THE JUDICIAL LIBERTINE—JURISDICTIONAL AND NON-JURISDICTIONAL ERROR OF LAW IN AUSTRALIA

BY VIVIENNE BATH*

> It cannot be that Legislatures, being rational, seek to break down the fences they have erected around individual tribunals and let them roam at large by the simple expedient of a privative clause. The clause must be read in the context of the statute. It cannot be intended to transform tribunals into judicial libertines.[1]

The decision of the House of Lords in *Anisminic Ltd* v *Foreign Compensation Commission*[2] was hailed as a landmark, permitting almost unlimited judicial review into the activities of administrative bodies and inferior courts. De Smith commented

> is not the practical effect of the decision [in *Anisminic*] . . . 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?[3]

Yet the decisions which have followed *Anisminic* even in England have revealed that the case has contributed little certainty to an area in which apparently irreconcilable decisions proliferate.

In Australia the view has traditionally been accepted that the approach of the Australian courts to judicial review and error of law must parallel the approach of courts in other common-law countries, meaning England. This ignores the fact that Australian circumstances have always to some extent differed from the English, and that this is particularly so in recent years with the introduction of the Administrative Appeals Tribunal and the initiation of the Administrative Decisions (Judicial Review) Act 1977 (Cth). The purpose of this article is to examine and discuss the views adopted by Australian courts to jurisdictional and non-jurisdictional error of law and judicial review in the period subsequent to the *Anisminic* decision.

1 INTRODUCTION: THE AFTERMATH OF *ANISMINIC* IN ENGLAND

In *Pearlman* v *Keepers and Governors of Harrow School*[4] Lord Denning took the view with regard to the distinction between jurisdictional and non-jurisdictional error of law that "(s)o fine is the distinction that in truth the . . . Court has a choice before it whether to interfere with an inferior court on a point of law".[5] Thus the Court of Appeal found itself able to interfere in *Pearlman* and in *R* v *Chief Immigration Officer, Gatwick Airport; ex parte*

---

* BA (AS) (Hons); LLB (Hons) (ANU).

1 *Re Hughes Boat Works Inc* (1980) 26 OR (2d) 420, 425 *per* Reid J.

2 [1969] 2 AC 147.

3 S A De Smith, "Judicial Review in Administrative Law: The Ever-Open Door?" (1969) 27 Cambridge Law Journal 161, 163.

4 [1979] 1 QB 56.

5 *Ibid* 70.

Kharrazi.[6] The expansion by the courts of the scope of judicial review[7] might also lead to the conclusion that the bar on review provided by the division of error of law into two categories must soon be totally removed. Nevertheless, even in the Court of Appeal, it is possible to find decisions where retention of this difference has proved useful. In *R* v *Preston Supplementary Benefits Tribunal; ex parte Moore*,[8] Lord Denning commented that although the court would always interfere when a tribunal exceeded its jurisdiction and breached natural justice, "(t)he courts should hesitate long before interfering by certiorari with the decisions of the appeal tribunals".[9] The most notable example of this in practice is *R* v *Secretary of State for the Environment; ex parte Ostler*,[10] in which the Court of Appeal gave full effect to a time limit clause (a privative clause which comes into effect on the expiry of a certain, usually brief, time for appeal), although the error attacked was fraud. In so doing, the Court found it necessary to resurrect the decision of the House of Lords in *Smith* v *East Elloe Rural District Council*,[11] the correctness of which was, in the light of *Anisminic*, at least questionable,[12] and to distinguish *Anisminic* itself, although on any viewpoint fraud is a more serious defect than a statutory misconstruction.[13] Lord Denning later justified his decision on the basis of public policy alone,[14] and indeed, in view of the decision of the Court of Appeal in *Pearlman* v *Keepers and Governors of Harrow School*,[15] public policy is the only rational explanation.

Time limit clauses had also given rise to difficulty in *Hamilton* v *Secretary of State for Scotland*,[16] where the Court had also followed the decision in *Smith's* case.[17] Where a restricted time for appeal is given and none is made, as a result of which major operations are undertaken involving considerable expense, it would clearly be of little public benefit to avoid the privative clause and declare the decision in consequence of which the work was undertaken a nullity. There is however little logical distinction between a time limit clause and the privative clause in *Anisminic*, unless the availability of an appeal within the specified time has the effect of giving a decision validity which would, in the terms of *Anisminic*, be a nullity.

In addition, the most recent efforts of Lord Denning to dispose finally of the difference between jurisdictional and non-jurisdictional error of law have met with resistance from the Privy Council and the House of Lords. In *Re Racal Communications Ltd*,[18] the Court of Appeal attempted to provide a conclusive definition of the words of a certain statute, although the decision reviewed was "not appealable". The House of Lords stressed that "not appealable" meant no appeal was available. But although the

---

[6] [1980] 1 WLR 1396.
[7] *Eg Secretary of State for Education and Science* v *Tameside MBC* [1977] AC 1014.
[8] [1975] 1 WLR 624.
[9] *Ibid* 631.
[10] [1977] 1 QB 122.
[11] [1956] AC 736.
[12] J Alder, "Time Limit Clauses and Judicial Review—*Smith* v *East Elloe* Revisited" (1975) 38 Mod L Rev 274.
[13] *Colonial Bank of Australasia* v *Willan* (1874) LR 5 PC 417, 442.
[14] Lord Denning, *The Discipline of Law* (1979) 108.
[15] [1979] 1 QB 56.
[16] [1972] SLT 233.
[17] [1956] AC 736.
[18] [1980] 3 WLR 181.

attempt of the Court of Appeal to merge appeal with judicial review failed, Lord Diplock was prepared to say that, although for review of judges the distinction between jurisdictional and non-jurisdictional error remained, for review of administrative bodies it had been for all practical purpose abolished.[19]

In *South East Asia Fire Bricks Sbn Bhd* v *Non-Metallic Mineral Products Manufacturing Employees Union*,[20] the Privy Council had to deal with the effect of a privative clause. The Board overruled a line of local authority that a privative clause did not prevent review for non-jurisdictional error and held that the error of law in question was made within jurisdiction and was thus not reviewable. The Industrial Court had been wrong in holding that the employees concerned had not terminated their contracts by going on strike, but as the dispute between the parties was a "trade dispute", the error was made within jurisdiction. In the terms of *Anisminic* it would have been easy to hold that such an error went to jurisdiction, but the Privy Council did not do so.

It is worth noting here that at the same time that the distinction between jurisdictional and non-jurisdictional error was under challenge, the Court of Appeal was also moving into the area of factual determinations. The difference between fact and law is by no means as clear as the terms suggest. *Cozens* v *Brutus*[21] went to the House of Lords for an answer. In 1974, in *R* v *West Sussex Quarter Sessions; ex parte Albert and Maud Johnson Trust Ltd*,[22] Lord Denning was in favour of granting certiorari when fresh evidence appeared after a trial. In *Dyson Holdings Ltd* v *Fox*[23] the Court of Appeal intervened to correct a tribunal's definition of "family" —in order to ensure consistency. In *R* v *Chief Immigration Officer, Gatwick Airport; ex parte Kharrazi*[24] the Court held that in determining whether Kharrazi intended to leave the United Kingdom "on completion of his course of study", the officer, by examining only one course of study, not the whole education, had asked the wrong question and had therefore erred in law. There is however much to be said for the view of Waller LJ that it had to be shown that the officer's decision was one no reasonable person could have come to on the evidence. As the officer had considered the matter and made a decision there was no error of law.

It is clear from the difficulties experienced by the English courts that *Anisminic* has not heralded the dawn of a new and more enlightened form of judicial review in England. It is more accurate to conclude that it has made the task of finding a consistent rule on which to base a decision almost impossible.

2 THE AUSTRALIAN COURTS AND *ANISMINIC*

In 1969, the then Chief Justice, Sir Garfield Barwick, commented that the decision in *Anisminic* was "no doubt . . . important in relation to the

---

[19] *Ibid* 186-187.
[20] [1981] AC 363.
[21] [1973] AC 854.
[22] [1974] 1 QB 24.
[23] [1976] 1 QB 503.
[24] [1980] 1 WLR 1396.

judicial control of administrative bodies".[25] Despite this remark, references to *Anisminic* by Australian Courts, including the High Court, have not been as common as might have been expected, and its influence upon the application of judicial review in the Australian context has been surprisingly limited.

In *R* v *Evatt; ex parte Master Builders' Association of NSW [No 2]*,[26] the High Court found that any error of law had been made, if at all, within the jurisdiction of the Conciliation and Arbitration Commission, without mentioning *Anisminic*. *Anisminic* was referred to by the Court in passing in *R* v *Joske; ex parte Shop Distributive and Allied Employees' Association*[27] and in *R* v *Booth; ex parte Administrative and Clerical Officers' Association*,[28] and not mentioned at all in a number of cases which touched upon matters in regard to which *Anisminic* would appear to have been relevant.[29] In 1978, it was followed by a majority of the High Court in *R* v *Dunphy; ex parte Maynes*[30] (or more accurately, by Mason J, with whose judgment the majority agreed). In 1980, however, Gibbs J in *Re Cook; ex parte Twigg*[31] referred to *Anisminic* in such terms as to indicate doubt as to its correctness. The reticence of the High Court may to a large extent be due to the fact that there is a history of High Court judgments on much of the industrial legislation which has given rise to most applications for mandamus and prohibition made to the Court. As a consequence, there is a large body of Australian authority on error of law which is cited to the Court and followed by it.

In 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. This is particularly the case in New South Wales. In *Grzybowicz* v *Smiljanic*,[32] for example, the Court of Appeal followed *Parisienne Basket Shoes Pty Ltd* v *Whyte*[33] and cited in addition six New South Wales cases, one from South Australia and one English case. In *Caltex Oil (Aust) Pty Ltd* v *Feenan*[34] the Court relied on three New South Wales cases, one Privy Council decision[35] and six High Court cases.[36] In *Houssein* v *Under Secretary, Department of Industrial Relations and Technology*[37]—a discussion of the privative clause and error of law—the Court relied on seven High Court decisions and one New South Wales case, although *Anisminic* was cited to the Court in argument. In a Privy Council

---

[25] *Brettingham-Moore* v *Municipality of St Leonards* (1969) 121 CLR 509, 523.
[26] (1974) 132 CLR 150.
[27] (1976) 135 CLR 194.
[28] (1978) 141 CLR 257.
[29] *Eg In re Staples; ex parte Australian Telecommunications Commission* (1980) 54 ALJR 507; *In re Shaw; ex parte Shaw* (1981) 55 ALJR 12; *In re Moodie; ex parte Emery* (1981) 34 ALR 481.
[30] (1978) 139 CLR 482.
[31] (1980) 54 ALJR 515, 520.
[32] [1980] 1 NSWLR 627.
[33] (1938) 59 CLR 369.
[34] [1980] 1 NSWLR 724.
[35] *R* v *Nat Bell Liquors, Ltd* [1922] 2 AC 128.
[36] Including *Parisienne Basket Shoes Pty Ltd* v *Whyte* (1938) 59 CLR 369; *R* v *War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228.
[37] [1980] 2 NSWLR 398.

decision[38] overturning the New South Wales Court of Appeal on the question of whether an error of law made was jurisdictional or non-jurisdictional,[39] the Privy Council distinguished the *Parisienne Basket Shoes* case[40] (on which the Court of Appeal had relied) and based its judgment on a 1945 decision of the New South Wales Court of Appeal.[41]

In South Australia, Bray CJ noted in 1971[42] that *Anisminic* had been decided and mentioned it in connection with natural justice and voidness. For the point in issue, which was a privative clause and the effect to be given to it, he relied on Australian High Court decisions. In three succeeding cases on jurisdictional error,[43] the judges of the Supreme Court reverted to antiquity: for example, *R* v *Bolton* (1841),[44] *Elston* v. *Rose* (1868),[45] *R* v *Whitbread* (1780)[46] and *Colonial Bank of Australasia* v *Willan* (1874).[47] Modernity was represented by such cases as the High Court decision of *Amalgamated Society of Carpenters & Joiners* v *Haberfield Pty Ltd* (1907),[48] *R* v *Nat Bell Liquors Ltd* (1922),[49] *R* v *Electricity Commissioners* (1924),[50] and the decision of the High Court in *R* v *District Court; ex parte White* (1966).[51]

In 1975 Bray CJ relied on a 1942 case, *R* v *Weymouth Licensing Justices; ex parte Sleep*,[52] to justify the contention that consideration of irrelevant matters can amount to excess of jurisdiction.[53] In 1978 Bray CJ commented that the judgment of Lord Reid in *Anisminic* "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".[54]

In *R* v *Ward; ex parte Bowering*,[55] however, the Supreme Court of South Australia cited *Anisminic* alone in order to hold that the jurisdictional/non-jurisdictional difference remains and to refuse review. In the Victorian

---

[38] *Manning* v *Thompson* (1979) 53 ALJR 582.
[39] *Manning* v *Thompson* [1977] 2 NSWLR 249.
[40] (1938) 59 CLR 369.
[41] *Ex parte Redgrave; Re Bennett* (1945) 46 SR (NSW) 122.
[42] *R* v *Johns; ex parte Public Service Association of South Australia Inc* [1971] SASR 206, 210.
[43] *R* v *Bleby, Johns and Lean; ex parte Royal Australian Nursing Federation* (1973) 4 SASR 445; *R* v *Chislett; ex parte Public Service Association of South Australia Inc* (1973) 4 SASR 427; *R* v *Bleby, Olsson and Stanley; ex parte South Australian Public Service Board (No 1) (Teachers* case) (1974) 9 SASR 320.
[44] [1841] 1 QB 66; 113 ER 1054; *R* v *Bleby, Johns and Lean* above n 43, 449 *per* Bray CJ.
[45] (1868) LR 4 QB 4; *R* v *Bleby, Johns and Lean* above n 43, 450 *per* Bray CJ, 456 *per* Mitchell J.
[46] (1780) 2 Dougl 549, 99 ER 347; *R* v *Chislett* above n 43, 438 *per* Bray CJ.
[47] (1874) LR 5 PC 417; *R* v *Chislett* above n 43, 438 *per* Bray CJ; *R* v *Bleby, Johns and Lean* above n 43, 449 *per* Bray CJ, 457 *per* Mitchell J.
[48] (1907) 5 CLR 33; *R* v *Bleby, Johns and Lean* above n 43, 449 *per* Bray CJ; *Teachers* case above n 43, 325 *per* Bray CJ.
[49] [1922] 2 AC 128; *R* v *Bleby, Johns and Lean* above n 43, 449 *per* Bray CJ, 456 *per* Mitchell J.
[50] [1924] 1 KB 171; *R* v *Chislett* above n 43, 442 *per* Mitchell J.
[51] (1966) 116 CLR 644; *R* v *Bleby, Johns and Lean* above n 43, 449 *per* Bray CJ.
[52] [1942] 1 KB 465.
[53] *R* v *Industrial Commission of South Australia; ex parte Minda Home Inc* (1975) 11 SASR 333.
[54] *R* v *Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative Ltd (No 2)* (1978) 18 SASR 65, 69.
[55] (1978) 20 SASR 424.

case of *R* v *Small Claims Tribunal; ex parte Barwiner Nominees Pty Ltd*[56] Gowans J adopted the same approach and came to the same conclusion. In *R* v *Small Claims Tribunal; ex parte Amos*,[57] the Supreme Court of Queensland mentioned *Anisminic* in passing, but found that any error made had been made within jurisdiction. A similar approach was adopted in *R* v *Bjelke-Petersen; ex parte Plunkett*.[58] An exception to this tendency to ignore or distinguish *Anisminic* is the decision of Northrop J in *R* v *Insurance Commissioner; ex parte Saltergate Insurance Co Ltd*,[59] where *Anisminic*, with the decisions of the High Court in *Murphyores Inc Pty Ltd* v *Commonwealth of Australia*[60] and *Falkirk Insurance Society Ltd* v *Life Assurance Commissioner*,[61] was followed and mandamus granted.

On the whole however, it is fair to say that the effect of *Anisminic* in Australia has been surprisingly insubstantial.

3 AUSTRALIAN CASES SINCE 1969

The classification of error of law cases is difficult because of the wide range of courts, tribunals and statutes involved, and of the variety of ways in which judges choose to describe their reasons for decision. For the purposes of this discussion, the cases are arranged very roughly under the terms in which the judges themselves explained their reasoning or under a heading which approximately conveys the nature of that reasoning.

The point should first be made that Australian judges do not appear to have doubted the continuing validity of the distinction between jurisdictional and non-jurisdictional error. In *Houssein* v *Under Secretary, Department of Industrial Relations and Technology*,[62] the New South Wales Court of Appeal ruled that a privative clause is still effective to exclude review for non-jurisdictional error of law on the face of the record and this view continues to be held—at least in theory—by other Australian courts which have dealt with the question.

Similarly, with regard to certiorari, the amount of discussion in Australian cases about the nature of the record and what appears on it[63] indicates that judges still regard non-jurisdictional error of law as a category distinct from jurisdictional error (which can be detected from any materials available), reviewable, if at all, only if patent. There are no cases where judges have contemplated the merging of the two categories of error of law, no matter how close the practical effect of their judgments has brought them to this point.

---

[56] [1975] VR 831.
[57] [1978] Qd R 127.
[58] [1978] Qd R 305.
[59] (1976) 12 ACTR 1.
[60] (1976) 136 CLR 1.
[61] (1976) 50 ALJR 324.
[62] [1980] 2 NSWLR 398; (1982) 56 ALJR 217 (High Court). See the Note below p 49.
[63] *Re Cook; ex parte Twigg* (1980) 54 ALJR 515; *University of New South Wales* v *Max Cooper and Sons Pty Ltd* (1980) 54 ALJR 21 (Privy Council); *Council of the City of Gold Coast* v *Canterbury Pipe Lines (Aust) Pty Ltd* (1968) 118 CLR 58; *R* v *Wright and Pope* [1980] VR 41; *R* v *Di Fazio; ex parte General Motors-Holden Ltd* (1979) 20 SASR 559, *per* Jacobs J (dissenting); *Re Moodie; ex parte Emery* (1981) 34 ALR 481.

A *"Industrial" matters and other "jurisdictional facts"*

(1) *Industrial Matters*

The High Court has always held that only the High Court can determine conclusively what constitutes an "industrial dispute" in the Commonwealth context.[64] The constitutional element involved in the phrase "disputes extending beyond the limits of any one State" also means that an inferior court cannot have the jurisdiction to decide that matter finally.[65] The reservation by the High Court of the right of final determination is not, however, confined to matters which involve the Constitution. The High Court has held that engagement in "coal-mining"[66] or "shale-mining"[67] must occur in fact, not merely on the decision of the tribunal determining the question, and that consequently an error in the determination of this fact means excess of jurisdiction.

The High Court also regards the definition of such matters as "conditions of employment"[68] and "industrial matters"[69] as facts the correct determination of which is essential to jurisdiction. Thus in *R* v *Booth; ex parte Administrative and Clerical Officers' Association*,[70] and *In re Morris; ex parte Australian Telecommunications Commission*,[71] although the application of a Commonwealth statute was under consideration and not section 51(xxxv) of the Constitution, the High Court reviewed the correctness of the lower body's findings on these points.

Where State legislation is involved, the High Court has established the same approach to "industrial matters".[72] Thus in *R* v *Bleby, Olsson and Stanley; ex parte South Australian Public Service Board (No 1) (Teachers* case),[73] the South Australian Supreme Court discussed review on the assumption that any error of law made by the Industrial Commissioner as to what constituted an "industrial matter" would be a jurisdictional error. In *R* v *Industrial Court of South Australia; ex parte Australian Government Workers Association*,[74] the Supreme Court took the same approach to the Industrial Court's decision on whether a trade union was engaged in "industry".[75]

---

[64] *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow & Co* (1910) 11 CLR 1; *R* v *Blakeley; ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54; *Re Holmes; ex parte Manchester Unity Independent Order of Oddfellows in Victoria* (1981) 55 ALJR 27.

[65] *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Jones* (1914) 18 CLR 224; *In re Turbet; ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1981) 55 ALJR 59.

[66] *R* v *Hickman; ex parte Fox* (1945) 70 CLR 598.

[67] *R* v *Drake-Brockman; ex parte National Oil Pty Ltd* (1943) 68 CLR 51.

[68] *R* v *Booth; ex parte Administrative and Clerical Officers' Association* (1978) 141 ALJR 507.

[69] *Re Morris; ex parte Australian Telecommunications Commission* (1980) 54 ALJR 507.

[70] (1978) 141 CLR 257.

[71] (1980) 54 ALJR 507.

[72] *Clancy* v *Butchers' Shop Employés Union* (1904) 1 CLR 181; *Baxter* v *New South Wales Clickers' Association* (1909) 10 CLR 114.

[73] (1974) 9 SASR 320.

[74] (1980) 24 SASR 199.

[75] Note *R* v *Industrial Commission of South Australia; ex parte Master Builders Association of South Australia Inc* (1981) 26 SASR 535.

(2) *Section 88E of the Industrial Arbitration Act 1942 (NSW)*

In *Stevenson* v *Barham*[76] Kelleher J at first instance held that he had no jurisdiction to hear the case because a share-farming contract was not an arrangement "whereby a person performs work in any industry". The High Court (on appeal from the New South Wales Court of Appeal), by a majority of three to two, decided that the contract was in fact within the scope of the section and that the decision of the Court of Appeal to issue mandamus should be upheld. Thus the approach adopted left the industrial judge no area in which he could err, although the closeness of the decision in the High Court and in the Court of Appeal[77] indicates that his view had considerable validity.

In marked contrast to this is the decision of the New South Wales Court of Appeal in *Caltex Oil (Aust) Pty Ltd* v *Feenan*.[78] The applicant argued that the actual existence of an "arrangement" between the parties was essential to the jurisdiction of the Industrial Commission. The Court held unanimously that it was not necessary:

> Subject to there being evidence to sustain a decision that there was jurisdiction, the legislation should be construed as conferring exclusive jurisdiction on the Commission to determine the relevant fact upon which jurisdiction depends.[79]

This decision rested to a large extent on the fact that the Commission is a superior Court of Record. Because of this, a judge of the Commission should be held to be entitled to determine his own jurisdictional facts.[80] On appeal to the Privy Council,[81] the proposition that the Commission had jurisdiction to determine its own jurisdictional facts was not mentioned.

(3) *The High Court and the BLF case*

The decision of the High Court in *R* v *Marks; ex parte Australian Building Construction Employees' and Builders Labourers' Federation*[82] demonstrates that the Court is still willing to intervene in industrial matters on the basis of "jurisdictional fact". Under section 142(1) of the Conciliation and Arbitration Act 1904 (Cth), the Conciliation and Arbitration Commission may order that one union should represent a particular group of employees. In the course of a demarcation dispute between two unions (the "FIA" and "BLF"), a Commissioner, and then the Full Commission on appeal, was obliged to construe the membership rules of FIA to determine eligibility criteria, as a result of which an order in FIA's favour was made. The BLF applied to the High Court for prohibition. A majority of the Court[83] held that the Full Commission had no jurisdiction to make the order.

> Obviously the Commission has to decide for itself the question of eligibility for membership, but the status of its finding on that point is

---

[76] (1977) 136 CLR 190.
[77] *Barham* v *Stevenson* [1975] 1 NSWLR 31 (majority decision).
[78] [1980] 1 NSWLR 724.
[79] *Ibid* 726 *per* Moffitt P.
[80] *Ibid* 730 *per* Hutley JA.
[81] *Caltex Oil (Aust) Pty Ltd* v *Feenan* (1981) 34 ALR 231.
[82] (1981) 35 ALR 241.
[83] Mason, Murphy and Brennan JJ.

> that of a finding as to a jurisdictional fact, one which is capable of review on prohibition under s 75(v) of the Constitution.[84]

This is an extremely broad view of jurisdictional fact. What can the Commission decide if it is not entitled to construe membership rules of particular unions? Although the Commission is not a court, let alone a Court of Record, even tribunals such as the Small Claims Tribunals,[85] which are protected by privative clauses less far-reaching than section 60 of the Conciliation and Arbitration Act are given some jurisdiction in which to determine their own jurisdictional facts. Yet the whole Court seemed to agree that this was a jurisdictional fact.

The rationale behind the decision seems to lie in the view of three judges[86] that the Commission in making an order under section 142(1) does not act judicially. This must in some way have supported the judges in their view that the Commission therefore had no power beyond that of deciding whether or not to make the order—like an administrative body acting *ultra vires* the Commission can make an order only if the circumstances supporting it actually exist.[87]

(4) *Small Claims cases*

In *R* v *Small Claims Tribunal; ex parte Gibson*,[88] the Supreme Court of Queensland, by a majority, decided that a dentist was not a "trader" within the Small Claims Tribunal Act 1973 (Qld) and the Tribunal therefore had no jurisdiction to make an order against him. The assumption behind this must again be that the actual fact of being a "trader" is essential to jurisdiction.

In *R* v *Small Claims Tribunal; ex parte RACV General Insurance Pty Ltd*,[89] Gobbo J concluded that a contract of insurance was not a contract for the performance of work so as to bring a claim under it within the scope of the Small Claims Tribunal Act 1973 (NSW), but refused prohibition on the basis that the Tribunal should consider its jurisdiction before the court intervened.

In *R* v *Small Claims Tribunal; ex parte Amos*,[90] however, the Supreme Court of Queensland took the view that the Tribunal had the jurisdiction to determine its jurisdictional facts itself—in this case whether a payment was a "bond".

> 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.[91]

---

[84] (1981) 35 ALR 241, 253 *per* Mason J.

[85] *R* v *Small Claims Tribunal; ex parte Barwiner Nominees Pty Ltd* [1975] VR 831; *R* v *Small Claims Tribunal; ex parte Amos* [1978] Qd R 127.

[86] Mason, Murphy and Wilson JJ.

[87] Classification of the role of the Commission as "non-judicial" carries with it the problem of the power of the court to grant prohibition. Space does not allow a discussion of this, but the decisions of Isaacs, Rich and Starke JJ in *Waterside Workers' Federation of Australia* v *Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482, and of the court in *R* v *Wright; ex parte Waterside Workers' Federation of Australia* (1955) 93 CLR 528 throw doubt on the power of the High Court to grant prohibition if the Commission was *not* exercising judicial power.

[88] [1973] Qd R 490.

[89] [1981] VR 602.

[90] [1978] Qd R 127.

[91] *Ibid* 131 *per* Kelly J.

Similarly, in *Thomson* v *Consumer Claims Tribunal*,[92] Hunt J held that "claim" must be understood to mean the assertion of a right rather than a valid claim as fact. "The legislative intention demonstrated by [the privative clause is] that the tribunal is to remain free to make such errors of law without any supervision."[93]

(5) *Magistrates and Committal Proceedings*

In a rather different category is the role of the magistrate in committal proceedings, who is given more immunity from review than judges of superior courts or other magistrates.[94] The majority of the New South Wales Court of Appeal in *Connor* v *Sankey*[95] reaffirmed a previous decision of the Court[96] that the powers of such a magistrate are not subject to review.[97] One of the ways in which the problem was expressed was whether the offence charged in the indictment must be in fact an offence and indictable or whether the magistrate's opinion on the matter is sufficient. Moffitt P concluded after a lengthy examination of the statute law and authority that the question was one of the very questions upon which the magistrate was obliged to form an opinion after inquiry.[98] Reynolds JA took the same view.[99] Only Street CJ thought that the Court could inquire into any excess of jurisdiction and grant relief accordingly. If the offence charged had been unknown to law, Street CJ would have intervened[1]—which must mean that the actual existence of an offence known to law is a precondition to jurisdiction in his view.

The view of the majority seems to be out of step with the cases previously discussed. In principle, if rights of citizens are at stake, the superior court should be jealous of its right to interfere. Although there is much force in the argument that all considerations of convenience lead to the conclusion that the magistrate should have the jurisdiction to determine his own jurisdictional facts,[2] this has not led judges in other cases to grant the tribunal absolute control over its own determinations. The higher court still retains the right to interfere. This usually applies to the question of appeal —although it can be, and often is, a factor which leads a court to refuse review, it has only rarely been used to justify allowing the tribunal to

---

92 [1981] 1 NSWLR 68.

93 *Ibid* 72.

94 *Eg R* v *Elliott; ex parte Elliott* (1974) 8 SASR 329; *R* v *Galvin; ex parte Bowditch* (1979) 2 NTR 9. Review was refused in both cases, but not on the grounds that it would not lie to a magistrate.

95 [1976] 2 NSWLR 570, Moffitt P and Reynolds JA.

96 *Ex parte Cousens; Re Blackett* (1946) 47 SR (NSW) 145.

97 Only Street CJ discussed the reasoning in *Ex parte Cousens*, which was based on the view that the function of a magistrate in committal proceedings "is essentially an executive and not a judicial function . . ." ((1946) 47 SR (NSW) 145, 146 *per* Jordan CJ). Street CJ disagreed with this proposition: "To say of a decision to commit or not to commit that it is not a determination affecting the rights of subjects involves an unacceptable degree of judicial remoteness from the plain, incontrovertible significance that attaches to such decision in ordinary circles (certainly to the person who is either committed for trial or released)". ([1976] 2 NSWLR 570,591). The majority followed *Ex parte Cousens* on the basis of *stare decisis*. ([1976] 2 NSWLR 570,617 *per* Moffitt P, 628 *per* Reynolds JA).

98 [1976] 2 NSWLR 570,613.

99 *Ibid* 628.

1 *Ibid* 595.

2 [1976] 2 NSWLR 570,610 *per* Moffitt P.

determine its own jurisdiction conclusively.[3] If the function of judicial review is to protect the rights of citizens, there are even stronger reasons for it in the case of committal proceedings than in other areas where it is readily granted.[4]

In contrast to this, in *Sankey* v *Whitlam*,[5] the Court of Appeal held that in deciding to disqualify himself from hearing the matter further on the ground of bias, the magistrate had exceeded his jurisdiction and "mandamus" would issue. The difference, according to Moffitt P,[6] was that "the questions . . . [in *Connor* v *Sankey*] were those which would in any event arise to be disposed of in the course of the exercise of the substance of the jurisdiction". Australian cases, with some limited exceptions,[7] now accept that bias goes to jurisdiction. Nevertheless, the decision in this case, when it is compared to *Connor* v *Sankey*,[8] suggests an inconsistency in approach which can be explained only on policy grounds. In *R* v *Bjelke-Petersen; ex parte Plunkett*,[9] on the other hand, the Queensland Supreme Court took the approach that the magistrate in committal proceedings should have broad powers, but did not concede the right of absolute immunity from review.

(6) *The Trade Practices Act 1974 (Cth)*

Two cases in which the High Court demonstrated a different approach to the matter are *R* v *Judges of Federal Court of Australia; ex parte Pilkington ACI (Operations) Ltd*[10] and *In re Adamson; ex parte Western Australian National Football League*.[11] In *Pilkington*, the construction the Federal Court placed upon section 80 of the Trade Practices Act 1974 (Cth) was challenged on the basis that by making an error as to the person entitled to bring an action, the Federal Court had exceeded its jurisdiction. The High Court relied on *Parisienne Basket Shoes Pty Ltd* v *Whyte*[12] to hold that the Federal Court had exclusive jurisdiction to determine this question. Aickin J held that as the Federal Court was the court of first instance for all matters, proper construction of the Act was for that Court alone,

> just as the questions of fact involved in a contravention of a provision as construed by the Federal Court are themselves for the Federal

---

[3] *In re Adamson; ex parte Western Australian National Football League* (1979) 53 ALJR 273,286 *per* Mason J.

[4] [1976] 2 NSWLR 570,590 *per* Street CJ.

[5] [1977] 1 NSWLR 333.

[6] *Ibid* 345.

[7] The High Court indicated that prohibition for bias would go in *R* v *Commonwealth Conciliation and Arbitration Commission; ex parte the Angliss Group* (1969) 122 CLR 546; and issued it in *R* v *Watson; ex parte Armstrong* (1976) 136 CLR 248; also *Sankey* v *Whitlam* [1977] 1 NSWLR 333; *R* v *Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative (No 2)* (1978) 18 SASR 65; note however the views expressed in *Re Anderson; ex parte Bateman* (1979) 53 ALJR 165,165 *per* Gibbs ACJ that "In principle it seems to me that the presence of bias does not mean the absence of jurisdiction". The case went off on the point that a Western Australian Family Court judge exercising federal jurisdiction is not a Commonwealth Officer within s 75(v) of the Constitution.

[8] [1976] 2 NSWLR 570.

[9] [1978] Qd R 305.

[10] (1978) 142 CLR 113.

[11] (1979) 53 ALJR 273.

[12] (1937) 59 CLR 369.

> Court to determine. Such . . . conditions are not "jurisdictional facts". . . .[13]

Mason J, with whom Stephen and Jacobs JJ agreed, thought that as a superior Court of Record, it was unlikely that the jurisdiction of the Federal Court would be dependent on the existence of a particular fact or condition.[14] Where it was necessary for the Federal Court to determine the standing of a prosecutor, it was therefore a matter within the jurisdiction of the Court—any error could be corrected on appeal.[15] In comparing this decision with the decisions earlier discussed, it should be noted that in *Stevenson* v *Barham*[16] and *Caltex (Aust) Pty Ltd* v *Feenan*,[17] which also dealt with a superior Court of Record,[18] only the New South Wales Court of Appeal was prepared to give it the authority consistent with that fact.[19] Similarly, unless the fact of its status was the determining factor, the respect granted the Federal Court here is in marked contrast with the *BLF* case,[20] which overturned determinations of the Conciliation and Arbitration Commission, and decisions which in earlier times overturned decisions of the Commonwealth Court of Conciliation and Arbitration[21] which was also a Court of Record and could be and sometimes was composed of a High Court judge. Indeed, Mason J appeared to be conscious of the inconsistency in *Re Adamson*.[22] In that case, Mason J took the view that the Federal Court was entitled to decide even a constitutional point in the exercise of its jurisdiction. Jacobs J agreed with the view of Mason J.[23] The three dissenting judges[24] regarded the matter as a jurisdictional one—prohibition should go if the Federal Court decided wrongly. Barwick CJ[25] and Murphy J[26] also seemed to regard the question as one of jurisdictional fact.

A similar view to that of Mason J was taken by Gibbs CJ in *R* v *Sweeney; ex parte Northwest Exports Pty Ltd*.[27] Prohibition was sought on the basis that section 144A of the Conciliation and Arbitration Act 1904 (Cth) was invalid and informations laid against the applicant were therefore also invalid. Gibbs CJ remarked:

> It should be said immediately that even if this ground is made out it would not follow that prohibition should be granted, since it would appear to be within the jurisdiction of the Federal Court to hear and determine the informations whether or not the section under which they have been laid is valid. . . .[28]

---

[13] (1978) 142 CLR 113, 138-139.
[14] *Ibid* 125.
[15] *Ibid* 126-127.
[16] (1977) 136 CLR 190.
[17] [1980] 1 NSWLR 724.
[18] The Industrial Commission of New South Wales
[19] [1980] 1 NSWLR 724, 731 *per* Hutley JA.
[20] (1981) 35 ALR 241.
[21] *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte BHP Co Ltd* (1909) 8 CLR 419; *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Brisbane Tramways Co Ltd* (1913) 18 CLR 54; *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389.
[22] (1979) 53 ALJR 273,286.
[23] *Ibid* 291.
[24] Gibbs, Stephen and Aickin JJ.
[25] (1979) 53 ALJR 273,277-278.
[26] *Ibid* 291.
[27] (1981) 35 ALR 135.
[28] (1981) 35 ALR 135,137.

B *Wrong Question, Misconstruction of Statute, Misconception of Jurisdiction*

In *R* v *Dunphy; ex parte Maynes*,[29] the High Court issued prohibition to the Industrial Court on the ground that the Industrial Court had exceeded its jurisdiction by finding that a contravention of the Conciliation and Arbitration Act 1904 (Cth) existed at a certain date when, on the correct construction of the section, the contravention had not occurred and could not have been found to occur if the question had been examined as at the correct date. Mason J gave as his reason for holding that the error went to jurisdiction: "It may be said that the Court through misconceiving the jurisdiction with which it was entrusted addressed itself to the wrong issue and therefore exceeded its jurisdiction".[30] The matters dealt with involved very careful and detailed examination of two sections of the Act and an interpretation of their relative importance. Although the authority of the High Court on statutory construction is more weighty than that of the Industrial Court, it is not self-evident that any error in construction goes to jurisdiction, as Mason J acknowledged.[31] If the construction of the Federal Court of section 80 of the Trade Practices Act in *Pilkington's* case[32] had been incorrect, a misconstruction of the statute would have been involved which presumably would not have gone to jurisdiction. The judgment of Mason J in *R* v *Dunphy*[33] (the leading judgment in the case) also ignores the fact that the Industrial Court is a superior Court of Record and is therefore presumably entitled to some leeway on questions of its own jurisdiction. The problems with the majority decision can best be summed up in the words of Murphy J:

> 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.[34]

In *R* v *Booth; ex parte Administrative and Clerical Officers' Association*,[35] in which mandamus and certiorari were issued to the Deputy Public Service Arbitrator, the Court in a joint judgment construed the term "conditions of employment" in the Public Service Arbitration Act 1920 (Cth) as including the right of appeal against persons appointed to positions who were not members of the Public Service at the time of their appointment. The Arbitrator, by adopting a different interpretation, had "misconstrued the provisions of the Act and misconceived the extent of his powers".[36] Again,

---

[29] (1978) 139 CLR 482.
[30] *Ibid* 496.
[31] *Ibid* 495.
[32] (1978) 142 CLR 113.
[33] (1978) 139 CLR 482, 486-496.
[34] *Ibid* 497.
[35] (1978) 141 CLR 257.
[36] *Ibid* 266.

why this should be a matter going to jurisdiction is not at all clear. In industrial litigation it seems that no error in interpretation is tolerated, although the practical effect of this is to allow the body no margin for error.

It also seems to be true to say that, although no theoretical difference between mandamus and certiorari is acknowledged, declining to hear or to act on a matter is rarely an error within jurisdiction. Cases in which review is granted because the lower body has been influenced by irrelevant considerations or has not heeded relevant ones tend on the whole to be mandamus cases.[37]

In *Sinclair* v *Mining Warden at Maryborough*,[38] the terms of the decision were similar to those in *R* v *Booth*.[39] In *R* v *Industrial Commission of South Australia; ex parte Minda Home Inc*,[40] Wells J granted mandamus on the ground that the Commission had misconceived its powers because, in order to reach the decision it did, the Commission must have relied on findings of fact or law (or both) which lay beyond its jurisdiction, though again, the error of the Commission was one which it could readily have made.

The approach of the New South Wales Court of Appeal in *Dickinson* v *Perrignon*[41] was rather more cautious. Although holding that the Board was wrong to hold that it had no jurisdiction, Street CJ was careful to distinguish between misconstruction of the statute investing the Board with jurisdiction, which did constitute a constructive refusal to exercise jurisdiction, and misconstruction of another statute, which did not have this effect.[42] A similar point was made by the Queensland Supreme Court in *R* v *Bjelke-Petersen; ex parte Plunkett*.[43] The magistrate in *Plunkett* had not exceeded his jurisdiction because he had correctly "clothed" himself with jurisdiction—any misconstruction of a statute in the course of his deliberations would be within jurisdiction. In *McBeatty* v *Gorman*,[44] the Industrial Magistrate had held he had no jurisdiction to allow an amendment to an incorrect notice of appeal, although the Court of Appeal thought that under section 65 of the Justices Act 1902 (NSW) he had. The view of Mahoney JA[45] that the Magistrate's error was within jurisdiction could also be explained on this ground. In any of these cases, however, it is just as possible to describe the additional statute (for example, section 65 of the Justices Act) as one investing the tribunal or court with jurisdiction. Similarly, views which regard the tribunal as entering upon its jurisdiction and being entitled to make errors therein, come up against the established theory of "ouster" of jurisdiction,[46] under which a mistake on certain matters will oust juris-

---

[37] Note decisions cited in *Falkirk Assurance Society Ltd* v *Life Assurance Commissioner* (1976) 50 ALJR 324; *Murphyores Incorporated Pty Ltd* v *Commonwealth of Australia* (1976) CLR 1; *Manning* v *Thompson* (1979) 53 ALJR 582 (Privy Council); *R* v *Insurance Commissioner; ex parte Saltergate Insurance Co Ltd* (1976) 12 ACTR 1.

[38] (1975) 132 CLR 473.

[39] (1978) 141 CLR 257.

[40] (1975) 11 SASR 333.

[41] [1973] 1 NSWLR 72.

[42] *Ibid* 85, relying on *Ex parte Hebburn; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416,420 *per* Jordan CJ.

[43] [1978] Qd R 305, 311 *per* Wanstall CJ.

[44] [1976] 2 NSWLR 560.

[45] *Ibid* 569.

[46] *Eg Bunbury* v *Fuller* (1853) 9 Ex 111, 156 ER 47; *R* v *Judge of County Court*

diction no matter how correctly it was entered upon. The tendency of the High Court and the South Australian Supreme Court to decide that individual sections of the relevant Act invest the tribunal with jurisdiction to act shows that each directive or power can be seen as essential to jurisdiction.

C *Relevant and Irrelevant Matters and Extraneous Considerations*

It has already been mentioned above that the terms "extraneous considerations", "irrelevant considerations" and "failing to take relevant considerations into account" have generally arisen in connection with mandamus cases, despite the reference made to them in *Anisminic*.[47] Stephen J referred to extraneous considerations in *Murphyores Inc Pty Ltd* v *Commonwealth of Australia*;[48] Gibbs J included them in his three tests for exceeding jurisdiction in *Falkirk Assurance Society Ltd* v *Life Insurance Commissioner*.[49] The New South Wales Court of Appeal used the same terminology in *Barton* v *Berman*,[50] basing its remarks on *R* v *War Pensions Entitlement Appeal Tribunal; ex parte Bott*.[51]

In *Manning* v *Thompson*[52] the Privy Council was in favour of issuing mandamus, again because the magistrate took an irrelevant consideration into account—though the substance of the error was the misconstruction of a statute. Northrop J granted mandamus on the ground that relevant considerations had been ignored in *R* v *Insurance Commissioner; ex parte Saltergate Insurance Co Ltd*.[53] In *R* v *Industrial Commission of South Australia; ex parte Minda Home Inc*[54] Bray CJ thought that the refusal of the Industrial Commission to allow amendment of the defective notice of appeal was due to the Commission's failure to take relevant matters into account; in this case, the section of the Act which, on the interpretation of the Supreme Court, empowered the Commission to give leave to amend.

In contrast to these cases are the applications for prohibition in *Re Shaw; ex parte Shaw*[55] and for certiorari in *R* v *Small Claims Tribunal; ex parte Barwiner Nominees Pty Ltd*.[56] In *Shaw* the application was based on the alleged bias of a Family Court judge (an allegation which the High Court found had not been made out) and on the consideration of matters which the majority of the Court felt to be extraneous, namely, the wealth of the husband's family. Gibbs ACJ, with whom Stephen and Wilson JJ agreed,[57] remarked that such a consideration would be an error within the jurisdiction

---

of Lincolnshire (1887) 20 QBD 167; *Colonial Bank of Australasia* v *Willan* (1874) LR 5 PC 417.

[47] [1969] 2 AC 147,171 *per* Lord Reid, 195 *per* Lord Pearce, 210 *per* Lord Wilberforce.

[48] *Murphyores Incorporated Pty Ltd* v *Commonwealth of Australia* (1976) 136 CLR 1, 12.

[49] (1976) 50 ALJR 324,329.

[50] [1980] 1 NSWLR 63,71 *per* Hope JA, again relying on *Ex parte Hebburn; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416,420 *per* Jordan CJ.

[51] (1933) 50 CLR 228.

[52] (1979) 53 ALJR 582.

[53] (1976) 12 ACTR 1.

[54] (1975) 11 SASR 333,337.

[55] (1981) 55 ALJR 12.

[56] [1975] VR 831.

[57] (1981) 55 ALJR 12,14.

of the judge (although it too must have involved a misconstruction of the statute). In *Barwiner Nominees* Gowans J took a slightly different approach. He felt that the referee had probably come to a decision without adverting to the relevant law, which was an error, and that the ultimate decision to order a refund for the defective goods without obliging the dissatisfied customer to return them was probably wrong in law. Nevertheless, he held that failure to take a relevant matter into account only amounted to an excess of jurisdiction when it amounted to a nullity—in this case, if the tribunal had considered the law irrelevant or had concluded that the law did not authorise the tribunal to make the order but had made it regardless. Since there was nothing to show that the tribunal had done either of those things, it had erred within its jurisdiction.[58]

In *R* v *Ward; ex parte Bowering*[59] the same approach was taken to the problem of nullity to avoid the application of *Anisminic*. In itself the term "nullity" contributes very little to the discussion of jurisdictional and non-jurisdictional error of law. A matter is a nullity if it is a decision taken outside jurisdiction. Its significance is that while the majority in *Anisminic* used the term to allow intervention, it is now one of the ways in which a court may decline to intervene without also declining to follow *Anisminic*.

D *Matters often regarded as "procedural"*

(1) *Standing*

Procedural matters (when they are described as such) are generally considered to be under the control of the court or the particular tribunal.[60] In *R* v *Evatt; ex parte Master Builders' Association of New South Wales*,[61] for example, the High Court decided that it was within the jurisdiction of the judge to decide who could appear before her. "The exercise of power now under consideration was purely in relation to a matter of procedure."[62] Similarly, in *R* v *Judges of the Federal Court of Australia; ex parte Pilkington ACI (Operations) Pty Ltd*,[63] the High Court took the view that the standing of a party wishing to appear before the Federal Court as a prosecutor was a matter for that court, even though the matter involved construction of a statute. In *McBeatty* v *Gorman*[64] part of the reason for the dismissal of the application by Samuels and Mahoney JJA was that they saw the amendment of a notice of appeal as a procedural matter, properly determinable by the Industrial Commission, not the Court of Appeal.

Opposed to this is the decision of the South Australian Supreme Court in *R* v *Industrial Commission of South Australia; ex parte Minda Home Inc*[65] where the Industrial Commission was ordered to consider the grant

---

[58] [1975] VR 831,841.
[59] (1978) 20 SASR 424.
[60] *Posner* v *Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461; *R* v *Commonwealth Conciliation and Arbitration Commission; ex parte Amalgamated Engineering Union* (1967) 118 CLR 219.
[61] (1974) 132 CLR 150.
[62] *Ibid* 155, *per* Gibbs, Stephen and Mason JJ.
[63] (1978) 142 CLR 113.
[64] [1976] 2 NSWLR 560,568, 569-570.
[65] (1975) 11 SASR 333.

of leave to amend. Misinterpretation by the Commission of its powers to grant leave was held to be a jurisdictional error.

Part of the decision of the South Australian Supreme Court in *R* v *Elliott; ex parte Elliott*[66] can also be seen as being based on procedural matters. A complaint laid was clearly defective, as six charges were brought under it. The Court held however that the complaint could have been amended and consent had been given by the applicant to the charge being heard. As a consequence the magistrate had jurisdiction.

(2) *Time*

The question of whether a wrong determination on the imposition of time limits is within jurisdiction or outside it is normally governed by the decision of the High Court in *Parisienne Basket Shoes Pty Ltd* v *Whyte*.[67] The statutes of limitations are in any case regarded as procedural rather than substantive law.[68] The majority of the New South Wales Court of Appeal in *Manning* v *Thompson*[69] held that the judge had jurisdiction to determine the reasons for and the imposition of the time limit for applications. On appeal the Privy Council[70] thought *Parisienne Basket Shoes* irrelevant, as the Board looked at the misconstruction of the statute leading up to the imposition of the time limit, rather than at the imposition of the time limit itself.

In *R* v *Stanley; ex parte Redapple Restaurants Pty Ltd*[71] the Industrial Court of South Australia held that it had power to allow an applicant an extension of time under the Limitation of Actions Act 1936-1975 (SA). The Supreme Court held that an error in the construction of that Act would be an error within jurisdiction—not on principle, but because the section of the Industrial Conciliation and Arbitration Act 1972-1975 (SA) imposing the time limit read "the Court shall not exercise the jurisdiction conferred on it by this paragraph unless an application . . . is made . . . within twenty-one days . . .".[72] The Supreme Court took this to mean that the Industrial Court had jurisdiction, but was debarred from exercising it. In *R* v *Di Fazio; ex parte General Motors-Holden Ltd*[73] the Industrial Magistrate allowed an extension of time under the Limitation of Actions Act 1936-1975 (SA), being bound by the Industrial Court's interpretation of the Act. In an application to the Supreme Court for certiorari against the magistrate (who was not protected by a privative clause), the Supreme Court determined for itself the correctness of the Industrial Court's interpretation (and approved it). *R* v *Levine; ex parte de Jong*[74] is another case involving time; as time is part of the definition of "small claim", the correct interpretation of the time limit clause is essential to the jurisdiction of the Small Claims Tribunal which is confined to small claims.

---

66 (1974) 8 SASR 329, 348 *per* Sangster J.
67 (1938) 59 CLR 369.
68 *Pedersen* v *Young* (1964) 110 CLR 162,166 *per* Menzies J.
69 [1977] 2 NSWLR 249.
70 (1979) 53 ALJR 582.
71 (1976) 13 SASR 290.
72 S 15(1)(e).
73 (1979) 20 SASR 559.
74 [1981] VR 131.

In *Grzybowicz* v *Smiljanic*,[75] on the other hand, the judge at first instance refused to hear the action because he considered it had been brought out of time. The Court of Appeal relied on the *Parisienne Basket Shoes* case[76] to hold that such a determination was within the jurisdiction of the judge.

(3) *Evidence*

Findings on the basis of evidence are of course questions of fact. The admissibility of evidence or conviction on too little or none at all can be a question of law. In *R* v *Galvin; ex parte Bowditch*[77] Gallop J went so far as to say that a magistrate acting completely without evidence would not be acting outside his jurisdiction. Similarly, in *R* v *Bjelke-Petersen; ex parte Plunkett*[78] the Court held that any error as to the admission of evidence or in findings on it was within the magistrate's jurisdiction. A slightly different approach was taken by the South Australian Supreme Court in *R* v *Ward; ex parte Bowering*.[79] The Court construed the privative clause broadly and decided that a ruling by a judge to refuse to admit evidence was a "decision" protected by the clause, which can only mean that the matter was within the jurisdiction of the judge.

In *Re Cook; ex parte Twigg*[80] the High Court held that Twigg had been convicted by a Family Court judge of an offence not known to the law—a conviction for which there was in any case no supporting evidence. In the leading judgment in the case, Gibbs J agonised over the question of evidence. He concluded that, on the basis of *R* v *Nat Bell Liquors Ltd*,[81] certiorari to quash the conviction should only go if the lack of evidence appeared on the face of the record, which he ultimately concluded it did. *Re Cook; ex parte Twigg*[82] is a curious decision, because the search for the record indicates that Gibbs J thought that all errors made were made within jurisdiction. For excess of jurisdiction it is generally accepted that the court is not confined to an examination of the record. In any case, as will be discussed below, conviction for an offence unknown to law should certainly be a jurisdictional error. There is a good deal of authority for the proposition that conviction despite a lack of evidence is within jurisdiction,[83] although there is also some authority against it.[84] It is however difficult to reconcile the view that such an error is within jurisdiction with the proposition that a judge taking irrelevant considerations into account or refusing to consider relevant ones thereby exceeds his jurisdiction, as in refusing to hear evidence the tribunal must be doing one or the other or both.

---

[75] [1980] 1 NSWLR 627.
[76] (1938) 59 CLR 369.
[77] (1979) 2 NTR 9.
[78] [1978] Qd R 305.
[79] (1978) 20 SASR 424.
[80] (1980) 54 ALJR 515,520.
[81] [1922] 2 AC 128.
[82] (1980) 54 ALJR 515.
[83] *R* v *Nat Bell Liquors Ltd* [1922] 2 AC 128; *R* v *Corporation of Glenelg; ex parte Pier House Pty Ltd* [1968] SASR 246; *R* v *Tennant; ex parte Woods* [1962] Qd R 241.
[84] *Gardiner* v *Land Agents Board* (1976) 12 SASR 458; *Armah* v *Government of Ghana* [1968] AC 192; in *R* v *War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 the Court preferred to speak of insufficiency of evidence.

E *Other Matters*

In *Re Cook; ex parte Twigg*[85] Barwick CJ commented that he agreed with Gibbs J that the Family Court had no jurisdiction to entertain the charge in question, which was contempt of court by a solicitor who allegedly instructed his client not to co-operate in a compulsory counselling session. Although Aickin J[86] was also of the view that prohibition would lie because a jurisdictional error had been made, the judgment of Gibbs J gives no indication that he considered the judge had exceeded his jurisdiction. Stephen J[87] stated that he was in favour of granting certiorari because an error of law appeared on the face of the record, namely conviction of an offence unknown to law. Gibbs J went so far as to say that he doubted whether prohibition would go, although the arguments in favour of it were by no means untenable "having regard to some of the statements"[88] made in *Anisminic*. Despite the obvious eagerness of the Court to grant certiorari, which the Court considered the appropriate remedy[89] (since prohibition would not quash the conviction), as a matter of principle and in view of other cases on jurisdiction, conviction for an offence which does not exist must be a jurisdictional error. This was certainly the view of Street CJ in *Connor* v *Sankey*[90] and although the majority in that case would have left the determination of the matter to the magistrate, the circumstances were exceptional. Even if it is part of a magistrate's task in committal proceedings to determine whether the offence charged is one known to law, a Family Court judge's power to commit for contempt, although not dependent on the actual commission of the offence,[91] does not appear to be in the same category. The power is ancillary to the judge's main function and the matter is not later to be heard in full criminal trial. In *R* v *Kelly; ex parte Berman*[92] Kitto J based his dissent on the proposition that Berman was not charged with any offence known to law, though he commented that this would not have mattered if the proceedings had been before a court ordinarily concerned with criminal matters, where a proper charge could have been made. The majority held that there was a charge known to law, but do not seem to have doubted that if there had not been, the Court would have exceeded its jurisdiction.

In *R* v *Elliott; ex parte Elliott*[93] the magistrate convicted the applicant on six charges laid under the one information. Bray CJ and Sangster J both thought that the error was a jurisdictional one, because the magistrate could in law convict on only one charge. Bray CJ thought it appropriate to grant certiorari to quash five out of the six convictions;[94] Sangster J declined to grant it because he considered an appeal more appropriate.[95] Jacobs J held

---

85 (1980) 54 ALJR 515,516.
86 *Ibid* 521.
87 *Ibid.*
88 *Ibid* 520.
89 *Ibid* 521,522.
90 (1976) 2 NSWLR 570,594.
91 *R* v *Nat Bell Liquors Ltd* [1922] 2 AC 128; *R* v *Kelly; ex parte Berman* (1953) 89 CLR 608,621 *per* Dixon CJ.
92 (1953) 89 CLR 608,630.
93 (1974) 8 SASR 329.
94 *Ibid* 342.
95 *Ibid* 366.

that as the magistrate had not acted completely outside jurisdiction, there was no excess and the error was within jurisdiction.[96] From the point of view of the applicant, convicted on six charges rather than one, this seems rather a harsh approach, although an appeal was available.

Other cases to be noted here are those which fit into no particular category but in which the courts found no justification for the action of the inferior body in its statute and held that the error went to jurisdiction. The decision in *R* v *Johns; ex parte Public Service Association of South Australia Inc*[97] is an example of this. The Court held that the Commissioner could not make a new award of his own motion and was therefore acting outside his jurisdiction. Similarly, in *R* v *Bleby, Johns and Lean; ex parte Royal Australian Nursing Federation*[98] Mitchell J held that the Commission was not entitled to apply the law wrongly to facts correctly found. The High Court granted prohibition to the Commissioner of Patents in *R* v *Smith; ex parte Mole Engineering Pty Ltd*[99] on the ground that the Commissioner had no power to grant a re-hearing of a matter already heard.

4 SUMMARY OF THE AUSTRALIAN POSITION

A *Trends towards Intervention*

The most striking aspect of the Australian cases is the different views adopted of industrial cases as opposed to the approach taken to those without industrial, or more accurately, employer-employee relationship, connotations. The most obvious example of this is the approach of the South Australian Supreme Court, which held that it had the power to intervene in most of the industrial cases which came before it by way of application for prerogative writ even where it ultimately refused to intervene. In *R* v *Chislett; ex parte Public Service Association of South Australia Inc*[1] relief against the Industrial Registrar was denied, only to be granted against the Industrial Commission[2] on an application by the same parties in the same matter. In the same period however the Court declined to intervene in two cases which did not involve industrial matters,[3] the refusal to intervene being justified by reasoning completely opposed to that which was used to justify intervention in the industrial cases. Similarly, although the High Court refused to intervene in several industrial cases which came before it, the approach the Court adopted to review involved maintaining the right to review where it did feel that an error had been made[4] no matter how insignificant the error.[5] This is again in marked contrast to the views of the

---

[96] *Ibid* 371. See *R* v *Hickman; ex parte Fox* (1945) 70 CLR 598; 615 *per* Dixon J.
[97] [1971] SASR 206.
[98] (1973) 4 SASR 445.
[99] (1981) 35 ALR 119.
[1] (1973) 4 SASR 427.
[2] *R* v *Bleby, Johns and Lean; ex parte Royal Australian Nursing Federation* (1973) 4 SASR 445.
[3] *R* v *Elliott; ex parte Elliott* (1974) 8 SASR 329; *R* v *Ward; ex parte Bowering* (1978) 20 SASR 424.
[4] See discussion of "industrial matter" above p 19 *et seq; Stevenson* v *Barham* (1977) 136 CLR 190.
[5] *R* v *Marks; ex parte Building Construction Employees' and Builders Labourers' Federation* (1981) 35 ALR 241.

High Court expressed particularly in the Trade Practices cases and family law cases.[6]

The exception to this general proposition in the cases discussed is New South Wales. Although the Court of Appeal intervened in *Dickinson* v *Perrignon*,[7] they were not prepared to do so in *McBeatty* v *Gorman*,[8] and the views expressed in *Caltex Oil (Aust) Pty Ltd* v *Feenan*[9] demonstrated less enthusiasm for intervention than that displayed by their colleagues on the courts referred to above.

(1) *Treatment of Privative Clauses*

Just as in *Anisminic Ltd* v *Foreign Compensation Commission*,[10] intervention where there is a privative clause involves considerable convolution of definition and extension of the boundaries of errors going to jurisdiction. The South Australian cases demonstrate how widely the area can extend. In *R* v *Chislett*[11] the width of the previous decisions of the Supreme Court made it quite difficult when the Supreme Court decided to refuse intervention. In an application to prohibit the Industrial Registrar from putting into effect the decision of the Industrial Commission which was subsequently struck down in *R* v *Bleby, Johns and Lean*,[12] the Supreme Court refused relief, not in the exercise of its discretion (in view of the application pending against the Industrial Commission), but on the basis that the privative clause protected the decision of the Commission from collateral attack. Since the rationale for the right to intervene being pursued is that a decision made in excess of jurisdiction is a nullity, it is difficult to see why collateral review should not be possible. In logic, if a decision is made outside jurisdiction and is a nullity, it must be void as against all persons and review should therefore be available against anyone acting under it.

Later, in *R* v *Di Fazio; ex parte General-Motors Holden Ltd*[13] the Court reviewed the decision of the Industrial Magistrate with a view to issuing certiorari for error on the face of the record, since he was not protected by a privative clause. The Magistrate was bound to follow the decision of the Industrial Court, which was not subject to appeal nor, in this instance, to review.[14] The Court rejected the argument that to issue certiorari to the Industrial Magistrate would in the circumstances be an attack on the decision of the Industrial Court which should be protected by its privative clause.

Opposed to this is the view of a somewhat differently composed South Australian Supreme Court in *R* v *Ward; ex parte Bowering*,[15] where the privative clause provided only that the decision be final and conclusive, without appeal and should not be questioned in any way. Despite strong

---

[6] *Re Cook; ex parte Twigg* (1980) 54 ALJR 515; and note *R* v *Baker and Wilkie; ex parte Johnston* (1981) 33 ALR 660 where the Court declined to interfere at all.

[7] [1973] 1 NSWLR 72.

[8] [1976] 2 NSWLR 560.

[9] [1980] 1 NSWLR 724.

[10] [1969] 2 AC 147.

[11] (1973) 4 SASR 427.

[12] (1973) 4 SASR 445.

[13] (1979) 20 SASR 559.

[14] A challenge brought against the Industrial Court's determination on the question had failed, as the Supreme Court held that it was a matter within the jurisdiction of the Industrial Court. *R* v *Stanley; ex parte Redapple Pty Ltd* (1976) 13 SASR 290.

[15] (1978) 20 SASR 424.

authority on the construction of the terms as not excluding review,[16] the Court construed the clause as prohibiting not only appeal but the issue of the prerogative writs.[17] The Court discussed policy—but the same policy considerations of speed and efficiency could equally well have applied to the Industrial Commission and the Industrial Court.

Similarly, in *R* v *Elliott; ex parte Elliott*[18] Jacobs J held that convicting on six charges when the magistrate could in reality only convict on one was within jurisdiction. The approach of Gowans J in *R* v *Small Claims Tribunal; ex parte Barwiner Nominees Pty Ltd*[19] also reflects a willingness to give effect to a privative clause and to allow tribunals the jurisdiction to go wrong.

All of the privative clauses dealt with above allowed intervention for want or excess of jurisdiction. *Houssein* v *Under Secretary, Dept of Industrial Relations and Technology*[20] reflects the accepted interpretation of privative clauses which purport to exclude all review as not excluding review for jurisdictional error.

(2) *Intervention for the sake of it*

Again this category is concerned primarily with the South Australian decisions, which seem in recent years to have gone the closest to merging the jurisdictional and non-jurisdictional difference. *R* v *Di Fazio*[21] is a good example of the court's retaining its power to intervene—as the Court concluded that it could do so despite the potentially dangerous precedent of the Supreme Court overturning a decision of the Industrial Magistrate which authority binding on him compelled him to reach—and despite their eventual finding that the authority binding on the Magistrate was correct in law.

Another instance of this problem is the decision of the Supreme Court in the *Teachers* case.[22] The Industrial Commission is protected by a privative clause from all but review for excess of jurisdiction.[23] An appeal on matters of law does, however, go to the Industrial Court which has conclusive jurisdiction to decide the jurisdiction of the Industrial Commission.[24] The matter went on appeal and the Industrial Court made a ruling. Could prohibition then go to the Industrial Commission in relation to this matter? The Supreme Court held that it could—the words "excess or want of jurisdiction" should be construed as applying to any case where the question of the want of jurisdiction of any tribunal was left to the Industrial Court. The Supreme Court then found that the Industrial Court's ruling was correct. This approach was also applied in *R* v *Industrial Commission of South*

---

[16] *Hall* v *Arnold* [1950] 2 KB 543; *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government* [1960] AC 260; *Ex parte Blackwell; Re Hateley* [1965] NSWR 1061; *Tehrani* v *Rostron* [1972] 1 QB 182; *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363.

[17] Support for this can be found in *Seereelall Jhuggroo* v *Central Arbitration and Control Board* [1953] AC 151.

[18] (1974) 8 SASR 329,371.

[19] [1975] VR 831.

[20] [1980] 2 NSWLR 398.

[21] (1979) 20 SASR 559.

[22] (1974) 9 SASR 320.

[23] Industrial Conciliation and Arbitration Act 1972-1975 (SA) s 95.

[24] *Ibid* s 94.

Australia; ex parte Fire Brigades Board.[25] The obvious criticism of this interpretation is that it involves a considerable stretching of the language of the statute.

A different approach leading to the same conclusion was taken by the Supreme Court of Queensland in *R* v *Industrial Court and Mount Isa Mines Ltd.*[26] The Court held that the Industrial Court had jurisdiction to hear an appeal from the Industrial Commissioner on a question of law only if the error of law had in fact occurred—in short, if it was a jurisdictional fact. The approach, it is submitted, of Gibbs J in *R* v *Industrial Court of Queensland; ex parte Federated Miscellaneous Workers' Union of Employees of Australia* is much to be preferred:

> In my opinion it was not the intention of the legislature that this court should be called upon to determine the correctness of a decision of the Industrial Court on appeal from the Commission, under the guise of determining whether the Industrial Court had jurisdiction. In the resolution of industrial disputes the speedy and decisive determination of the questions in issue is often a matter of very great importance and there was thus a good reason why the legislature left it to the Industrial Court to determine whether the grounds on which an appeal is brought from a decision of the Commission are or are not made out.[27]

The retention of the category of "jurisdictional fact", particularly in the industrial cases, is also a means by which the Supreme Court can maintain its control, but it is at the cost of the convenience which the provision of only one avenue of appeal is intended to provide. The expansion of the Court's ability to intervene, associated with refusal to do so, can only be explained as the determination of the courts not to be excluded from the decision-making process.

(3) *Jurisdiction by Consent*

A feature of recent cases is orders made by courts which are unsure of their power to make them but do so in the absence of objection from the parties concerned. Although there is no jurisdiction by consent in theory,[28] the decisions in these cases can only be regarded as a form of it in practice. An example of this is the decision of the South Australian Supreme Court in *R* v *Full Industrial Commission of South Australia; ex parte Public Service Association of South Australian Inc*[29] where, although unsure of their own power to grant certiorari for an error the Court thought was really within jurisdiction, the Court granted it in the absence of objection from the affected party.

Similarly, the grant of certiorari by the High Court,[30] particularly in more

---

[25] (1981) 26 SASR 580.
[26] (1966) 59 Qd R 245.
[27] (1967) 60 Qd R 349, 365.
[28] *Re Cook; ex parte Twigg* (1980) 54 ALJR 515,522 *per* Aickin J: "it is trite law that consent or absence of opposition does not give jurisdiction".
[29] (1977) 16 SASR 496.
[30] *Pitfield* v *Franki* (1970) 123 CLR 448; *R* v *Marshall; ex parte Federated Clerks Union of Australia* (1975) 132 CLR 595 *per* McTiernan J; *R* v *Booth; ex parte Administrative and Clerical Officers' Association* (1978) 141 CLR 257.

recent cases,[31] which have moved further away from any of the original justifications for its issue,[32] must affect the decisions of members of the Court when a party does object and claims that the High Court has no jurisdiction to issue certiorari.

(4) *Conceptual Backing*

From the cases already discussed, it will be clear that the difference between jurisdictional and non-jurisdictional error is so well-accepted as to require little discussion. What is remarkable about the cases is how little Australian judges now seem to rely on such terms as "procedural". Although a number of cases were decided on what was in effect "jurisdictional fact", few of them adverted directly to that point. In general, distinguishing between jurisdictional and non-jurisdictional error is essentially a matter of statutory interpretation and the application of precedent.

The concept of nullities and voidness has come in for some attention, particularly where judges do not wish to follow *Anisminic*.[33] It is however certainly true to say that there is no infallible test which can be applied to a situation to obtain a certain result.

B *Declining Intervention*

(1) *Where the matter would otherwise be within jurisdiction*

In *R* v *Moore; ex parte Graham*[34] Gibbs J remarked that prohibition would not lie to a body if while acting within jurisdiction, it made an award it had power to make, merely because it thought power was conferred by one section whereas it was in truth given by another. As a reason for declining to intervene, this parallels the dissenting view of Bray CJ in *R* v *Bleby, Johns and Lean; ex parte Royal Australian Nursing Federation*[35] that a decision which could validly have been taken within jurisdiction was still within jurisdiction, although it had been taken under the wrong part of the Act. It should be noted however that the mandamus cases often involve decisions made within power which are taken outside jurisdiction because of irrelevant considerations or statutory misconstructions and the like.[36]

(2) *Where intervention would serve no purpose*

In *R* v *Johns; ex parte Public Service Association of South Australia Inc*[37] and *R v Bleby, Johns and Lean; ex parte Royal Australian Nursing Federation*,[38] Bray CJ was in favour of refusing certiorari because the Commission could and quite possibly would produce exactly the same result within their jurisdiction.

---

[31] *Re Cook; ex parte Twigg* (1980) 54 ALJR 515; *Re Moodie; ex parte Emery* (1981) 34 ALR 481.

[32] *Eg R* v *Marshall; ex parte Federated Clerks Union of Australia* (1975) 132 CLR 595, *per* McTiernan J; *Re Cook; ex parte Twigg* (1980) 54 ALJR 515.

[33] *R* v *Small Claims Tribunal; ex parte Barwiner Nominees Pty Ltd* [1975] VR 831; *R* v *Ward; ex parte Bowering* (1978) 20 SASR 424.

[34] (1977) 138 CLR 164,173.

[35] (1973) 4 SASR 445.

[36] *Eg R* v *Full Industrial Commission of South Australia; ex parte Public Service Association of South Australia Inc* (1977) 16 SASR 496; *R* v *Booth; ex parte Administrative and Clerical Officers' Association* (1978) 141 CLR 257.

[37] [1971] SASR 206.

[38] (1973) 4 SASR 445.

(3) *Where an appeal is preferable*

Although Barwick CJ was of the view that the availability of appeal is not a matter for consideration in the exercise of the judicial discretion,[39] this is not a view which other judges in Australia share. In *R* v *Elliott; ex parte Elliott*[40] the majority refused certiorari because they considered appeal more appropriate. A similar view was taken by the New South Wales Court of Appeal in *McBeatty* v *Gorman*.[41] A number of judges commented in *Re Cook; ex parte Twigg*[42] that an appeal would have been preferable. In *R* v *Baker and Wilkie; ex parte Johnston*[43] the Court went so far as to refuse prohibition solely on the ground that the issues should first be canvassed in the Family Court. Similarly, in *Caltex Oil (Aust) Pty Ltd* v *Feenan*[44] the New South Wales Court of Appeal ordered Caltex to pay costs to the other party for the delay while Caltex chose whether to pursue an appeal or relief by way of prerogative writ.

The refusal to grant the remedy generally corresponds with a decision or feeling on the part of the judges that the error is within jurisdiction, though this is not invariably the case. In *R* v *Elliott*[45] Jacobs J thought the error was made within jurisdiction and covered by the privative clause, while Sangster J thought it was made outside jurisdiction but declined to intervene. In *McBeatty* v *Gorman*[46] only Mahoney and Samuels JJ were prepared to say that the error was within jurisdiction. Street CJ preferred not to decide. In *Caltex Oil* the whole Court found the error was within jurisdiction.

(4) *Policy Considerations*

It has already been noted that the policy behind a particular enactment can be a factor in interpreting that enactment and in giving relief. In *R* v *Ward*[47] the policy behind the Court of Disputed Returns was discussed and was an important factor in the decision to refuse relief.[48] In the Small Claims Tribunal cases, the nature of the Tribunals and their functions are of obvious importance. Similarly, in cases involving magistrates, policy plays a considerable role in the court's determinations.

In the industrial arena, the purpose of the legislature in not providing an appeal beyond a certain stage has not been a matter with which judges have concerned themselves. They have preferred to adduce some kind of "intention" from a close examination of sections probably written without jurisdiction in mind. On the one side there is the view of Barwick CJ that "(i)t is for the public interest that tribunals of limited jurisdiction be confined within that jurisdiction".[49] On the other are such comments as that of

---

[39] *In re Adamson; ex parte Western Australian National Football League* (1979) 53 ALJR 273,278.
[40] (1974) 8 SASR 329.
[41] [1976] 2 NSWLR 560.
[42] (1980) 54 ALJR 515,521 *per* Mason J, 521 *per* Murphy J, 523 *per* Wilson J.
[43] (1981) 33 ALR 660.
[44] [1980] 1 NSWLR 724.
[45] (1974) 8 SASR 329.
[46] [1976] 2 NSWLR 560.
[47] (1978) 20 SASR 424.
[48] Note also *Devan Nair* v *Yong Kuan Teik* [1967] 2 WLR 846, where the same approach was taken by the Privy Council.
[49] *In re Adamson* (1979) 53 ALJR 273,278.

Murphy J in *R* v *Dunphy; ex parte Maynes*[50] that as the decision was reasonable, the court should refrain from intervention, and the views of Mason and Jacobs JJ in *Stevenson* v *Barham*[51] that it is proper that industrial tribunals should determine industrial questions. Certainly this is a policy which the New South Wales Court of Appeal seems to favour.

C *Conclusion*

The decisions which have been discussed show a considerable range of judicial opinion on error of law. A difference between industrial and non-industrial matters can be noted, and a difference of opinion on a State basis, since the New South Wales Court of Appeal seems less eager to intervene than the South Australian Supreme Court. To a certain extent, the variety of decisions is due to the diversity of statutes and of the fact situations which give rise to the question of error of law—Licensing Courts, Small Claims, industrial matters, criminal committal proceedings and so on. On certain matters, such as *locus standi* and, to a certain extent, review of evidence, there is considerable consistency of view. There is also a consistent body of opinion on the preferability of appeals—again with the exception of the industrial cases. The South Australian view on industrial matters in particular comes very close to ignoring completely the policy behind the privative clause and to unifying errors of law inside and outside jurisdiction. On the whole, apart from the industrial cases it seems fair to say that Australian courts are not inclined to interfere, particularly where appeal is available, and an applicant who wishes to succeed must be able to show both an obvious error and a good reason why such an error should be jurisdictional. As has been noted, it is probably easier to obtain mandamus on this ground than prohibition or certiorari (where jurisdictional error is involved).

In the industrial area, the view of the New South Wales Court of Appeal corresponds to its attitude on other matters. In South Australia, more applications are being refused, for various reasons. In the High Court, despite earlier indications that the Court might be less willing to intervene in future, the recent decision of the Court in the *BLF* case[52] leads to the conclusion that judicial restraint in this area is not to be expected.

5 POLICY

A *Judicial Review—Justification and Desirability*

The attention which has been paid to the judgments in *Anisminic Ltd* v *Foreign Compensation Commission*[53] has adverted mainly to the fact that the scope of the judgment was broad enough to circumvent the broadest of ouster clauses and to give the court unlimited power to intervene when it so wishes.[54] Less attention has been given to the desirability of its so doing or,

---

[50] (1978) 139 CLR 482,497.
[51] (1977) 136 CLR 190,201.
[52] (1981) 35 ALR 241.
[53] [1969] 2 AC 147.
[54] *Eg* Lord Denning in *Pearlman* v *Keepers and Governors of Harrow School* [1979] QB 56, 69; *R* v *Chief Immigration Officer, Gatwick Airport; ex parte Kharrazi* [1980] 1 WLR 1396; J A Smillie, "Judicial Review of Administrative Action—A Pragmatic Approach" (1980) 4 Otago Law Review 417; S A De Smith, "Judicial Review in

indeed, to the desirability of the judgment itself. Both in the width of the judgments of English judges[55] and in the works of learned writers on jurisdictional error[56] there is implicit the supposition that judicial review is in itself a desirable part of the system of justice and the right of every citizen.

The proposition that judicial review upholds the rights of the ordinary citizen, however true it may be in the English context, is not necessarily one which has been shown to be true by Australian experience. *Anisminic* itself was 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. Where in England judicial review for error of law is often directed against appeal tribunals and other government bodies or officials at the instance of individuals,[57] in Australia the cases which have come before the High Court and the State Supreme Courts in recent years have tended to have been brought by employers or unions or, in the non-industrial area, large companies or individuals seeking to defend their business interests.[58] The rights with which the courts in Australia are often concerned are the proprietary rights of the wealthy rather than the personal rights of the oppressed individual.[59] Although the rule of judicial interpretation "that the general rights of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Acts of Parliament"[60] applies in theory to preserve the right of the "Queen's subject" to review of a decision by a higher court, in view of the restrictive privative clauses introduced by Commonwealth and State legislatures—particularly in industrial legislation[61] —it appears that in many cases Parliament does intend to deprive some subjects of their right to take every case to the highest judicial authority available. This can be explained as the intervention of Parliament to eradicate inconvenient private rights—it may also be explained as the desire of the legislature to preserve other rights which the availability of judicial review has done nothing to protect.

The most obvious flaw in the argument that judicial review is a right is the time and expense involved in obtaining it. The more avenues of review

---

Administrative Law: The Ever-Open Door?" (1969) 27 Cambridge Law Journal, 161,165.

[55] Judgments of Lord Denning, above n 54; *In re Racal Communications Ltd* [1980] 3 WLR 181,187 *per* Lord Diplock.

[56] Lord Diplock, "Administrative Law: Judicial Review Reviewed" (1974) 33 Cambridge Law Journal 233; T Thomas, "Judicial Review and *South East Asia Fire Bricks*—A Missed Opportunity" [1980] 2 Malaya Law Journal lxxvi; Smillie, *op cit.*

[57] Cases cited below p. 40.

[58] Cases cited below p 41.

[59] There are of course exceptions to this; in the area of jurisdictional error, note *Grzybowicz* v *Smiljanic* [1980] 1 NSWLR 627; *R* v *Galvin; ex parte Bowditch* (1979) 2 NTR 9; *R* v *Elliott; ex parte Elliott* (1974) 8 SASR 329; *In re Morris; ex parte Australian Telecommunications Commission* (1980) 54 ALJR 507; *Small Claim* cases cited above, p. 21.

[60] *Jacobs* v *Brett* (1875) LR 20 Eq 1, 7 *per* Sir G Jessel MR; quoted in *Clancy* v *Butchers' Shop Employes Union* (1904) 1 CLR 181,204 *per* O'Connor J.

[61] *Eg* Conciliation and Arbitration Act 1904 (Cth) s 31(1) (before amendment), s 60 of Act in present form; Industrial Conciliation and Arbitration Acts 1961-1964 (Qld) ss 8(6) and 34; Industrial Conciliation and Arbitration Act 1972-1975 (SA) ss 92 and 95; Industrial Arbitration Act 1940 (NSW) s 84.

which are available to a party, the longer the litigation and the more expensive the process. The cause of justice is not best served by extensive delay. Where the sums involved are small, the continued process of review and appeal can be used to thwart the purpose of the legislature in establishing a tribunal to hear matters with a minimum of fuss. An obvious example of this is the Small Claims Tribunal. If challenges in the Supreme Court were common, the original claimant would possibly be well-advised not to bring a claim, lest he run the risk of losing before the Supreme Court. Another example is the *Caltex Oil* v *Feenan* litigation which originated before the Industrial Commission but ended up in the Privy Council.[62] The sum involved was $17,600. An appeal to the Industrial Court from the decision of the Industrial Commission was available but Caltex chose not to pursue it. The cost to the Feenans, had they lost, could by that time have made the whole matter a very expensive one. Other examples are the *Barton*[63] and *Sankey*[64] litigation, both of which demonstrate how successfully the availability of the prerogative writs can be used to delay litigation and consequently increase expense.

The cases of *R* v *Chislett; ex parte Public Service Association of SA Inc*[65] and *R* v *Bleby, Johns and Lean; ex parte Royal Australian Nursing Association*,[66] applications for writs against different persons brought by the same party in consequence of the same decision, are other instances of the use that can be made of judicial review to avoid ordinary avenues of appeal. Where both parties can afford to pay the costs, the effect is merely to take up the time of the courts and to delay a decision which could have been arrived at considerably more expeditiously. Where one party cannot afford to lose, there can be in practical terms no question of preservation of that party's rights.

An essential part of the proposition that judicial review does operate to protect the rights of a citizen is the assumption that judicial intervention will be "liberal" in its tendencies; that, as in England, the Lord Dennings of the judicial system will lean towards preserving rights or, if necessary, creating them, where a citizen comes into conflict with the system—the tenant who wishes to buy his house,[67] the handicapped person in search of compensation,[68] the foreign school student denied the chance of an English education.[69]

It is of course true that even in England redress is not always available. In Australia, where so many of the cases are industrial, judicial intervention has often tended to be conservative. An examination of applications brought

---

[62] *Caltex Oil (Aust) Pty Ltd* v *Feenan* [1980] 1 NSWLR 724; (1981) 34 ALR 231 (Privy Council).

[63] *Attorney-General* v *Barton* [1979] 1 NSWLR 524; *Barton* v *Walker* [1979] 2 NSWLR 740; *Barton* v *Berman* [1980] 1 NSWLR 63; *Barton* v *R* (1980) 32 ALR 449 (High Court).

[64] *Connor* v *Sankey* [1976] 2 NSWLR 570; *Sankey* v *Whitlam* [1977] 1 NSWLR 333; *Sankey* v *Whitlam* (1978) 142 CLR 1 (High Court).

[65] (1973) 4 SASR 427.

[66] (1973) 4 SASR 445.

[67] *Pearlman* v *Keepers and Governors of Harrow School* [1979] 1 QB 56.

[68] *R* v *Northumberland Compensation Appeal Tribunal; ex parte Shaw* [1952] 1 KB 338; *R* v *Medical Appeal Tribunal; ex parte Gilmore* [1957] 1 QB 574.

[69] *R* v *Chief Immigration Officer, Gatwick Airport; ex parte Kharrazi* [1980] 1 WLR 1396.

under section 75(v) of the Constitution which dealt with industrial matters (these cases comprise almost the entirety of such applications) reveals that the majority of them were brought by employers and resulted in the grant of the relief sought. Where employers made such applications, the High Court swept aside privative clauses designed to prevent intervention,[70] expanded the definition of "Commonwealth officer"[71] so as to include almost anyone except State judges exercising Federal jurisdiction,[72] issued prohibition to superior Courts of Record,[73] granted the relief sought in the absence of affected parties and the Commonwealth officer concerned,[74] granted prohibition where it would not normally issue,[75] and ultimately moved on to the grant of certiorari.[76] On the application of employers, the Court struck down awards which purported to deal with "coal-mining"[77] and "shale-mining"[78] on the ground that the employees were in fact not engaged in those industries.

On the whole the unions have not been successful in the applications they have made, and in many cases of course it has not been to their interest to make an application.[79]

---

[70] Especially *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow and Co* (1910) 11 CLR 1; *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54; *Australian Coal and Shale Employees Federation* v *Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161; *R* v *Hickman; ex parte Fox* (1945) 70 CLR 598.

[71] *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54.

[72] *R* v *Murray and Cormie; ex parte the Commonwealth* (1916) 22 CLR 437.

[73] *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389.

[74] *Waterside Workers' Federation of Australia* v *Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482; *Cf* Kitto J in *R* v *Commonwealth Industrial Court; ex parte Cocks* (1968) 121 CLR 313.

[75] *Ie* when the court would normally be regarded as being *functus officio*. *R* v *Hibble; ex parte BHP Co Ltd* (1920) 28 CLR 456; *Waterside Workers' Federation of Australia* v *Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482; *R v Dunphy; ex parte Maynes* (1978) 139 CLR 482.

[76] *Pitfield* v *Franki* (1970) 123 CLR 448; *R* v *Marshall; ex parte Federated Clerks Union of Australia* (1975) 132 CLR 595 *per* McTiernan J; *R* v *Booth; ex parte Administrative and Clerical Officers' Association* (1978) 141 CLR 257.

[77] *R* v *Hickman; ex parte Fox* (1945) 70 CLR 598; *R* v *Central Reference Board; ex parte Theiss (Repairs) Pty Ltd* (1948) 77 CLR 123; *R* v *Murray; ex parte Proctor* (1949) 77 CLR 387.

[78] *R* v *Drake-Brockman; ex parte National Oil Pty Ltd* (1943) 68 CLR 51.

[79] *R* v *Murray; ex parte Proctor* (1949) 77 CLR 387 (application granted); *R* v *Commonwealth Conciliation and Arbitration Commission; ex parte Amalgamated Engineering Union* (1967) 118 CLR 219 (application refused—error, if any, within jurisdiction); *Australian Coal and Shale Employees Federation* v *Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161 (application refused); *R* v *Blakeley; ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54 (application granted); *R* v *Taylor; ex parte Professional Officers Association—Commonwealth Public Service* (1951) 82 CLR 177 (inter-union dispute, application refused—error within jurisdiction. This case is often quoted to justify the refusal of the court to intervene); *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Amalgamated Engineering Union* (1953) 89 CLR 636 (application refused—error within jurisdiction); *R* v *Kirby; ex parte Transport Workers' Union of Australia* (1954) 91 CLR 159 (application granted—constitutional grounds); *R* v *Evatt; ex parte Master Builders' Association of New South Wales [No 2]* (1974) 132 CLR 150 (application refused—error within jurisdiction); *R* v *Marshall; ex parte Federated Clerks Union of Australia* (1975) 132 CLR 595 (application refused—constitutional grounds); *R* v *Joske; ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194 (application refused—no error); *R* v *Booth; ex parte Administrative and Clerical Officers' Association* (1978) 141 CLR 257 (appli-

At the same time, the High Court refused to intervene in the matter of a conviction,[80] refused to find a breach of natural justice where a person claimed he was handicapped,[81] and held that a maintenance order made against a person was made within jurisdiction although he had never been served,[82] and that persons found not to comply with the statutory definition of a "conscientious objector" by a magistrate were not entitled to the issue of a prerogative writ.[83] The cases are a reminder that intervention is a two-edged sword. Refusal to intervene can be as much the mark of a "liberal" judge as the decision to allow intervention. The fact that the judge has first to hear the case and make up his mind can itself be a considerable disservice to a needy respondent who has to pay at least part of the costs.

Basic to the assumption that judicial review is desirable is the view of both judges and writers that the judge is suited to be the ultimate arbiter. It is obvious that in many questions involving findings of fact the judge will not be the best able to assess the evidence of witnesses or the technicalities of a particular matter. Courts have paid lip-service to this proposition, yet have continued to move into the area of factual determinations.[84] Although in a recent Federal Court decision, *Blackwood Hodge (Aust) Pty Ltd* v *Collector of Customs NSW*[85] the majority defined questions of fact broadly in order to refuse to overturn the decision, the approach of the High Court is to treat most matters as questions of law, even though, in the terms of *Brutus* v *Cozens*[86] the matter could be one of fact.[87] By reserving to themselves the power to determine whether a matter is a matter of law, judges are able to interfere in matters which would otherwise be beyond their control. For example, where the job of the industrial tribunal, although it involves law, is essentially a task of laying down conditions[88] or conducting a process of negotiation, the interference of judges on questions of law can only serve to emphasise the artificiality of the judge-made distinction between law and fact. Although there is much to be said for the proposition that bodies should be compelled to operate within the ambit of the powers granted to them, where the law on the matter is inextricably linked with conclusions drawn from the observation of witnesses and the expertise of the tribunal in a particular matter, the review for one small error of law can have the effect of overturning a decision made on the basis of a

---

cation granted); *R* v *Marks; ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1981) 35 ALR 241 (application granted—inter-union dispute).

[80] *Parisienne Basket Shoes Pty Ltd* v *Whyte* (1938) 59 CLR 369.

[81] *R* v *War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228, Evatt J (dissenting).

[82] *Posner* v *Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461.

[83] *R* v *District Court of the Metropolitan District Holden at Sydney; ex parte White* (1966) 116 CLR 644; *R* v *District Court of Northern District of the State of Queensland; ex parte Thompson* (1968) 118 CLR 488.

[84] Lord Devlin: "All legal history shows that, once the judges get a foothold in the domain of fact, they move to expand. Questions of fact become in a mysterious way questions of law." *The Times*, 27 October 1976. Quoted in J A G Griffith, *The Politics of the Judiciary* (1977) 211.

[85] (1981) 47 FLR 131.

[86] [1973] AC 854.

[87] *Hope* v *Council of the City of Bathurst* (1980) 54 ALJR 345.

[88] *In re Adamson; ex parte Western Australian National Football League* (1979) 53 ALJR 273,286 *per* Mason J on the role of Industrial bodies establishing awards.

considerable variety of matters. The decision of the High Court in the *BLF* case[89] is a good example of this. The effect of this is the substitution of the judicial opinion for the non-judicial, which in many cases is equivalent to the substitution of the less-informed view for the more-informed.

There have been some indications that the courts recognise their own unsuitability to control some matters.[90] They are, however, not willing to abandon their belief that law is an exact science in which truth reposes in those with legal training and judicial appointments.

Opposed to this is the contention that it is important that inferior bodies and courts be consistent in their decisions, and that everyone has the right to have the law on a particular matter decided correctly. It is, of course, desirable that all decisions of law be correct, but as the views of judges vary, it is often difficult to obtain a "correct" view unless a matter goes to the High Court. In reality, the pursuit of a decision correct in law is the pursuit of a decision in one's own favour, the party who obtains it not being much concerned with its legal correctness. This is not to say that an error of law should not be corrected so that a person may obtain his rights under the law, but to stress that with errors of law as with errors of fact or judgment, the purity of the law is not the sole or absolute consideration in the pursuit of justice. In terms of consistency, no one would deny that it is a fundamental part of a system of justice that persons with the same legal problem should obtain the same answer from the legal system. But although judicial review can be one means of forcing lower courts and bodies to be consistent, it is not necessarily the most attractive or efficient means. In the issue of prerogative writs—quite apart from the question of jurisdictional and non-jurisdictional error—there are more matters to be considered than the merits of the case. The standing of the applicant, the nature of the person to whom the writ is to be issued, the nature of his duties, the efficacy of issuing the writ and the judicial discretion and so on are all matters to be considered, as the merits are not. Where an appeal is provided, none of these factors are involved, and ostensibly an appeal should be the best and most efficient way of determining the matter. Despite this, some judges have expressed the view that the availability of an appeal should not affect either the availability of prerogative relief[91] or even the exercise of the judicial discretion.[92]

Where appeal is not available, as in many of the English cases and some of the Australian cases,[93] the desirability of consistency must again be balanced against the advantages of quick disposal of the matter and whatever policy it is that lies behind the unavailability of appeal. It must be remembered that if judicial review is available to obtain a decision on law on one point in which an inconsistency of approach has appeared, it is also

---

[89] (1981) 35 ALR 241.

[90] *Stevenson* v *Barham* (1977) 136 CLR 190,199 *per* Mason and Jacobs JJ; *McBeatty* v *Gorman* [1976] 2 NSWLR 560; *R* v *Elliott; ex parte Elliott* (1974) 8 SASR 329; *R* v *Ward; ex parte Bowering* (1978) 20 SASR 424.

[91] *In re Adamson; ex parte Western Australian National Football League* (1979) 53 ALJR 273,277 *per* Barwick CJ, 282 *per* Gibbs J.

[92] *Ibid* 278 *per* Barwick CJ.

[93] *Eg R* v *Insurance Commissioner; ex parte Saltergate Insurance Co Ltd* (1976) 12 ACTR 1; *Falkirk Assurance Society Ltd* v *Life Insurance Commissioner* (1976) 50 ALJR 324.

available to every disappointed applicant. An examination of the number of cases on section 88F of the Industrial Arbitration Act 1940 (NSW)[94] demonstrates that in any one piece of legislation there is a large number of potential fact situations and legal problems. One decision does not necessarily provide consistency, because it may answer only one question or a small number of questions.

B *Jurisdictional and Non-Jurisdictional Error*

In view of the above discussion, the question then becomes, should the distinction between jurisdictional and non-jurisdictional error be retained? If so, in what form? In a sense, the discussion of the Australian cases has shown the lack of utility in such a discussion. Australian judges do not appear to have contemplated disposing of the distinction. The *Anisminic* decision was not needed to provide the tools of intervention already created by decisions of the High Court.[95] The South Australian Supreme Court has proved itself capable of extensive intervention without relying on *Anisminic*.[96]

Recommendations for change are based upon the presumption that justice and judicial review are virtually synonymous and on the proposition that the distinction between the two forms of error of law is conceptually and practically unsound, and should, for that reason, be eradicated.

While it is certainly true that there is no one method on which to base the distinction, conceptually the difference between jurisdiction and non-jurisdictional error is quite clear and readily comprehensible. Even if for the purposes of judicial review for error of law the distinction were to be swept away, the concept of jurisdiction in its "narrow sense"[97] must still continue to have some meaning. Bodies which are given only certain powers are necessarily not equipped with others and there must be some general indication of what the ambit of the powers they do have, are. Can an Industrial Court, for example, grant a divorce?

The problem is therefore not with the general scope of powers, but with errors which, it is assumed, the legislature did not intend to empower the body to make. When this necessitates an extremely close examination of the wording of sections to determine first their correct interpretation, and then whether the body should be allowed to come to an incorrect conclusion, there can certainly be no concept to guide the judge. Such matters as "irrelevant considerations" and "asking the wrong question" indicate nothing more than that an error was made. Similarly, describing a decision as a "nullity" in order to strike it down, although ingenious, is completely circular. A nullity is null because it is in excess of jurisdiction—it is in excess of jurisdiction because it is a nullity. It provides no explanation of

---

[94] *Ex parte V G Haulage Services Pty Ltd; Re the Industrial Commission of New South Wales* [1972] 2 NSWLR 81; *Davies* v *General Transport Development Pty Ltd* [1967] AR (NSW) 371; *In re Becker and Harry M Miller Attractions Pty Ltd (No. 2)* [1972] AR (NSW) 298; *Barham* v *Stevenson* [1975] 1 NSWLR 31; *Stevenson* v *Barham* (1977) 136 CLR 190; *Caltex Oil (Aust) Pty Ltd* v *Feenan* [1980] 1 NSWLR 724; (1981) 34 ALR 231 (Privy Council).

[95] *R* v *War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228; *R* v *Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100.

[96] Cases cited above p 33.

[97] *Anisminic* v *Foreign Compensation Commission* [1969] 2 AC 147,171 *per* Lord Reid.

why that decision is in excess of jurisdiction. Other conceptual analyses also fail to provide a clear answer. The main significance of this lack of conceptual clarity is that it is supposedly impossible to predict the result of any determination as to whether an error is jurisdictional or not, which results from and leads to inconsistency in the case law and the administration of justice. This alleged inconsistency has caused a number of writers to call for the abolition of the distinction[98] and at least one to conclude that the continued use of it by judges is completely disingenuous—that they use it as an excuse for their reluctance to intervene.[99]

It is clear that judicial review is not intended to provide a substitute for appeal, or a choice of court for dissatisfied litigants. The distinction between jurisdictional and non-jurisdictional error finds its theoretical justification in the balancing of the public interest in preventing a tribunal or court from acting in an arbitrary or unauthorised fashion[1] and the public interest in obtaining a final decision from a body set up to determine a particular matter. Because it is too much to hope that such a body will invariably be correct, some allowance must be made for it to go wrong. Thus there will be occasions when intervention will be inappropriate, even where some error has been made.

The question of the public interest also involves consideration of which body should be able to define it and determine its direction. Although Parliament makes the laws, in this area courts have taken it upon themselves to interpret those laws in a manner justified more by judicial precedent than strict analysis. However, it cannot be forgotten (or it should not be) that legislative and hence social policy is determined by Parliament, not by the courts, and that it is not necessarily the function of the courts to alter the balance of public and administrative convenience which has been determined elsewhere:

> Let judges . . . remember that Solomon's throne was supported by lions on both sides; let them be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty.[2]

The question is therefore not simply whether an error has been committed. If there is no appeal provided, its unavailability is surely a factor to be considered in allowing one, in effect, to be heard. If there is an appeal, its availability and the question of which body the appeal is to, are also factors in analysing the policy behind the enactment and the interest of the whole of the public, as distinct from the public interest represented by the person of a dissatisfied applicant. Public interest is not confined to the interests of one or a few individuals, despite the emphasis of our judicial system, and the public interest is accordingly not necessarily best served by allowing review to one person at the cost of denying finality to others. The argument that defining an error of law as a non-jurisdictional error is merely an

---

[98] T Thomas, "Judicial Review and *South East Asia Fire Bricks*—A Missed Opportunity" [1980] 2 Malaya Law Journal lxxvi; J A Smillie, "Judicial Review of Administrative Action—A Pragmatic Approach" (1980) 4 Otago Law Review 417.

[99] J A Smillie, *op cit.*

[1] H W R Wade, "Constitutional and Administrative Aspects of the *Anisminic* case" (1969) 85 LQR 198,200: "If a ministry or tribunal can be made a law unto itself, it is made a potential dictator . . .".

[2] Francis Bacon, *Of Judicature.*

"avoidance device"[3] occasionally put into effect fails to recognise that in Australia at least, review is often refused on the ground that the error was made within jurisdiction. Similarly, the contention that judges are motivated to refuse review entirely on grounds which do not in reality relate to the power which they consider Parliament has entrusted to that body, fails to take into account the reliance which Australian courts have placed both on judicial precedent and on a close and detailed examination of the relevant legislation and the intention which can be drawn from it. It is certainly true that Australian courts tend to concentrate far more on the wording of a section than on the function and purpose of the whole. Nevertheless, there is more consistency to be found in the following of precedent and a conscientious application of general principle than in the alternatives—the use of the judicial discretion and a finding that no error has been made.

Conceptually and practically, the real objection to the abolition of the distinction is the privative clause. It has been suggested that:

> (t)he 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.[4]

This is probably an accurate reflection of the sentiment in *Anisminic* and the logical development of a long line of judicial interpretation based on the inability of judges to accept that their views were not always welcome. The leading example of this is *Re Hughes Boat Works Inc*[5] where the relevant tribunal was protected by three privative clauses—one taking away all appeal, right of review and so on,[6] one giving the Board exclusive jurisdiction in the matter,[7] and one giving it power to determine its own jurisdictional facts, including the one the interpretation of which was under challenge.[8] To talk of "(t)he apparent acceptance by Legislatures of the judicial treatment of privative clauses . . ."[9] under these circumstances is to rely more on fantasy than on reason. The contention that Parliament has come to acquiesce in the treatment of privative clauses by the courts has little foundation in reality. The whole history of privative clauses has involved the defeat of the legislature, rather than agreement to the preservation of "citizens' rights".

However it must be remembered that the maintenance of the distinction between jurisdictional and non-jurisdictional error of law has allowed judges to intervene where intervention would otherwise be precluded. If there is no distinction, there is no reason why a privative clause couched in traditional terms should not be given its natural meaning—no appeal and no review. In a number of jurisdictions, the legislature has given in to the inevitable and incorporated in the privative clause a right to review for excess or want

---

[3] J A Smillie, "Judicial Review of Administrative Action—A Pragmatic Approach" (1980) 4 Otago Law Review 417.
[4] *Ibid* 439.
[5] (1980) 26 OR (2d) 420.
[6] Labour Relations Act, RSO 1970 (Canada), c 232, s 97.
[7] *Ibid* s 55(12).
[8] *Ibid* s 95(1).
[9] (1980) 26 OR (2d) 420,426 *per* Reid J.

of jurisdiction.[10] In either of these cases, to allow review for any error of law is very much an instance of judicial legislation unsupported by any overwhelming consideration of the public interest or individual justice.

Despite the attempts of most Australian courts—notably the New South Wales Supreme Court—to achieve consistency by following precedent, it is undoubtedly the situation that decisions display some striking discrepancies. It is of course also the case that in any appeal some uncertainty must be present. Lord Diplock's solution to the problem[11]—the retention of the jurisdictional and non-jurisdictional distinction for review of "judicial" decisions (meaning those made by judges) and its abolition for review of administrative bodies can be dismissed. Apart from the obvious difficulty of application[12] and the move away from the administration/judicial dichotomy in Australia,[13] the creation of courts in some States to serve the functions of tribunals in other States[14] demonstrates the artificiality of the distinction. It is in any case not a self-evident proposition that judges, who are experts in law, should be less subject to review of their legal determinations, than administrative bodies which are set up to serve a particular need in a particular way.

The main difficulty seems to be the expansion by judges of the ambit of jurisdictional error to a stage where the line is drawn through every section and sub-section and must be pursued through every proviso. It is unrealistic to speak of the intention of Parliament in the course of this process, since although the draftsman is giving the court or tribunal instructions, he is not necessarily granting it powers subject to the condition that exceeding them will take the tribunal outside its jurisdiction.

In *Re Hughes Boat Works Inc*[15] the Court concluded that the determination of jurisdictional errors was so subjective that judges would interfere when they felt the interpretation of the statute by the lower court was unreasonable. In the United States, courts are entitled to interfere where there is no "substantial evidence" to justify the tribunal's conclusion.[16] The High Court appeared to be moving towards a narrower view of jurisdictional error in *R* v *Hickman; ex parte Fox*,[17] where Dixon J said that a body acts within power where it makes a decision that is "a *bona fide* attempt to exercise its power, that . . . relates to the subject matter of the legislation, and that . . . is reasonably capable of reference to the power given to the body." This view has not gained much support in recent years[18] but it is

---

[10] Industrial Conciliation and Arbitration Act 1972-1975 (SA) ss 92(3) to 95; Small Claims Tribunal Act 1973 (Vic) s 17.

[11] Lord Diplock, "Administrative Law: Judicial Review Reviewed" (1974) 33 Cambridge Law Journal 233.

[12] *Attorney-General* v *BBC* [1980] 3 WLR 109.

[13] *Heatley* v *Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 512-513 *per* Aickin J and cases cited therein. Note however the curious comments in the *BLF* case (1981) 35 ALR 241 and discussion above p 20.

[14] *Eg* Victoria and Queensland have Small Claims Tribunals, the Australian Capital Territory a Small Claims Court.

[15] (1980) 26 OR (2d) 420.

[16] Administrative Procedure Act 1946 (US) s 10 and corresponding State Acts.

[17] (1945) 70 CLR 598,615.

[18] *R* v *Elliott; ex parte Elliott* (1974) 8 SASR 329 *per* Jacobs J is an exception to this.

suggested that this is due not so much to its difficulty,[19] but to the fact that Dixon J himself, even in *R* v *Hickman*,[20] did not apply the test literally. There was no real reason, particularly in view of the privative clause, why the Board should not make a binding decision on the meaning and application of the words "coal-mining industry", and if it could not do so, the Dixon test was doomed to failure. The Court in fact reverted to an examination of the Regulations and decided for itself what could and could not be within power.

It is submitted that for reasons both of policy and of practicality the scope of review for jurisdictional error should be limited. For this purpose the Dixon test as it is formulated above seems the best suited. The factor of "reasonableness" is not necessarily too vague to apply—courts in negligence cases have managed to apply the test and produce a relatively coherent body of law. If the court looks at the generality of the law, and examines the sub-section or section under discussion in the context of the powers given to the tribunal and the function to be served by it and relates the error to those matters, it must be both easier for the court to determine when a reviewable error has been made and for an applicant to predict what the court will decide. It must also have the effect of preventing applicants from asking for writs as in the *BLF* case[21] as a way of obtaining an extra hearing when all modes of appeal have failed.

As a matter of policy there seems to be no good reason why tribunals and especially courts should not be entrusted with the power to determine their own jurisdiction or to interpret their own statutes within the bounds of reason and good faith. It is curious that judges are so sure that other judges or persons appointed to positions of power will act irresponsibly, stupidly or in bad faith, while at the same time mouthing the truism that it is Parliament which makes the laws and determines the allocation of power. Isaacs J in *Baxter* v *New South Wales Clickers' Association* sums up the position:

> The legislature is master of its own creature. It has erected a Court which it thinks may be well trusted to observe the bounds prescribed. . . . The matters adjudicated upon concern hundreds or even thousands of individuals and affect the course of trade and industry; and it is not to be wondered at that Parliament, choosing between the possibility of a highly trained and specially experienced judicial tribunal accidentally exceeding the exact limits of its powers, and the disastrous confusion which may result from a total overthrow under the strict rules of common law prohibition of industrial arrangements, have preferred the former. It has always power to shorten the authority of the Court or impose a check upon its action.
>
> And it is not true that the Court may without possibility of control indulge in extravagant commands. . . .
>
> . . . if the Industrial Court were to sentence an employer or employé to penal servitude, or to eternal deprivation of industrial rights, or to fine him £1000, the order would be so outrageous and unreasonable as to be altogether beyond the pale of the Act, and could not be

---

[19] As H Whitmore and M Aronson, *Review of Administrative Action* (1978) suggest, 507.
[20] (1945) 70 CLR 598.
[21] (1981) 35 ALR 241.

> supported as a *bonâ fide* exercise of judicial power. . . . But the legislature, in reposing its confidence in the Industrial Court, of course leaves out of consideration all such wild and irrational conduct and so should we.[22]

In summary, the following conclusions can be drawn: Australian courts continue actively to maintain the distinction between jurisdictional and non-jurisdictional error of law, and are, generally speaking, not anxious to intervene in the decisions of inferior courts or tribunals on the ground of jurisdictional error. The exception to this general proposition is the industrial cases, where intervention has been common, and minor errors have been described as going to jurisdiction. Australian judges attempt to follow precedent in their decisions, although the industrial cases make it impossible to say that their approach is consistent.

It has been argued that judicial review, particularly in this area is not necessarily desirable and that judicial intervention should be curtailed. As a means to this end, it is submitted the distinction between jurisdictional and non-jurisdictional error should be retained and expanded, by the refusal of judges to intervene where a decision was made *bona fide* and was reasonably capable of being related to the power which the inferior court or body purported to exercise. In short, it is submitted that the cause of justice would be better served by judicial restraint than by extensive judicial review.

NOTE: In *Houssein* v *Undersecretary, Department of Industrial Relations and Technology*,[23] an appeal from the New South Wales Court of Appeal, the High Court considered the effect of the words "not liable to be challenged, appealed against, reviewed, quashed or called in question, by any court of judicature on any account whatsoever". The Court (Stephen, Mason, Aickin, Wilson and Brennan JJ.), in a joint judgment, was careful to confine its decision to the question whether those words were sufficient to oust the jurisdiction of the Supreme Court to review for non-jurisdictional error and relied on *South East Asia Fire Bricks*[24] to hold that they were sufficient. Of interest is the suggestion of the court with regard to the provisions of section 84(1)(b) of the Industrial Arbitration Act 1940-1981 (NSW), which states that "No writ of prohibition or certiorari shall lie in respect of (certain industrial matters)", that ". . . even excess of jurisdiction in relation to industrial matters may not suffice to attract the prerogative writs".

---

[22] (1909) 10 CLR 114, 161-162.
[23] (1982) 56 ALJR 217.
[24] [1981] AC 363.