took the view that the minute of adjudication disclosed that the commission had misconstrued the Order in Council both as to the meaning of "successor in title" and as to the necessity for an applicant to be a person who had a claim against the Egyptian Government on February 28, 1959, or a "successor in title" of such person; and that these were "errors going to the jurisdiction."[76]

In the end, his Honour relied upon the Court of Appeal decision in *Davies v Price*[77] the ratio decidendi of which was, according to his Lordship, that:

> an error by the inferior tribunal in construing the statutory description of the matters on which it was to be satisfied was an "error within jurisdiction" and could not be corrected by the High Court if it disagreed with that construction.[78]

Sellers LJ was much more perfunctory.[79] Whilst acknowledging that Anisminic's action was based on a misconstruction of the terms of the order in Council as to "the matters to be proved by an applicant in order to establish a claim"[80], his Lordship was of the opinion that:

> the courts cannot substitute their views on the construction of the Order in Council for that of the commission, who alone have to be satisfied that a claim has been established. A determination may in the view of some be wrong either in fact or in law, but it may nonetheless be a determination. ... What the commission had to do was to determine the application made to them. I think it would be a travesty to say that they have not done so.[81]

In addition, his Lordship was of the view that the question of jurisdiction was

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75 [1968] 2 QB 862 at 910.
76 [1968] 2 QB 862 at 907.
77 [1939] 1 KB 232.
78 [1968] 2 QB 862 at 909.
79 See [1968] 2 QB 862 at 881-6.
80 [1968] 2 QB 862 at 882.
81 [1968] 2 QB 862 at 883.

"determinable at the commencement, not at the conclusion, of the inquiry".[82] The relevant test was:

> whether the commission had power to enter upon the inquiry and make a determination; not whether their determination was right or wrong in fact or in law.[83]

His Lordship agreed with Diplock LJ that the Commission had power to enter upon the inquiry and make a determination, stating that:

> it fell to the commission and to them alone to construe the Order in Council which directed the matters which had to be established to their satisfaction by applicants claiming to share in the fund.[84]

Consequently, the trial judge had no jurisdiction to consider whether the Commission was right or wrong in its conclusion, nor the Court of Appeal.[85]

Russell LJ, who generally agreed with the judgment of Diplock LJ, stated, in a very brief judgment[86], that:

> in the course of determination of a claim it is for the commission to decide upon "[the] true construction [of the Order in Council]" and not a court.[87]

Anisminic lost, for the time being. It then appealed to the House of Lords.[88]

The House of Lords decision

The House of Lords decided[89] by a majority of three to two[90] that the Foreign

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82 [1968] 2 QB 862 at 884.

83 [1968] 2 QB 862 at 884. In this respect, his Lordship cited the views of Lord Denman CJ in *R v Bolton* (1841) 1 QB 66 at 74.

84 [1968] 2 QB 862 at 885.

85 [1968] 2 QB 862 at 886.

86 [1968] 2 QB 862 at 912- 3.

87 [1968] 2 QB 862 at 912.

88 The case was twice before the House of Lords, once on a preliminary issue (unreported, 29 July 1964, but referred to in the judgment of Browne J [1969] 2 AC 223 at 231).

89 See *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147.

90 Lord Reid, Lord Pearce and Lord Wilberforce (adopting the same view as the trial judge, Browne J); Lord Morris of Borth-y-Gest and Lord Pearson dissenting. (Lord Pearson, although holding that the Commission had not made any jurisdictional error, was nevertheless of the view that an error of the kind found by the majority to have been made by the Commission would have gone to jurisdiction.)

Compensation Commission had made a jurisdictional error - albeit of an "apparently extreme"[91] type - in holding that Anisminic was not entitled to claim compensation. The Lords held that the Commission had misunderstood the meaning of "successor in title" and, in considering its nationality, had exceeeded its jurisdiction by taking into account an irrelevant or extraneous consideration.

Lord Reid, in a now famous and oft-cited passage, said in regard to "excess of jurisdiction":

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.[92]

Lord Pearce, preferring to use the single expression "lack of jurisdiction" to embrace traditional jurisdictional errors as well as various errors of law not traditionally regarded as going to jurisdiction, said:

> Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a

[91] B C Gould "Anisminic and Jurisdictional Review" [1970] *Pub L* 358 at 359.

[92] [1969] 2 AC 147 at 171.

nullity.[93]

Lord Wilberforce spoke in terms of a tribunal staying within the proper area of its jurisdiction:

> In every case, whatever the character of a tribunal, however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute: at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited. There is always an area, narrow or wide, which is the tribunal's area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter. Equally ... [there is] the requirement that a decision must be made in accordance with principles of natural justice and good faith. ... The question, what is the tribunal's proper area, is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality, or unquestionability upon its decisions. These clauses in their nature can only relate to decisions given within the field of operation entrusted to the tribunal. They may, according to the width and emphasis of their formulation, help to ascertain the extent of that field, to narrow it or to enlarge it, but unless one is to deny the statutory origin of the tribunal and of its powers, they cannot preclude examination of that extent.[94]

Entry by the tribunal into its general field of jurisdiction is not enough. Lord Wilberforce went on to say:

> A tribunal may quite properly validly enter upon its task and in the course of carrying it out may make a decision which is invalid - not merely erroneous. This may be described as "asking the wrong question" or "applying the wrong test" - expressions not wholly satisfactory since they do not, in themselves, distinguish between doing something which is not in the tribunal's area and doing something wrong within that area - a crucial distinction which the court has to make.[95]

Lord Pearson agreed with the majority on this point, saying:

> According to the appellants' contentions, the commission were satisfied of the only matters of which on the true construction of the Order in Council the

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93 [1969] 2 AC 147 at 195.

94 [1969] 2 AC 147 at 207.

95 [1969] 2 AC 147 at 210. His Lordship cited, as cases of the former kind, *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898, *Seereelall Jhuggroo v Central Arbitration and Control Board* [1953] AC 151, and *R v Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Hierowski* [1953] 2 QB 147.

> appellants as applicants had to satisfy them, and so the appellants were entitled to a determination in their favour; but the commission, misconstruing the Order in Council, erroneously thought that there were further matters of which the appellants had to satisfy them, and so the commission embarked upon an irrelevant inquiry and (in the familiar phrase) asked themselves the wrong question and gave a purported determination which was *outside the area of their jurisdiction.* If that is the right view of what the commission have done, there has been *excess of jurisdiction. [Emphasis added]* [96]

Thus, the Foreign Compensation Commission, having entered its general field of jurisdiction - namely, the receipt and determination of claims for compensation[97] - was then required to "correctly identify and define the limits or boundaries of the precise area of jurisdiction vested in it".[98] Lord Pearce stated:

> The only listed matters so far as relevant to the present claim were, the appellants argue, (1) the fact that the property referred to in Annex E was in Egypt; (2) the identity of the claimant as referred to in Annex E; and (3) the nationality of the claimant on certain dates. There is no doubt that on these matters they satisfied the commission.[99]

Lord Wilberforce, after referring to the same requirements, said:

> As, ex concessis, all these conditions were fulfilled to the satisfaction of the commission, the appellants' claim was in law established; the commission by seeking to impose another condition, not warranted by the Order, was acting outside its remitted powers and made no determination of that which alone it could determine.[100]

Lord Reid, "on a true construction of the Order"[101], concluded that:

> a claimant who is an original owner does not have to prove anything about successors in title ... [T]he commission made an inquiry which the Order did not empower them to make, and they based their decision on a matter which they had no right to take into account. ... In themselves the words "successor in title" are, in my opinion, inappropriate in the circumstances of this Order to

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96 [1969] 2 AC 147 at 215. However, his Lordship was unable to agree that the Commission had misunderstood the Order in Council or made any error affecting its jurisdiction.

97 [1969] 2 AC 147 per Lord Reid at 173.

98 J K MacRae "Jurisdictional Error: A Post-Anisminic Analysis" (1977) 3 *Auckland UL Rev* 111 at 124.

99 [1969] 2 AC 147 at 201. Lord Morris, on the other hand, stated (at 179) that the Commission "had not been satisfied of the matters referred to in article 4, with the result that they could not treat the main claim as established".

100 [1969] 2 AC 147 at 214. The "other" condition purportedly imposed by the Commission was that TEDO also be a British national on the appropriate dates (which was not the case).

101 [1969] 2 AC 147 at 174.

> denote any person while the original owner is still in existence, and I think it most improbable that they were ever intended to denote any such person. ... I would therefore hold that the words "and any person who became successor in title to such person" in article 4 (1) (b) (ii) have no application to a case where the applicant is the original owner. It follows that the commission rejected the appellants' claim on a ground which they had no right to take into account and that their decision was a nullity.[102]

In short, the majority Lords held that the Foreign Compensation Commission had misconstrued the third (and final) requirement of the Order as to nationality[103] so as to, in effect, add a fourth (and unauthorised) requirement, namely, that where the applicant was the original owner it had to also prove that both it *and* any suceessor in title were British nationals.[104] As a result, the Commission:

* "made an inquiry which the Order did not empower them to make" [105];
* "based their decision on a matter which they had no right to take into account" [106];
* had "no jurisdiction to put further hurdles" in Anisminic's way [107];
* was "seeking to impose another condition, not warranted by the Order" [108].

It has been asserted that the majority Lords:

> did not decide that the misconstruction of the phrase "successor in title" involved an excess of jurisdiction, but rather that the misconstruction of the wider question as to when the existence of a successor in title was relevant did.[109]

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102 [1969] 2 AC 174 at 174-5. The Commission was also found to have erred as to the meaning of "successor in title", which meant something akin to "successor by survivorship".

103 Lord Reid referred to the compressed drafting of the relevant provision, saying (at 173) that "the draftsman did not state separately what conditions have to be satisfied (1) where the applicant is the original owner and (2) where the applicant claims as successor in title of the original owner".

104 Lord Morris, in his dissenting opinion, accepted that the Commission was obliged to interpret the Order but "in deciding whether or not they were satisfied of the matters they were working within the confines of their denoted delegated and remitted jurisdiction": [1969] 2 AC 147 at 194.

105 [1969] 2 AC 147 per Lord Reid at 174.

106 [1969] 2 AC 147 per Lord Reid at 174.

107 [1969] 2 AC 147 per Lord Pearce at 201.

108 [1969] 2 AC 147 per Lord Wilberforce at 214.

109 R D McInnes "Jurisdictional Review after *Anisminic*" (1977) 9 *Vict U Well L Rev* 37 at 41.

In other words, the excess of jurisdiction resulted from the "misconstruction of the article as a whole rather than a misconstruction of one of the matters detailed in that article" [110]; a misconstruction of the latter kind would not necessarily go to jurisdiction. True, their Lords, in particular Lord Reid[111], acknowledged the continued existence of non-jurisdictional errors of law, but it is submitted that it is inaccurate to assert that the error resulted from the misconstruction of the article as a whole. The primary focus was on the construction of Article 4 (1) (b) (ii), since it was not argued that the Commission had not been satisfied of the first two matters referred to in Article 4 (1) (a) and (b) (i) . As Lord Reid pointed out:

> This is the crucial question in this case. It appears from the commission's reasons that they construed this provision as requiring them to inquire, when the applicant is himself the original owner, whether he had a successor in title.[112]

The Commission's misconstruction of the terms of Article 4 (1) (b) (ii) was found, in effect, to be so fundamental that it resulted in the Commission travelling outside the area of its jurisdiction. It was an "error of law on which the decision depend[ed]".[113]

If there was, after the House of Lords decision, to be any basis for meaningfully distinguishing between jurisdictional and non-jurisdictional errors of law, it would need to be on some more solid footing than whether there was a misconstruction of the salient provisions of the instrument conferring jurisdiction as a whole as opposed to a misconstruction of any one or more of those provisions. In addition, the whole concept of statutory misconstruction as a ground for judicial intervention, as Professor Wade[114] has pointed out, is "really a question of how much latitude the court is prepared to allow" [115]:

> The real weakness in the majority's position, it may be felt, is that it leaves

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110 R D McInnes "Jurisdictional Review after *Anisminic*" (1977) 9 *Vict U Well L Rev* 37 at 41.

111 See [1969] 2 AC 147 at 171.

112 [1969] 2 AC 147 at 173.

113 cf *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 per Lord Denning MR at 70. The Commission's error was, in the words of Wade, represented as "something more than a mere error of interpretation": see H W R Wade "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 *L Q Rev* 198 at 210.

114 H W R Wade "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 *L Q Rev* 198.

115 H W R Wade "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 *L Q Rev* 198 at 210.

> the Commission with virtually no margin of legal error. It comes perilously close to saying that there is jurisdiction if the decision is right but none if it is wrong. Almost any misconstruction of a statute or order can be represented as "basing their decision on a matter with which they had no right to deal," "imposing an unwarranted condition" or "addressing themselves to the wrong question."[116]

Whilst the majority Lords gave a wide range of examples of errors of law which *might* go to jurisdiction, the decision is "singularly unhelpful in determining when they will"[117]. Indeed, only Lord Wilberforce gave *some* guidance as to when an error *might* be held to go to jurisdiction. His Lordship identified two different types or classes of cases. First, there is the case where the legislature:

> ... while stating general objectives, is prepared to concede a wide area to the authority it establishes: this will often be the case where the decision involves a degree of policy making ... .[118]

Secondly, there is the case in which:

> ... it is apparent that Parliament is itself directly and closely concerned with the definition amd delimitation of certain matters of comparative detail and has marked by its language that these shall be closely observed.[119]

In resolving jurisdictional problems, the reviewing court, in determining what is within the tribunal's area as opposed to what is not[120], must, in his Lordship's opinion, be guided by "the form and subject matter of the legislation"[121]. Be that as it may, his Lordship's distinction fails to provide any concrete basis for distinguishing between the two types of errors of law. In the end, the court has to make a decision as to whether the error is so "serious" or "fundamental" that, whether as a matter of justice or legal principle or otherwise, judicial intervention is required in the circumstances of the case.

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116 H W R Wade "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 *L Q Rev* 198 at 211.

117 R D McInnes "Jurisdictional Review after Anisminic" (1977) 9 *Vict U Well L Rev* 37 at 53.

118 [1969] 2 AC 147 at 209.

119 [1969] 2 AC 147 at 209.

120 cf [1969] 2 AC 147 per Lord Wilberforce at 210.

121 [1969] 2 AC 147 per Lord Wilberforce at 209.

The "*Anisminic* revolution"

As early as 1969, de Smith[122] was able to assert, with considerable confidence:

> is not the practical effect of the decision nevertheless to obliterate the distinction between reviewable errors on matters going to jurisdiction and errors which are normally unreviewable (otherwise than on appeal) because they "go the merits" of the decision?[123]

In the years that followed, it was indeed confirmed that, in England at least, the decision of the House of Lords in *Anisminic* had resulted in the complete obliteration of the distinction between these two types of errors of law. The point had been reached where:

> any error [could] be accurately described as arising from a failure to take into account a relevant factor or a taking into account of an extraneous consideration. The mere fact that an error occurred is evidence that one of these two things happened.[124]

In *New Zealand Engineering and Associated Trades Union v Court of Arbitration*[125] a decision of the New Zealand Court of Appeal, Cooke J stated:

> ... if *Anisminic Ltd v Foreign Compensation Commission* widened the field of jurisdictional review or jurisdictional error, it did so in the sense of preferring one of two long-competing lines of reasoning and authority to the other.[126]

The "line of authority" preferred by the majority Lords in *Anisminic* would appear to be that epitomised in such decisions as *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [127], *Seereelall Jhuggroo v Central Arbitration and Control Board* [128], *R v Fulham, Hammersmith and Kensington Rent Tribunal; Ex*

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122 S A de Smith "Judicial Review in Administrative Law: The Ever-Open Door?" (1969) 27 *Camb L J* 161.

123 S A de Smith "Judicial Review in Administrative Law: The Ever-Open Door?" (1969) 27 *Camb L J* 161 at 163.

124 B C Gould "Anisminic and Jurisdictional Reveiw" [1970] *Pub L* 358 at 361.

125 [1976] 2 NZLR 283.

126 [1976] 2 NZLR 283 at 301.

127 [1937] AC 898.

128 [1953] AC 151.

parte Hierowski [129], and *Maradana Mosque Trustees v Mahmud* [130]. The errors of law identified in those cases as going, or potentially going, to jurisdiction were, respectively, applying a wrong and inadmissible test[131], failing to take into account a consideration which statutorily ought to have been taken into account or taking into account a matter beyond the matters which may lawfully be taken into account[132], making a final order not authorised in the particular case[133], and asking the wrong question.[134] All those cases contained rather extreme examples of excesses of jurisdiction occurring "during the inquiry" itself and not otherwise determinable at the commencement of the particular inquiry.

The result of the *Anisminic* decision - which, interestingly, was not immediately apparent when the decision was first handed down[135] - is that, in jurisdictions where it is accepted, every error of law is, even in the absence of a statutory right of appeal or review, prima facie reviewable and that a court will only refrain from interfering where it thinks that the original decision was right or, perhaps, where the error in question was one of fact (other than jurisdictional fact).[136] In the words of de Smith:

> ... the general tenor of the judgments in the *Anisminic* case supports the view that, for the purpose of judicial review of administrative action, the really important dichotomy is not the hair-splitting distinction between jurisdictional and non-jurisdictional error, but the distinction between error of law and

129 [1953] 2 QB 147.

130 [1967] 1 AC 13. Diplock LJ, in the Court of Appeal in *Anisminic*, said that the Privy Council decision in the *Maradana Mosque* case was "mainly decided" on the ground of denial of natural justice and that he found difficulty in reconciling that part of the judgments of the Privy Council in relation to excess of jurisdiction ([1967] 1 AC 13 at 14, 23, 25 and 26) with previous authorites: see [1968] 2 QB 862 at 908-9.

131 [1937] AC 898 at 915-7.

132 [1953] AC 151 at 161.

133 [1953] 2 QB 147 at 150-1 and 152.

134 [1967] 1 AC 13 at 14, 23, 25 and 26.

135 In the years 1969-77 *Anisminic* featured in only 2 reported cases, plus another noted in *The Times*: *Aldridge v Simpson-Bell* (1971) SC 87; *R v Southampton Justices; Ex parte Green* [1976] QB 11; and *R v Southampton Justices; Ex parte Corker* (1976) *The Times*, 12 February 1976. In none of those decisions is there unqualified support for the extended doctrine of jurisdictional error, although in *Green* Lord Denning MR was prepared to hold that a failure to take into account matters which ought to have been taken into account came within the category of "want of jurisdiction". In *Aldridge* the question of extended jurisdictional error was successfully evaded. In *Corker* it was held that certiorari would not lie to quash the errors in question (pertaining to an exercise of a discretion on "wrong" principles) unless they were apparent on the face of the record, thus implying that the errors did not, in themselves, go to jurisdiction.

136 See *Re Racal Communications Ltd* [1981] AC 373; *O'Reilly v Mackman* [1983] 2 AC 237; *R v Greater Manchester Coroner; Ex parte Tal* [1984] 3 WLR 643; *R v Hull University Visitor; Ex parte Page* [1992] 3 WLR 1112. See also B C Gould "Anisminic and Jurisdictional Review" [1970] *Pub L* 358.

error of fact.[137]

The so-called "*Anisminic* revolution in the gospel according to Lord Diplock"[138] then unfolded over a 15 year period.[139]

Although, in *Anisminic,* the Lords expressly recognised the continued existence of a distinction between reviewable errors of law going to jurisdiction and unreviewable errors on matters going to the merits[140], the fact is that the majority took such a broad view of what matters went to jurisdiction[141] it soon became almost impossible to conceive of any error of law which would not, in the majority's opinion, go to jurisdiction.[142] As de Smith pointed out at the time:

> ... [I]s not the practical effect of the decision nevertheless to obliterate the distinction between reviewable errors on matters going to jurisdiction and errors which are normally unreviewable (otherwise than on appeal) because they "go to the merits" of the decision? The survival of such a distinction was expressly recognised in the judgments. Yet it is very difficult to see what errors of law the Commission would have been allowed to perpetrate without the prospect of judicial intervention.[143]

In 1974 Lord Diplock made an extra-judicial statement that the House of Lords decision in *Anisminic* had indeed rendered obsolete the distinction between jurisdictional and non-jurisdictional errors of law. His Lordship, in an address (in memory of Stanley de Smith) delivered at the University of Cambridge on 18 October 1974 [144], said that:

> ... the concept of errors of law which go to "jurisdiction" has been expanded to include errors of law which previously could only have been reviewed if

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137 S A de Smith "Judicial Review in Administrative Law: The Ever-Open door?" (1969) 27 *Cam L J* 161 at 164.

138 H W R Wade "Visitors and Error of Law" (1993) 109 *L Q Rev* 155 at 157. Interestingly, Lord Diplock, in the Court of Appeal in *Anisminic* [1968] 2 QB 862, adhered to the traditional doctrine of jurisdictional error, holding that any errors, if errors there were, clearly fell within jurisdiction.

139 See S A de Smith "Judicial Review in Administrative Law: The Ever-Open Door?" (1969) 27 *Cam L J* 161; H W R Wade "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 *L Q Rev* 198; H W R Wade "Visitors and Error of Law" (1993) 109 *L Q Rev* 155.

140 [1969] 2 AC 147 per Lord Reid at 171 and Lord Pearce at 195.

141 [1969] 2 AC 147 per Lord Reid at 171 and Lord Pearce at 195.

142 See J A Smillie "Jurisdictional Review of Abuse of Discretionary Power" (1969) 47 *Can B R* 623 at 638.

143 S A de Smith "Judicial Review in Administrative Law: The Ever-Open Door?" (1969) 27 *Camb L J* 161 at 163-4.

144 "Administrative Law: Judicial Review Reviewed" (1974) 33 *Camb L J* 233.

> they appeared on the face of the record. ... the wider significance [of the House of Lords decision in *Anisminic*] is that it renders obsolete the technical distinction between errors of law which go to "jurisdiction" and errors of law which do not. In doing so it enlarges the material that can be made available to the court on certiorari to found an inference that those responsible for an administrative decision have erred in law. So technicalities as to what constitutes the "record" for the purposes of review no longer matter.[145]

His Lordship expanded on this theme when delivering the second Tun Abdul Razak memorial lecture in Kuala Lumpur in July 1979, saying, among other things:

> ... the concept of what goes to jurisdiction has since become so broad as to make them obsolete...
>
> ... the concept of jurisdiction in administrative law has become indistinguishable from the concept of *ultra vires*...
>
> Thus the whole range of administrative activity in England has now become subject to judicial control as to its *vires*...
>
> Since any error of law on matters relevant to the decision will cause the decision-maker to ask himself the wrong question, want of jurisdiction has now merged with error of law on the part of an administrative authority made in the course of reaching a decision whether it appears on the face of the record or not, to constitute the principal ground on which administrative acts may be held by the courts to be null and void.[146]

It was subsequently confirmed in *Re Racal Communications Ltd* [147] that *Anisminic* had indeed abolished the distinction between jurisdictional and non-jurisdictional errors of law, but only in respect of statutory tribunals and authorities, not in respect of inferior courts.[148] In that case, Lord Diplock (with whom Lord Keith of Kinkel agreed) described the effect of *Anisminic* in these terms:

> It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires. It proceeds on the presumption that where Parliament confers on *an administrative tribunal or authority as*

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145 "Administrative Law: Judicial Review Reviewed" (1974) 33 *Camb L J* 233 at 242-4.

146 Diplock, Lord "Judicial Control of Government" [1979] 2 *MLJ* cxl at cxliii, cxliv and cxlv.

147 [1981] AC 374.

148 The Foreign Compensation Commission was, of course, an administrative tribunal, not an inferior court. Nevertheless, Lord Diplock's approach was, with respect, inconsistent with the position expressly recognised by the Lords in *Anisminic* that there was still a category of non-jurisdictional error. See also *R v Surrey Coroner; Ex parte Campbell* [1982] QB 661 at 675; *BHP Petroleum Pty Ltd v Balfour* (1987) 180 CLR 474 at 480-1.

> *distinct from a court of law,* power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the *administrative tribunal or authority* have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on *a tribunal or authority that is not a court of law,* Parliament did not intend to do so. The break-through made by *Anisminic*... was that, *as respects administrative tribunals and authorities,* the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity. *[Emphasis added]* [149]

Subsequently, in *O'Reilly v Mackman* [150] Lord Diplock, at several points in his judgment, appeared to say that the traditional distinction between jurisdictional and non-jurisdictional errors of law had also been abolished for inferior courts as well as tribunals.[151] His Lordship (with whom all members of the House of Lords agreed) said:

> ... [T]he landmark decision of this House in *Anisminic v Foreign Compensation Commission* ... has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of *inferior courts and statutory tribunals* were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction ... [T]he full consequences of the *Anisminic* case, in introducing the concept that if a statutory decision-making authority asks itself the wrong question it acts without jurisdiction, have been virtually to abolish the distinction between errors within jurisdiction that rendered voidable a decision that remained valid until quashed, and errors that went to jurisdiction and rendered a decision void ab initio provided that its validity was challenged timeously in the High Court by an appropriate procedure. *[Emphasis added]* [152]

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149 [1981] AC 374 at 382-383.

150 [1983] 2 AC 237.

151 This was expressly acknowledged by the High Court of Australia in *Craig v South Australia* (1995) 69 ALJR 873 at 878.

152 [1983] 2 AC 237 at 278 and 283.

In England, by 1984, the restriction in relation to inferior courts, to the extent (if any) to which it still existed in that country, had gone completely.[153] As the High Court of Australia pointed out in *Craig v South Australia*[154]:

> [T]he distinction between jurisdictional error and error within jurisdiction has been seen as effectively abolished in England ... .[155]

In that regard, in *R v Hull University Visitor; Ex parte Page*[156] the House of Lords accepted unanimously that *Anisminic* had rendered obsolete the distinction between the two types of error of law. In the words of Lord Browne-Wilkinson:

> [I]n general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law.[157]

What has happened to the once supervisory role of the courts? Smillie has astutely pointed out that:

> ... the [*Anisminic*] decision confers upon the courts such wide powers of review that their function now appears to be more appellate than supervisory. By adoption of the *Anisminic* approach, a court now has almost unlimited power to impose its view in respect of a particular matter upon a specialised tribunal created by the Legislature for the express purpose of dealing with such questions.[158]

The other practical outcome of *Anisminic,* in jurisdictions where it is accepted, is that the decision would result - and, in England, has resulted - in the virtual end of error of law on the face of the record.[159] Professor Wade has remarked that the doctrine "can now be consigned to the dustbin of legal history".[160] In that regard, the broad concept of jurisdictional error of law leaves little, if any, room for a category of non-jurisdictional error of law. The current English position is that

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153 See *R v Greater Manchester Coroner; Ex parte Tal* [1984] 3 WLR 643.

154 (1995) 69 ALJR 873.

155 (1995) 69 ALJR 873 at 878.

156 [1993] AC 682.

157 [1993] AC 682 at 702.

158 J A Smillie "Jurisdictional Review of Abuse of Discretionary Power" (1969) 47 *Can B R* 623 at 642.

159 See B C Gould "Anisminic and Judicial Review" [1970] *Pub L* 358 at 361. Interestingly, the continuing existence of error of law on the face of the record was recognised by the majority judges in *Anisminic* (see Lord Reid at [1969] 2 AC 171 and Lord Pearce at 195) and in *R v Secretary of State for the Environment; Ex parte Ostler* [1977] 1 QB 122.

160 H W R Wade "New Twists in the *Anisminic* Skein" (1980) 96 *L Q Rev* 492 at 494.

certiorari is now available to correct any error of law made by an inferior court, tribunal or administrative authority regardless of whether the error is on the face of the record or otherwise.[161]

In England, and in other jurisdictions where the *Anisminic* principle has been accepted, those two seemingly "conceptually indistinguishable"[162] doctrines of ultra vires and jurisdictional error for all intents and purposes have now been completely assimilated. This ostensibly logical, sensible and probably inevitable development in the law has struck at the divergent principles (in terms of the incidence of judicial interventionism) in which the two doctrines were historically and conceptually grounded. With typical clarity, Wade has pointed out that:

> A paradoxical result is that *Anisminic* is now held to have destroyed the logic on which the decision itself was based. When the House of Lords invalidated the tribunal's decision which, by statute, "shall not be questioned in any court of law," they did so under the long-established doctrine that a clause of that kind would protect errors of law which were *intra vires* but not those which were *ultra vires,* since Parliament could not be supposed to have intended to give any tribunal power to determine its own jurisdiction. But now that all errors of law are *ultra vires,* there is nothing left upon which the clause can operate, so that for a court to refuse to apply it, as was done in *Anisminic,* can now only be naked disobedience of Parliament.[163]

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[161] See *R v Hull University Visitor; Ex parte Page* [1993] AC 682.

[162] S D Hotop, "Judicial Control over Local Government Authorities", Ch 4, *Local Government Legislation Service (New South Wales),* vol 2 [Commentary] (Butterworths, Sydney, 1976), p 26.

[163] H W R Wade "Visitors and Error of Law" (1993) 109 *L Q Rev* 155 at 158. However, in *R v Hull University Visitor; Ex parte Page* [1993] AC 682 the House of Lords still refused to grant relief, endorsing the dissenting judgment of Geoffrey Lane LJ in *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56, a case in which there was a relevant "final and conclusive" provision in the statute. (See also Lord Diplock's observation in *Re Racal Communications* [1981] AC 374 at 382-3 that it is presumed that the legislature does not intend subordinate bodies - *other than* inferior courts - conclusively to determine questions of law.) Thus, even in England a decision of an inferior court - as opposed to an administrative tribunal - might still escape judicial review as being "final and conclusive". In the words of Sir Anthony Mason, "[t]his begins to look like jurisdiction under another name": "Life in Administrative Law Outside the ADJR Act" [Seminar Paper], *Life in Administrative Law Outside the ADJR Act,* Australian Institute of Administrative Law, NSW Chapter, Sydney NSW, 17 July 1996, p 12.

CHAPTER 3

ANISMINIC IN THE HIGH COURT OF AUSTRALIA

"New opinions are always suspected, and usually opposed, without any other reason but because they are not already common."[1]

Preview

1. Despite some intermittent enthusiasm for the *Anisminic* doctrine of "extended jurisdictional error", the High Court of Australia for the most part continues to maintain, or at least pay lip-service to, a distinction between jurisdictional and non-jurisdictional errors of law.

2. However, using its own "local" version of the *Anisminic* principle, which actually predates the House of Lords decision in *Anisminic*, the High Court is able to categorise virtually every error of law as jurisdictional and intervene and strike down any exercise of power which it deems to be an abuse of power just as easily as its British counterparts.

3. There is a considerable body of case law to support the proposition that *Anisminic* has, in fact, been *impliedly* accepted by the High Court.

In *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch*[2] Brennan J (as he then was) stated:

> This court has not accepted Lord Diplock's view that the distinction between jurisdictional and non-jurisdictional errors was for practical purposes abolished by the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*... .[3]

McHugh J went even further, saying:

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[1] John Locke, *An Essay concerning Human Understanding* (1690), dedicatory epistle.

[2] (1991) 173 CLR 132.

[3] (1991) 173 CLR 132 at 141.

> [T]his court has rejected the proposition that for practical purposes there is no distinction between jurisdictional and non-jurisdictional errors of law ... .[4]

The justices in the majority (Brennan, Dawson and Gaudron JJ), as well as those in dissent (McHugh and Deane JJ), all maintained the distinction between errors of law that go to jurisdiction and those that do not.

In 1969 Barwick CJ in *Brettingham-Moore v Municipality of St Leonards*[5] expressed the view that the House of Lords decision in *Anisminic* was "no doubt ... important to the judicial control of administrative bodies".[6] Nothing was said about inferior courts or statutory tribunals. Indeed, in the years that followed, there were few references to *Anisminic* by the High Court of Australia.[7]

The decision was, however, followed by Mason J (as he then was) in *R v Dunphy; Ex parte Maynes*[8] with whose judgment the majority agreed. Nevertheless, Gibbs J (as he then was) appeared to doubt the correctness of the *Anisminic* doctrine in *Re Cook; Ex parte Twigg*.[9]

In *R v Gray & Ors; Ex parte Marsh & Anor* [10] the High Court more fully considered the decision of the House of Lords in *Anisminic*. Gibbs CJ referred to the "well recognised distinction between an error made by a tribunal in the course of deciding a matter, on the one hand and an absence of jurisdiction on the other".[11] The Chief Justice noted, however, that "the question on which side of the line a particular case should fall may be a very difficult one".[12] His Honour went on to say:

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4 (1991) 173 CLR 132 at 165.

5 (1969) 121 CLR 509.

6 (1969) 121 CLR 509 at 523.

7 There was, for example, no mention of *Anisminic* in such cases of alleged jurisdictional error as *R v Evatt; Ex parte Master Builders Association of NSW (No 2)* (1974) 132 CLR 150, *In re Staples; Ex parte Australian Telecommunications Commission* (1980) 54 ALJR 507, *Re Shaw; Ex parte Shaw* (1981) 55 ALJR 12 and *Re Moodie; Ex parte Emery* (1981) 34 ALR 481. In many other cases, *Anisminic* was only referred to by the Court in passing: see, for example, *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194 and *R v Booth; Ex parte Administrative and Clerical Officers' Association* (1978) 141 CLR 257.

8 (1978) 139 CLR 482.

9 (1980) 54 ALJR 515 at 520.

10 (1985) 157 CLR 351.

11 (1985) 157 CLR 351 at 371.

12 (1985) 157 CLR 351 at 371.

Since *Anisminic Ltd v Foreign Compensation Commission* it has been more clearly understood that an error of law may amount to a jurisdictional error even though the tribunal which made the error had jurisidiction to embark on its inquiry. In that case Lord Wilberforce said [[1969] 2 AC 147 at 210]:

> "... the cases in which a tribunal has been held to have passed outside its proper limits are not limited to those in which it had no power to enter upon its inquiry or its jurisdiction, or has not satisfied a condition precedent. Certainly such cases exist ... but they do not exhaust the principle. A tribunal may quite properly validly enter upon its task and in the course of carrying it out may make a decision which is invalid - not merely erroneous. This may be described as "asking the wrong question" or "applying the wrong test" - expressions not wholly satisfactory since they do not, in themselves, distinguish between doing something which is not in the tribunal's area and doing something wrong within that area - a crucial distinction which the court has to make."

See also per Lord Reid [at 171] and per Lord Pearce [at 195].

In *Anisminic Ltd v Foreign Compensation Commission,* Lord Pearce said [at 194]:

> "It would lead to an absurd situation if a tribunal, having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to inquire and decide as set out in the Act of Parliament."[13]

The Chief Justice's references to *Anisminic* hardly amounted to an endorsement of the *Anisminic* doctrine of extended jurisdictional error.[14] The distinction between lack of jurisdiction on the one hand and excess of jurisdiction on the other had been established well before *Anisminic* and it had long been acknowledged that such errors as misconstruction of the statute, "asking the wrong question" and "applying the wrong test" could go to jurisdiction. For example, in *Parisienne Basket Shoes Pty Ltd v Whyte*[15] Dixon J pointed out that:

> the clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, *whether procedural or otherwise,* which attend the exercise of

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13 (1985) 157 CLR 351 at 371-372.

14 Margaret Allars, in her *Introduction to Australian Administrative Law* (Sydney, Butterworths, 1990) sees the Court's decision as an "apparent endorsement of the *Anisminic* doctrine" but notes that the Court continued to maintain a distinction between jurisdictional and non-jurisdictional errors of law (pp 223-224).

15 (1938) 59 CLR 369.

> jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari, or appeal. But, if there be want of jurisdiction, then the matter is coram non judice. *[Emphasis added]* [16]

Further, as Latham CJ pointed out in *R v Hickman; Ex parte Fox and Clinton*[17] :

> An authority with a limited jurisdiction cannot give itself jurisdiction by a wrong determination as to the existence of a fact upon which its jurisdiction depends, or by *placing a wrong construction upon a statute upon which its jurisdiction depends,* unless by a valid provision the authority is given power to act upon its own opinion in relation to the existence of the fact or in relation to the construction of the statute. *[Emphasis added]* [18]

In *Ex parte Hebburn Ltd; Re Kearsley Shire Council*[19] Jordan CJ was in no doubt that:

> if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply "a wrong and inadmissible test": *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898 at 917; or to "misconceive its duty", or "not to apply itself to the question which the law prescribes": *R v War Pensions Entitlement Appeal Tribunal* (1933) 50 CLR 228 at 242, 242; or "to misunderstand the nature of the opinion which it is to form": *R v Connell [Ex parte Hetton Bellbird Collieries Ltd]* (1944) 69 CLR 407 at 432 ... [20]

a jurisdictional error will have been committed "leaving the jurisdiction in law constructively unexercised".[21]

It should also be noted that the High Court had in 1982 "applied without qualification"[22] the Privy Council decision in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*[23] (in which it had

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16 (1938) 59 CLR 369 at 389.

17 (1945) 70 CLR 598.

18 (1945) 70 CLR 598 at 606. See also *R v Dunphy; Ex parte Maynes* (1978) 139 CLR 482 in which *Anisminic* was mentioned in the context of a judicial finding that a fundamental misconstruction of the empowering statute had occurred.

19 (1947) 47 SR (NSW) 416.

20 (1947) 47 SR (NSW) 416 at 420.

21 (1947) 47 SR (NSW) 416 at 420. Addressing oneself to the wrong question had also been accepted as a jurisdictional error in such cases as *Board of Education v Rice* [1911] AC 179 and *R v Minister of Housing and Local Government; Ex parte Chichester RDC* [1960] 1 WLR 587.

22 M Allars, *Introduction to Australian Administrative Law* (Sydney, Butterworths, 1990), p 233.

23 [1981] AC 363.

been held that the distinction between jurisdictional and non-jurisdictional errors of law remained) in the case of *Houssein v Under Secretary of Industrial Relations and Technology (NSW).*[24] There is nothing in *Gray* to suggest that the High Court had embraced the fullness of the *Anisminic* doctrine so as to "abolish the distinction betwen errors within jurisdiction ... and errors that went to jurisdiction".[25]

In *BHP Petroleum Pty Ltd v Balfour*[26] the High Court, in a joint judgment (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ), once again invoked *Anisminic* by quoting a passage from Lord Diplock's speech in *Re Racal Communications Ltd*[27]:

> The approach to be adopted can be expressed by using the words of Lord Diplock in *Re Racal Communications Ltd* [1981] AC 374 at 382-3 where after referring to *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, his Lordship said:
>
> "It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined ... So if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do ..."[28]

Once again, it was, with respect, unnecessary and somewhat confusing to cite *Anisminic* as support for the long established proposition that a jurisdictional error occurs in circumstances where there has been a fundamental misconstruction of the empowering statute when, by 1987, the *Anisminic* doctrine, at least in England, had been extended to embrace errors of law going far beyond the type of error which in *Balfour* was found to go to jurisdiction.[29]

In *Re Queensland Electricity Commission & Ors; Ex parte Electrical Trades Union*

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[24] (1982) 148 CLR 88.

[25] *O'Reilly v Mackman* [1983] 2 AC 237 per Lord Diplock at 283.

[26] (1987) 180 CLR 474.

[27] [1981] AC 374.

[28] (1987) 180 CLR 474 at 480-1.

[29] In England, by 1984, errors of law corresponding to broad or extended ultra vires (eg taking into account irrelevant considerations) were recognised as being jurisdictional errors: see *R v Greater Manchester Coroner; Ex parte Tal* [1984] 3 WLR 643. Nevertheless, as Margaret Allars noted, the endorsement of the passage from *Re Racal* "indicates some sympathy for the reasoning of the *Anisminic* doctrine" (*Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990), p 227).

of Australia[30] the High Court made no express mention to the *Anisminic* doctrine and there would appear to be nothing in the judgments (except the judgment of Brennan J who, with Deane J, was in the minority) which could reasonably be relied upon as support for either the substance or reasoning of the *Anisminic* doctrine. Brennan J did, however, use language very close to the language and thought-forms of *Anisminic* whilst not expressly invoking the decision. Referring to the decision of the Australian Conciliation and Arbitration Commission which had declined to hear an industrial dispute on the ground that it was in the public interest that the matter be dealt with by a state tribunal, his Honour said:

> That decision was erroneous. It is not necessary to give a label to the Commission's error: it might be said to be an error of law as to the nature of the public interest which might warrant the Commission refraining from further hearing an application for an award, or an error of law as to the nature of the discretion to be exercised, or the making of a decision not to make an overriding federal award without *taking account of all the matters which*, on a full hearing, *would have been relevant* to that decision. *[Emphasis added]* [31]

The majority (Mason CJ, Wilson and Dawson JJ) drew a clear distinction between a "constructive refusal to exercise ... jurisdiction" (cf *Ex parte Hebburn Ltd; Re Kearsley Shire Council*[32]) and a failure to take into account a relevant consideration or to give sufficient weight to such a consideration.[33]

It was not until 1991 that the High Court for the first time gave more than perfunctory consideration to the *Anisminic* doctrine of extended jurisdictional error. The opportunity arose in *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch*.[34] The Full Commission of the Industrial Commission of South Australia had entertained, but refused, an application for leave to appeal from a decision of a registrar to register an alteration in the rules of the appellant association. The Supreme Court of South Australia (Full Court) had judicially reviewed that decision, quashing the order and remitting the matter to the Full Commission. The matter went on appeal to the High Court.

The appellant association argued that any error of law made by the Full

[30] (1987) 72 ALR 1.
[31] (1987) 72 ALR 1 at 11.
[32] (1947) 47 SR (NSW) 416 at 420.
[33] (1987) 72 ALR 1 at 7.
[34] (1991) 173 CLR 132.

Commission was not a jurisdictional one and that relief by way of judicial review to correct such an error was excluded by a privative clause. (The privative clause in question relevantly limited judicial review to "excess or want of jurisdiction".)

The majority of the High Court (Brennan, Dawson and Gaudron JJ) concluded that the Full Commission had erred in regarding the proposed appeal as involving no more than an appellable review of an unstructured discretion, whereas the proposed appeal required a rehearing on the merits of the issues. This, the majority concluded, was a jurisdictional error which went beyond a mere refusal or failure to exercise jurisdiction (itself a jurisdictional error, but one which would have been protected by the privative clause). Accordingly, the privative clause did not prevent judicial review and the Supreme Court of South Australia had the power to correct the error.

Brennan J (as he then was) spoke in terms of "[m]isunderstanding the nature of the ... decision", "[m]isconceiving the nature of the jurisdiction" and "appl[ying] an erroneous test".[35] Dawson and Gaudron JJ spoke in terms of the Commission being "ahead of itself" and thus acting "in excess of jurisdiction".[36]

In the minority, Deane J found that the Commission had "failed to appreciate the extent of the jurisdiction which it would be called upon to exercise if leave to appeal were granted" but, in his Honour's view, such an error was one within jurisdiction.[37] McHugh J, also in the minority, was of the view that the Commission had "misunderstood the matters it could take into account in exercising [its] jurisdiction".[38] However, in his Honour's view, that was not a jurisdictional error[39] as the Commission had not "misconceived the nature of its jurisdiction".[40]

None of the five justices appeared to endorse either the language or substance of the *Anisminic* decision, in particular that part of Lord Reid's speech where there was identified as a jurisdictional error the taking into account of an irrelevant consideration.[41] Admittedly, Dawson and Gaudron JJ referred to *Anisminic* rather

35 (1991) 173 CLR 132 at 140.
36 (1991) 173 CLR 132 at 161.
37 (1991) 173 CLR 132 at 153.
38 (1991) 173 CLR 132 at 166.
39 (1991) 173 CLR 132 at 166.
40 (1991) 173 CLR 132 at 165-166.
41 [1969] 2 AC 417 at 171.

obliquely, indeed almost ambiguously:

> The Supreme Court appears to have approached the present matter on the basis that jurisdictional error, including jurisdictional error of the type identified in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, is sufficient to overcome the hurdle to judicial review contained in s 95 of the Act. Certainly it referred to and said it was applying the test in that part of the speech of Lord Reid in *Anisminic* (at 171) where there was identified as jurisdictional error that error involved when a tribunal has "based its decision on some matter which, under the provisions setting it up, it had no right to take into account".[42]

Nevertheless, whilst their Honours went on to conclude that the Supreme Court was "correct to allow the appeal and to make the orders that it did"[43] they did so on traditional jurisdictional error grounds of excess of jurisdiction "for reasons that do not precisely equate with the reasons of the Supreme Court".[44]

In the majority, Brennan J stated that the Court "ha[d] not accepted" that the distinction between jurisdictional and non-jurisdictional errors of law had been abolished.[45] After referring to *Anisminic, Re Racal Communications Ltd*[46] and *O'Reilly v Mackman* [47], his Honour stated:

> That distinction was maintained by this court in *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88; *Hockey v Yelland* [(1984) 157 CLR 124]; and *R v Gray; Ex parte Marsh* (1985) 157 CLR 351, as it was by the Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363, a case decided shortly before *Racal Communications*.[48]

His Honour went on to say:

> Making the distinction between jurisdictional and non-jurisdictional errors, this court construes general privative clauses as impliedly exempting certiorari for jurisdictional error from the ouster of supervisory jurisdiction.[49]

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42 (1991) 173 CLR 132 at 160.
43 (1991) 173 CLR 132 at 161.
44 (1991) 173 CLR 132 at 161.
45 (1991) 173 CLR 132 at 141.
46 [1981] AC 374.
47 [1983] 2 AC 237.
48 (1991) 173 CLR 132 at 141.
49 (1991) 173 CLR 132 at 141.

Dawson and Gaudron JJ expressly acknowledged the continued existence of a distinction between jurisdictional and non-jurisdictional errors of law. Their Honours stated that had it been necessary for the Commission to determine whether leave to appeal should be granted to enable a different decision to be reached, the Commission's failure to make that determination, whilst amounting to a failure to exercise jurisdiction, "would have been an error within jurisdiction".[50]

McHugh J, although in dissent, agreed with Brennan J that the distinction between jurisdictional and non-jurisdictional errors of law had been retained:

> An error made because of a failure to take into account a matter relevant to the exercise of ... discretion is an error made within, and not outside or in excess of, jurisdiction: this court has rejected the proposition that for practical purposes there is no distinction between jurisdictional and non-jurisdictional errors of law: see *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* 148 CLR 88; *Hockey v Yelland* [(1984) 157 CLR 124]; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351.

Deane J, also in dissent, said:

> [T]he mere fact that the Commission wrongly takes account of a particular consideration (eg an erroneous view of the law or a mistaken view of the facts) does not mean that a proceeding before the Commission or an award or order made by the Commission is itself vitiated by an excess or want of jurisdiction. The proceeding or the award or order will be so vitiated only if the effect of the error is that the Commission purports to entertain a proceeding or make an award or order which is of a nature which the Commission has no jurisdiction, in the circumstances, to entertain or make. Nor does the mere fact that, in the exercise of the jurisdiction conferred upon it, the Commission falls into error about the identification or content of relevant questions or about the order in which it should deal with questions mean that the award or order actually made is itself amenable to challenge on the ground of excess or want of jurisdiction ... . Error in relation to such questions is error within jurisdiction ... .[51]

Although their Honours differed as to how to characterise the alleged error of the Commission, the tenor of the majority judgments and that of the two dissenting justices is substantially the same, namely, that a distinction still remains between those errors of law which go to jurisdiction and those which do not. In addition, their Honours re-affirmed the traditional view of jurisdictional error that embraced three

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[50] (1991) 173 CLR 132 at 163.

[51] (1991) 173 CLR 132 at 151-3.

different types of jurisdictional error: namely, a lack (or want) of jurisdiction, an excess of jurisdiction, and a wrongful failure or refusal to exercise jurisdiction.[52]

The Court's decision also demonstrates the flexibility of the traditional doctrine of jurisdictional error as espoused by the Court in a number of decisions over the years. In that regard, the Commission's error - namely, its failure to appreciate the extent of its jurisdiction which it would be called upon to exercise if leave to appeal were granted - was reasonably capable of being characterised as either an error within jurisdiction or one outside jurisdiction. To the extent to which the Commission misunderstood the matters it could reasonably take into account in exercising jurisdiction and thus failed to take into account a matter relevant to the exercise of its jurisdiction, the Commission arguably did no more than make a non-jurisdictional error (as the dissenting justices held).[53] However, such an error of law *can* amount to a jurisdictional error of law where the court forms the view that the tribunal's exercise of its jurisdiction has been fundamentally affected, that is, where the error is said to be one "on which the decision of the case depends".[54]

Such flexibility is frustrating and introduces much uncertainty into the law. Lord Denning MR in an oft-cited dictum from *Pearlman v Keepers and Governors of Harrow School*[55] stated:

> So fine is the distinction that in truth the High Court has a choice before it whether to interfere with an inferior court on a point of law. If it chooses to interfere, it can formulate its decision in the words: "The court below had no jurisdiction to decide this point wrongly as it did". If it does not choose to interfere, it can say: "The court had jurisdiction to decide it wrongly, and did so". Softly be it stated, but that is the reason for the difference between the decision of the Court of Appeal in *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862 and the House of Lords [1969] 2 AC 147.[56]

The distinction between jurisdictional and non-jurisdictional error of law is often

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52 (1991) 173 CLR 132 at 141 and 144-5 (per Brennan J), 153 (per Deane J),160 (per Dawson and Gaudron JJ), and 164 and 166 (per McHugh J).

53 (1991) 173 CLR 132 at 153 (per Deane J) and 165-6 (per McHugh J).

54 *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 per Lord Denning MR at 70.

55 [1979] QB 56.

56 [1979] QB 56 at 70.

"hair-splitting"[57] and there is "no one method on which to base the distinction"[58]. In addition, it is unarguably the case that value judgments and such factors as the court's view as to whether the original decision was "correctly" decided enter into - perhaps wrongly - the determination process. On the other hand, it has also been argued that a notion of jurisdiction embracing all errors of law not only "fails to cater with sufficient sensitivity for the complexities of social policy in the relevant areas"[59] but may also "subvert the sovereignty of Parliament".[60]

In *Coco v R*[61] the High Court[62] held that a statutory approval granted by a judge for the use of a listening device in premises frequented by a person suspected of having committed an offence was wholly invalid. The court held that the relevant statutory provision[63] did not confer power on a judge to authorise entry on to premises for the purpose of installing and maintaining a listening device in circumstances where that entry otherwise would have constituted a trespass.

Mason CJ, Brennan, Gaudron and McHugh JJ found that the judge had:

> misapprehended the nature and scope of the power. By so doing, he misconstrued the statute which gave him jurisdiction, addressed an irrelevant consideration and exceeded his jurisdiction ... . This error might also be characterized as an error on the face of the record.[64]

Their Honours cited *Anisminic* and *R v Gray; Ex parte Marsh*[65] as authorities for their conclusion as to excess of jurisdiction. Certainly, the invocation of misconstruction of the statute as a ground of jurisdictional error was quite consistent with the traditional doctrine of jurisdictional error in its more liberal form but their Honours' added reference to the taking into account of an "irrelevant consideration" - supported by a subsequent reference to "extraneous factor"[66] - is a

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57 S A de Smith "Judicial Review in Administrative Law: The Ever-Open Door?" (1969) *Camb L J* 161 at 164.

58 V Bath "The Judicial Libertine - Jurisdictional and Non-jurisdictional Error of Law in Australia" (1983) 13 *F L Rev* 13 at 44.

59 G L Peiris "Patent Error of Law and the Borders of Jurisdiction: The Commonwealth Experience Assessed" (1984) 4 *Legal Studies* 271 at 279.

60 M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990), p 234.

61 (1994) 179 CLR 427.

62 Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

63 Section 43, Invasion of Privacy Act 1971 (Q).

64 (1994) 179 CLR 427 at 443.

65 (1985) 157 CLR 351.

66 (1994) 179 CLR 427 at 443.

clear, albeit perfunctory, application of the *Anisminic* principle. Indeed, whilst the doctrine of ultra vires in its broad or extended form, as opposed to the concept of jurisdictional error, could easily have been invoked to deal with the subject-matter and the error of law involved, their Honours expressly used the language of jurisdiction.

Deane and Dawson JJ, in dealing with the judge's error, spoke in terms of "mistake" and "fundamental misapprehension ... about the extent of the powers being exercised and the nature and extent of the authority which was given".[67] The effect of that "misapprehension" was to nullify the judge's approval.[68] The language of their Honours was totally consistent with the traditional doctrine of jurisdictional error, while at the same time not inconsistent with the *Anisminic* principle.

Toohey J also found that the approval granted by the judge was wholly invalid, but on a somewhat technical ground of statutory construction.[69] His Honour's reasoning indicates an implicit application of the doctrine of ultra vires.[70]

In *State of New South Wales v Canellis & Ors*[71] the High Court held, among other things, that, the principle in *Dietrich v The Queen*[72] excepted, the rules of procedural fairness did not extend to a requirement that legal representation be provided to a party at a trial, let alone a witness at an inquiry. Brennan J (as he then was) cited, among other judicial authorities[73], *Anisminic* as authority for the proposition that:

> Where procedural fairness in a particular respect is not accorded in the exercise of a power, the power is exceeded ... .[74]

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67 (1994) 179 CLR 427 at 448.

68 (1994) 179 CLR 427 at 448.

69 (1994) 179 CLR 427 at 457. His Honour held that the authority to enter and remain upon the premises could not be severed from the approval itself.

70 See, in particular, his Honour's comments at 453 and 457.

71 (1994) 181 CLR 309.

72 (1992) 177 CLR 292. The *Dietrich* principle refers to the court's jurisdiction to grant an adjournment or order a permanent stay of proceedings at a trial until such time as an indigent person charged with a serious criminal offence is provided with legal representation necessary for a fair trial or resources for such representation.

73 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Kioa v West* (1985) 159 CLR 550.

74 (1994) 181 CLR 309 at 332.

His Honour's invocation of *Anisminic* as authority for the proposition that a denial of procedural fairness constitutes an "excess" of jurisdiction recalls the dicta of Lords Reid and Pearce in *Anisminic* in relation to the jurisdictional effect of a failure to comply with the requirements of natural justice.[75] His Honour's statement - particularly, his reference to power being "exceeded" - tends to show some sympathy for the *Anisminic* principle (at least in relation to the legal consequences of a breach of the rules of procedural fairness), especially in light of the fact that the invocation of *Anisminic* was to some extent unnecessary in any event, as pre-*Anisminic* cases such as *Ridge v Baldwin*[76] had already established that the legal effect of a failure to comply with the requirements of natural justice was that the particular decision was void.

In *Craig v South Australia*[77] the High Court was given another opportunity to consider the *Anisminic* doctrine. This time there were a few more surprises.

The respondent sought relief in the nature of certiorari to quash a decision by a district court judge to stay the prosecution of the appellant. The Full Court of the Supreme Court of South Australia had quashed the stay order for error of law. The High Court (per Brennan, Deane, Toohey, Gaudron and McHugh JJ) allowed the appellant's appeal, finding that the trial judge had not erred but that the Full Court had in having regard to the transcript of the proceedings before the trial judge.

The High Court rejected expansive formulations of "the record" for the purposes of error of law on the face of the record[78] and held that the record did not ordinarily include the transcript of proceedings nor the reasons for the decision unless they were incorporated in the inferior court's order.[79] The Court also stated that the distinction between jurisdictional and non-jurisdictional error had not been discarded in Australia as in England, *at least* as regards inferior courts (as opposed to administrative tribunals).[80]

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75 [1969] 2 AC 147 at 171 and 195, respectively.

76 [1964] AC 40.

77 (1995) 69 ALJR 873.

78 See, for example, *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 515; *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368 at 389-393, 394-395.

79 (1995) 69 ALJR 873 at 879-80. The High Court did, however, acknowledge that from time to time it may be necessary to examine the transcript in order to ascertain the nature of the application that was made. Nevertheless, incorporation of reasons would not be effected merely by using such prefatory words as "accordingly" or "for these reasons".

80 (1995) 69 ALJR 873 at 878.

The Court, after quoting[81] the well-known passage in Lord Reid's speech in *Anisminic* [82] about addressing the wrong issue or asking oneself the wrong question, went on to state:

> In *Anisminic,* the respondent Commission was an administrative tribunal. Read in context, the above comments should, in our view, be understood as not intended to refer to a court of law. That was recognised by Lord Diplock in *In re Racal Communications Ltd* ([1981] AC 374 at 382-383; see also *BHP Petroleum Pty Ltd v Balfour* (1987) 180 CLR 474 at 480-481) and affirmed by the English Divisional Court in *R v Surrey Coroner; Ex parte Campbell* [1982] QB 661 at 675. It is true that Lord Reid's comments were subsequently suggested by Lord Diplock (*O'Reilly v Mackman* [1983] 2 AC 237 at 278) and held by the Divisional Court (*R v Greater Manchester Coroner; Ex parte Tal* [1985] 1 QB 67 at 81-83) to be also applicable to an inferior court with the result that the distinction between jurisdictional error and error within jurisdiction has been seen as effectively abolished in England ... . That distinction has not, however, been discarded in this country ... and, for the reasons which follow, we consider that Lord Reid's comments should not be accepted here as an authoritative statement of what constitutes jurisdictional error by an inferior court for the purposes of certiorari. In that regard, it is important to bear in mind a critical distinction which exists between administrative tribunals and courts of law. ...[83]

The distinction in question was that, in the absence of express statutory authority to the contrary, an administrative tribunal, as opposed to a court of law, lacked authority "either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law".[84] Thus:

> 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.[85]

However, such an error of law would not, in the Court's opinion, ordinarily constitute jurisdictional error in the case of an inferior court:

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81 (1995) 69 ALJR 873 at 877-78.

82 [1969] 2 AC 147 at 171.

83 (1995) 69 ALJR 873 at 878.

84 (1995) 69 ALJR 873 at 878.

85 (1995) 69 ALJR 873 at 878.

> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error. [86]

Be that as it may, the Court also had this to say about jurisdictional error and inferior courts:

> ... jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that [some] particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case. Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern.[87]

The High Court decision in *Craig* is the first occasion on which the Court has displayed an almost unambiguous openness towards the *Anisminic* doctrine of

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[86] (1995) 69 ALJR 873 at 878-9.

[87] (1995) 131 ALR 595 at 601. According to Sir Anthony Mason, the passage "indicates that, even if all that Lord Reid said in *Anisminic* does not apply to inferior courts, [it] may apply if it satisfies the requirement that the error be jurisdictional": "Life in Administrative Law Outside the ADJR Act" [Seminar Paper], *Life in Administrative Law Outside the ADJR Act*, Australian Institute of Administrative Law, NSW Chapter, Sydney NSW, 17 July 1996, p 9. The former Chief Justice was referring to that part of Lord Reid's speech in *Anisminic* in which his Lordship stated (at [1969] 2 AC 171) that a tribunal would exceed its jurisdiction if it, relevantly, "misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it".

extended jurisdictional error, *at least* as regards administrative tribunals. Admittedly, the Court's comments in relation to administrative tribunals - as opposed to inferior courts - are, strictly speaking, obiter. Be that as it may, the following conclusions may reasonably be drawn - albeit somewhat tentatively - from the Court's decision:

1. The traditional distinction between jurisdictional errors of law on the one hand and non-jurisdictional errors of law on the other still exists, at least as regards inferior courts and analogous quasi-judicial statutory tribunals.[88]

2. However, even as regards inferior courts and analogous tribunals, there is still the possibility that such a body *may* commit a reviewable jurisdictional error of the *Anisminic* type (for example, a failure to take into account some matter which ought to have been taken into account). *Ordinarily,* that will not be the case. Much would appear to depend upon whether the error in question may be said to be one on which the decision of the case depends. The answer to that question would appear to be one of degree on the facts of each particular case.[89]

3. Insofar as administrative tribunals are concerned, a jurisdictional error of the *Anisminic* type will be committed by such a body where the error is such that the body's exercise or purported exercise of power is thereby affected.[90]

The types of error identified as potential jurisdictional errors in the context of administrative tribunals would appear to go beyond those types of constructive jurisdictional error identified in such previous cases as *Ex parte Hebburn Ltd; Re Kearsley Shire Council* [91] and *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd.* [92] Those errors were largely confined to such things as fundamental misconstruction of the empowering statute, asking the

88 (1995) 69 ALJR 873 at 878.
89 (1995) 69 ALJR 873 at 878-9.
90 (1995) 69 ALJR 873 at 878.
91 (1947) 47 SR (NSW) 416 per Jordan CJ at 420.
92 (1953) 88 CLR 100.

wrong question, applying the wrong test, and the rejection of evidence or the making of a decision unsupported by the evidence in such a way as to indicate that any one or more of the foregoing had been committed in the course of determining matters going to jurisdiction. The High Court in *Craig* displayed a willingness to also include such matters as the failure to take into account relevant considerations and the unauthorised taking into account of irrelevant considerations.[93]

The Court has, of course, reserved to itself the right to determine when an administrative tribunal's exercise or purported exercise of power has been "affected" by an error. In the words of Professor Wade:

> It comes perilously close to saying that there is jurisdiction if the decision is right, but none if it is wrong.[94]

Also interesting is the implication that an inferior court or analogous body may commit a jurisdictional error of the *Anisminic* type where, for example, it takes into account some matter which it ought not to have taken into account in determining "a question *within* jurisdiction".[95] Clearly, the Court has left the door right open to intervene in an "appropriate" case. Moreover, the Court seems to have blurred the traditional distinction between "questions" and "answers".[96] MacRae has correctly pointed out:

> ...[W]hat the *questions* posed by the statute are must be distinguished from the *answers* to those questions given in the light of the facts and merits of each particular case. Having correctly identified the statutory criteria, the task of applying them to the facts of each case, of weighing the evidence and the merits and of adjudicating between the conflicting interests of the parties, is the very task remitted to the tribunal, and errors made in the performance of that task remain non-jurisdictional in nature.[97]

In theory, at least, provided the court or tribunal asks itself the right question, a so-

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93 In the past, such matters as the taking into account of irrelevant considerations were arguably only jurisdictional where, for example, the subject error occurred in the context of forming a particular "opinion" the existence of which was a statutory condition of the exercise of the relevant power: see, for example, *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 and 432.

94 H W R Wade "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 *L Q Rev* 198 at 211; cf "there is jurisdiction if the decision is right and none if it is wrong": *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 per Lord Sumner at 151.

95 (1995) 69 ALJR 873 at 879 *[emphasis added]*.

96 See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 per Lord Pearce at 195.

97 J K MacRae "Jurisdictional Error: A Post-*Anisminic* Analysis" (1977) 3 *Auckland UL Rev* 111 at 125-6.

called wrong answer should be immune from judicial review, provided that the answer is one that lies within the court or tribunal's jurisdiction. A question *within* jurisdiction, in theory, at least, ought to be even more impregnable, since:

> Jurisdiction to determine a dispute necessarily includes the authority to determine the merits of the dispute.[98]

It would appear that the High Court has all but accepted the reality that there is little *conceptual* basis for distinguishing between jurisdictional and non-jurisdictional errors of law and that, even in its traditional form, the concept of "excess of jurisdiction" can be stretched to embrace virtually any error of law made by a court or tribunal in the course of exercising its jurisdiction.[99]

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98 S A de Smith *Constitutional and Administrative Law* (H Street and R Brazier, eds) [5th ed] (Penguin Books, London, 1985), p 578.

99 Nevertheless, Sir Anthony Mason has written that "Australian law appears now not to conform to English principles of administrative law in terms of the application of Lord Reid's statement in *Anisminic* and in the distinction which Australian law draws between error within jurisdiction and jurisdictional error": Life in Administrative Law Outside the ADJR Act" [Seminar Paper], *Life in Administrative Law Outside the ADJR Act*, Australian Institute of Administrative Law, NSW Chapter, Sydney NSW, 17 July 1996, p 9.

CHAPTER 4

ANISMINIC IN OTHER AUSTRALIAN SUPERIOR COURTS

"... neither was there any error or fault found ..."[1]

Preview

1. Most State and Territory superior courts continue to maintain, or at least pay lip-service to, a distinction between jurisdictional and non-jurisdictional errors of law. Many decisions in which *Anisminic* has been invoked are supportable without reference to *Anisminic* on the basis of the traditional doctrine of jurisdictional error as understood and applied in this country.

2. However, there have been *some* enthusiastic, unashamed and unambiguous endorsements of the *Anisminic* doctrine of extended jurisdictional error by such courts.

3. In addition, there is a considerable body of case law to support the proposition that *Anisminic* has, in fact, been *impliedly* accepted by most Australian superior courts.

Margaret Allars has correctly pointed out that:

> Despite the prevarication of the High Court, there are instances of bold endorsement of the *Anisminic* doctrine by State and Territory Supreme Courts in reviewing a tribunal's taking into account irrelevant considerations or failing to take into account relevant considerations and denial of procedural fairness ... .[2]

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1 Daniel 6:4 (AV).

2 M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990), p 227.

New South Wales

One of the boldest endorsements of the *Anisminic* doctrine of extended jurisdictional error was the New South Wales Court of Appeal decision in *Thelander v Woodward* [3]. In that case, Woodward J, sitting as a royal commissioner, had committed a witness for contempt of the commission for failing to answer questions put to him. In arriving at his decision, the royal commissioner took into account evidence other than what the commission had seen and heard whilst the witness was in the witness box. The Court of Appeal held that the commissioner had travelled outside his jurisdiction by taking into account matters which he had no right to consider and made an order quashing his decision.

Reynolds JA (with whom Moffitt P and Glass JA agreed) said:

> There is ... no question but that the Commissioner embarked upon an inquiry in respect of which he had jurisdiction. It is well settled, however, that a tribunal of limited jurisdiction which properly embarks upon an inquiry within its jurisdiction may nevertheless travel outside that jurisdiction in the course of it. Various formulations have been made as to what errors are to be regarded as coming within this category of jurisdictional error and the question is whether the decision which results is merely erroneous or invalid. The crucial decision which has to be made is whether what is seen to be an error was done within the area of jurisdiction remitted to the tribunal or is properly to be regarded as done outside it: cf per Lord Wilberforce, *Anisminic* [1969] 2 AC 147, at p 207 et seq. ... In the present case ... the Commissioner asked himself the wrong question and travelled outside the remitted jurisdictional area. In making the decision he did, the Commissioner took into account matters he had no right to take into account. Whilst this is not a matter of jurisdiction in the narrow sense, it is within the wider sense as expounded by Lord Reid in *Anisminic* [1969] 2 AC 147, at p 171. For this reason, I think that an order to quash should be granted.[4]

With respect to his Honour, whilst it is clear that the commissioner took into account an irrelevant consideration, it is not entirely clear just what was the "wrong question" which the royal commissioner asked himself. It is also not clear whether the taking into account of the irrelevant consideration was itself the asking the wrong question or something different altogether. In any event, to the extent to which the commissioner did ask himself the wrong question, such an error had been recognised as one going, or potentially going, to jurisdiction before the

[3] [1981] 1 NSWLR 644.

[4] [1981] 1 NSWLR 644 at 655.

Anisminic case.[5]

Nevertheless, the clear and unambiguous statement by the court that the taking into account of an irrelevant consideration - a matter which [the commissioner] "had no right to take into account"[6] - resulted in an excess of jurisdiction is perhaps as bold an endorsement of the *Anisminic* doctrine as one could hope to find.

In *Macksville & District Hospital v Mayze*[7], a decision of the NSW Court of Appeal[8], Kirby P stated that since *Anisminic*:

> it has generally been considered both in England and Australia that a denial or breach of the rules of natural justice is a jurisdictional error which renders the impugned decisions null and void.[9]

His Honour's invocation of *Anisminic* as authority for the proposition stated recalls the oft-cited dicta of Lords Reid and Pearce in *Anisminic* in relation to the jurisdictional effect of a failure to comply with the rules of natural justice.[10] In particular, his Honour's use of the words "jurisdictional error" show more than perfunctory support for the *Anisminic* principle (at least in relation to the legal consequences of a failure to comply with the rules of natural justice). Having said that, his Honour's invocation of *Anisminic* was to some extent unnecessary in any event, as pre-*Anisminic* cases such as *Ridge v Baldwin*[11] had already established that the legal effect of a failure to comply with the requirements of natural justice was that the particular decision was void, but his dicta do tend to suggest support for a broader definition of jurisdictional error.

Be that as it may, in *Darkingung Local Aboriginal Land Council v Minister for Natural Resources [No 2]* [12] Stein J in the Land and Environment Court of New

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5 See, for example, *Board of Education v Rice* [1911] AC 179; *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228; *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416;*Toronto Newspaper Guild v Globe Printing Co* (1953) 3 DLR 561; *R v Minister of Housing and Local Government; Ex parte Chichester RDC* [1960] 1 WLR 587. See also *R v Dunphy; Ex parte Maynes* (1978) 139 CLR 482.

6 [1981] 1 NSWLR 644 at 655.

7 (1987) 10 NSWLR 708.

8 Kirby P, Mahoney and Priestley JJA.

9 (1987) 10 NSWLR 708 at 713.

10 [1969] 2 AC 147 at 171 and 195, respectively.

11 [1964] AC 40.

12 (1987) 61 LGRA 218.

South Wales had this to say about the *Anisminic* doctrine of extended jurisdictional error:

> [I]t is interesting to note that the *Anisminic* doctrine appears to have had little or no impact in Australia. It has been almost totally ignored by Australian appellate courts. Surprisingly, and with few exceptions, it has been little referred to or quoted. Certainly, no Australian court has recognised and applied the abolition of the distinction between jurisdictional and non-jurisdictional errors of law.[13]

His Honour went on to hold that a privative clause[14] which purported to prevent, among other things, judicial review of a ministerial certificate was effective to oust judicial review except in circumstances of an excess of jurisdiction (more-or-less in traditional terms) or an ultra vires act including bad faith in all its connotations but not including judicial review on the grounds of manifest unreasonableness[15], the taking into account of irrelevant considerations, the failure to take account of relevant considerations (unless they happened to be material to bad faith) or review on the basis of any breach of the rules of procedural fairness. His Honour was clearly of the view that jurisdictional error did not extend to those errors of law corresponding with broad or extended ultra vires (other than bad faith or other errors material to bad faith).

Interestingly, in previous proceedings relating to the construction of the same legislation[16] - *Darkingung Local Aboriginal Land Council v Minister for Natural Resources*[17] - Bignold J in the Land and Environment Court of New South Wales appeared to display considerable enthusiasm for the *Anisminic* doctrine of extended jurisdictional error. His Honour, after citing excerpts from the oft-quoted speeches of Lords Reid and Wilberforce from *Anisminic*[18], referred to *Church of Scientology Inc v Woodward*[19] and *Osmond v Public Service Board of New South Wales*[20] as Australian authority for the proposition that, in the absence of clear

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13 (1987) 61 LGRA 218 at 228.

14 Section 36(8), Aboriginal Land Rights Act 1983 (NSW). That subsection provided that a certificate issued by a minister, stating that certain land the subject of a claim under s 36 of that Act was needed or likely to be needed for an essential public purpose, was to be accepted as final and conclusive evidence of the matters set out in the certificate and was not liable to appeal or review.

15 cf *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

16 Section 36(8), Aboriginal Land Rights Act 1983 (NSW).

17 (1985) 58 LGRA 298.

18 [1969] 2 AC 147 at 171 and 210 respectively.

19 (1982) 154 CLR 25.

20 [1984] 3 NSWLR 447.

words, a privative clause would not protect manifest jurisdictional errors, ultra vires acts or a denial of natural justice.[21] His Honour saw those two decisions as reflecting "the high authority with which *Anisminic* is regarded by Australian courts".[22]

With the greatest respect to Bignold J, it is not easy to see how his Honour could regard either of those authorities as judicial support for the *Anisminic* doctrine of extended jurisdictional error. First, the *Scientology* case was decided without reference to the House of Lords decision in *Anisminic.* Secondly, although Glass JA and Kirby P (the latter in dissent) referred to *Anisminic* in *Osmond*, the most that could be said is that the NSW Court of Appeal in that case acknowledged that since *Anisminic* the former distinctions between statutory appeal on a question of law and judicial review for a misdirection in law or statutory misconstruction had become somewhat blurred.[23]

Whilst it is fairly clear that his Honour approved of Lord Diplock's decision in *Re Racal Communications Ltd*[24] in relation to the *Anisminic* doctrine, and favoured a wide interpretation of what constitutes a jurisdictional error, his decision related more to the question of whether the particular statutory provision ousted the jurisdiction of the court to judicially review the conclusive certificiate issued by the minister than the actual grounds upon which the certificate could be declared a nullity. Indeed, having found that the certificate was not entitled to the protection afforded by the relevant statutory provision on the ground that it disclosed an error on its face, it was not necessary for his Honour to decide whether the *Anisminic* doctrine of extended jurisdictional error applied.

As mentioned above, in *Darkingung Local Aboriginal Land Council v Minister for Natural Resources [No 2]*[25] Stein J expressly decided that judicial review of the conclusive certificate was excluded on the basis of:

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21 (1985) 58 LGRA 298 at 324.

22 (1985) 58 LGRA 298 at 325.

23 [1984] 3 NSWLR 447 at 466.

24 [1981] AC 374. His Honour also cited, with apparent approval, *R v HM Treasury* [1985] 1 All ER 589, a case in which it was held that a "conclusive" provision would not prevent judicial review on the ground of "manifest unreasonableness" (cf *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. His Honour also expressed the view that bad faith would also vitiate any decision in relation to the issue of a "conclusive certificate".

25 (1987) 61 LGRA 218.

> manifest unreasonableness, the taking into account of relevant considerations, unless ... they happen to be material to bad faith.[26]

In *Greiner v Independent Commission Against Corruption; Moore v Independent Commission Against Corruption*[27] the New South Wales Court of Appeal used the language of *Anisminic* when framing the form of its declaratory relief (holding that the Independent Commission Against Corruption had exceeded its jurisdiction in concluding that the conduct of the appellants amounted to "corrupt conduct" within the meaning of the relevant legislation[28]) but its majority decision[29] was clearly one based on the traditional doctrine of jurisdictional error, albeit in its more liberal version as developed by the High Court of Australia.[30] In the words of Gleeson CJ, the commission had, among other things, "failed to apply the correct test" and "incorrectly stated the issue that arose for decision, and avoided the problem that was central to that issue".[31] There was also the invocation of a ground analogous to "no evidence" to the effect that there was nothing in the report of the commisioner[32] or in argument before the court which would justify the conclusions of "corrupt conduct".[33]

The *substance* of the decision of the Court of Appeal was that the commision had reached a decision unsupported by the evidence in such a way as to demonstrate that it had misunderstood the test it had to apply in determining matters going to

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[26] (1987) 61 LGRA 218 at 230. His Honour also excluded judicial review on the ground of denial of natural justice (procedural fairness). However, in *Worimi Local Aboriginal Land Council v Minister Administering the Crown Land Act* (1991) 72 LGRA 149, his Honour held that the rules of procedural fairness (relevantly, the hearing rule) applied to a decision by the minister to issue the conclusive certificate. In so doing, he overruled his earlier decision in *Darkingung [No 2]* insofar as it was authority for the proposition that judicial review of the certificate was excluded on the ground of denial of procedural fainess. Subsequently, in *Darkingung Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (L & E Ct, Stein J, No 40078/86, 30 July 1991, unreported), his Honour affirmed his decision in *Darkingung [No 2]* as regards the proposition that judicial review was excluded on the grounds of manifest unreasonableness or the taking into account of irrelevant considerations (in the absence of bad faith).

[27] (1992) 28 NSWLR 125.

[28] Sections 7-9, Independent Commission Against Corruption Act 1988 (NSW).

[29] Gleeson CJ and Priestley JA; Mahoney JA dissenting.

[30] cf *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 455-6; *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen ofAustralia* (1950) 82 CLR 54; *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100; *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338.

[31] (1992) 10 NSWLR 125 at 147.

[32] Commissioner Ian Temby QC.

[33] cf *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100.

jurisdiction.[34] The court made no reference to such *Anisminic* factors as the taking into account of irrelevant considerations.

In *Commissioner of Police v District Court of New South Wales & Anor*[35] the New South Wales Court of Appeal[36] was in no doubt that there was still a relevant distinction to be made between jurisdictional and non-jurisdictional errors of law, despite its earlier decision in *Thelander v Woodward.*[37] In particular, Mahoney JA had this to say about the *Anisminic* doctrine:

> It was suggested that, as the result of the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and other English cases, certiorari now lies to correct any decision of an inferior court, whether apparent on the record or otherwise ... .
>
> The submission recognised that this "is not the position which the Australian courts have arrived at, and in particular is not reflected in any decision of the High Court".
>
> Such a view, if adopted, would allow the equivalent of an appeal for error of law in respect of every inferior court or tribunal and, on one view, whatever be the nature of the error of law. Alternatively, there would be such a review if the error went to the issue before the inferior body. It would render superfluous administrative procedures, so far as they relate to errors of law.
>
> That is not the course which, in general, has been followed by the High Court or this Court. If it is to be taken, it should be taken by the High Court. In so far as it may be relevant, it is a course which, in my respectful opinion, should not be taken as stated and without significant qualification. An error of law going to the nature or extent of the jurisdiction exercised by the inferior court or tribunal is, I think, appropriate for correction by certiorari. Incidental errors of law, or errors relating, for example, to evidence, procedure, or merely collateral matters are not.[38]

In *Walker v Industrial Court of New South Wales & Anor*[39] the New South Wales Court of Appeal, by majority,[40] held that the Full Industrial Court of NSW, which had reversed a decision of a judge in the former Industrial Commission of NSW, had

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34 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120.

35 (1993) 31 NSWLR 606.

36 Kirby P, Mahoney and Clarke JJA.

37 [1981] 1 NSWLR 644.

38 (1993) 31 NSWLR 606 at 640.

39 (1994) 53 IR 121.

40 Meagher and Sheller JJA, Kirby P dissenting.

made a non-jurisdictional error of law in not attaching sufficient weight to a legal argument which was supported by considerable judicial authority. However, the error of law was not, in the opinion of the majority, a jurisdictional one.[41] In the words of Sheller JA (with whom Meagher JA agreed):

> There is a critical difference between the error [the subject of the *PSA* case[42]] and the error claimed to have been made by the Industrial Court in this case. The error [in the *PSA* case], in the opinion of the majority of the High Court, was [the South Australian Industrial Commission's] failure to address the question it had to decide or its prematurely addressing that question. The error was related to the nature or extent of the jurisdiction of the Commission. The error of the Full Industrial Court, which is relied upon, is not so related. ... [T]he majority decision, even if erroneous, was not one made without authority or beyond the authority of the Industrial Court ... . The majority understood the nature of the jurisdiction they had to exercise. It is not enough that the Industrial Court erred in law in making its decision ... .[43]

Interestingly, but immaterially, his Honour cited *Anisminic* as authority for that last proposition of law.[44] However, there was nothing in the majority judgments, nor in the dissenting judgment of Kirby P,[45] to suggest that the Court of Appeal was endorsing the extended range of jurisdictional errors recognised in *Anisminic*. The decision is significant in that the court recognised that there was still an important distinction to be made between so-called jurisdictional and non-jurisdictional errors of law. The court accepted that the error of law made by the majority of the Full Industrial Court would have been disturbed if an appeal lay to the Court of Appeal from their findings. However, there was no such appeal right and, as mentioned above,[46] a privative clause protected the error.

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41 The error, found by the majority to be non-jurisdictional, was protected by a privative clause (s 301, Industrial Relations Act 1991 (NSW)) which ousted the jurisdiction of the Court of Appeal to quash or otherwise correct non-jurisdictional errors on the face of the record.

42 *Public Service Association of South Australia v Federated Clerks' Union of South Australia, South Australian Branch* (1991) 173 CLR 132.

43 (1994) 53 IR 121 at 153-5.

44 Kirby P also cited *Anisminic* somewhat immaterially as an example of the "resistance of supervisory courts to the exclusion of their jurisdiction to require courts and tribunals of limited jurisdiction to keep within that jurisdiction": (1994) 53 IR 121 at 137.

45 Kirby P was of the opinion that the error of law made by the majority in the Full Industrial Court went to jurisdiction. His Honour saw the error as being a constructive refusal or failure to exercise jurisdiction by reason of, relevantly, a misconstruction of the extent of its jurisdiction: see (1994) 53 IR 121 at 139. The reasoning of Kirby P was, however, quite consistent with the liberal version of the traditional doctrine of jurisdictional error: cf *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351.

46 See footnote 25.

In *Rosemount Estates Pty Ltd v Cleland & Ors*[47], a decision of the Land and Environment Court of New South Wales, the applicant company sought a number of declarations, inclucing a declaration that the report, findings and recommendations of the first respondent commissioner were invalid. Waddell AJ, after noting that *Anisminic* had preserved the distinction between "an error of law going to jurisdiction or to compliance with the legal requirements to be fulfilled by the body under review and an error of law committed in the valid exercise of its powers"[48], concluded that it was not open to the court to find invalidity solely on the ground of an error of law made by the commissioner in his interpretation of certain provisions of an environmental planning instrument.[49] In that regard, his Honour said:

> It may be that there is justification to extend the grounds of judicial review to include the making of an error of law in the exercise of jurisdiction which is fundamental to the finding or recommendation of the body reviewed which leads to a manifestly unreasonable result. Lord Diplock contemplated the addition of further grounds of review. However, the question of recognising such an additional ground has not been argued and should not be pursued further.[50]

However, his Honour did proceed to find that the foundation of the commissioner's recommendation that development consent be granted in respect of the operation of an open cut coal mine was the commissioner's finding that the development was permissible with consent, and that that finding was "manifestly unreasonable".[51] His Honour said:

> ... It is clearly required that the recommendations should be, and should be seen to be, fairly based on the findings and the material in the report.

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47 (1995) 86 LGERA 1.

48 (1995) 86 LGERA 1 at 17.

49 His Honour also cited Lord Denning's dictum in *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338 at 346 to the effect that a tribunal may often decide a point of law wrongly whilst keeping well within its jurisdiction.

50 (1995) 86 LGERA 1 at 17. His Honour's comments about "fundamental" errors echo those of Lord Denning MR in *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 at 70: "The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction ... ."

51 (1995) 86 LGERA 1 at 30. The court agreed with the applicant that the proposed development, despite screening, would be an unwelcome visual intrusion on large parts of the countryside, and the commissioner's conclusion that it would not do so was found by the court to be manifestly unreasonable: cf *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234.

> If a recommendation is manifestly unreasonable, considered in this way, it cannot be regarded as complying with the statutory requirements.[52]

His Honour declared that the commissioner's recommendation was not a recommendation for the purposes of the relevant statutory provisions.[53] He also made an order (in the nature of mandamus) that the commissioner exercise according to law the functions required of him.[54]

His Honour's invocation of "*Wednesbury* unreasonableness"[55] as a ground of invalidity - resulting in a finding that the commissioner's jurisdiction in law had been constructively unexercised[56] - was an implicit, if not explicit, acceptance of the *Anisminic* doctrine of extended jurisdictional error.[57]

Victoria

In *R v Small Claims Tribunal and Syme; Ex parte Barwiner Nominees Pty Ltd*[58] the Supreme Court of Victoria (per Gowans J) expressly rejected the view that every error of law made by an inferior tribunal went to jurisdiction. The applicants, relying heavily on *Anisminic,* had argued, among other things, that the tribunal had exceeded its jurisdiction in making an order that a consumer be refunded the purchase price for a defective product without having to return the actual product. Gowans J, whilst acknowledging that the relevant law had not been adverted to at all, appeared to be of the view that the ultimate order was probably wrong in law.[59] However, after quoting at length from the majority judgments in *Anisminic,* his Honour said:

> I do not take these observations to justify the proposition that if a tribunal fails to take something into account which is relevant the result is invalidity. It is only when, by doing so, the tribunal steps outside jurisdiction that nullity is

52 (1995) 86 LGERA 1 at 30.

53 Sections 119 and 101, Environmental Planning and Assessment Act 1979 (NSW).

54 (1995) 86 LGERA 1 at 30.

55 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234.

56 *cf Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.

57 Interestingly, in *Anisminic Ltd v Foreign Compensation Commission & Ors* [1969] 2 AC 147 at 171 and 195, neither of Lords Reid and Pearce actually included in their respective lists of errors of law going to jurisdiction "*Wednesbury* unreasonableness".

58 [1975] VR 831.

59 [1975] VR 831 at 839 and 841. Interestingly, and curiously (in the light of his subsequent finding as to the nature of the subject error of law), his Honour had already held that the tribunal was obliged to apply the principles of the ordinary law of contract to the case before it.

the result.[60]

His Honour decided the case "by reference to earlier Victorian authority"[61], concluding:

> If it appeared from the material that the Tribunal had considered that the law was not relevant at all, or if it was, that it did not authorise its order, or that it had not concluded that it did, there would be a case for treating the order as made without fulfilment of the conditions and therefore without jurisdiction. This was the approach of Smith J in *R v Chairman of General Sessions at Hamilton, ex parte Atterby* [[1959] VR 800]. But there is nothing in the material to show that the Tribunal did not conclude that the law authorised the order made. All that appears is that the Tribunal was itself in error in concluding that the law authorised the order. This is not enough to show a want or excess of jurisdiction.[62]

His Honour, it is submitted, could just as easily have found that the tribunal had made a jurisdictional error of the traditional kind in the form of the tribunal misconstruing the nature of its function[63] or applying a wrong and inadmissible test.[64] Be that as it may, the court was clearly of the view that there remained a category of identifiable unreviewable errors of law.[65]

In *R v Thomas & Ors; Ex parte Sheldons Consolidated Pty Ltd*[66] the Supreme Court of Victoria (per Kaye J) found that the Laundry Conciliation and Arbitration Board, duly appointed and constituted under the Industrial Relations Act 1979 (Vic), had failed to comply with a condition precedent to the board having jurisdiction to embark on conciliation of the subject dispute and that the board had therefore commenced conciliation proceedings "without jurisdiction to do so".[67] His Honour went on to say:

> In circumstances of absence of jurisdiction, the court will intervene by

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60 [1975] VR 831 at 840.

61 R D McInnes "Jurisdictional Review after Anisminic" (1977) 9 *Vict U Well L Rev* 37 at 52.

62 [1975] VR 831 at 841.

63 See, for example, *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432.

64 See, for example, *Estate and Trust Agency (1927) Ltd v Singapore Improvement Trust* [1937] AC 898 at 917.

65 It is has been noted that "the basic premise of His Honour, viz that there are still some errors of law which are not jurisdictional, remains unaffected by a possibly erroneous view as to what are jurisdictional errors of law": E I Sykes, D J Lanham, and R R S Tracey, *General Principles of Administrative Law* (Butterworths, Sydney, 1979), p 47.

66 [1982] VR 617.

67 [1982] VR 617 at 625.

prerogative writ of prohibition: see *Anisminic*....

The error found to have been made by the board could easily have been accommodated within the accepted exception to the traditional doctrine of jurisdictional error, namely, the jurisdictional fact doctrine, without invoking the *Anisminic* doctrine of extended jurisdictional error (or, for that matter, excess of jurisdiction at all).

In *Antoniou v Roper*[68], another decision of the Supreme Court of Victoria, Murphy J struck down a decision of a minister to make an amendment to a planning scheme the purpose and purported effect of which was to prevent certain landowners obtaining a building approval. It was held that the purported amendment was a nullity on the grounds of improper purpose and denial of procedural fairness. It was submitted that the minister had "acted ultra vires his power within the principles expressed in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, 195."[69] His Honour, after citing the salient extracts from the judgments of Lords Reid[70] and Pearce[71] in relation to the various ways in which a lack or an excess of jurisdiction may arise, struck down the minister's decision. The decision shows more than perfunctory enthusiasm for the *Anisminic* doctrine of jurisdictional error, even though the same decision could have been reached using the doctrine of broad or extended ultra vires[72] and without *any* invocation of the doctrine of jurisdictional error at all. Indeed, his Honour's invocation of *Anisminic* seemed more directed at pointing out that a decision is a nullity where there is a breach of the rules of procedural fairness, bad faith, improper purpose or the taking into account of irrelevant considerations. In that regard, the references to *Anisminic* were quite unnecessary.[73]

In *Clarkson v Director of Public Prosecutions & Ors*[74] the court, in dealing with a

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68 (1990) 70 LGRA 351.

69 (1990) 70 LGRA 351 at 372.

70 [1969] 2 AC 147 at 171.

71 [1969] 2 AC 147 at 195.

72 See, for example, *Westminster Corporation v London and North Western Railway Co* [1905] AC 426; *Thompson v Randwick Municipal Council* (1950) 81 CLR 87; *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997; *Balmain Association Inc v Planning Administrator of Leichhardt Council* (1991) 25 NSWLR 615; *Warringah Shire Council & Ors v Pittwater Provisional Council* (1992) 76 LGRA 231.

73 See, for example, *Ridge v Baldwin* [1964] AC 40; *Thompson v Randwick Municipal Council* (1950) 81 CLR 87.

74 [1990] VR 745.

case concerning the availability of relief in the nature of certiorari for an alleged denial of procedural fairness, noted that:

> Today "jurisdiction" and "want of jurisdiction" have been afforded greater importance by the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, *dicta* from which case has been regularly followed. The report of this decision occupies some 109 pages in the law reports and it would seem an impertinence to purport to summarise the judgment.[75]

The court, after citing the salient extracts from the judgments of Lords Reid[76] and Pearce[77] in relation to the various ways in which a lack or an excess of jurisdiction may arise, accepted that a denial of procedural fairness would render a trial a nullity, as being in excess of jurisdiction. Once again, the court's invocation of *Anisminic* seemed more directed at pointing out that a decision is a nullity where there is, relevantly, a breach of the rules of procedural fairness. In that regard, the references to *Anisminic* were again unnecessary.[78]

In *Director of Public Prosecutions & Anor v His Honour Judge Fricke*[79] the Supreme Court of Victoria[80] invoked *Anisminic* insofar as that case was authority for the proposition that there was still a relevant distinction to be made between jurisdictional and non-jurisdictional errors of law. The defendant had been convicted of having driven a motor vehicle in excess of the speed limit. His appeal to a higher court[81] was allowed on the ground that because he had not personally attended at the relevant registry the charge sheet and summons had not been statutorily filed. On application to the Supreme Court for judicial review, that decision was upheld. On appeal to the Full Court, the appeal was dismissed on the ground that the county court judge:

> having had jurisdiction to engage in the re-hearing had ... as much jurisdiction to decide the case wrongly as he had to decide it correctly. To adapt the language of Lord Wilberforce in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, at p. 210, his Honour was not

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75 [1990] VR 745 at 753 per Murphy J.

76 [1969] 2 AC 147 at 171.

77 [1969] 2 AC 147 at 195.

78 See *Ridge v Baldwin* [1964] AC 40; *Mahon v Air New Zealand Ltd* (1983) 50 ALR 193; *Balmain Association Inc v Planning Administrator of Leichhardt Council* (1991) 25 NSWLR 615.

79 [1993] 1 VR 369.

80 Per Fullagar, Tadgell and J D Phillis JJ.

81 The County Court.

> making a decision outside his area; he was simply making a wrong decision within his area. There being no appeal from his decision, its correctness or otherwise is not to the point in determining whether he is amenable to judicial review.[82]

The court had earlier held[83] that the mere fact that a tribunal had made a mistake of law, even as to the proper construction of a statute, did not necessarily constitute a jurisdictional error of law.[84]

The decision cannot reasonably be seen to be an unequivocal invocation of *Anisminic* since it was well established before *Anisminic* that there was a valid distinction to be made between reviewable errors of law going to jurisdiction and non-reviewable errors of law within jurisdiction.[85] If anything, by the time the Full Court dealt with this matter, the House of Lords decision in *Anisminic* was anything but authority for the proposition attributed to it by the court in this case.[86]

Queensland

In *R v Small Claims Tribunal; Ex parte Amos*[87] the Supreme Court of Queensland made reference in passing to *Anisminic*, proceeding to hold that any error made by the tribunal was a non-jurisdictional one.[88] Indeed, the court went further, taking the view that the tribunal had jurisdiction to determine its jurisdictional facts itself - in this particular case, whether a particular payment was a "bond". Kelly J said:

> It was open to the Tribunal to determine on whatever material was before it that the money was paid by way of bond and that consequently it did have jurisdiction with respect to the claim.[89]

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82 [1993] 1 VR 369 at 376.

83 [1993] 1 VR 369 at 376.

84 See, for example, *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Aickin J at 268; *R v Minister of Health* [1939] 1 KB 232 at 245-6.

85 See, for example, *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors & Draughtsmen of Australia* (1950) 82 CLR 54.

86 See *Re Racal Communications Ltd* [1981] AC 374 at 382-3; *O'Reilly v Mackman* [1983] 2 AC 237 at 278; *R v Greater Manchester Coroner; Ex parte Tal* [1985] 1 QB 67 at 81-3.

87 [1978] Qd R 127.

88 A similar approach was adopted in *R v Bjelke-Petersen; Ex parte Plunkett* [1978] Qd R 305. In that case, it was held that any error by a magistrate as to the admission of evidence or in findings on it was non-jurisdictional.

89 [1978] Qd R 127 at 131.

South Australia

In some South Australian superior court decisions the *Anisminic* doctrine of extended jurisdictional error has been referred to with apparent approval but without any explicit judicial endorsement.[90]

In *R v Industrial Commission of South Australia; Ex parte Minda Homes Inc*[91] Bray CJ of the Supreme Court of South Australia was of the view that the commission's refusal to allow amendment of a defective notice of appeal constituted a failure to take a relevant matter into account (namely, the statutory provision empowering the commission to give leave to amend).[92] The commission was ordered to consider the grant of leave to appeal. His Honour's approach, in holding that the error went to jurisdiction, shows some enthusiasm for Lord Reid's concept of extended jurisdictional error.

In *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Ltd (No 2)*[93] Bray CJ made the comment that *Anisminic* or, more particularly, the judgment of Lord Reid in that case:

> may well represent the law of the future, even if it does not, as I think it very probably does, represent the law of the present.[94]

Be that as it may, in *R v Ward; Ex parte Bowering*[95] the Supreme Court of South Australia held that the distinction between jurisdictional and non-jurisdictional errors of law remained and cited *Anisminic* alone as authority for that proposition. The court held that a ruling by a judge to refuse to admit evidence was an error within jurisdiction.

In *Federated Clerks' Union of Australia (South Australian Branch) v Industrial*

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90 See, for example, *R v Industrial Commission (South Australia); Ex parte Adelaide Milk Supply Co-operative Ltd (No 2)* (1978) 18 SASR 65 at 69; *R v Ward; Ex parte Bowering* (1978) 20 SASR 424; *Federated Clerks' Union of Australia (South Australian Branch) v Industrial Commission of South Australia* (1990) 53 SASR 524.

91 (1975) 11 SASR 333.

92 (1975) 11 SASR 333 at 337.

93 (1978) 18 SASR 65.

94 (1978) 18 SASR 65 at 69.

95 (1978) 20 SASR 424.

Commission of South Australia [96] the Supreme Court of South Australia (Full Court) quashed an order made by the Full Commission of the Industrial Commission of South Australia entertaining, but refusing, an application for leave to appeal from a decision of an industrial registrar. Both the Full Court, and the High Court on appeal[97], concluded that the commission had erred in regarding the proposed appeal as involving no more than an appellable review of an unstructured discretion when in fact it required a rehearing on the merits. Although the High Court based its decision on grounds other than those identified in *Anisminic,* the Supreme Court appears to have approached the matter[98] on the basis of that jurisdictional error identified in *Anisminic* where a tribunal has "based its decision on some matter which, under the provisions setting it up, it had no right to take into account".[99]

In *State of South Australia v Judge Russell & Anor* [100] the Supreme Court of South Australia[101] held by majority[102] that a trial judge had made a jurisdictional error in determining that the second respondent was unable to obtain legal representation "through no fault of his own" because not all of the facts had been properly investigated and the test in *Dietrich v The Queen*[103] had been misunderstood. Matheson J (with whom Prior J was in "substantial agreement"[104]) cited with apparent approval the oft-quoted passage from Lord Reid's speech in *Anisminic*[105] in relation to excess of jurisdiction. Olsson J, in dissent, relied upon more traditional authorities[106], concluding that the trial judge had "correctly directed himself and ... arrived at those findings of fact which, on his view, fairly arose from the

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96 (1990) 53 SASR 524.

97 See *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132.

98 See *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 per Dawson and Gaudron JJ at 160.

99 [1969] 2 AC 147 per Lord Reid at 171.

100 (1994) 62 SASR 288. This was the decision which went on appeal to the High Court of Australia and was ultimately reversed by that Court: see *Craig v South Australia* (1995) 69 ALJR 873.

101 In Banco (Matheson, Prior and Olsson JJ).

102 Matheson and Prior JJ.

103 (1992) 177 CLR 292.

104 (1994) 62 SASR 288 at 298.

105 [1969] 2 AC 147 at 171.

106 *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 147-8; *Glenvill Homes Pty Ltd v Builders Licensing Board* [1981] 2 NSWLR 608 at 616; *R v Bjelke-Petersen; Ex parte Plunkett* [1978] Qd R 305 at 311; *Dickinson v Perrignon* [1973] 1 NSWLR 72 at 85; *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420; *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 243.

evidence".[107]

Western Australia

The Supreme Court of Western Australia still apppears to make a distinction between jurisdictional and non-jurisdictional errors of law.

In *Carter & Ors v Drake*[108] the court, in dealing with a "no certiorari" privative clause, drew the distinction between the two types of errors of law. Malcolm CJ said:

> The effect of a provision that a decision shall not be "quashed or called in question" in any court is to oust the jurisdiction of a court to issue a writ of certiorari on the ground of error of law within jurisdiction but not on the ground of jurisdictional error ... .[109]

His Honour went on to cite a lengthy passage from the judgment of Brennan J (as he then was) in *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch*[110] to the effect that the High Court had not accepted Lord Diplock's view that the distinction between jurisdictional and non-jurisdictional errors of law had for all practical purposes been abolished.

In *Re Western Australian Trotting Association & Ors; Ex parte Chambers*[111] the Supreme Court of Western Australia held[112] that the approach taken by the Racing Penalties Appeals Tribunal (which had heard and dismissed an appeal against the appellant's conviction and penalty in respect of an alleged offence of administering a "drug" to a horse) that a certain substance (sodium bicarbonate) was a "drug" as defined was a misconstruction of the definition and so constituted an error of law on the face of the record. Malcolm CJ, after referring to *Anisminic,* noted that the High Court had "not accepted the views of Lord Diplock and Lord Denning regarding the obliteration of the distinction between jurisdictional and non-jurisdictional error".[113]

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107 (1994) 62 SASR 288 at 302.
108 (1992) 9 WAR 82.
109 (1992) 9 WAR 82 at 90.
110 (1991) 173 CLR 132 at 141-2.
111 (1992) 9 WAR 178.
112 Per Malcolm CJ, Wallwork and White JJ agreeing.
113 (1992) 9 WAR 178 at 184.

His Honour cited[114] the comments of Gibbs CJ in *R v Gray; Ex parte Marsh*[115] that there is a "well recognised distinction between an error made by a tribunal in the course of deciding a matter, on the one hand and an absence of jurisdiction on the other".[116] In the end, his Honour found it unnecessary to determine whether the error of law was jurisdictional or non-jurisdictional, as the error appeared plainly on the face of the record.[117] However, the error, involving a misconstruction of a definition in the rules,[118] could have been accommodated as a jurisdictional error within the traditional doctrine of jurisdictional error in its more liberal form.[119]

In *Archer v Howell & Anor (No 2)*[120] the court, in dealing with a case of alleged denial of procedural fairness with respect to disciplinary action taken in relation to a legal practitioner, said in relation to the traditional distinction between the two types of errors:

> In *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 Lord Reid (at 171) and Lord Wilberforce (at 210) indicated that the distinction was to an extent blurred, but the Australian courts still maintain the distinction between an error in the course of deciding the issue and an error that goes to absence of jurisdiction. It can be seen more in practice in those cases where the statute contains what has been called privative sections: see *Hockey v Yelland* (1984) 157 CLR 124 at 130; *Houssein v Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371, per Gibbs CJ; *Public Service Association (SA) v Federated Clerks' Union (SA Branch)* (1991) 173 CLR 132 at 139-141.[121]

The court went on to hold that certiorari would lie to correct an error of law on the face of the record provided the error (as in the case at hand) went to the power or jurisdiction of the inferior tribunal in such a substantial manner as to affect the entire hearing. In that regard, the court said:

> It also follows that in a case where certiorari will lie because a person has been denied a fair or proper hearing, distinctions between error of law and

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114 (1992) 9 WAR 178 at 184.

115 (1985) 157 CLR 351.

116 (1985) 157 CLR 351 at 371.

117 (1992) 9 WAR 178 at 185-6.

118 (1992) 9 WAR 178 at 195.

119 See, for example, *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432; *R v Foster; Ex parte Crown Crystal Glass Co Pty Ltd* (1944) 69 CLR 299 at 310.

120 (1992) 10 WAR 33.

121 (1992) 10 WAR 33 at 41 per Rowland J.

error going to jurisdiction lose importance.[122]

In *Ex parte Minister for Corrective Services*[123] the Supreme Court of Western Australia[124] held that the Promotions Appeal Board established under the Industrial Relations Act 1979 (WA) had, on the face of the record, misdirected itself regarding its powers and had therefore made a jurisdictional error in failing properly or at all to exercise its jurisdiction. The board had not made a full inquiry into the claims for promotion by the applicant (as required by the relevant legislation) and was found to have "misdirected itself on a point of law with the result that [its] purported decision ... was not an effective exercise of [its] jurisdiction".[125] Somewhat curiously, and unnecessarily, the court cited *Anisminic*[126] as authority for the proposition that a failure to exercise jurisdiction is not a lack or an excess of jurisdiction but nonetheless a form of jurisdictional error susceptible to judicial review.[127]

In *Western Australian Museum & Anor v Information Commissioner*[128] the Supreme Court of Western Australia (per White J) found that the respondent had, among other things, erred in finding that the public interest in the discharge of her duties under the Freedom of Information Act 1992 (WA) outweighed the public interest in withholding sensitive or confidential information without properly assessing the particular case on its merits. White J stated:

> An error of law made by a tribunal may amount to a jurisdictional error, even though the tribunal had jurisdiction to embark upon the inquiry, if the error amounts to "applying the wrong test" or having regard to irrelevant considerations: see *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371-372, 374-375, 378-379, 395; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, 195, 210.[129]

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122 (1992) 10 WAR 33 at 42 per Rowland J.

123 (1993) 9 WAR 534.

124 Malcolm CJ, Kennedy and Rowland JJ.

125 (1993) 9 WAR 534 per Kennedy J at 541. See *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-3; *Ex parte Hebburn Pty Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420 per Jordan CJ; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 178 per Aickin J.

126 [1969] 2 AC 147 at 171, 195.

127 (1993) 9 WAR 534 at 540. Cf *Public Service Association of South Australia v Federated Clerks' Union of Australia,South Australian Branch* (1991) 173 CLR 132.

128 (1994) 12 WAR 417.

129 (1994) 12 WAR 417 at 423-424.

Once again, the errors found to have been made by the respondent could easily have been accommodated within the traditional doctrine of jurisdictional error, liberally interpreted, without the need to invoke *Anisminic.*

Tasmania

The effect of *Anisminic* in Tasmania appears to have been very insubstantial.

In *R v Dixon; Ex parte Ridler*[130] the Supreme Court of Tasmania held that, contrary to the decision of a magistrate, an appellant against the grant by a minister of a lease or permit in relation to marine farming was not limited to the grounds which gave standing to object and that the magistrate was obliged to consider any relevant matter put forward against the granting of the application. Underwood J concluded that the magistrate had:

> misconstrued the nature and scope of his jurisdiction, on the basis that he held that his inquiry was limited in the case of each appellant to the question of whether his or her livelihood or use of the waters would be adversely affected by the issue of the permit.[131]

The report of the decision discloses that the court's attention was referred to, among other authorities, *Ex parte Hebburn Ltd; Re Kearsley Shire Council*[132] and *Anisminic.* However, it is unclear as to the precise basis on which the court's decision was reached. The decision is certainly supportable without reference to *Anisminic* on the basis that the magistrate had, among other things, "misconceived his function".[133]

Northern Territory

A robust endorsement of the *Anisminic* doctrine of extended jurisdictional error occurred in the Supreme Court of the Northern Territory decision in *R v Liquor Commission of the Northern Territory & Ors; Ex parte Pitjantjatjara Council Inc &*

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130 (1993) 2 Tas R 42.

131 (1993) 2 Tas R 42 at 59.

132 (1947) 47 SR (NSW) 416.

133 See *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 455-6; *Rv Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54; *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100; *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338.

Anor.[134]

The court found that the Liquor Commission of the Northern Territory had exceeded its jurisdiction in not taking into account a matter which it was required to take into account in considering whether to grant an application for a licence. Under the relevant statute the commission was required to have regard to, among other things, "the needs and wishes of the community". The court (per Muirhead J) found that the commission had reached its conclusion without considering the needs and wishes of the Aboriginal people who formed part of the community contemplated by the statute.[135]

The court found that the commission's error "went to its jurisdiction" and that the commision had therefore "exceeded its jurisdiction in granting the licence".[136] Muirhead J stated that the relevant principles were "plainly stated by Lord Reid in *Anisminic*"[137] and he then proceeded to quote[138] Lord Reid's oft-cited dictum concerning the various ways in which a tribunal may exceed its jurisdiction.[139]

Interestingly, his Honour had already held that the commission's error appeared plainly on the face of the record.[140] Accordingly, the error was in any event reviewable under the doctrine of error of law on the face of the record even if it was seen as only an error within jurisdiction. Further, the error was, in any event, arguably jurisdictional in the liberal version of the traditional doctrine in the sense that the commission could be said to have "misconceived its function" or addressed itself to the wrong issue.[141] Thus, his Honour's invocation of *Anisminic* was, to some extent, unnecessary. Nevertheless, the decision shows more than perfunctory support for the reasoning and substance of the *Anisminic* doctrine. As Enright has pointed out:

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134 (1984) 31 NTR 13.

135 (1984) 31 NTR 13 at 18.

136 (1984) 31 NTR 13 at 22.

137 (1984) 31 NTR 13 at 22.

138 (1984) 31 NTR 13 at 22.

139 [1969] 2 AC 147 at 171.

140 (1984) 31 NTR 13 at 22.

141 See *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 455-6; *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54; *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100; *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338.

> This [decision] shows judicial approval for *Anisminic* but the decision is weakened because the error would probably be jurisdictional error in the pre-*Anisminic* sense.[142]

Australian Capital Territory

In *R v Insurance Commissioner; Ex parte Saltergate Insurance Co Ltd* [143] Northrop J, in granting relief by way of mandamus on the ground that relevant considerations had not been taken into account by the decision maker, followed *Anisminic* and some High Court decisions.[144]

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[142] C Enright, *Judicial Review of Administrative Action* (Branxton Press, Sydney, 1985), p 638.

[143] (1976) 12 ACTR 1.

[144] *Murphyores Inc Pty Ltd v Commonwealth of Australia* (1976) 136 CLR 1; *Falkirk Insurance Society Ltd v Life Assurance Commissioner* (1976) 50 ALJR 324.

CHAPTER 5

THE APPARENT FAILURE AND IMPLICIT SUCCESS OF THE *ANISMINIC* REVOLUTION IN AUSTRALIA

THE AUSTRALIAN EXPERIENCE ASSESSED

" 'Contrariwise,' continued Tweedledee, 'if it was so, it might be; and if it were so, it would be: but as it isn't, it ain't. That's logic.' "[1]

Preview

1. Australian courts have found the *Anisminic* decision largely unnecessary, having already developed their own liberal interpretation of the traditional doctrine of jurisdictional error.

2. Australian courts, for the most part, have been content to proceed on a case-by-case basis, guided only by certain nebulous and self-serving parameters, all of which are readily capable of manipulation and therefore uncertain in their application.

3. The development and promulgation of this distinctively Australian pragmatic and flexible approach to judicial review on the ground of jurisdictional error is traced through four pre-*Anisminic* Australian cases.

Introduction

The general approach of Australian superior courts to judicial review on the grounds of jurisdictional error and error of law has been decidedly non-dogmatic, pragmatic and flexible.

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[1] Lewis Carroll, *Through the Looking-Glass*, ch 4.

There would appear to be a number of reasons why the Australian courts have been reluctant to formally embrace the *Anisminic* doctrine of extended jurisdictional error, despite the fact that in Australia "a decision of the House of Lords has always commanded very great respect".[2]

Perhaps the main reason is that, for the most part, Australian courts have found the decision unnecessary. Margaret Allars has stated:

> Prior to the decision in *Anisminic,* the High Court had developed a liberal version of the traditional ground of jurisdictional error. The liberal version allowed for jurisdictional error to be established not only where a tribunal misconstrued its empowering Act, but also where it had "misconceived its function" or addressed itself to the wrong issue. After the *Anisminic* decision the High Court maintained a liberal and therefore very flexible approach to traditional jurisdictional error, an approach incorporating the test of whether a tribunal has misconceived its function or addressed itself to the wrong issue, yet leaving scope for the existence of non-jurisdictional errors of law which may not be reviewed under this ground of review.[3]

By the time the Lords handed down their decision, there was already in this country a "large body of Australian authority on error of law which is cited to the [High] Court and followed by it".[4] In the case of the States:

> the tendency to follow local authority is even stronger. Some of the State courts scarcely need to look beyond the decisions of their illustrious predecessors, and most of them rarely look further than those of the High Court.[5]

Another reason suggested as an explanation for the Australian courts' reluctance to expressly embrace *Anisminic* is their supposedly less interventionist approach. McMillan has written:

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2 D G Benjafield and H Whitmore, *Principles of Australian Administrative Law* [4th ed] (Law Book Co, Sydney, 1971), p 312. Indeed, until *Parker v R* (1963) 111 CLR 610 the High Court tended to follow decisions of the House of Lords at the expense of its own opinions and cases: see *Piro v W Foster & Co Ltd* (1943) 68 CLR 313 at 320. The approach of State courts was, until fairly recently, quite similar; in the case of NSW, see *Kelly v Sweeney* [1975] 2 NSWLR 720; *Life Savers (Australasia) Ltd v Frigmobile Pty Ltd* [1983] 1 NSWLR 431 at 433-4; *X v Amalgamated Television Services Pty Ltd (No 2)* (1987) 9 NSWLR 575 at 584.

3 *Halsbury's Laws of Australia* [vol 1] (Butterworths, Sydney, 1991), p 13,549.

4 V Bath "The Judicial Libertine - Jurisdictional and Non-jurisdictional Error of Law in Australia" (1983) 13 *F L Rev* 13 at 16.

5 V Bath "The Judicial Libertine - Jurisdictional and Non-jurisdictional Error of Law in Australia" (1983) 13 *F L Rev* 13 at 16.

> The Australian reality, it was often overlooked, was usually more predictable and less interventionist. A predominant theme was the pertinence of judicial restraint in penetrating the exercise of a broad administrative discretion.[6]

However, it is submitted, with respect, that all of the statements set out above, although demonstrably correct, ignore the fact that there is a considerable body of Australian case law to support the proposition that *Anisminic* has in fact been *impliedly* accepted by most Australian superior courts. Enright has pointed out:

> But despite lack of clear and authoritative judicial endorsement in Australia it seems *Anisminic* has been accepted. Actions speak louder than words and it appears that for decision makers which are not courts stricto sensu *Anisminic* has been implicitly accepted. Where a body is not a court then ultra vires both simple and extended is applied. No attempt is made to classify these decision makers as judicial or administrative and appropriate jurisdictional error or ultra vires accordingly. By dint of this practice jurisdictional error has been confined to courts.[7]

Enright's proposition deserves careful consideration, particularly his assertion that the various components of the doctrine of ultra vires tend to be applied to the decisions of both administrative and quasi-judicial bodies, as opposed to inferior courts in respect of which the traditional doctrine of jurisdictional error, presumably in its so-called liberal version, applies.

At the outset, it is certainly not correct to say that the doctrine of jurisdictional error has been confined exclusively to courts.[8] However, there is certainly considerable judicial authority to support his view that the doctrine of ultra vires is often invoked in preference to the doctrine of jurisdictional error in circumstances where arguably the latter was the more appropriate ground of review.[9] In some cases, it is not entirely clear which of the two doctrines is being invoked. For example, in *Rosemount Estates Pty Ltd v Cleland & Ors* [10] Waddell AJ, in the Land and Environment Court of New South Wales, struck down the recommendation of a

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6 J McMillan "Developments under the ADJR Act: The Grounds of Review" (1991) 20 *F L Rev* 50.

7 C Enright, *Judicial Review of Administrative Action* (Branxton Press, Sydney, 1985), pp 638, 639.

8 See, for example, *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100; *Potter v Melbourne and Metropolitan Tramways Board* (1957) 98 CLR 337; *Permanent Trustee Co of NSW Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125.

9 See, for example, *Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No 1)* (1987) 77 ALR 577; *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 45; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1980) 144 CLR 45.

10 (1995) 86 LGERA 1.

commissioner of inquiry on the ground of "*Wednesbury* unreasonableness"[11] without any express reference to excess of jurisdiction.[12] In *Coco v R*[13] six of the justices of the High Court[14] invoked the language of jurisdictional error whilst the seventh, Toohey J, implicitly applied the doctrine of ultra vires.[15] It would appear that much depends on how the case is presented to and argued before the reviewing court, and an applicant for relief often has a choice in that regard.

In several cases, primarily mandamus cases, the extended ultra vires ground of irrelevant considerations has been successfully invoked (in cases of an actual or constructive wrongful failure or refusal to exercise jurisdiction, as opposed to a strict excess of jurisdiction), thus bypassing the esoteric distinctions between the doctrine of jurisdictional error in its traditional and extended forms.[16] In one such case, *Falkirk Assurance Society Ltd v Life Insurance Commissioner*[17], Gibbs J (as he then was) included the "irrelevant considerations" ground of invalidity in his three tests for exceeding jurisdiction.[18]

The maintenance by most Australian superior courts of the traditional distinction between errors going to jurisdiction and errors within jurisdiction - a distinction "so fine"[19] it is "hair-splitting"[20] - has also allowed judges to intervene "where intervention would otherwise be precluded".[21] McMillan has astutely pointed out that:

> It has long been a feature of administrative law that ambiguous standards and contrasting principles provide the margin between restraint and intervention, validity and invalidity. That choice is familiar in the error of

11 cf *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234.

12 His Honour, however, had earlier in his judgment invoked the concepts of jurisdiction and error of law in relation to another alleged ground of invalidity: see (1995) 86 LGERA 1 at 16-17.

13 (1994) 179 CLR 427.

14 Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ.

15 See, in particular, his Honour's comments at (1994) 179 CLR 453 and 457.

16 See, for example, *R v Industrial Commission of South Australia; Ex parte Minda Homes Inc* (1975) 11 SASR 333; *Murphyores Inc Pty Ltd v Commonwealth of Australia* (1976) 136 CLR 1; *Falkirk Assurance Society Ltd v Life Insurance Commissioner* (1976) 50 ALJR 324; *R v Insurance Commissioner; Ex parte Saltergate Insurance Co Ltd* (1976) 12 ACTR 582.

17 (1976) 50 ALJR 324.

18 (1976) 50 ALJR 324 at 329.

19 *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 per Lord Denning MR at 70.

20 S A de Smith "Judicial Review in Administrative Law: The Ever-Open Door?" (1969) 27 *Camb L J* 161 at 164.

21 V Bath "The Judicial Libertine - Jurisdictional and Non-jurisdictional Error of Law in Australia" (1983) 13 *F L Rev* 13 at 46.

> law/error of fact distinction, and the jurisdictional error/error within jurisdiction dichotomy. What recent developments have done is to infuse that choice or contrast more extensively throughout the grounds of review.[22]

The inherent vagueness of the traditional distinction affords a reviewing court the opportunity to intervene in "appropriate" cases, whilst declining to interfere in others:

> Judicial review for error going to jurisdiction and scrutiny of error within jurisdiction call for, and in general have evoked, materially different attitudes. In cases of jurisdictional excess, the movement of modern English and Commonwealth law is towards scrupulous control. On the other hand, where the irregularity complained of is within jurisdiction, the courts exercise greater restraint and show, for the most part, a preference for detachment to intervention.[23]

However, what is an "appropriate" case for judicial intervention? Australian courts, for the most part, have been content to proceed on a case-by-case basis, guided only by such nebulous and self-serving parameters as "misconstruing the statute the source of jurisdiction", "misconceiving one's duty", "failing to comply with some requirement essential to its valid or effectual performance", "not applying oneself to the question which the law prescribes", "misunderstanding the nature of the opinion to be formed" and "being actuated by extraneous considerations", all of which are "readily capable of manipulation and ... therefore uncertain in [their] application".[24]

Whilst continuing to pay lip service to the traditional distinction between the two types of errors of law[25], but at the same time adopting a frustratingly pragmatic approach to what constitutes "the record" for the purposes of a particular

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[22] J McMillan "Developments Under the ADJR Act: The Grounds of Review" (1991) 20 *F L Rev* 50 at 51.

[23] G L Peiris "Patent Error of Law and the Borders of Jurisdiction: The Commonwealth Experience Assessed" (1984) 4 *Legal Studies* 271 at 277.

[24] J A Smillie "Judicial Review of Administrative Action - A Pragmatic Approach" (1980) 4 *Otago L Rev* 417 at 422.

[25] See, eg, *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 per Brennan J at 141; *Craig v South Australia* (1995) 69 ALJR 873 per Brennan, Deane, Toohey, Gaudron and McHugh JJ at 878.

application for certiorari [26], Australian courts have reserved the right to pronounce validity or invalidity as the case may require while appearing to be cautiously and responsibly non-interventionist. The fact is, however, that:

> [i]f the court considers that the tribunal has been guilty of an error of sufficient importance to warrant the decision being quashed, it will have no difficulty describing the irregularity as a jurisdictional error ... .[27]

The development and promulgation of this distinctively Australian "liberal and therefore very flexible approach to traditional jurisdictional error"[28] can be traced through four pre-*Anisminic* Australian cases: *R v War Pensions Entitlement Appeal Tribunal & Anor; Ex parte Bott* [29], *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [30], *Ex parte Hebburn Ltd; Re Kearsley Shire Council* [31], and *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* .[32]

Case Study No 1: *R v War Pensions Entitlement Appeal Tribunal & Anor; Ex parte Bott* [33]

The tribunal, after hearing evidence on a statutory appeal[34], requested two independent medical specialists to examine the appellant and to report the result to the tribunal. After receiving the report (which was adverse to the appellant), the tribunal resumed its consideration of the appeal in the presence of the appellant's representative, but the appellant himself was refused admission. The report was read, but cross-examination upon it was not allowed. The appellant's appeal was disallowed by the tribunal.

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[26] See, eg, *Hockey v Yelland* (1984) 157 CLR 124 at 143 per Wilson J (who stated that there was no fixed rule which required the same answer to be given in every case as to what constituted "the record") ; *Craig v South Australia* (1995) 69 ALJR 873 at 879 per Brennan, Deane, Toohey, Gaudron and McHugh JJ. "The determination of the precise documents which constitute 'the record' of the inferior court for the purposes of a particular application for certiorari is ultimately a matter for the court hearing the application": *Craig* at 879.

[27] J A Smillie "Judicial Review of Administrative Action - A Pragmatic Approach" (1980) 4 *Otago L Rev* 417 at 434.

[28] M Allars, *Halsbury's Laws of Australia* [vol 1] (Butterworths, Sydney, 1991), p 13,549.

[29] (1933) 50 CLR 228.

[30] (1944) 69 CLR 407.

[31] (1947) 47 SR (NSW) 416.

[32] (1953) 88 CLR 100.

[33] (1933) 50 CLR 228.

[34] Section 45K(7), Australian Soldiers' Repatriation Act 1920 (Cth).

The majority of the High Court of Australia[35] held that the course the tribunal took did not offend against the rules of procedural fairness or, to use the phrase oft-invoked in the case, "substantial justice"[36]. Rich, Dixon and McTiernan JJ said:

> A writ of mandamus does not issue except to command the fulfilment of some duty of a public nature which remains unperformed. If the person under the duty professes to perform it, but what he actually does amounts in law to no performance because he has misconceived his duty or, in the course of attempting to discharge it, has failed to comply with some requirement essential to its valid or effectual performance, he may be commanded by the writ to execute his function according to law *de novo,* at any rate if a sufficient demand or request to do so has been made upon him. In the case of a tribunal, whether of a judicial or an administrative nature, charged by law with the duty of ascertaining or determining facts upon which rights depend, if it has undertaken the inquiry and announced a conclusion, the prosecutor who seeks a writ of mandamus must show that the ostensible determination is not a real performance of the duty imposed by law upon the tribunal. It may be shown that the members of the tribunal have not applied themselves to the question which the law prescribes, or that in purporting to decide it they have in truth been actuated by extraneous considerations, or that in some other respect they have so proceeded that the determination is nugatory and void. ... The correctness or incorrectness of the conclusion reached by the tribunal is entirely beside the question whether a writ of mandamus lies. It is also beside the question that the determination, although not void, is yet one which, because of some failure to proceed in the manner directed by law, or of some collateral defect or impropriety, is liable to be quashed by a Court which on appeal, certiorari, or other process is competent to examine it ... .[37]

The majority found that there was no foundation for the issue of mandamus as the tribunal, it was found, had not conducted itself improperly. Not being a court of law, it was not bound by any rules of evidence and was not required to act on sworn testimony only. Further, the tribunal had not abdicated its duty by its action in relation to the report of the medical specialists.[38]

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35 Rich, Starke, Dixon and McTiernan JJ (Evatt J dissenting).

36 cf *Smith v The Queen* (1878) LR 3 App Cas 614 at 623.

37 (1933) 50 CLR 228 at 242-3. The majority, in the final two statements set out above, clearly recognised that the court in judicial review proceedings is not concerned with the "merits" of the particular matter and that relief by way of mandamus is not directed to such matters as errors *within* jurisdiction which may be correctable by statutory appeal or by certiorari where the errors appear plainly on the face of the tribunal's record.

38 Evatt J found that the tribunal had not accorded "substantial justice" to the appellant. Interestingly, the tenor of his dissenting judgment (at (1933) 50 CLR 251-7) is more consistent with subsequent developments in relation to procedural fairness than are the views espoused by the majority in relation to that matter: see *Ridge v Baldwin* [1964] AC 40; *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222; *Kioa v West* (1985) 159 CLR 550; *Johns v Australian Securities Commission & Ors* (1993) 67 ALJR 850.

The lasting significance of the decision, despite the paucity of judicial authority cited in support[39], is the high-level recognition accorded to the proposition that relief by way of mandamus, and possibly other prerogative relief as well[40], will lie where, for example, an inferior tribunal "misconceives its duty"[41], "fail[s] to comply with some requirement essential to its valid or effectual performance"[42], "not applies itself to the question which the law prescribes"[43] or is "actuated by extraneous considerations".[44]

The case has been cited with approval - either in its own right or otherwise - in numerous cases throughout the years, including *Dickinson v Perrignon*[45], *Ex parte Hebburn Ltd; Re Kearsley Shire Council*[46], *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch*[47],and *Ex parte Minister for Corrective Services*[48].

Case Study No 2: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [49]

Wages were frozen in Australia during the Second World War. However, a provision[50] of the National Security (Economic Organisation) Regulations (Cth)[51] allowed alteration of a rate of wages if an industrial authority was "satisfied that the rates of remuneration ... [were] anomalous" and the new award was approved by

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39 Only one judicial authority - *R v Nicholson* (1899) 2 QB 455 - was cited by Rich, Dixon and McTiernan JJ who were jointly responsible for the major oft-cited utterance on judicial relief for constructive jurisdictional error and that case was, in any event, largely immaterial to their Honours' thesis. The other judge in the majority, Starke J, cited some 8 authorities, only one of which is now adjudged to be of lasting significance (*Local Government Board v Arlidge* [1915] AC 120).

40 Rich, Dixon and McTiernan JJ, at 243, viewed the errors as so serious that they would render any determination "nugatory and void" and distinguished them from some other "collateral defect or impropriety". Clearly, their Honours saw the errors as jurisdictional in nature and effect.

41 cf (1933) 50 CLR 228 at 242.

42 (1933) 50 CLR 228 at 242.

43 cf (1933) 50 CLR 228 at 242.

44 (1993) 50 CLR 228 at 243.

45 [1973] 1 NSWLR 72.

46 (1947) 47 SR (NSW) 416.

47 (1991) 173 CLR 132.

48 (1993) 9 WAR 534.

49 (1944) 69 CLR 407.

50 Regulation 17(1)(b).

51 Statutory Rules 1942 No 76.

the responsible minister. An increased rate of wages was awarded, in purported reliance upon that provision, to shift workers at certain collieries.[52] The employer company challenged the award on a writ of prohibition to the High Court.

Latham CJ (with whom the other members of the court agreed) stated:

> [W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts.[53]

and:

> 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 power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.[54]

In other words, if the opinion actually formed is not, in the view of the reviewing court, correctly based in law, then the necessary opinion does not exist.[55]

The Chief Justice also said:

> A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power ... .[56]

The court found that some of the rates of wages in question may have been such that there were reasons, even good reasons, for altering them, but that alone was

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52 The Central Industrial Authority appointed under s 29 of the Coal Production (War-time) Act 1944 (Cth) had referred the claim to one James Connell, a Local Industrial Authority appointed under s 33 of the Act, for investigation and settlement.

53 (1944) 69 CLR 407 at 430.

54 (1944) 69 CLR 407 at 432.

55 See also *Ex parte Howells; Re McCulloch* (1949) 49 SR (NSW) 238 at 241.

56 (1944) 69 CLR 407 at 430. However, the mere fact that an inferior court or tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute a jurisdictional error: see *R v Minister of Health* [1939] 1 KB 232 at 245-6; *Dickinson v Perrignon* [1973] 1 NSWLR 72 per Street CJ at 85; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Aickin J at 268; *Re Coldham & Ors; Ex parte Brideson* (1989) 166 CLR 338 at 349. The erroneous application of the law to the situation in hand or misapprehension of general principles of law does not necessarily constitute an error of law affecting the basis of jurisdiction: see, eg, *R v Small Claims Tribunal and Syme; Ex parte Barwiner Nominees Pty Ltd* [1975] VR 831; *Walker v Industrial Court of New South Wales & Anor* (1994) 53 IR 121.

not to be regarded as evidence of an "anomaly":

> Claims for a change in rates of remuneration, whether made by employers or employees, are normally based upon a contention that the existing rates are for some reason unfair or wrong.[57]

However,

> Unless, in addition, it is shown that the rates in question are incongruous with an existing rule, it cannot be said that the existence of an anomaly is established.[58]

Relief in the nature of prohibition was granted by the court.

In a well-reasoned dissenting judgment, McTiernan J said:

> There is in my opinion nothing to show that Mr Connell could not have been duly satisfied that the rates which he altered ... were anomalous. The evidence I think confirmed the supposition that he was duly satisfied that those rates were anomalous.
>
> The evidence given by the mine-workers could, I think, have reasonably satisfied a fair-minded arbitrator that the work ... involves substantially the same risks and strain and had practically the same incidents as to the work to which the "extra payment in relation to high places" was applicable; that the pegged rates for the work ... were disparate in relation to the pegged rate for the work carrying the extra payment; and that he could have been reasonably satisfied that the pegged rates ... deviated from a rule, which it would be quite legitimate to apply, that there should be a fair proportion between the rates of pay applicable to workers engaged in practically the same field and incurring substantially the same risks, and it was therefore fair and reasonable to say that such pegged rates were anomalous.[59]

It is submitted, with respect, that it was "reasonably open" to Mr Connell to be satisfied that the rates of remuneration in question were anomalous. In that regard, the majority's view that unless it could be shown that the rates in question were incongruous with an existing rule it could not be said that the existence of an anomaly was established appears to be an unnecessary interpolation or "gloss" on the relevant statutory provisions. The majority's decision has all the hallmarks of a court finding a question of law - and a jurisdictional one at that - where the matter is

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[57] (1944) 69 CLR 407 at 433.

[58] (1944) 69 CLR 407 at 433.

[59] (1944) 69 CLR 407 at 451.

deemed to have been incorrectly decided by the tribunal and is one in respect of which the reviewing court is of the opinion, rightly or wrongly, that it is more equipped to decide.

The case is, nevertheless, an important one and has often been cited with approval.[60] The decision goes further than that in the *War Pensions* case[61] in that the court displayed a preparedness to review the exercise by an inferior tribunal of a *subjective* discretion to determine the existence of its jurisdiction. Thus, where, for example, such a tribunal takes into account some extraneous consideration, or otherwise misconstrues the statute giving it power, in determining the existence of its jurisdiction, it will have misconceived its duty.

Case Study No 3: *Ex parte Hebburn Limited; Re Kearsley Shire Council/Ex parte J & A Brown & Abermain Seaham Collieries Limited; Re Kearsley Shire Council*[62]

Two companies appealed to a magistrate against the council's assessment of certain lands for a local lighting rate under section 123 of the Local Government Act 1919 (NSW). The council had defined, pursuant to section 123(2) of that Act, a lighting district within which a local rate to defray the cost of lighting public places should be levied, before proceeding to make the rate by resolution of council.

The council then levied the rate by service of rate notices upon persons liable to pay the rate. The two companies were served with rate notices in respect of the four parcels of land with which they were respectively concerned.

Section 123 of the Local Government Act 1919, as then in force[63], provided as follows:

> (1) Where the council of a municipality or shire proposes to levy any local rate for the purpose of defraying the cost of lighting public places the provisions of this section shall apply.
>
> (2) The council shall, in the manner prescribed, define a lighting

[60] See, eg, *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416; *Foley v Padley* (1984) 154 CLR 349; *Szelagowicz v Stocker* (1994) 35 ALD 16.

[61] *R v War Pensions Entitlement Appeal Tribunal & Anor; Ex parte Bott* (1933) 50 CLR 228.

[62] (1947) 47 SR (NSW) 416.

[63] Section 123 was repealed by Act No 19 of 1945, s 8(a): see (1947) 47 SR (NSW) 416 at 418.

district within which such rate shall be levied.

(3) Any person who will, if such lighting district be adopted, be liable to pay any such rate on land within such lighting district may within one month after service of the rate notice appeal to the nearest court of petty sessions against the inclusion of that land therein.

(4) The court shall hear and decide such appeal.

(5) The court shall, in deciding the appeal, consider whether that land is within that portion of the area which will derive benefit from the expenditure of the rate.

(6) The decision of the court shall not be subject to appeal.

(7) The boundaries of any lighting district may be altered by the council at any time provided that the procedure herein prescribed for the definition of a lighting district shall, *mutatis mutandis,* be followed and that the same right of appeal shall apply.[64]

The applicant companies argued that where portion only of a parcel of land would derive benefit from the expenditure of the rate, only that portion should be included within the lighting district. The council submitted that if any portion of a parcel would derive benefit from the rate, the whole parcel had to be included in that district.[65]

The magistrate dismissed the companies' appeals, finding as a fact that:

> the subject lands in all cases were directly benefited by the lights as to part thereof, that as a consequence they were benefited as a whole, and that they therefore came within the provisions of [s]ection 123, sub-section (5) of the Local Government Act, 1919 ... ."[66]

Jordan CJ (with whose judgment Street J (as he then was) concurred[67]) said:

> I think it plain enough ... that the magistrate adopted the argument submitted ... for the Council, namely, that it necessarily followed, as a matter of law, from the fact that portion only of a parcel of the land derived benefit from the lighting of a public place or places, that the whole of the parcel must be included in the lighting district notwithstanding that the rest of the parcel received no benefit from the lighting. ...[68]

64 See (1947) 47 SR (NSW) 416 at 417.

65 See (1947) 47 SR (NSW) 416 at 417.

66 (1947) 47 SR (NSW) 416 at 419. The magistrate's reasons were furnished after the matter came before a judge in the first instance on return of rules *nisi* for mandamus.

67 See (1947) 47 SR (NSW) 416 at 423.

68 (1947) 47 SR (NSW) 416 at 419.

It was submitted on behalf of the applicant companies that the learned magistrate "did not apply his mind"[69] to the proper question but "misdirected himself as to the question he had to decide".[70] The correct question, according to the companies, was that contained in s 123(5) of the Act, namely, "whether *that* land is within that portion of the area which will derive benefit from the expenditure of the rate" *[emphasis added]*.[71] The companies argued that the question the magistrate dealt with was "whether any portions of the lands in question were within the portion of the Shire deriving benefit from the expenditure of the rate".[72] The magistrate thus put the "wrong question" to himself; having found that portion of the lands in question was within the area and portion outside, the magistrate, it was submitted, "failed to exercise a discretion as to which part should be exempted".[73] In short, the magistrate, the companies argued, had "misconceived what the section required him to do".[74]

On behalf of the council, it was submitted that s 123(6) of the Act prevented the issue of mandamus.[75] The learned magistrate was the person to decide questions of fact and questions of law and even if the magistrate decided the law wrongly, which was not admitted, the court could not interfere.[76] The magistrate "did not misdirect himself in law".[77] As a matter of statutory construction, the words "that land" where occurring in s 123 of the Act meant "the land subject to the one assessment". The magistrate had to see if the land rated derived benefit from the expenditure of the rate. It was conceded, the council argued, that *some* of the subject land did benefit from that expenditure. Further, if the magistrate could determine that only some of the land benefited, it was said on behalf of the council

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69 See (1947) 47 SR (NSW) 416 at 418.

70 See (1947) 47 SR (NSW) 416 at 418.

71 (1947) 47 SR (NSW) 416 at 418.

72 See (1947) 47 SR (NSW) 416 at 418.

73 See (1947) 47 SR (NSW) 416 at 418. The applicant companies relied on *R v War Pensions Entitlement Appeal Tribunal & Anor; Ex parte Bott* (1933) 50 CLR 228 (at 242) in relation to misconception of duty and constructive failure to perform a public duty.

74 See (1947) 47 SR (NSW) 416 at 418.

75 The "no appeal" (or "finality") privative clause in question would not, in any event, have prevented the court from reviewing the magistrate's decision on any of the established grounds of judicial review; at best, the provision would only have been effective to oust any statutory right of appeal which might otherwise have been available under the Act: see *Kydd v Liverpool Watch Committee* [1908] AC 327; *Piper v St Marylebone Licensing JJ* [1928] 2 KB 221; *R v Agricultural Land Tribunal (South Eastern Area); Ex parte Hooker* [1952] 1 KB 1.

76 See *Ex parte Susan Austen* (1897) 18 NSWLR 216.

77 See (1947) 47 SR (NSW) 416 at 418.

that there was no provision in the Act for the issue of fresh rate notices. Finally, *even if* the magistrate was wrong, it was, the council submitted, "only a mistake in law ... [a] mere error of law ... only one in interpreting a difficult section"[78] not amenable to correction by the court; the error, if there was one, "in no way led the magistrate to refrain from deciding the question which the statute required him to decide".[79]

Jordan CJ was "unable to agree with [that] submission".[80] The Chief Justice went on to say:

> ... I think the scheme of the section to be this. It is, in the first place, for the Council to determine what public places it will light and how it will light them. The Council must then define the district, called a lighting district, consisting of the lands which will, in its opinion,derive benefit from the lighting. It may then make a local lighting rate, and levy it on the persons who are *prima facie* liable for the rate. But any such person may appeal to a magistrate against the inclusion in the lighting district of relevant land, on the ground that it will derive no benefit from the lighting. It follows that if the Court allows the appeal as to any land that land becomes excluded from the lighting district, and the particular local lighting rate is not payable in respect of it.
>
> I can see nothing in the language of the section to justify the conclusion that if one small corner of a large parcel of land which the Council has included in the lighting district receives some benefit from the lighting, but the rest of it derives none, the fact that the corner benefits makes the rest which does not "land which will derive benefit from the expenditure of the rate."
>
> Yet it appears from the learned magistrate's report that he regarded the problem set for him, by the section as that of determining whether any part of the land the subject of an appeal would derive benefit from the lighting, it following, if it would, that the whole of it must necessarily be included in the scheme, whether the rest of it would derive any benefit or not. In so doing, I think, with all respect, that he misunderstood the question which the section invested him with jurisdiction to decide, which was whether any, and if so what part, of the land the subject of an appeal would derive benefit and should therefore be included in the lighting district, and whether any, and if so what part of it, would not derive benefit, and should therefore be excluded.[81]

His Honour, whilst in no doubt that "the mere fact that a tribunal has made a

78 See (1947) 47 SR (NSW) 416 at 418-9.

79 (1947) 47 SR (NSW) 416 at 419. In relation to mandamus, it was submitted on behalf of the council that a mere error of law on the part of the magistrate did not give a right to relief by way of mandamus: see *R v Cotham* [1898] 1 QB 802 at 806.

80 (1947) 47 SR (NSW) 416 at 419.

81 (1947) 47 SR (NSW) 416 at 419-20.

mistake of law, even as to the proper construction of a statute, does not necessarily constitute a constructive failure to exercise jurisdiction"[82], said in a now famous and oft-cited dictum:

> But there are mistakes and mistakes; and if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply "a wrong and inadmissible test": *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [[1937] AC 898 at 917]; or to "misconceive its duty," or "not to apply itself to the question which the law prescribes": *The King v. War Pensions Entitlement Appeal Tribunal [;Ex parte Bott]* [(1933) 50 CLR 228 at 242-3]; or "to misunderstand the nature of the opinion which it is to form": *The King v. Connell [;Ex parte Hetton Bellbird Collieries Ltd]* [(1944) 69 CLR 407 at 432], in giving a decision in exercise of its jurisdiction or authority, a decision so given will be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law: *R. v. Board of Education* [[1910] 2 KB 165].[83]

The Chief Justice found that the magistrate had not determined the appeals according to law; accordingly, the magistrate's jurisdiction was left in law constructively unexercised.

Davidson J adopted a similar approach, saying:

> Two questions then arise, namely, whether the proper interpretation was placed upon the section of the Act; and second, whether if the magistrate's conclusion was wrong his error is open to correction by a prerogative writ of mandamus.[84]

As to the first question, his Honour stated:

> There is nothing to suggest that if some small portion only on a large holding falls within the ambit of benefit the residue must carry a penalty for nothing. A suggestion has been offered in argument that there are no means available for severance of the rate which is struck annually. But any such defect is the responsibility of the Council which should exercise the degree of care necessary to avoid such difficulties so far as possible. The provision for alterations of the boundaries of lighting districts favours this point of view.[85]

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[82] (1947) 47 SR (NSW) 416 at 420. See *R v Minister of Health* [1939] 1 KB 232 at 245-6.

[83] (1947) 47 SR (NSW) 416 at 420.

[84] (1947) 47 SR (NSW) 416 at 421-2.

[85] (1947) 47 SR (NSW) 416 at 422.

His Honour then proceeded to review the principles upon which relief by way of mandamus is issued. Certain determinations would be immune from prerogative relief (whether by way of mandamus, certiorari or otherwise):

> But the determination must be a real and not merely an ostensible performance of the duty cast by law upon the tribunal. Failure in this respect may appear if it be shown that the tribunal's decision has been actuated by extraneous considerations or that its members have not really applied their minds to the question the law has prescribed: *The King v. War Pensions Entitlement Appeal Tribunal* [(1933) 50 CLR 228 at 242, 243]. The latter of these defects may occur owing to a wrong construction of the Act that imposed the duty, or by following other decisions with misleading results: *R. v. Board of Education* [[1910] 2 KB 165 at 179-180]; *Board of Education v. Rice* [[1911] AC 179]; *R. v. St. George's, Southwark, Vestry* [(1887) 19 QBD 533]. Each case must depend upon its own circumstances and the ultimate test is to be found in the terms of the statute. If the statutory provisions are disregarded by consideration of extraneous matters or owing to a misinterpretation in mistake of the law there is either a wrongful assumption or refusal of jurisdiction as the case may be: *Ex parte Martin* [(1923) 23 SR 411 at 415]. The same principle is applicable in ascertaining whether for purposes of prohibition there has been a wrongful assumption of jurisdiction: *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [[1937] AC 898 at 906]; *The King v. Connell [;Ex parte Hetton Bellbird Collieries Ltd]* [(1944) 69 CLR 407 at 431].

Davidson J concluded that the magistrate "did not apply his mind to the real question prescribed by the statute" with the result that there had been a "denial of jurisdiction".[86]

But, with all respect to their Honours, is it that obvious that the learned magistrate "misunderstood the question which [he had] to decide"[87] or "did not apply his mind to the real question"?[88] The question for determination was that contained in s 123(5) of the Local Government Act 1919:

> ... whether that land is within that portion of the area which will derive benefit from the expenditure of the rate.

It is clear from the report made by the magistrate that he certainly sought to answer that question:

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86 (1947) 47 SR (NSW) 416 at 423. His Honour's use of the expression "denial of jurisdiction" is presumably a reference to a constructive failure to exercise jurisdiction, as opposed to an excess of jurisdiction: cf Jordan CJ at 420.

87 (1947) 47 SR (NSW) 416 per Jordan CJ at 420.

88 (1947) 47 SR (NSW) 416 per Davidson J at 423.

> After hearing the evidence ... and after making a personal inspection ... I came to the conclusion ... that the subject lands in all cases ... came within the provisions of [s]ection 123, sub-section (5) of the Local Government Act, 1919, that is, that the lands were within that portion of the area (*i.e.* the Shire) which derived benefit from the expenditure of the rate.[89]

If there was any "misunderstanding" at all as to the question to be answered, it surely pertained to the words "that land" where occurring in s 123(3) and (5) of the Act. In that regard, the magistrate took the view that those words were a reference to a "parcel of land", so that if any portion of a parcel would derive benefit from the expenditure of the rate the whole parcel would be subject to the rate. The applicant companies, and the Supreme Court on appeal, were of the opinion that the words "that land" referred to the whole or any part of the land included within a parcel of land.

Admittedly, the words were ambiguous and the interpretation adopted by the magistrate could certainly lead to an anomalous result of the type described by Jordan CJ, where:

> one small corner of a large parcel of land which the Council has included in the lighting district receives some benefit from the lighting, but the rest of it derives none,[90]

but was it so self-evident in this case that the error in construction went to jurisdiction? The problem with the Supreme Court's decision can best be summed up in the words of Murphy J in *R v Dunphy; Ex parte Maynes*[91]:

> The interpretation placed on the ... provisions by the [court] was fairly open to it. At the most, it has made some error in interpreting them. It stretches the concept of jurisdiction too far to treat the decision as having been made without jurisdiction. ... If an error of law ... can be so easily treated as a misconception of its own jurisdiction and therefore an absence of jurisdiction, this Court assumes a freewheeling power to interfere ... whenever it appears to it that some error of law has been made ... .[92]

It is, with respect, all too self-serving, as well as begging the question in any event, to talk about "asking the wrong question" or "not applying one's mind to the real

89 See (1947) 47 SR (NSW) 416 at 419.
90 (1947) 47 SR (NSW) 416 at 420.
91 (1978) 139 CLR 482.
92 (1978) 139 CLR 482 at 497.

question". It would have been more instructive, and accurate, in this particular case, to have spoken in terms of a fundamental "error of law on which the decision of the case depends".[93] Even the pre-*Anisminic* reference of Davidson J to the "consideration of extraneous matters"[94] was capable at least of more meaningfully embracing the error found to have been made by the learned magistrate; in other words, the magistrate took into account an irrelevant consideration, namely, the view that certain land could derive benefit as a whole from the expenditure of a rate where part only of that land would derive actual benefit from that expenditure.

The interpretation placed by the magistrate on the section, with respect, arguably was fairly open to him. In the final analysis, a "wrong" decision on the facts ends up being characterised as a constructive jurisdictional error because the magistrate apparently "misunderstood the question which [he had] to decide" and "did not apply his mind to the real question". As Wade has perceptively pointed out:

> Almost any misconstruction of a statute or order can be represented as ... "addressing themselves to the wrong question."[95]

Nevertheless, the case has had considerable impact. In particular, the dictum of Jordan CJ[96], in which his Honour referred to expressions used in various cases, including the *War Pensions* case[97] and *R v Connell*[98], to describe a constructive jurisdictional error has been cited with approval in numerous subsequent cases.[99] The concept of a constructive failure or refusal to exercise jurisdiction is, it is submitted, a self-servingly useful device for permitting judicial intervention in circumstances where the court is of the opinion that a "wrong" decision has been made because, for example, extraneous factors supposedly have been taken into account.

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93 cf *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 per Lord Denning MR at 70.

94 (1947) 47 SR (NSW) 416 at 423.

95 H W R Wade "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 *L Q Rev* 198 at 211.

96 (1947) 47 SR (NSW) 416 at 420.

97 *R v War Pensions Entitlement Appeal Tribunal & Anor; Ex parte Bott* (1933) 50 CLR 228.

98 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407.

99 See, eg, *Dickinson v Perrignon* [1973] 1 NSWLR 72 per Street CJ in Eq at 85; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Aickin J at 268; *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 per Brennan J at 143-4; *Ex parte Minister for Corrective Services* (1993) 9 WAR 534 per Malcolm CJ at 541.

Case Study No 4: *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* [100]

The board, pursuant to s 23(1) of the Stevedoring Industry Act 1949 (Cth), was empowered to cancel or suspend the registration of an employer where, after such inquiry as it thought fit, the board was satisfied that the employer was "unfit to continue to be registered as an employer" or had "acted in a manner whereby the proper performance of stevedoring operations ha[d] been interfered with".

The company, a registered employer under the Act, was made the subject of an inquiry by a duly authorised delegate of the board[101] on the general ground that it had not exercised proper supervision over waterside workers employed by it.[102]

The court[103] acknowledged that the question whether prohibition should go to the board was "one of considerable difficulty ... a question of nicety".[104] The board's power to cancel or suspend registration:

> does not depend upon the fulfilment of one or other of [the] conditions as a matter of objective truth or reality. It depends upon the satisfaction of the board or its delegate that one or other of the conditions does exist. If the board or its delegate is subjectively "satisfied" that the prosecutor company is either unfit to continue to be registered or has acted in a manner whereby the performance of stevedoring operations has been interfered with, then the power exists ... to cancel or suspend the company's registration no matter how erroneous in point of fact the opinion of the board or its delegate may be. But it does matter if the opinion is erroneous in law. That is to say the board must understand correctly the test provided or prescribed by s 23(1) and actually apply it. It is only when the board or its delegate is satisfied of the existence of facts which do amount in point of law to what the section means by unfitness or by acting in a manner whereby the proper performance of stevedoring operations is interfered with that the board or its delegate reaches a position where one or other of them may lawfully

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100 (1953) 88 CLR 100.

101 See s 11, Stevedoring Industry Act 1949.

102 "Australia's waterfront workers have seldom enjoyed a sympathetic press and too often have been subject to unfair attacks by anti-Labor politicians": P Morris, foreword, in R Lockwood, *Humour is Their Weapon: Laugh with the Australian Wharfies* (Ellsyd Press, Sydney, 1985), p 7. Be that as it may, there was considerable industrial unrest on the Australian waterfront in the 1940s and '50s.

103 Per Dixon CJ, Williams, Webb and Fullagar JJ.

104 (1953) 88 CLR 100 at 117.

exercise the authority which s 23(1) purports to bestow.[105]

The court went on to say:

> If on the facts no basis could exist for exercising the power it would be a proper exercise of this court's jurisdiction to award a writ of prohibition ... . But the chief point of difficulty in the case lies in the distinction between on the one hand a mere insufficiency of evidence or other material to support a conclusion of fact when the function of finding the fact has been committed to the tribunal and on the other hand the absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the existence of the power depends. It is not enough if the board or the delegate of the board, properly interpreting paras (a) and (b) of s 23(1) and applying the correct test, nevertheless satisfies itself or himself on inadequate material that facts exist which in truth would fulfil the conditions which one or other or both of those paragraphs prescribe. The inadequacy of the material is not in itself a ground for prohibition. But it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other conditions that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact.[106]

The court found that there was "no affirmative ground" for saying that the company was unfit to continue to be registered as an employer and "none" for saying that it had acted in a manner whereby the proper performance of stevedoring operations had been interfered with.[107] As to the meaning of the word "unfitness", it was a quality connoting:

> deficiencies of [an] organisation or equipment of its undertaking, because of the want of skill, knowledge or experience in those controlling or managing the undertaking, because of practices adopted in dealing with the employment of labour and no doubt for many other reasons relevant to the capacity or competency of the company to fulfil its functions or duties as an employer in the business of stevedoring ... entirely different things from faults or errors of omission or commission which a foreman or foremen, a supervisor or supervisors, may commit from time to time.[108]

The board was found to have resorted to the power to cancel or suspend merely "as a means of enforcing upon employers the requirement ... to maintain a

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105 (1953) 88 CLR 100 at 117. The court also stated, at 117, that there was nothing wrong in the board's entering into, in effect, a preliminary inquiry to ascertain whether the requisite jurisdictional fact existed (ie "whether a case exists for the exercise of its powers").

106 (1953) 88 CLR 100 at 118-120.

107 (1953) 88 CLR 100 at 120.

108 (1953) 88 CLR 100 at 121.

supervision of gangs of waterside workers [to] ensure that the members do not cease or suspend work or leave the ship or wharf without discovery and that their absence is reported".[109] Although the court did not speak in terms of "improper purpose", it is submitted that the board's finding was tantamount to a finding that the board had exercised the power for an improper purpose, that is, the board was "not exercising its powers for the purposes for which they were granted but for what is in law an ulterior purpose".[110] Such an abuse of power is a ground of ultra vires in its broad or extended form and arguably would go to jurisdiction under the *Anisminic* principle.[111]

It could also have been said that the board had regard to irrelevant or extraneous considerations, namely, the apparent "lax supervision" over workers employed by the company and the board's policy to impose upon employers the requirement as to supervision referred to above.[112] Indeed, the court in effect said as much when it held that the board had exercised the power for a purpose not sanctioned by the empowering legislation. To use the language of *Anisminic,* did not the board:

* "make an inquiry which the Act did not empower them to make" [113];

* "base their decision on a matter which they had no right to take into account" [114]; and

* have "no jurisdiction to put further hurdles" in the company's way? [115]

The High Court held, as a matter of legal principle, that an inferior tribunal "must understand correctly the test provided or prescribed" by the statutory grant of jurisdiction and "the purpose of the function committed to the tribunal [must not be]

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109 (1953) 88 CLR 100 at 121.

110 *Thompson v Randwick Municipal Council* (1950) 81 CLR 87.

111 Interestingly, in the House of Lords decision in *Anisminic* neither Lord Reid nor Lord Pearce included improper purpose in their respective lists of errors of law going to jurisdiction.

112 (1953) 88 CLR 100 at 121.

113 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147 per Lord Reid at 174.

114 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147 per Lord Reid at 174.

115 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147 per Lord Pearce at 201.

misconceived".[116] The board was found to have misunderstood the statutory test and misconceived the purpose of the power. The Foreign Compensation Commission was found to have misunderstood the statutory test contained in Article 4 (1) (b) (ii) of the Order in Council. Both tribunals can be said to have misconceived the purpose of their respective functions: the board sought to impose a requirement, admittedly in the form of a sanction, to give effect to a policy which was inconsistent with and not authorised by the empowering legislation, and the commission sought to impose an unauthorised requirement, namely, that where an applicant for compensation was the original owner it had to also prove that both it *and* any successor in title were British nationals.

The High Court stated that a jurisdictional error would be committed by such a tribunal where it either rejected evidence or made a decision unsupported by the evidence *in such a way* as to indicate that it had misunderstood the test it had to apply in determining matters going to jurisdiction, applied the wrong test or was not in reality satisfied as to the requisite matters.[117] The board was found by the High Court to have made a decision unsupported by the evidence ("No ground for saying that the company is 'unfit'"[118]) in such a way as to indicate that it had misunderstood the relevant statutory test. The commission likewise was found by the Lords to have made a decision unsupported by the evidence ("There is no doubt that on these matters [Anisminic] satisfied the commission"[119]) in such a way as to indicate that it too had misunderstood the relevant statutory test.

Both bodies misconstrued the empowering legislation in a very fundamental way. The error of law in each case was found to go outside jurisdiction. In one case no basis existed for the exercise of a power to cancel or suspend. In the other case no basis existed to deny a claim for compensation. In each case, the relevant body, to

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116 (1953) 88 CLR 100 at 117 and 120.

117 (1953) 88 CLR 100 at 120. The question whether evidence ought to be accepted is, in itself, a question of fact, not law: see *Azzopardi v Tasman UEB Industries Ltd* [1985] 4 NSWLR 139. However, the making of findings, or the drawing of inferences, in the absence of evidence is an error of law: *Azzopardi*. Further, unreasonable fact finding can occasionally amount to "*Wednesbury* unreasonableness" (cf *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223): see, eg, *Fuduche v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 117 ALR 418; *Minister for Immigration and Ethnic Affairs v Teo* (1995) 57 FCR 194. Extreme cases of rejection of evidence or "wrong" findings can go to jurisdiction if the error in question indicates, for example, that the tribunal has asked itself the wrong question or applied the wrong test: *Stevedoring Industry* at 120; *Teo* at 208.

118 (1953) 88 CLR 100 at 121.

119 [1969] 2 AC 147 per Lord Pearce at 201.

use the language of the High Court in *Craig v South Australia*[120], fell into an error of law which caused it:

> to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material ... to make an erroneous finding [and] reach a mistaken conclusion[121],

such that its exercise or purported exercise of power was adversely affected.

The High Court decision in the *Stevedoring Industry* case is, it is submitted, as bold an endorsement of the *Anisminic* principle as one can hope to find, notwithstanding differences in language, thought-forms and approach.

The present writer submits that it may fairly be concluded that Australian superior courts, using their own "local" version of the *Anisminic* principle, can categorise virtually every error of law as jurisdictional and intervene and strike down any exercise or purported exercise of power which they deem to be an abuse of power just as easily as their British counterparts. As Enright pointed out, actions do speak louder than words.[122]

Why not then go all the way and formally abolish for all practical purposes the distinction between jurisdictional and non-jurisdictional errors of law?

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120 (1995) 69 ALJR 873.

121 (1995) 69 ALJR 873 per Brennan, Deane, Toohey, Gaudron and McHugh JJ at 878; cf *Minister for Immigration and Ethnic Affairs v Teo* (1995) 57 FCR 194 at209 where it was said that although the decision of the Immigration Review Tribunal was flawed for error of law, either because a decision could not reasonably have been reached to that effect, or because of the absence of a jurisdictional fact, the decision would not be impugned on the basis that a discretion had miscarried by failure to take into account relevant considerations.

122 See C Enright, *Judicial Review of Administrative Action* (Branxton Press, Sydney, 1985), p 638.

CHAPTER 6

AN ALTERNATIVE APPROACH

"And ye shall know the truth, and the truth shall make you free."[1]

Preview

1. The distinction between jurisdictional and non-jurisdictional errors of law has, for all *practical* purposes, been abolished, both in England and in Australia and no useful purpose is served by continuing to pay lip-service to the traditional doctrine.

2. No inferior court or tribunal *ought* to be able to make an error of law on which the case depends.

3. The *Anisminic* doctrine needs to be resisted, since it would too easily invite the reviewing court to impose its own view in respect of a particular matter upon the inferior court or tribunal.

4. What is needed is the adoption of a realistic yet *honest* approach to the question of judicial review in which the reviewing court would enquire as to whether or not the particular decision, or the view of the law made by the inferior court or tribunal, could be *rationally* supported on a construction which the empowering legislation may *reasonably* be considered to bear.

In light of the fact that "[n]o satisfactory test has ever been formulated for distinguishing findings which go to jurisdiction from findings which go to the merits"[2], and given that abolition of the distinction would have, it is submitted, little practical impact on the existing practice of most Australian superior courts[3], there

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[1] John 8:32 (AV).

[2] S A de Smith, *Judicial Review of Administrative Action* [3rd ed] (Stevens & Sons, London, 1973), p 100.

[3] In *Craig v South Australia* (1995) 69 ALJR 873 at 878-9 the High Court implicitly accepted *Anisminic* at least as regards administrative tribunals, as opposed to inferior courts, but appears to have kept its options open in relation to the latter, saying that *Anisminic*-type errors of law would not "ordinarily" go to jurisdiction in cases involving inferior courts.

would appear to be little merit in continuing to maintain the purported distinction between jurisdictional and non-jurisdictional errors of law.

However, it is submitted that the almost irresistible temptation to fully embrace the *Anisminic* doctrine needs to be resisted, since it would too easily invite the reviewing court, whose proper role is *supervisory* only, to impose its own view in respect of a particular matter upon a specialised tribunal which was established by the legislature for the express purpose of dealing with such matters.

Lord Denning MR, in what has since become a well-known passage from *Pearlman v Keepers and Governors of Harrow School* [4], said:

> The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends.[5]

It is submitted that, for all intents and purposes, Lord Denning's formulation *is* the test ordinarily applied by superior courts when reviewing a decision for error of law. However, when is an error of law one "on which the decision of the case depends"? Is this test just another exercise in subjective futility?

Some help comes from *Re Hughes Boat Works Inc and International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW) Local 1620 et al* [6], a decision of the Divisional Court of Ontario's High Court of Justice.

In that case, the Ontario Labour Relations Board made a decision[7], ostensibly protected by a privative clause[8], that a particular collective agreement was binding and that a "sale" within the statutory sense[9] had occurred. Judicial review of the board's decision was sought.

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[4] [1979] QB 56.

[5] [1979] QB 56 at 70.

[6] (1980) 26 OR (2d) 420.

[7] Pursuant to s 55(2) of the Labour Relations Act, RSO 1970, c 232.

[8] Section 55(12) of the Act. (See also ss 97 and 95(1) of that Act for other "preclusive" provisions.)

[9] The word "sale" was defined in s 55(1)(b) of the Labour Relations Act, RSO 1970, c 232, to include leases, transfers and any other manner of disposition.

The court[10] referred to the traditional distinction between jurisdictional and non-jurisdictional errors of law as follows:

> It is thus customarily said that a tribunal protected by a privative clause "has a right to be wrong" or that it can err in law "within jurisdiction", or "on the merits".
>
> All of this is trite law. There is no problem in stating it. The problem is, and always has been, how to draw the line between an error of law and an error of jurisdiction. In case after case the line has been drawn, but how it has been done remains unexplained. No general test has ever been established. There is no logical pattern to the decisions. What is clear, however, is that Courts are unwilling to accept egregious legal error in the tribunals and will readily intervene to correct it. Where intervention would amount to nothing more than a substitution of the Court's opinion on the merits for that of the tribunal the Courts will refrain. Where, however, it goes beyond that, and can justly be classified as a serious error of law, the Courts will not hesitate to correct it.[11]

It was then stated that, in light of the privative clause, the *real* issue was whether the board's interpretation of the relevant statutory provisions was "patently unreasonable", that is:

> whether it could "be rationally supported on a construction which the relevant legislation may reasonably be considered to bear".[12]

As a "concession to the relevance of a tribunal's experience and expertise", the question was characterised in terms of "reasonableness" of interpretation rather than "correctness".[13] After all, "an interpretation may be seen to be 'reasonable' notwithstanding that it might not be one that the reviewing court would have made".[14] In addition, where a statutory provision is reasonably capable of more than one interpretation and:

> ... one of two possible meanings leads to consequences that a tribunal sees in the light of its experience and expertise as impractical, I see no reason why the tribunal should not reject it. Nor do I think that in the absence of a

[10] Reid, Grange and Montgomery JJ (Reid J delivering the judgment of the court).

[11] (1980) 26 OR (2d) 420 per Reid J at 425.

[12] (1980) 26 OR (2d) 420 per Reid J at 431, citing the words of Dickson J in *Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses Association et al* (1975) 41 DLR (3d) 6 at 11.

[13] (1980) 26 OR (2d) 420 at 431.

[14] (1980) 26 OR (2d) 420 at 431; *cf R v Dunphy; Ex parte Maynes* (1978) 139 CLR 482 per Murphy J at 497 ("The interpretation placed on the ... provisions by the [court] was fairly open to it").

compelling body of law the Court holds a warrant for forcing it upon them.[15]

The court proceeded to find that the board's interpretation of the statutory provision was not practically unreasonable and avoided an impractical result.[16] Reid J concluded as follows:

> The question whether the Board has erred so seriously as to require intervention must, therefore, be answered in the negative.[17]

It is submitted that such an approach has considerable merit. Furthermore, the approach is in no sense foreign to Anglo-Australian jurisprudence, being the approach already followed by Australian superior courts in the context of the judicial review of the exercise of an administrative discretion pursuant to the doctrine of ultra vires. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[18] Mason J (as he then was) said:

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned: [*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223] at 228.[19]

This is the approach consistently followed by many superior courts, in particular, the Land and Environment Court of New South Wales.[20] For example, in *Byron*

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15 (1980) 26 OR (2d) 420 at 432.

16 (1980) 26 OR (2d) 420 at 432. The court also found (at 434) that the board had not committed any jurisdictional error in more traditional terms.

17 (1980) 26 OR (2d) 420 at 432.

18 (1986) 162 CLR 24.

19 (1986) 162 CLR 24 at 40-41. Mason J's reference to *Wednesbury* would appear to be not a reference to so-called "*Wednesbury* unreasonableness" - a decision "so unreasonable that no reasonable authority could ever have come to it" ([1948] 1 KB 223 at 230) - but a reference to the following remarks of Lord Greene MR (at 228): "What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. ... [T]he court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority."

20 See, eg, *CB Investments Pty Ltd v Colo Shire Council* (1980) 41 LGRA 270; *Glenpatrick Pty Ltd v Maclean Shire Council* (1989) 72 LGRA 205; *Penrith City Council v Waste Management Authority* (1990) 71 LGRA 376; *Drummoyne Municipal Council v Maritime Services Board* (1991) 72 LGRA 186; *Malcolm on behalf of Maryland Residents Group v Newcastle City Council* (1991) 73 LGRA 356 at 358-360 and the cases there cited; *Oshlack v Richmond River Shire Council* (1993) 82 LGERA 222; *Byron Shire Businesses for the Future Inc v Byron Council & Anor* (1994) 84 LGERA 434.

Shire Businesses for the Future Inc v Byron Council & Anor[21] the applicant sought judicial review of a development consent granted by the first respondent council on various grounds, one being that as the proposed development[22] was likely to significantly affect the environment of endangered fauna the subject development application ought to have, but had not, been accompanied by a fauna impact statement as required by the relevant legislation.[23] In that regard, Pearlman J relevantly stated:

> The question for determination in these proceedings was whether it was reasonably open to the Council, upon the material before it, to conclude that the proposed development was not likely to significantly affect the environment of endangered fauna. That formulation of the appropriate test in proceedings for judicial review has been consistently applied in this Court ... .[24]

Her Honour proceeded to hold that it was not reasonably open to the council to conclude that there was no likelihood of significant effect on the environment of endangered fauna.[25]

It was pointed out in the *Hughes Boat Works* case[26] that:

> The safeguard against unjustified tribunal action lies in the principle that its interpretation must not be "patently unreasonable". ... [I]t seems to me that our function is not to decide whether the tribunal's interpretation is correct or incorrect in the sense that we agree with it or disagree with it. We are, in my opinion, to consider whether the interpretation was or was not patently unreasonable.[27]

It is not entirely clear whether the expression "patently unreasonable" is a

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21 (1994) 84 LGERA 434.

22 Construction of a village in Byron Bay, NSW, to be operated by Club Mediterranee.

23 Section 77(3)(d1), Environmental Planning and Assessment Act 1979 (NSW).

24 (1994) 84 LGERA 434 at 440.

25 (1994) 84 LGERA 434 at 447. A similar alleged ground of invalidity in relation to non-production of an environmental impact statement was rejected by her Honour who found, at 454, that it was reasonably open to the council to conclude that the proposed development was not "designated development" in respect of which an environmental impact statement would otherwise have been required.

26 *Re Hughes Boat Works Inc and International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW) Local 1620 et al* (1980) 26 OR (2d) 420.

27 (1980) 26 OR (2d) 420 at 432.

reference to "*Wednesbury* unreasonableness".[28] In *Wednesbury Corporation* Lord Greene MR stated that "unreasonableness" may be understood in two different senses. First, the expression may be used in a "rather comprehensive" and superfluous sense as a synonym for "abuse of power" covering such things as misdirection in law and the taking into account of extraneous considerations.[29] Secondly, the expression can be used in the narrow sense of "manifest unreasonableness": a decision "so unreasonable that no reasonable authority could ever have come to it".[30] It is the latter that has since come to be known as "*Wednesbury* unreasonableness".

The concept of "*Wednesbury* unreasonableness" can present difficulties at times. Cripps J (as he then was) astutely pointed out:

> The application of the ["*Wednesbury*"] principles is ... not always easy particularly where the decision under challenge is made in the context of broad policy considerations, is made by a decision maker which has no express statutory criteria it is bound to apply (or where the criteria are so broadly stated with reference to concepts such as the "public interest" or the "circumstances of the case" as to amount to the same thing), and who is not required to give reasons. The problem is made no easier by the circumstance that the resolution of the challenge takes place within an adversarial system, the efficiency of which is inversely proportional to the breadth of the issue for determination.[31]

In *Legal & General Life of Australia Ltd & Anor v North Sydney Municipal Council & Anor*[32] Cripps J stated that where "*Wednesbury* unreasonableness" is alleged with respect to a decision of a collegiate body (for example, a decision of councillors in, say, a town planning matter) the burden is on the challenger to demonstrate, in

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[28] On balance, it would appear that the expression goes beyond so-called "*Wednesbury* unreasonableness". Reid J at 430 cited with approval a dictum of Dickson J from *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp* (1979) 97 DLR (3d) 417 at 425 in which Dickson J quoted from *Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses Association et al* [1975] 1 SCR 382 at 389 in which various examples of "patently unreasonable" errors were given: "... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it."

[29] [1948] 1 KB 223 at 229.

[30] [1948] 1 KB 223 at 230 and 234.

[31] J S Cripps "Judicial Review of Environmental and Planning Laws" (1991) 13 *Sydney L Rev* 7 at 9.

[32] (1989) 68 LGRA 192.

effect, a decision which "verged on an absurdity".[33]

The present writer is of the opinion that the concept of "*Wednesbury* unreasonableness" is too narrow and difficult a concept to form an acceptable basis for judicial review of tribunal decisions where error of law is involved. In addition, invocation of "*Wednesbury* unreasonableness" would, it is submitted, offend against the long-held and fundamental principle, to date ostensibly observed in applying the doctrine of jurisdictional error (whether in its traditional or extended form), that the reviewing court is not to get involved in the actual merits of the decision under challenge. Cripps has written:

> The problem is exacerbated where the decision is impugned on the ground of "*Wednesbury* unreasonableness" because the Court in such a challenge is bound to have regard to merit matters. An unfortunate consequence is that the Court's decision becomes part of a political process over which it has no control. The standing and legitimacy of the judicial system is put at risk because public confidence in its capacity to administer impartial justice is eroded if it is seen as part of the political process.[34]

There is, however, a third sense in which the expression "unreasonableness" has been used. In *Williams v Melbourne Corporation*[35], a case involving judicial review of a piece of subordinate legislation, Dixon J (as he then was) had this to say about the matter:

> ... Although in some jurisdictions the unreasonableness of a by-law made under statutory powers by a local governing body is still considered a separate ground of invalidity ... in this Court it is not so treated ... .
>
> To determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply. Notwithstanding that ex facie there seemed a sufficient

[33] (1989) 68 LGRA 192 at 204. "*Wednesbury* unreasonableness" has, however, been successfully invoked in a number of different contexts, including an unreasonable failure of a decision maker to initiate inquiries (see, eg, *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 65 ALR 549; *Videto v Minister for Immigration & Ethnic Affairs (No 2)* (1985) 8 ALN 238), the fixing of an unreasonably short period of time for compliance with a ministerial direction (see *Balmain Association Inc v The Planning Administrator for Leichhardt Council* (1991) 25 NSWLR 615), and unreasonable opinion formation or fact finding (see *Parramatta City Council v Pestell* (1972) 128 CLR 305, and *Fuduche v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 117 ALR 418).

[34] J S Cripps "Judicial Review of Environmental and Planning Laws" (1991) 13 *Sydney L Rev* 7 at 9. The writer was clearly not using the word "political" in any party-political sense.

[35] (1933) 49 CLR 142.

> connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that *it could not reasonably have been adopted as a means of attaining the ends of the power.* In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is *not a real exercise of the power. ... [Emphasis added]* [36]

Applying Dixon J's concept of "unreasonableness" to decisions of tribunals, it could be said that a decision is "unreasonable" if its character is such that it could not reasonably have been made as a means of attaining the ends of the power conferred upon the tribunal. Any such decision is "not a real exercise of the power". The concept is similar to the concept of "disproportionality" or "lack of proportionality".[37] In *South Australia v Tanner*[38] Wilson, Dawson, Toohey and Gaudron JJ said:

> ... It is not enough that the court itself thinks the regulation inexpedient or misguided. It must be so lacking in reasonable proportionality as *not to be a real exercise of the power. [Emphasis added]* [39]

It is debatable whether, in the context of judicial review of subordinate legislation, lack of proportionality, even if it is accepted as a separate ground of invalidity, is

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[36] (1933) 49 CLR 142 at 154-5.

[37] The European Court of Justice has laid down the principle that, to be valid, subordinate legislation must conform with the so-called "principle of proportionality": see, for example, *R v Intervention Board for Agricultural Produce; Ex parte E D & F Man (Sugar) Ltd* [1986] 2 All ER 115. As Kirby P pointed out in *State of New South Wales & Ors v Macquarie Bank Ltd* (1992) 30 NSWLR 307 at 323 the means which the subordinate legislation employs "must be appropriate and necessary to attain the authorised objective sought by the law-maker". His Honour went on to say (at 324): "If the burdens imposed are clearly out of proportion to the authorised object, the measure will be annulled. There must therefore exist a reasonable relationship between the end and the means of the law. The means must be reasonably likely to bring about the apparent objective of the law. The detriment to those adversely affected must not be disproportionate to the benefit to the public envisaged by the legislation." In the *Macquarie Bank* case a clause of a regulation made under the Liquor Act 1982 (NSW), which purported to provide for the cancellation of a licence in the event of non-payment of licence fees, was struck down as being inconsistent with the statutory scheme for dealing with non-payment of licence fees. Kirby P also expressed the view that there was no proportionality between the object for which the regulation-making power had been conferred and the purported exercise of that power. However, Mahoney JA (with whose reasons for judgment Handley JA agreed) expressed doubt (at 330) as to whether lack of proportionality, in itself, was a ground for holding invalid a regulation otherwise within the terms of the regulation-making power.

[38] (1989) 166 CLR 161.

[39] (1989) 166 CLR 161 at 168.

saying much more than what is already subsumed within "unreasonableness".[40] Nevertheless, as Mahoney JA pointed out in *State of New South Wales & Ors v Macquarie Bank Ltd*[41]:

> It is, I believe, clear that, if what a regulation provides is outrageous, quite unreasonable, or otherwise operates to produce exceptional results, that has long been seen as a reason for concluding that the regulation is not directed to achieving the objectives for which the regulation-making power was given, as going beyond what was authorised by the statute, or as directed to achieving a purpose which the statute did not contemplate ... .[42]

"Not a real exercise of the power" - "not directed to achieving the objectives for which the ... power was given" - "going beyond what was authorised by the statute" - "directed to achieving a purpose which the statute did not contemplate" - these expressions refer to something which, even if it falls short of being "manifestly unreasonable", may still fairly be described as being "quite unreasonable" or:

> so patently unreasonable that [it] cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.[43]

Such a basis for judicial intervention avoids the problems of making esoteric distinctions between errors going to jurisdiction and errors that do not, and between errors of fact and errors of law.[44]

The question whether or not judicial intervention is warranted would depend on a number of policy considerations similar to those applied by the courts in

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[40] As Dixon J (as he then was) pointed out in *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155 a piece of subordinate legislation would be invalid as being "not a real exercise of the power" if it "could not reasonably have been adopted as a means of attaining the ends of the power". That was his Honour's understanding of "unreasonableness" in the context of the validity of subordinate legislation in this country and it is difficult to distinguish between what his Honour accepted as a ground of invalidity and what is now being referred to as a separate ground of invalidity. Both speak in terms of "means" and "ends". Both speak in terms of the purported exercise of power not being a real exercise of power. Implicit, if not explicit, in each approach is the conclusion that the legislature could not have intended to give authority to make the subordinate legislation in question: cf *Kruse v Johnson* [1898] 2 QB 91 per Lord Russell at 100. However, it is submitted that, in the wider context of administrative decision making, lack of proportionality is saying something quite different from other accepted grounds of invalidity (in particular, "*Wednesbury* unreasonableness").

[41] (1992) 30 NSWLR 307.

[42] (1992) 30 NSWLR 307 at 330.

[43] *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp* (1979) 97 DLR (3d) 417 per Dickson J at 425.

[44] "The criteria adopted by the courts for distinguishing between questions of law and questions of fact have not been uniform. Policy considerations may influence the decisions of the courts ...": S A de Smith, *Judicial Review of Administrative Action* [3rd ed] (Stevens & Sons, London, 1973), p 112.

determining whether a duty of care exists in the context of a common law negligence action. With regard to the latter, Lord Pearce stated in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[45]:

> How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others.[46]

Further, as Lord Wilberforce pointed out in *McLoughlin v O'Brian*[47]:

> foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation.[48]

References to the need for "protection" from the acts or omissions of others and to "standards of value or justice" are admittedly vague, as are references to the need for "fairness". With regard to the latter, Lawton J has said:

> From time to time ... lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise.[49]

If the judicial test were to become one of "patent unreasonableness", the role of the reviewing court would, it is submitted, be not materially different from its existing role in relation to ensuring compliance with the rules of procedural fairness (in particular, the need for a fair hearing). As Brennan J (as he then was) pointed out in *Kioa v West*[50]:

> When the question for the court is whether the condition is satisfied, the court must place itself in the shoes of the repository of the power to determine the procedure adopted was reasonable and fair.[51]

The reviewing court would need to be guided by "the form and subject matter of the legislation".[52] Has the legislature displayed a preparedness to concede "a wide

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45 [1964] AC 465.

46 [1964] AC 465 at 536.

47 [1983] 1 AC 410.

48 [1983] 1 AC 410 at 420.

49 *Maxwell v Department of Trade* [1974] 1 QB 523 at 539.

50 (1985) 159 CLR 550.

51 (1985) 159 CLR 550 at 627.

52 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147 per Lord Wilberforce at 209.

area"[53] to the tribunal? Or is it apparent that the legislature is:

> itself directly and closely concerned with the definition and delimitation of certain matters of comparative detail and has marked by its language that these shall be closely observed [?][54]

Another factor which would need to be carefully considered is whether the reviewing court's preferred construction of the empowering legislation would lead to "practical or impractical consequences in the field of activity [the tribunal] is called on to supervise".[55]

Other "pragmatic" factors which might be relevant to the exercise of the court's discretion as to whether or not to intervene in a particular case, and not necessarily in any order of importance, are:

* whether the alleged irregularity is incidental, as opposed to fundamental, to the actual decision (in other words, the "triviality" of the matter)[56];

* whether the matter in question is one on which reasonable persons might reasonably arrive at divergent conclusions[57];

* whether the subject-matter is such that, having regard to the specialised expert nature of the tribunal, the reviewing court ought reasonably to have confidence in the tribunal's decision;

* whether the matter is one on which the reviewing court would find it

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53 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147 per Lord Wilberforce at 209.

54 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147 per Lord Wilberforce at 209.

55 *Re Hughes Boat Works Inc and International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW) Local 1620 et al* (1980) 26 OR (2d) 420 per Reid J at 432.

56 cf *Commissioner of Police v District Court of New South Wales & Anor* (1993) 31 NSWLR 606 per Mahoney JA at 640. One way of approaching that question would be to ask whether, "but for" the alleged irregularity, the power would have been exercised in the manner in which it was, or at all: cf *Thompson v Randwick Municipal Council* (1950) 81 CLR 87. Another way of approaching the matter is to ask whether, had the tribunal not erred, its conclusion in all probability would still have been the same: see, eg, *Swist v Alberta Assessment Appeal Board* [1976] 1 WWR 204.

57 cf *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509.

extremely difficult to form an independent opinion without hearing all the evidence;

* whether the matter is one in respect of which the reviewing court is *fairly* of the opinion that it is more equipped to decide[58];

* whether the reviewing court's preferred construction of the empowering legislation would lead to practical or impractical consequences in the tribunal's area of operations;

* whether, in the circumstances of the particular case, the proceedings of the tribunal were "fair" in all or most respects (in other words, whether the rules of procedural fairness were substantially complied with)[59];

* whether the conduct of the applicant was patently unmeritorious or a contributory cause of the alleged irregularity;

* whether judicial intervention would work such an injustice as to be disproportionate to the end secured by strict compliance with the law[60]; and

* the availability and effectiveness of alternative remedies.[61]

The existence and terms of any privative clause[62] would also need to be considered. Smillie has written:

> [P]rivative clauses, however wide their terms, do not automatically impose

58 cf *Ex parte Wurth; Re Tully* (1954) 55 SR (NSW) 47.

59 In the case of a "minor", technical breach, the court would need to be satisfied that the irrgeularity made no difference to the final result which was otherwise "acceptable" in all relevant respects.

60 cf *Strathfield Municipal Council v Alpha Plastics Pty Ltd* (1988) 66 LGRA 124; *Anson Bay Co (Aust) Pty Ltd v Bob Blackmore Excavations Pty Ltd* (L & E Ct, Hemmings J, No 40014/89, 17 April 1989, unreported).

61 cf *Anderton v Auckland City Council* [1978] 1 NZLR 657.

62 Privative clauses are ordinarily construed by reference to the judicial presumption that the legislature does not intend to deprive the citizen of judicial redress, other than to the extent expressly stated or necessarily to be implied: see, eg, *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181 at 204 per O'Connor J; *Hockey v Yelland* (1984) 157 CLR 124 at 130 per Gibbs CJ and at 142 per Wilson J; see also *Anisminic* at 170 per Lord Reid.

> any legal obligation on the courts' inherent powers of review ... . However this does not mean that such provisions should be denied any practical significance or effect. Inclusion of a privative clause indicates that Parliament intended a reviewing court to give the tribunal considerable latitude in interpreting and applying its statutory mandate. The proper significance of a privative clause is that its existence should be considered, along with all other relevant factors, when the reviewing court determines the extent to which it should, consistent with Parliament's intention, examine the tribunal's findings and reasoning.[63]

In the *Hughes Boat Works* case[64] Reid J spoke of the "appropriate question" to be asked when the relevant legislation contains a privative clause:

> I think it is this: is there here an error of law and if so, is it of such magnitude as to require intervention in light of the general principle that Courts should intervene in the administrative process as little as possible?[65]

To borrow a phrase from Lord Denning:

> This principle enables us to step over the trip-wires of previous cases and to bring the law into accord with the needs of today.[66]

In short, what is suggested is the adoption of a "realistic pragmatic approach to judicial review".[67] Such an approach is, it is submitted, an honest recognition of what, for practical purposes, ordinarily *is* the judicial reality. In the *Hughes Boat Works* case[68], Reid J stated, with remarkable candour:

> I think that what may transmute an error of law in our minds into one of jurisdiction is frequently little more than the conviction that the error is a serious one justifying an intervention.[69]

The Lords in *Anisminic* saw the error of the Foreign Compensation Commission as

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63 J A Smillie "Judicial Review of Administrative Action - A Pragmatic Approach" (1980) 4 *Otago L Rev* 417 at 439.

64 *Re Hughes Boat Works Inc and International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW) Local 1620 et al* (1980) 26 OR (2d) 420.

65 *Re Hughes Boat Works Inc and International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW) Local 1620 et al* (1980) 26 OR (2d) 420 at 428.

66 *Hill v Parsons* [1972] Ch 305 per Lord Denning MR at 316.

67 J A Smillie "Judicial Review of Administrative Action - A Pragmatic Approach" (1980) 4 *Otago L Rev* 417 at 456.

68 *Re Hughes Boat Works Inc and International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW) Local 1620 et al* (1980) 26 OR (2d) 420.

69 *Re Hughes Boat Works Inc and International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW) Local 1620 et al* (1980) 26 OR (2d) 420 at 428.

being such an error. The High Court in the *Stevedoring Industry Board* case[70] saw the error of the Australian Stevedoring Industry Board as also being such an error.

The doctrine of jurisdictional error was invented by the superior courts to ensure that inferior tribunals complied with the rule of law. The public interest still demands that such tribunals act appropriately. However, the doctrine of jurisdictional error has outlived its usefulness and ought to be abolished altogether. The approach suggested above, if not *already* the actual test applied by superior courts when reviewing a decision for error of law, is at least an honest and workable alternative. Although uttered in a quite different context, the words of Lord Denning MR seem particularly apt:

> There may be no difference in logic, but I think there is a great deal of difference in common sense. The law is the embodiment of common sense: or, at any rate, it should be.[71]

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[70] *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100.

[71] *S C M (United Kingdom) Ltd v W J Whittall & Son Ltd* [1971] 1 QB 337 at 344.

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