"THE *ANISMINIC* REVOLUTION" IN AUSTRALIA

THE RECEPTION OF THE DOCTRINE OF EXTENDED JURISDICTIONAL ERROR IN AUSTRALIA

Ian Ellis-Jones

BA LLB (Syd) Grad Dip Leg Prac [Equiv] (UTS) Adv Mang Cert (STC)
Solicitor of the Supreme Court of New South Wales and the High Court of Australia
Consultant, Henningham & Ellis-Jones, Solicitors & Mediators, Sydney
Local Government Consultant, Dunhill Madden Butler, Solicitors, Sydney
Lecturer in Law, Faculty of Law, University of Technology, Sydney
Director, UTS Community Law and Research Centre

1997

A thesis submitted in fulfilment of the requirements
of the degree of Master of Laws by Thesis
Faculty of Law
University of Technology, Sydney

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.

I also certify that the thesis has been written by me and that any help I have received in preparing the thesis, and all sources used, have been acknowledged in the thesis.

Production Note:
Signature removed prior to publication.

Ian David Ellis-Jones

11 August 1997

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.

My gratitude also goes to those who offered encouragement on the project and otherwise: my dear wife Elspeth, my three children Fiona, Simon and Peter, my former law partner Bill Henningham PSM, and my good friends Ross Bowey and Danny Arraj, Solicitor.

My appreciation also extends to all my students, past and present, who put up with me during the preparation of this thesis, and otherwise.

And finally, thanks to the inspiring and persuasive Leslie Katz SC, who gave me my first exposure to Administrative Law and the *Anisminic* case.

Ian Ellis-Jones
11 August 1997

CONTENTS

-oo0oo-

TABLE OF CASES

-oo0oo-

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.

---

[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;