

## Chapter 10

# The Boundaries Between Fact and Law in Administrative Review

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### Introduction

There are clear statements that Australian courts will approach questions of fact differently from questions of law in applications for judicial review on the basis of jurisdictional error, review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and in statutory appeals. That has been well established at least since the clear statement of Brennan J in *Waterford v Commonwealth* that '[t]here is no error of law simply in making a wrong finding of fact'<sup>1</sup> – an observation reiterated by a majority of the High Court in *Corporation of the City of Enfield v Development Assessment Commission*.<sup>2</sup> An even more comprehensive statement was made by Menzies J in *R v District Court; Ex parte White*: '[e]ven if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law'.<sup>3</sup> These statements appear clear and unequivocal. Their clarity has a ready attraction.

On the other hand, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (S20), McHugh and Gummow JJ observed that '[t]he introduction into this realm of discourse of a distinction between errors of fact and law, to supplant or exhaust the field of reference of jurisdictional error, is not to be supported'.<sup>4</sup> Further, their Honours held that the line drawn between factual and legal matters may vary according to the purpose it serves,<sup>5</sup> and a number of cases have suggested there is no test of universal application for drawing the line.<sup>6</sup> This highlights the inherent

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1 (1987) 163 CLR 54 at 77.

2 (2000) 199 CLR 135 at [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

3 (1966) 116 CLR 644 at 654; see also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356–357 (Mason CJ). Similar statements abound: see, eg, *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 155–156 (Glass JA, with whom Samuels JA agreed).

4 (2003) 77 ALJR 1165 at [54].

5 Ibid at [58]; T Endicott, 'Questions of Law' (1998) 114 *Law Quarterly Review* 292 at 310–314.

6 See also *Da Costa v The Queen* (1968) 118 CLR 186 at 194 (Windeyer J); *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 394 (per curiam); *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at [39] (per curiam); *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at [111] (per curiam).

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