

THE 'NO EVIDENCE' DOCTRINE AND THE LIMITS TO JUDICIAL REVIEW

Timothy H Jones and Robert Thomas*

This article presents a critical analysis of the 'no evidence' ground of judicial review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The contention is that its presence in the Act raises in an acute form the problem of defining the outer limits of judicial review. It is concluded that courts can properly review findings of fact by decision-makers to a broader extent than most courts are prepared to admit to at present. The shift in the underlying justification of review from a formalist to a more substantive conception of the rule of law, and from the *ultra vires* rule towards the articulation of principles of good administration, requires a corresponding change in the courts' attitude towards evidential matters.

Under the *Administrative Decisions (Judicial Review) Act (ADJR Act) 1977* (Cth), the absence of an evidential basis for an administrative decision is recognised as a ground of judicial review.¹ It is accepted there that the Federal Court (or High Court, as appropriate) can examine whether there was before an administrative decision-maker evidence or material of probative value upon which the decision could properly be based. This article presents a critical analysis of this 'no evidence' basis for judicial intervention. The main focus is upon the relevant provisions of the *ADJR Act*, since these have provided a ready focus for both academic debate and judicial decision. Some discussion of the position at common law is also necessary, in order to place the statutory provisions in their appropriate context. The presence of the 'no evidence' ground in the *ADJR Act* raises in an acute form the problem of defining the outer limits of judicial review. The difficulty is that of trying to draw the line between, on the one hand, a court's permissible questioning of an administrative decision because it is not supported by any evidence at all, and, on the other hand, the impermissible challenging of it because the court thinks that the decision-maker reached the wrong conclusion in relation to the evidence upon which the decision was based.

Judicial Review of Law and Fact

A persistent refrain in writing on judicial review of administrative decision-making is that of the demarcation of an appropriate limit to the scrutiny

* Faculty of Law, University of Manchester.

1 ss 5(1)(h) and (3), 6(1)(h) and (3). The same legal test is incorporated in the *Migration Act 1958* (Cth) ss 476(1)(g) and (4).

which the courts apply to questions of fact. That the courts and the executive possess different (constitutional) roles is a statement which is almost too obvious to make. The implied constitutional doctrine of the separation of powers would seem to favour a policy of judicial restraint. The exercise of Commonwealth judicial power is restricted to courts which cannot exercise administrative powers.² Different terminology can be utilised to draw the distinction between the respective functions of the judicial and executive branches of government. Judicial review is seen as being concerned with matters of law and procedure, with the *method* by which the decision was reached. Administrators have to decide issues of fact and policy and are concerned with the *merits* of the decision.

The traditional contrast between questions of law and questions of fact is of limited assistance in drawing the boundary between court and administrator.³ It has come to be recognised that the distinction is a malleable one,⁴ and also that the scope of the courts to review matters of fact is rather greater than the traditional texts would tend to suggest.⁵ It can be necessary for a reviewing court to examine the facts quite closely in order to determine whether one of the possible grounds for judicial review has been made out. In the context of the *AD(JR) Act*, this reality was recognised by Fox J in *Borkovic v Minister for Immigration and Ethnic Affairs*.

It is plain that under the Act ... this court does not have power to make a decision on the merits of the factual position for itself. It is plain that it is not invited or empowered under the Act to consider the facts for itself for the purpose of forming and declaring its own views thereon. Of course, in order to apply some of the provisions of the Act it is necessary to examine the facts quite closely, but this is not for the purpose of the court arriving at its own decision; rather, it is to see whether the case comes within one of the specific provisions of the relevant sections of the Act.⁶

2 See *Borkovic v Minister for Immigration and Ethnic Affairs* (1981) 39 ALR 186 at 188–189.

3 See, generally, GA Flick, 'Error of Law or Error of Fact?' (1983) 15 *UWALR* 193.

4 For an earlier discussion of this theme, see TH Jones, 'Mistake of Fact in Administrative Law' (1990) *Pub L* 507, pp 507–10. See also J Dickinson (1927) *Administrative Justice and the Supremacy of Law in the United States*, Russell & Russell, p 55:

In truth, the distinction between 'questions of law' and 'questions of fact' really gives little help in determining how far the courts will review.... They are not two mutually exclusive kinds of question, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right.

5 See JL Caldwell, 'Factual review in judicial review' (1978) *NZLJ* 339.

6 (1981) 39 ALR 186 at 188.

When determining whether an administrative decision is, for example, unreasonable or based upon an irrelevant consideration, it can be necessary for a court to question a finding of fact made by an administrator. Furthermore, it is only realistic to accept that a reviewing court can classify a matter as one of law, rather than fact, in order to legitimise its decision to intervene.⁷ Seventy years ago, Dickinson was referring to:

the impossibility of hoping to establish a clear line between so-called 'questions of law' and 'questions of fact' by any substantive test of definition. All that can be said is, that any factual state or relation which the courts conclude to regard as sufficiently important to be made decisive for all subsequent cases of similar character becomes thereby a matter of law for formulation by the court.⁸

Appeal versus review

A contrast which has often been drawn in order to delimit the role of the court is that between appeal and review. As the High Court recently has reminded us, when a court is engaged in examining the legality of an administrative decision, it 'must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision'.⁹ The same point was made emphatically by Brennan J in *Attorney-General (NSW) v Quin*.

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power, and subject to political control, for the repository alone.¹⁰

But as the previous Chief Justice concedes implicitly in this quotation, and indeed has stated explicitly elsewhere: '[t]he distinction between method and merits is sometimes elusive'.¹¹

In a judicial review case, unlike an appeal, it is clearly not the function of the court to reconsider all the material before the primary decision-maker

7 This was accepted by Lord Griffiths in *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 694, where he noted that decisions on matters of fact 'can all too easily be dressed up as issues of law'.

8 Dickinson (1927) p 312.

9 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

10 (1990) 170 CLR 1 at 35-6. See also *Sean Investments v MacKellar* (1981) 38 ALR 363 at 371 per Deane J.

11 *Kioa v West* (1985) 159 CLR 550 at 622.

in order to reach its own view of the facts.¹² As noted at the outset of the article, however, the Federal Court can quash an administrative decision under the 'no evidence' doctrine. When this occurs, the decision would be described as having been invalidated by an error of law, not an error of fact. The orthodox view is that it is not the role of a reviewing court to evaluate the material before the decision-maker and to reach its own conclusion after weighing the evidence for itself.¹³ The distinction required to be drawn is that between a court weighing for itself conflicting evidence which was before the decision-maker and deciding that there is no evidence to support the decision reached. But there can be a very fine line between the existence of evidence supporting an administrative decision and the weight to be given to that evidence. A reviewing court has to be wary of substituting its own view by concluding that the decision has *no* evidence to support it and is therefore vitiated by an error of law. An error of law exists when a finding of fact is made without evidence to support it, not when it is based upon conflicting evidence.¹⁴ Writing extra-judicially, the previous Chief Justice recognised the potential breadth of judicial review.

An error of law inferred from the material before the agency is so closely related to the merits of the case that a Court having a general jurisdiction to review for error of law has authority to exercise a substantial degree of control over the reasoning process of the administrative agency as well as over its procedures.¹⁵

The label used to describe the basis for the court's intervention is important, however, not least because it can 'give greater constitutional respectability to judicial intervention'.¹⁶

The issue of a court examining findings of facts by administrators cannot be easily separated from the justification for judicial review. The

12 The term judicial review is used somewhat loosely in this article. Some of the cases discussed arise under statutory schemes which permit an appeal to a court on a question (that is, error) of law; see, for example, the *Native Title Act 1993* (Cth) s 169 and the *Fisheries Management Act 1991* (Cth) s 161.

13 See *Ruangrong v Minister for Immigration and Ethnic Affairs* (1988) 14 ALD 773 at 774 per Davies J.

14 See, for example, *Amcor v Comptroller-General of Customs* (1991) 105 ALR 216 at 224. There may be a rough parallel with the rule of criminal procedure under which even tenuous, weak or vague evidence can be taken into account by a jury and is capable of supporting a verdict of guilty. A verdict of not guilty can only be directed by a judge if there is such a defect in the evidence that a verdict of guilty could not be sustained; see *Doney v The Queen* (1990) 171 CLR 207.

15 Sir Gerard Brennan (1986) 'The Purpose and Scope of Judicial Review' in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects*, Oxford University Press, p 31.

16 I Yeats (1994) 'Findings of Fact: The Role of the Courts' in G Richardson and H Genn (eds) *Administrative Law and Government Action*, Clarendon Press, p 137.

principal explanation used to be based upon the *ultra vires* rule, under which the courts sought to enforce the will of Parliament as supplemented by the ordinary common law rules. Underpinning this justification lies a formalist conception of the rule of law, whereby the courts seek to protect private rights. Over recent years, this traditional model has come to be seen as unable to explain judicial review. The *ultra vires* rule has been viewed as a mere tautology, since it does not indicate exactly what constitutes an error of law, and as meaning that the courts will strike down what they choose to strike down.¹⁷ The shortcoming of this approach to judicial review is that the courts have limited themselves too severely in ensuring that public power is exercised in an open and accountable manner. In response to such limitations, the courts would appear to have to shift the basis of their ability to review administrative action by elaborating principles of good administration in order to supplement legislative intent. For example, the development of the principles of legality, procedural propriety, rationality, relevancy, legitimate expectations, equality and the protection of fundamental rights have begun to give shape to a substantive meaning of the rule of law.¹⁸ Though the courts' attitude has been far from coherent, and interspersed with lapses into the traditional model of judicial review, it is possible to observe a general trend towards an acceptance of a more substantive conception of legality.

This change in the underlying conception of administrative legality may require the courts to undertake a more intensive review of findings of fact by administrators. According to one commentator,

if judicial review [is] confined to correcting errors of law on the face of the record, the only evidence needed would be the record of the decision ... [b]ut when the court's jurisdiction includes abuse of power and procedural unfairness, the requirements for evidence are much greater.¹⁹

If the courts are unwilling to examine the evidential basis of an administrative decision, their ability to ensure substantive legality may well be severely diminished. The change in the justification underlying judicial review may require a corresponding shift in the court's approach to fact finding.

There remain, however, cogent reasons of policy and principle why it is necessary for reviewing courts to try and maintain the notion that their concern is purely with 'no evidence' as a matter of law. Making decisions on matters of fact is a primary function of administrators, who would appear to

17 See J Laws (1992) 'Illegality: The Problem of Jurisdiction' in J Goudie and M Supperstone (eds) *Judicial Review*, Butterworths, p 52.

18 See PP Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Pub L* 467.

19 M Purdue (1991) 'The Scope for Fact Finding in Judicial Review' in G Hand and J McBride (eds) *Droit Sans Frontières: Essays in Honour of L Neville Brown*, Holdsworth Club, p 193.

be better placed to make the necessary determinations.²⁰ Absent any form of statutory authority, courts must tread carefully in seeking to rectify the errors of administrators. As Yeats has suggested, courts are wary of 'a willingness to intervene' because of an apparent error on a matter of fact coming to be regarded as 'an invitation to any disgruntled participant to try his luck in the courts'.²¹ By tradition, of course, the courts are the ultimate arbiters on matters of law and not of fact. The long title to the *AD(JR) Act* describes it as 'relating to the Review on Questions of Law of certain Administrative Decisions'. A reviewing court can do no more than require the administrator to make the decision in accordance with the law as decided by the court. The Administrative Appeals Tribunal (AAT) is the body which has been created by Parliament to exercise review on the merits. Unlike the AAT, the Federal Court (or High Court, for that matter) cannot substitute its view of the right or preferable decision.²² The converse is that, because of the separation of powers mandated by the Constitution, the AAT is precluded from having the final say on matters of law.²³

The Common Law Background

Some examination of the common law is necessary, since this provides the background against which the *AD(JR) Act* functions. It has influenced judicial interpretation of the Act: 'the culture of the common law ... pervades the whole of the proceedings'.²⁴ The common law also remains relevant at the Commonwealth level because of the availability of judicial review under s 75(v) of the Constitution and s 39B of the *Judiciary Act* 1903 (Cth). The common law is also significant because of the varied statutory schemes which permit an appeal on a question of law to the Federal Court. These bring into play the general common law principles of judicial review, rather than the provisions of the *AD(JR) Act*.²⁵ Unfortunately, the precise status of 'no evidence' as a ground of judicial review under Australian common law is far from clear. This is in contrast to the position in English law, where the principle is more firmly established.²⁶

20 See, generally, KC Davis, 'Evidence in the Administrative Process' (1943) 55 *Harv LR* 364; Lord Diplock, 'Judicial Control of the Administrative Process' (1971) 24 *Current Legal Probs* 1.

21 Yeats (1994) p153.

22 See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J.

23 See the *Administrative Appeals Tribunal Act* 1975 (Cth), which makes provision for appeal on questions of law to the Federal Court.

24 J Goldring, 'Public Law and Accountability of Government' (1984) 15 *FLR* 1, p 12.

25 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. The powers of the Federal Court to review many migration decisions are now laid down (and restricted) by Part 8 of the *Migration Act* 1958 (Cth). The constitutionality of this legislation has been upheld by the High Court: see *Abebe v The Commonwealth* [1999] HCA 14.

26 *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1

Australian courts have been reluctant to interfere with an administrative decision on the basis that it is not supported by the evidence before the decision-maker because this is sometimes equated to appeal on the merits.²⁷ As noted by the full Federal Court in *Szelagowicz v Stocker*, a review of the relevant Australian authorities leads to the conclusion: 'It may be an error of law for a decision-maker to make a decision in the absence of evidence; but it is not necessarily so in every case'.²⁸ A suggestion can be made to explain the judicial equivocation over the 'no evidence' ground of review. What may in fact be being denied is the authority to review the weight or sufficiency of the evidence, which would be regarded as going to the merits of the case. Thus, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, Mason J said that:

in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.²⁹

It should not be thought that all courts have followed this line. In one State court decision, it has been suggested that an error of law exists where 'evidence was fundamentally misapprehended'.³⁰ As a general rule, however, most courts engaged in administrative law proceedings would follow the majority of the High Court in the *Melbourne Stevedoring* case, in recognising 'the distinction between on the one hand a mere insufficiency of evidence or other material to support a conclusion of fact ... and on the other hand the absence of any foundation in fact'.³¹ The second factor which appears to influence judicial attitudes to judicial review for 'no evidence' is the desire to refute any general power to correct mistakes of fact made by decision-makers.³²

In relation to issues of jurisdictional fact, courts are much less reluctant to re-examine and re-weigh evidence and findings of fact. Where the exercise of a decision-maker's jurisdiction is dependent upon the existence of certain

WLR 1320; *Coleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 WLR 433.

- 27 See, for example, *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369.
- 28 (1994) 34 ALD 16 at 20. See also *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 70 ALR 147 at 150 per Wilcox J: 'the reported cases provide little guidance as to the principle underlying the ground or as to the limits of its application'.
- 29 (1985-86) 162 CLR 24 at 41.
- 30 *Keeffe v McInnes* [1991] 2 VR 235 at 248 per Marks J.
- 31 *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119.
- 32 See, in particular, the approach of Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 340-341 and 355-360; see also *R v District Court; Ex parte White* (1966) 116 CLR 644 at 655 per Windeyer J.

facts, it is held to be appropriate for a reviewing court to correct any errors which are made.³³ *De novo* review of a jurisdictional fact is not thought to be inappropriate, even where the relevant decision-making power has been conferred in subjective terms. Of course, if the notion of jurisdictional fact were to be broadly interpreted, it could result in extensive 'retrial' of matters of fact by reviewing courts. 'No evidence' need not be any more of a licence to a court to review findings of fact.³⁴

The strongest, if not exactly unequivocal, common law authority for the 'no evidence' ground of review is the decision of the High Court in *Sinclair v Mining Warden at Maryborough*.³⁵ Some members of the High Court appeared to accept here that the making of findings and the drawing of inferences in the absence of evidence could constitute an error of law. This case concerned a challenge to the validity of the Warden's decision to grant mining leases on Fraser Island. A mining company had applied for four leases. The relevant regulations provided that public notice should be given of the application and that objections should be heard in the Warden's Court. The Warden was required to reject any application if he was of the opinion that the public interest would be prejudicially affected by the granting of the application. The Warden heard evidence from an environmental pressure group and the applicant. One of the applicant's statements to the Warden demonstrated that there was no evidence of the existence of any minerals in two of the four areas for which leases were sought and that minerals were present in only 60 of the 640 acres covered by the other two areas. There was no evidence that more than 60 acres would be required for the mining operations. The Warden's decision was that he was bound to make a recommendation favourable to the mining company unless he was satisfied that the public interest would be prejudiced. He took the view that, although there was force to the objectors' arguments, they only represented a section of the public. He was thus precluded from deciding that the interests of the public as a whole would be prejudicially affected. The Warden's recommendation was thus that the leases should be granted.

The High Court was unanimous in deciding that the Warden's decision was legally incorrect. All the members of the Court were satisfied that the Warden had been wrong to conclude that he could not accept the evidence of the objectors as evidence to be considered when deciding what was in the public interest. Three of the judges further found that the Warden had failed to appreciate that he was not bound to recommend that the applications for leases be granted, merely on due observance of the formalities and the absence of prejudice to the public interest. In particular, Chief Justice Barwick, with whom Justice Murphy concurred, regarded it as 'essential that there be material before him, quite apart from any objection, which

33 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 per Latham CJ; *R v Blakely; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54 at 90-92 per Fullagar J.

34 See also text accompanying n 40 below.

35 (1975) 132 CLR 473.

would warrant an affirmative conclusion on the substance of the applications that the recommendations should be made'.³⁶ The Chief Justice found that 'there was no material whatever upon which the warden could recommend the acceptance of the applications'.³⁷ Although the phrase 'no evidence' appears three times in the Chief Justice's judgment,³⁸ a possible reading is that he was using the issue of evidence to support his finding that the Warden had misconceived his legal duty in that he had asked himself the wrong question by failing to be affirmatively satisfied as to the presence of minerals.³⁹ This approach would be consistent with the idea that misunderstanding the nature of a legal duty is a basic error of law. The other judgments in the case are rather opaque on the precise significance of the issue of evidence.

There are two principles of Australian common law which can be stated with greater certainty. First, an insufficiency, rather than an absence, of evidence to support a finding of fact by a primary decision-maker does not constitute an error of law.⁴⁰ This is in contrast to Federal law in the United States, with its 'substantial evidence' doctrine.⁴¹ Limited quantitative review of the evidence by a court there is encouraged as being necessary to uphold the rule of law.⁴² The question whether findings of fact have an adequate evidentiary basis has long been treated as one of law.⁴³ There would otherwise be the risk:

that where the rights depended upon facts, the [decision-maker] could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.⁴⁴

36 Ibid at 481.

37 Ibid at 480.

38 Ibid at 477, 479.

39 RL Towner, "No Evidence" and Excess of Jurisdiction in Administrative Law' (1978) *NZLJ* 48, p 52.

40 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139.

41 See, generally, B Schwartz (1991) *Administrative Law*, 3rd edn, Little Brown, pp 634-40.

42 The distinguished Australian, HV Evatt, observed that:

the most surprising feature in the development of administrative law in the United States is the persistence of the notion that the ordinary courts of law should be permitted to review the findings of fact which have been remitted by the legislature to the decision of the administrator.

HV Evatt, 'The Judges and the Teachers of Public Law' (1936) 53 *Harv LR* 1145, p 1162.

43 *Florida East Coast Line v United States* 234 US 167 (1914).

44 *ICC v Louisville & NRR* 227 US 88 at 91 (1913).

There is substantial evidence in support of a finding of fact when an inference of the existence of the fact can reasonably be drawn. If there is such an evidential basis, the reviewing court must uphold the finding, even though it might have reached a different conclusion itself.⁴⁵ The substantial evidence test is of the rationality or reasonableness of a decision, not its correctness in the view of the court. It is thus not a particularly expansive doctrine of judicial review. Interestingly enough, it appears that the US courts, unlike their Anglo-Australian counterparts, would not apply a more stringent test to jurisdictional facts. Judicial review of all findings of fact, including those upon which a decision-maker's jurisdiction depends, are subject to the same substantial evidence rule.⁴⁶

The second basic common law principle is that simply making an incorrect finding of fact does not constitute an error of law.⁴⁷ In *Australian Broadcasting Tribunal v Bond*, Mason CJ, with whom Brennan J agreed, stressed that:

at common law, under the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference ... even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.⁴⁸

There are, however, a number of different ways (at both common law and under the *AD(JR) Act*) in which courts have related findings of fact to errors of law. This is only to be expected, for as McMillan has rightly pointed out:

[f]or reasons that are understandable, judges have often shown unease when faced with a clear error, that could only be described as factual, but which alone had the potential to steer a decision down one path rather than another.⁴⁹

Some judges have shown themselves unwilling to recognise a constitutional restraint upon their powers when confronted with a decision which they consider to be wrong or unjust. A variety of legal devices have been utilised. Thus, a decision can be struck down as erroneous in law if it was, on the evidence before the decision-maker, reached irrationally or

45 *Stork Restaurant, Inc v Boland* 282 NY 256 (1940).

46 *National Labour Relations Board v Hearst Publications* 322 US 111 (1944). AC Aman Jr and WT Mayton (1993) *Administrative Law*, West Publishing, p 460 n 13, observe: 'The jurisdictional fact doctrine is essentially dead today'.

47 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 57. See also *Abebe v The Commonwealth* [1999] HCA 14 at para 138; *R v District Court; Ex parte White* (1966) 116 CLR 644 at 654.

48 (1990) 170 CLR 321 at 356.

49 J McMillan, 'Developments under the ADJR Act: The Grounds of Review' (1991) 20 *FLR* 50, p 59.

capriciously.⁵⁰ That is, a judge can simply label a finding of fact with which he or she disagrees as unreasonable.⁵¹ The making of a decision which is perverse on the evidence can indicate that the decision-maker has misconceived the scope of the relevant power, or the grounds upon which it should have been exercised.⁵²

In *Federal Commissioner of Taxation v Broken Hill South Ltd*,⁵³ the High Court accepted that it was an error of law for there to be no material upon which the decision could reasonably be reached. Starke J was keen to emphasise that the court was not trespassing on the territory of the executive and was not providing an appeal on the merits.

This court has no authority to decide whether the finding is correct, but only whether there is any material upon which the tribunal could reasonably so find.... It is not for this court ... to determine whether the decision of the board was correct, but only whether there was material before it upon which it could reasonably reach its conclusion.⁵⁴

The ADJR Act

Section 5(1)(h) of the Act provides as a ground of review: 'that there was no evidence or other material to justify the making of the decision'. The background to the appearance of this section in the 1977 Act is of interest. The Kerr Committee, in its report of 1971, reached the conclusion that a lack of evidence to support a finding of fact was usually reviewable at common law as an error of law.⁵⁵ The Australian case law in fact presented a rather more ambiguous picture than this. Nevertheless, the Committee concluded that the proposed error of law ground of review would encompass review for lack of evidence. Indeed, it has been suggested by a member of the Committee that an even more expansive view of the then common law was taken.

The Committee considered introduction of the United States ground — 'lack of substantial evidence on the record' — but considered the scope of error of law to be sufficiently wide to encompass at least a large part of that ground.⁵⁶

50 *Australasian Steel Co Ltd v Commissioner of Taxes (Qld)* (1935) 53 CLR 544 at 555 per Rich and Dixon JJ; *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 per Latham CJ.

51 See, for example, *Sim v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 17 ALD 546.

52 *Ward v Williams* (1954) 92 CLR 496.

53 (1941) 65 CLR 150.

54 *Ibid* at 155, 156.

55 Commonwealth Administrative Review Committee (1971) *Report*, Parliamentary Paper No 144, Australian Government Publishing Service, para 36(v).

56 H Whitmore, 'Administrative Law in the Commonwealth: Some Proposals for

By way of stark contrast, the Ellicott Committee, which reported in 1973, took the more realistic view that the head of review for error of law might not even be adequate to cover review for 'no evidence', let alone the stricter scrutiny for lack of substantial evidence.⁵⁷ It was accordingly recommended that a lack of evidence ground be specifically provided for.

The Act adopted this recommendation and it thus settles any remaining question as to the existence of 'no evidence' as a separate ground of review. The purpose of the legislation was not, of course, to authorise a surrogate appeal. The architects of the legislative scheme, apparently motivated by 'a concern to constrain the Court from embarking on anything like a review on the merits',⁵⁸ included section 5(3) to provide that this ground should not be taken to be made out unless:

- (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established; or
- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

The mirror provisions are sections 6(1)(h) and (3), which apply to judicial review of conduct *en route* to a decision which is reviewable under the Act. The interpretation of these sections — and section 5(3) in particular — has caused difficulties for courts. One important question has concerned the relationship between section 5(1)(h) and the error of law ground in section 5(1)(f). Might there be circumstances where a lack of evidence case, which could not be brought under section 5(1)(h), could instead be brought within section 5(1)(f)? This would avoid the possible limiting effect of section 5(3). Further questions concerning the relationship of section 5(1)(h) to other heads of review in the Act arise. *Prima facie*, it would appear that it might be possible to challenge the factual basis of a decision — and avoid the effect of section 5(3) — by utilising one of the other heads of review set out in section 5(1). These could include:

- ◆ failure to take into account a relevant consideration, or taking into account an irrelevant consideration, under paragraph (e) in conjunction with section 5(2)(a) and (b);⁵⁹

Reform' (1972) 5 *FLR* 7, p 13.

57 Committee of Review of Prerogative Writ Procedures (1973) *Report*, Parliamentary Paper No 56, Australian Government Publishing Service, paras 41–43.

58 LJ Curtis, 'Judicial Review of Administrative Acts' (1979) 53 *ALJ* 530, pp 536–7.

59 See, further, the text accompanying nn 114ff below.

- ◆ unreasonableness under paragraph (e) and section (2)(g), arguing that it was unreasonable to make a decision where a finding relating to a matter critical to the ultimate decision was not supported by the evidence;⁶⁰
- ◆ under section 5(j) for being 'otherwise contrary to law';⁶¹ or
- ◆ perhaps even under section 5(1)(a), dealing with natural justice, on the basis that a decision should be based 'upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined'.⁶²

This question is returned to below.

Section 5(3)(a)

The rather opaque language of section 5(3) has not made its meaning easy to discern. The first limb may not add anything to the law as previously understood.⁶³ In *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*, Latham CJ stated:

Thus, where the existence of a particular opinion is made a condition of the exercise of the power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts.⁶⁴

Paragraph (a) of s 5(3) requires consideration of the statutory framework against which a decision is made. Its effect is limited to those instances where the establishment of a particular fact is a precondition in law to the decision. Within this statutory context, the provision is concerned with the reasoning process of the decision-maker. It does not ask whether the decision might have been different had there been other evidence before the decision-maker. It is concerned with whether the decision-maker's inferences were reasonable, having regard to the evidence. On its face, the provision is difficult to classify as supportive of either an expansive or limited approach to evidential review. On the one hand, it appears to restrict the application of section 5(1)(h) to those instances where the relevant legislation has expressly provided that a particular matter be established. On the other hand, it appears more permissive than the

60 *Luu v Renevier* (1989) 91 ALR 39.

61 *Detsonjarus v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 21 ALD 139.

62 *Minister for Immigration and Ethnic Affairs v Pochi* (1979) 44 FLR 41 at 67 per Deane J, applying *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456.

63 *Szelagowicz v Stocker* (1994) 35 ALD 16 at 22.

64 (1944) 69 CLR 407 at 430.

common law in that it suggests that the reference to 'no evidence' in section 5(1)(h) should not be read too literally. The indication is that a more generous meaning is intended in terms of 'no evidence or other material ... from which he could reasonably be satisfied that the matter was established'. There is potential here also to enlarge the scope judicial review by means of a restrictive application of the requirement of reasonable satisfaction, thereby limiting the room for manoeuvre on the part of decision-makers.⁶⁵

Section 5(3)(b)

The language of the second limb of section 5(3) is reminiscent of the jurisdictional fact doctrine at common law. What this suggests, paradoxically, is that the provision cannot mean what it appears to. One commentator, writing shortly after the passage of the *AD(JR) Act*, claimed:

[s]ection 5(3)(b) effects a revolutionary change in the law in so far as it appears unconditionally to establish a right to review the existence of all findings of fact upon which a decision is based, whether jurisdictional or not and whether they appear on the record or not. This provision is far-reaching in its implications and goes much further than the scope for review of findings of fact at common law.⁶⁶

If this were true, of course, it would erode any real distinction between judicial review and appeal. Any finding of fact upon which an administrative decision-maker relied would be subject to the same close scrutiny as a jurisdictional fact. The problem is that an administrative 'decision' can be looked at atomistically as well as in the aggregate. It would theoretically be possible 'to subdivide material on large facts into lots of little facts, each of which must exist ... if they are part of the impugned decision's factual basis'.⁶⁷ This tactic of finding 'no evidence' to support a secondary finding of fact would be capable of almost indefinite extension.⁶⁸ It would be strange to give such an expansive interpretation to what is supposed to be a limiting section. What this indicates, perhaps, is that the section needs to be read in the context of the general approach of the (common) law to review of matters of fact.⁶⁹

65 M Aronson and N Franklin (1987) *Review of Administrative Action*, LBC, p 87 n 57.

66 J Griffiths, 'Legislative Reform of Judicial Review of Commonwealth Administrative Action' (1978) 9 *FLR* 42, pp 61–2. Cf E Campbell (1981) 'Principles of Evidence and Administrative Tribunals' in E Campbell and L Waller (eds) *Well and Truly Tried: Essays in Honour of Sir Richard Eggleston*, LBC, pp 80–3.

67 Aronson and Franklin (1987) p 87.

68 Cf *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 149–150.

69 Compare the observations of Pincus J in *Western Television Ltd v Australian Broadcasting Tribunal* (1986) 12 FCR 414 at 429.

That the purpose of section 5(3)(b) is a rather more limited one is also revealed by an examination of the legislative history. The explanatory memorandum to the Bill for the *AD(JR) Act* stated:

The inclusion of this ground as formulated may have the effect of widening the grounds on which courts would grant relief in Australia. The formulation is intended to embody the reasons for the decision of the House of Lords in the *Tameside* case.

The reference here is to the decision of the House of Lords in *Secretary of State for Education and Science v Tameside MBC*,⁷⁰ a case where the Secretary of State had a statutory power to give directions if satisfied that the local authority were acting unreasonably. The House of Lords held that, even though the statutory power was phrased in subjective terms, the valid exercise of the power depended on there being evidence before the Secretary of State that the local authority was acting unreasonably and that there was no such evidence. Lord Wilberforce outlined the scope of judicial review in these circumstances.

If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If those requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.⁷¹

The local authority had decided to reverse its policy of converting all its schools to the comprehensive education system. The Secretary of State took the view that this was unreasonable, because it would cause unacceptable difficulties for parents, given the imminence of a new academic year. The House of Lords found that there was no evidence of such a degree of difficulty as to make the local authority's proposed course of action unreasonable. The Secretary of State had therefore based his decision upon the existence of a particular fact which the House of Lords found did not exist. Section 5(3)(b) was included to encompass the type of situation in *Tameside*: where there was a positive finding of the non-existence of the relevant fact. Thus section 5(3)(b) was actually intended to require that an applicant show *more* than that there was no evidence before the decision-maker of the fact found or presumed as the basis for the decision. There is a requirement to negative the fact, something which will not necessarily be straightforward if the facts underpinning the decision are ambiguous.⁷² An

70 [1977] AC 1014.

71 *Ibid* at 1047 (citation omitted).

72 *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13

applicant may be facilitated in positively showing the non-existence of the fact by being able to resort to admissible evidence beyond that which was formally before the administrator at the time of the decision.⁷³ Where an application is partly grounded in an alleged finding of a non-existent fact, 'such a case may require proof of the truth in a way which was not before the [decision-maker] or to disprove something which could be shown to have been wrongly found by the [decision-maker]'.⁷⁴ In such a case, evidence which was not before the decision-maker may be admissible.

Paragraph (b) does not require the identification a single particular fact which can be identified as the foundation of the decision. In *Curragh Queensland Mining Ltd v Daniel*, Black CJ, on behalf of the full Federal Court, explained:

A decision may be based upon the existence of many particular facts; it will be based upon the existence of each particular fact that is critical to the making of the decision. A small factual link in a chain of reasoning, if it is truly a link in the chain and there are no parallel links, may be just as critical to the decision, and just as much a fact upon which the decision is based, as a fact that is of more obvious immediate importance. A decision may also be based on a finding of fact that, critically, leads the decision-maker to take one path in the process of reasoning rather than another and so come to a different conclusion.

If a decision is in truth based ... on a particular fact for which there is no evidence, and the fact does not exist, the decision is flawed whatever the relative importance of the fact.⁷⁵

This indicates that, while paragraph (b) seems to be a fairly limited ground of judicial review, there is considerable scope for review of a decision-maker's fact-finding. This would be to assess both the existence of a particular fact and whether it could be said to have been 'critical' to the decision.

Curragh Queensland Mining Ltd v Daniel provides a good example of the application of sections 5(1)(h) and 5(3)(b).⁷⁶ In 1988, a delegate of the

FCR 511 at 519–521; *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 223.

73 *Curragh Queensland Mining Ltd v Daniel* at 223–224. Applied in *Rahman v Minister for Immigration and Multicultural Affairs* (1998) 155 ALR 465 and *Ntiamoh v Minister for Immigration and Multicultural Affairs* (1997) 49 ALD 524.

74 *Mendoza v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 405 at 418 per Einfeld J. Compare the suggestion in *Loveridge v Pharmacy Restructuring Authority* (1995–96) 39 ALD 103 at 106–107 that new evidence cannot be introduced where its sole effect is to contradict material which was before the decision-maker.

75 *Curragh Queensland Mining Ltd v Daniel* at 220–221. See also *Akers v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 363 at 374 per Lee J: 'Section 5(3)(b) is not limited to those cases where the erroneous assumption of fact was the predominant reason for the decision'.

Comptroller-General of Customs had refused an application for a concessional rate of duty for some items of equipment which the applicant required for its coal mine. The equipment had been acquired in order to meet a supply date for coal under an agreement with the Queensland Electricity Generating Board. In 1989, this decision was set aside by the Federal Court because of an error in the construction and application of the tariff.⁷⁷ In 1990, a second decision refusing the concessional rate of duty was made, based on the premise that there was in Australia a company able to supply suitable, equivalent equipment. The delegate found as a fact that the Australian company could not meet the designated digging date, but he was of the opinion that it was open to the applicant to have a later delivery date which the company could meet. He concluded that suitably equivalent goods were 'reasonably available' in Australia and that no concessional rate should apply. The full Federal Court reversed a first instance decision and held that the applicant had made out the no evidence ground. Speaking for the Court, Black CJ judged that the finding as to the potential to accept a later delivery date had been critical to the delegate's decision.⁷⁸ He accepted that the dig date was an important element of the applicant's contract to supply coal and that the supply of the equipment was vital to the meeting of contractual obligations. The delegate's decision had been based on the particular finding of the possibility of a later delivery date. There had been no evidence before the delegate upon which this finding could have been made. There had been no suggestion that the applicant was in a strong position to renegotiate the supply contract. Moreover, the applicant had been able to introduce evidence at the first instance hearing to show that the fact relied upon by the delegate — the achievability of a later delivery date — did not exist.

In my view, the unchallenged evidence ... was such that the only finding reasonably open was that a materially later delivery date could not have been achieved and that the facts as to a later delivery date upon which the decision-maker based his decision did not exist. Accordingly, the challenge to the decision on the ground in s 5(1)(h) ought to have been successful before the primary judge.⁷⁹

There is earlier case law under the *AD(JR) Act* which indicates a willingness to indulge in intensive judicial review under this provision. For example, in *Barbaro v Minister for Immigration and Ethnic Affairs*, the applicant was challenging a deportation order.⁸⁰ The Minister had based his

76 See also *Sacharowitz v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 25 ALD 245.

77 *Curragh Queensland Mining Ltd v Wilson* (1989) 17 ALD 636.

78 *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 221.

79 *Ibid* at 225. This can be contrasted with the position in *Loveridge v Pharmacy Restructuring Authority* (1995-96) 39 ALD 103, where there was evidence of the disputed matter (the distance by which a pharmacy was to be relocated) before the decision-maker.

80 (1982) 46 ALR 123.

decision upon the fact of the applicant's involvement in organised crime, *viz* his membership of *L'Onorata Societa*. Smithers J took the view that this fact of membership did not exist and that it was not supported by evidence. He concluded:

That fact was clearly a fact essential to the decision and upon which the Minister based his discretion. As it was not a fact, the ground specified in s 5(1)(h) of the Act, namely that there was no evidence or other material to justify the making of the decision is established.⁸¹

There are two interesting aspects to this decision. The first is that non-membership of such a shadowy organisation as *L'Onorata Societa* is a claim of just the kind which one might think would be difficult for an applicant to prove. It is only through an extensive examination of the material before the Minister that Smithers J was able to conclude that there was no evidence of membership. The effect of this, of course, is hardly different to a re-hearing of the merits of the case. Secondly, although deciding the case under the *AD(JR) Act*, Smithers J made extensive reference to the *Tameside* case and the reasoning which he applies is clearly derived from that decision.

A rather more straightforward reliance upon *Tameside* can be seen in the judgment of Sheppard J in *Peko-Wallsend v Minister for Aboriginal Affairs*.⁸² A decision to grant a tract of land to an Aboriginal land trust had been based on the fact that a uranium deposit was outside the area. In truth, the deposit was within the relevant area. Sheppard J thus saw justification for reliance upon sections 5(1)(h) and (3)(b), quoting approvingly from the speech of Lord Wilberforce in *Tameside*. The difference from *Barbaro*, of course, is that the presence of a mineral deposit in a particular location is a fact somewhat easier of verification than membership of a criminal organisation (or, indeed, the 'fact' at issue in *Tameside* itself).⁸³

A further case which indicates a preparedness to engage in intensive review under section 5(3) is *Hanson v Commonwealth Director of Quarantine*, one of those rare Federal Court decisions concerning the fate of pigeons.⁸⁴ Wilcox J applied section 5(1)(h) to strike down, *inter alia*, an order that some pigeons thought to have been illegally imported should be destroyed. He concluded that there was no evidence to justify the official view that the birds had been imported or were diseased. The court applied a strict test of evidential inference, rejecting a hearsay publication which was tendered to support the official suspicions. There is again extensive judicial analysis of the relevant questions of fact.

81 Ibid at 145.

82 (1985) 59 ALR 51.

83 On which, see D Bull, '*Tameside* Revisited: Prospectively "Reasonable"; Retrospective "Maladministration"' (1987) 50 *MLR* 307.

84 (1984) 57 ALR 365.

Other grounds of review

As previously outlined, one of the difficult questions of interpretation of the *AD(JR) Act* is that of the relationship between section 5(1)(h) and the other grounds of review, particularly the error of law ground in section 5(1)(f). One school of thought would have been that the presence of section 5(1)(h) did not preclude the invalidation of a decision for lack of evidence under section 5(1)(f), or unreasonableness under sections 5(1)(e) and (2)(g) (or even for breach of the rules of natural justice under section 5(1)(a)). This would be notwithstanding that the same want of evidence did not amount to a complete lack of it such as would satisfy section 5(1)(h) when read with section 5(3)(b).⁸⁵ The problem with this approach, of course, is that it appeared to have the effect of rendering otiose section 5(3). The second school of thought, therefore, was that, whatever the content of their common law equivalents may have been, the other heads of review should be read in such a way as to exclude review for legal error in the form of no evidence. Thus, in *Western Television Board v Australian Broadcasting Tribunal*, Pincus J noted the 'argument that under para (f) of s 5(1), an order of review may be obtained on the ground 'that the decision involved an error of law', but preferred the analysis 'that if the expression "error of law" is taken to include lack of evidence, then s 5(3) has no practical effect'.⁸⁶ It followed, therefore, that an argument based upon no evidence had to be made out under paragraph (h) of section 5(1). The resolution of the conflict between these two approaches would await the decision of the High Court in *Australian Broadcasting Tribunal v Bond*, discussed in detail in the next section.⁸⁷

Australian Broadcasting Tribunal v Bond

Prior to the decision of the High Court in *Bond*, the leading authority on the scope of review under the *AD(JR) Act* was the decision of the full Federal Court in *Lamb v Moss*.⁸⁸ The approach taken there was that the remedial character of the legislation required a generous interpretation to be given to the breadth of judicial review under the Act. *Bond* indicates that a more conservative approach should be taken and that, in some respects at least, the availability of judicial review under the *AD(JR) Act* may be more circumscribed than that at common law.

Bond involved an appeal from a unanimous decision of the full Federal Court which had set aside two principal findings of the Australian Broadcasting Tribunal.⁸⁹ These were to the effect that first, Mr Alan Bond would not be a fit and proper person to hold a commercial television licence and, second, in view of his control of certain broadcasting licensees, those

85 See the account of Wilcox J in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 70 ALR 147 at 169.

86 (1986) 11 ALN N262 at 264.

87 (1990) 170 CLR 321.

88 (1983) 49 ALR 533.

89 *Bond v Australian Broadcasting Tribunal* (1989) 89 ALR 185.

licensees were in turn not fit and proper persons. Section 88 of the *Broadcasting Act 1942* (Cth) empowered the Tribunal to suspend or revoke the licenses in question upon finding that the licensees were no longer fit and proper persons. The Tribunal had yet to consider whether to exercise this statutory power. The two findings which were overturned by the Federal Court were in turn based on a number of findings of primary facts which the Tribunal had decided against Mr. Bond in respect of three issues:

1. a defamation settlement negotiated with the then Premier of Queensland;
2. threats made by Mr. Bond to use his television staff to obtain material adverse to an institutional investor; and
3. the truthfulness of evidence given to the Tribunal by Mr. Bond.

The Federal Court identified a number of errors in the approach of the Tribunal. The Tribunal had erred by equating the question of Mr. Bond's fitness with that of the licensees without considering the evidence before it as to the way the relevant companies in fact operated and their past compliance with their legal obligations.⁹⁰ The Tribunal had also erred in making its adverse findings in respect of Mr. Bond without making findings about the purpose and motive of the Premier in reaching the settlement. The Full Court observed:

It would be impossible both in logic and common sense for the Tribunal to determine the nature of the transaction involved in the settlement of the defamation claim without making findings as to what was said and done by each person involved in the settlement negotiations on both sides of the record.⁹¹

The Tribunal argued that the Federal Court should not intervene by way of judicial review since it had yet to make its final decision under the *Broadcasting Act*. This argument was rejected, the Court noting that the findings of the Tribunal were most serious, that they affected significant public companies, and that judicial review should be timely in such circumstances.⁹² It regarded both the ultimate findings of fact and the primary findings of fact made adversely to Mr. Bond to be reviewable.⁹³ Thus the finding as to Mr. Bond's fitness was reviewable, because its 'resolution ... directly produced the ultimate conclusion [that the licensees were not fit and proper persons]'.⁹⁴ The Federal Court did appear to recognise, however, that there was a possible danger in this approach.

90 Ibid at 205–206.

91 Ibid at 206–208.

92 Ibid at 198–199.

93 Following *Lamb v Moss* (1983) 49 ALR 533.

94 *Bond v Australian Broadcasting Tribunal* (1989) 89 ALR at 209.

If every factual finding on which an ultimate decision is based is to be classified as a separate decision and attacked on, for example the 'no evidence' ground, the scope of judicial review under the A.D.J.R. Act would become wider than, hitherto, it generally has been thought to be.⁹⁵

The undesirability of an atomistic approach⁹⁶ to judicial review of administrative decision-making proved to be a decisive consideration for the High Court. It unanimously set aside the decision of the Federal Court. The leading judgment is that of Mason CJ, with whom Brennan J agreed.⁹⁷ The Chief Justice adopted a narrow interpretation of 'decision' in the *AD(JR) Act* and held that the Tribunal had not erred in law in making its findings as to the fitness to hold licenses of Mr Bond and the licensees. He noted that if the concept of 'decision' was extended too far, there was a risk that the efficient administration of government would be impaired. The Chief Justice held that generally only final or operative, rather than intermediate, determinations are reviewable, unless the intermediate determination is one specifically provided for by statute.⁹⁸ Thus the finding that Mr Bond was not a fit and proper person, which was not authorised under a specific provision of the *Broadcasting Act*, was not independently reviewable as a decision (nor did it constitute reviewable conduct). It 'was no more than a step in the Tribunal's reasoning on the way to the finding that the licensees were no longer fit and proper persons to hold their licences'.⁹⁹ On the other hand, the finding that the licensees were no longer fit and proper persons was reviewable, even though only an intermediate determination, because it was specifically authorised by section 88 of the *Broadcasting Act*. What *Bond* suggests as a basic principle is that, absent any statutory authority for the determination of an issue of fact, a finding of primary fact (or the inference drawn from it) does not amount to a reviewable decision under the *AD(JR) Act*. But a finding of primary fact can still be reviewable as part of the ultimate decision, if the ultimate decision depended upon it: 'Review of an ultimate or operative decision on permissible grounds will expose for consideration the reasons which are given for the making of the decision and the processes by which it was made'.¹⁰⁰ This meant that the finding of Mr Bond's unfitness was reviewable as part of the finding that the licensees were not fit and proper persons. The primary facts made in relation to the settlement of the defamation action also fell into this category.

95 Ibid at 209. See also *McVeigh v Willara Pty Ltd* (1984) 57 ALR 344 at 353.

96 See text accompanying n 67, above.

97 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 365. Deane J also agreed, but would have allowed a broader interpretation to procedural fairness (at 366-367). Toohey and Gaudron JJ, in a joint judgment, stated their 'general agreement with the observations of Mason CJ as to the grounds upon which factual findings may be reviewed', but expressed their view differently on the meaning of 'decision' under the *AD(JR) Act* (at 377).

98 Ibid at 337.

99 Ibid at 339.

100 Ibid at 338.

In addition to offering guidance on the kinds of 'decisions' to which the *AD(JR) Act* applies, *Bond* is most important for what it has to say about the method of statutory interpretation to be adopted and the relationship between the different heads of review contained in s 5. The Chief Justice concluded that findings of fact 'which constitute elements in the chain of reasoning leading to the ultimate administrative decision or order' are reviewable for both error of law under s 5(1)(f) and no evidence under s 5(1)(h).¹⁰¹ Each of the specific heads of review in s 5(1) should be read in the context of the others and not as being free-standing.¹⁰² The Chief Justice said that the error of law ground in s. 5(1)(f) embraced the 'no evidence' rule 'as it was accepted and applied in Australia before the enactment of the *AD(JR) Act*' in 1977 (although the Act did not come into force until 1980). The 'no evidence' ground in s 5(1)(h) expanded that concept, but only to the limited extent permitted under s 5(3). As discussed earlier, of course, it is difficult to say with any certainty quite what stage of development the 'no evidence' ground of review had reached by 1977. The Chief Justice is not really able to offer much guidance on this issue,¹⁰³ other than to suggest some limits to the Australian common law. (These seem to be intended as 1990 limits, just as much as 1977 ones.) This method of statutory interpretation is rather curious; it has been doubted subsequently by the Federal Court in *Szelagowicz v Stocker*.¹⁰⁴ The Australian common law of judicial review is not fixed.¹⁰⁵ Justice Gummow's extra-judicial question is apposite: 'Is not the Act to be read in an ambulatory fashion so as to accommodate decisions which modify the general law from time to time?'.¹⁰⁶ The *AD(JR) Act* is not the only means to gain access to the Federal Court in a judicial review case. An applicant can utilise s 39B of the *Judiciary Act* to apply for a prerogative writ against a Commonwealth officer. (There is additionally the original jurisdiction conferred upon the High Court by the Constitution,¹⁰⁷ but it is most likely that judicial review proceedings brought in the High Court will be remitted to the Federal Court.¹⁰⁸) If the error of law ground of review in the *AD(JR) Act* is to be interpreted as fixed in 1977, thereby ignoring 22 years of common law development, it may well be that litigants will succeed

101 Ibid at 328.

102 Ibid at 357–358.

103 Compare, for example, the apparent contradiction between the accounts given at 355–356 and 359–360 as to whether the Australian common law recognises a 'no sufficient' or 'no probative' evidence test.

104 (1994) 35 ALD 16 at 21.

105 This is recognised in Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *FLR* 122, p 125: 'It would be a mistake to assume that [the] development of common law principles has come to an end'.

106 WMC Gummow, 'Reflections on the Current Operation of the *ADJR Act*' (1991) 20 *FLR* 128, p 129.

107 Ss 75(iii) and (v).

108 *Judiciary Act* 1903 (Cth) s 44(2A).

under s 39B (where they are not limited to the grounds of review in the *AD(JR) Act*) and fail under the Act. Justice Gummow has commented:

[I]t has not been suggested that the remedies referred to in s. 39B and s. 75(v) of the Constitution are identified solely by the case law in England and the colonies in 1900. May not the result be in such a case that the [AD(JR)] Act fails in its purpose of providing a convenient and effective means of redress to persons aggrieved by federal decision-making procedures?¹⁰⁹

It is not surprising, then, that applicants not infrequently commence proceedings concurrently under both Acts. Indeed, the Federal Court Rules make provision for a joint application to be made.¹¹⁰

Bond offers little guidance on the interpretation of s 5(1)(h), as read with s 5(3), since the respondents did not seek to make use of these provisions. The Chief Justice stated that paragraph (a) of s 5(3) severely limited the operation of s 5(1)(h), finding that it applied to decisions in respect of which the decision-maker 'was required by law to reach that decision only if a particular matter was established'.¹¹¹ In such a case,

it is enough to show an absence of evidence or material from which the decision-maker could reasonably be satisfied that the particular matter was established, that being a lesser burden than that of showing an absence of evidence (or material) to support the decision.¹¹²

As regards s 5(b), the Chief Justice merely noted that it permitted an order of review upon 'proof of the non-existence of a fact critical to the making of the decision'.¹¹³ It is disappointing that no further clarification was forthcoming, even if *obiter*.

Relevant and irrelevant considerations

Prior to the decision of the High Court in *Bond*, there had been signs that the Federal Court was tending towards a liberal approach to the scope of judicial review of findings of fact under the *AD(JR) Act*. One technique, which had been applied in a number of cases, was to use the grounds of review of taking into account irrelevant considerations or failing to take into account relevant considerations.¹¹⁴ Although, in *Akpan v Minister for Immigration and Ethnic Affairs*, Sheppard J had explicitly refuted any equation of 'irrelevant considerations and relevant considerations with

109 Gummow (1991) p 129.

110 Order 54A.

111 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358.

112 *Ibid.*

113 *Ibid* at 357-358.

114 Ss 5(1)(e) and (2)(a) & (b).

considerations which were either incorrectly or correctly based on fact',¹¹⁵ some other Federal Court judges did seem prepared to characterise factual errors as irrelevant considerations. For example, in *Akers v Minister for Immigration and Ethnic Affairs*, it was held that an immigration official, by 'proceeding upon an erroneous premise on a fundamental matter', had taken 'into account an irrelevant consideration. To proceed to a decision upon the misapprehension of matters material to the decision, may be described as an improper exercise of power'.¹¹⁶ A development of this method was that summarised by Davies J in *Independent FM Radio Property Ltd v Australian Broadcasting Tribunal*.

The cases have developed, I believe, to the extent that the making or failure to make a particular finding of fact in the course of the reasoning process may be attacked on such grounds and that the taking into account of a fact found unreasonably or the failure to take into account a fact that a reasonable decision-maker must have found and taken into account provides a ground of review under ss. 5(1)(e) and 5(2)(a) and (b) of the A.D.J.R. Act.¹¹⁷

This approach, which utilised the relevant/irrelevant considerations ground as a means to challenge findings of fact, was rejected by Chief Justice Mason in *Bond*. His preferred formulation of the standard of review for findings of fact is 'a finding of fact will ... be reviewable on the ground that there is no probative evidence to support it and an inference will be reviewable on the ground that it was not reasonably open on the facts'.¹¹⁸

Limiting judicial review

Chief Justice Mason's judgment in *Bond* is a good example of how the debate about the 'no evidence' doctrine becomes entangled with arguments about the legitimacy of judicial review of questions of fact. There is self-evidently a broader agenda being addressed. The Chief Justice sought to define a more limited jurisdiction for the Federal Court than had been evident from much of the case law. He said:

The expression 'judicial review', when applied to the traditional review functions of the superior courts in our system of justice ... ordinarily does not extend to findings of fact as such. To expose all findings of fact, or the generality of them, to judicial review would expose the steps in administrative decision-making to comprehensive

115 (1982) 58 FLR 47 at 50.

116 (1988) 20 FCR 363 at 373. See also *Singh v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4 at 10: 'If assertions of important facts were disbelieved without reason then I should suppose that the decision-maker would be guilty of failing to take a relevant consideration into account'.

117 (1989) 17 ALD 529 at 531. See also *Minister for Immigration and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77 at 80.

118 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 359-360.

review by the courts and thus bring about a radical change in the relationship between the executive and judicial branches of government. Amongst other things, such a change would bring in its train difficult questions concerning the extent to which the courts should take account of policy considerations when reviewing the making of findings of fact and the drawing of inferences of fact.¹¹⁹

An important consideration lying behind the Chief Justice's interpretation of error of law in the *AD(JR) Act* was his view that the breadth of review under s 5(1)(f):

is necessarily influenced by the scope and purpose of the *AD(JR) Act* as an element in the statutory scheme of review constituted by that Act and the *AAT Act*. Two elements of that scheme are significant for present purposes. The first is that the *AAT Act* alone provides for review on the merits; the second is that the two Acts draw a sharp distinction between errors of fact and errors of law.¹²⁰

Given this desire to clarify the distinction between judicial review of matters of law and an appeal on matters of fact, it is with a degree of irony that one notes the headline to a press report of the decision of the High Court: 'Bond unfit to run television station, says court'.¹²¹

The 'No Evidence' Doctrine After *Bond*

Paragraph (h) of s 5(1) identifies it as a ground of review that 'there was no evidence ... to justify the making of the *decision*'. Through the interpretation which he gave to the concept of a 'decision' in the *AD(JR) Act*, Chief Justice Mason limited the scope for judicial review under the 'no evidence' doctrine (as well as the other heads set out in s 5).¹²² Judicial review at common law is not so limited to substantive or final determinations.¹²³ This raises the anomaly that, in this respect at least, judicial review under what was taken to be reforming legislation is more restrictive than at common law. But while s 5(1)(h) may be 'concerned with the decision itself rather than all the facts found in the course of making the decision',¹²⁴ judicial review of the existence of evidence necessarily involves delving into facts.

119 Ibid at 341.

120 Ibid at 357.

121 *The Times*, 27 July 1990.

122 This aspect of the decision has been followed in a number of subsequent cases. For an example of an administrative decision held to be sufficiently final and determinative, see *Deloitte Touche v Australian Securities Commission* (1996) 136 ALR 453; for two examples of decisions held to be insufficiently final and determinative, see *Tasmanian Conservation Trust v Minister for Resources* (1995) 127 ALR 580 and *NSW Aboriginal Land Council v ATSIC* (1995) 131 ALR 559.

123 See, for example, *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

124 *McVeigh v Willara Pty Ltd* (1984) 57 ALR 344.

Bond also attempted to restrict review of findings of fact, holding that these will not be reviewable in isolation from the decision itself.¹²⁵

Some judges have struggled to come to terms with the restrictive approach to the scope of judicial review enunciated in *Bond*. For instance, in *Commissioner of Taxation v McCabe*, Davies J stated:

On one view, *Bond's* case enunciated a new approach to administrative law. There are aspects of the remarks of Mason CJ which support that view. After anxious consideration, I have, however, concluded that the Chief Justice and the other Justices did not intend to do so. I have come to the view that their Honours intended the contrary, namely that Judges should heed the existing law and not embark upon a new approach to judicial review.¹²⁶

The difficulty with this gloss on *Bond* is that the High Court *was* seeking to assert a more limited role for judicial review than had been evident from a number of Federal Court decisions. It would be wrong to conclude that these decisions are left undisturbed by *Bond*. The High Court there criticises the practice of reviewing findings of fact related to a decision rather than the decision itself.

A curious aspect to the legacy of *Bond* is that the Chief Justice's judgment has been read as expressing a preference for no evidence submissions to be considered under s 5(1)(e) or s 5(1)(f). As explained by the Federal Court in *Szelagowicz v Stocker*,

all the usual challenges to decisions by reference to the evidence are challenges which fall under s 5(1)(e) and (f). Those challenges are determined by comparing the decision and the reasons for the decision with the material which was before the decision-maker. They encompass challenges that the decision was perverse, was such as could not be reached by any reasonable decision-maker and so on.¹²⁷

What, then, is the role given to ss 5(1)(h) and (3)? It seems that their function is to expand to a limited extent the scope for review of evidential findings under these other heads of review. Paragraph (a) of s 5(3) seems to add little to the existing common law. Paragraph (b), with its *Tameside* review, does add something: 'a ground of review where there was before the decision-maker no evidence of a fact, the decision was based on the fact and the fact did not exist'.¹²⁸ This is a plausible reading, but it seems strange to interpret the Act in such a way that most no evidence cases should not be dealt with under s 5(1)(h), the one section which specifically mentions the availability of judicial review on this basis. The restrictions contained in

125 For an application of this principle, see *Director of National Parks and Wildlife v Barritt* (1990) 102 FLR 392.

126 (1990) 26 FCR 431 at 438.

127 (1994) 35 ALD 16 at 22.

128 *Ibid.*

paragraphs (a) and (b) of s 5(3) apply only to this head of review. There are two factors which appear to have influenced this mode of interpretation of the *AD(JR) Act*. The first is that the Act has not been interpreted as containing a *code* of the grounds of judicial review. These have not been read as independent and free-standing provisions. In *Bond*, the Chief Justice was not prepared to interpret s 5(1)(h), as elucidated by s 5(3), as definitive of the no evidence doctrine. He observed that 'such a result would verge upon the extreme and would pay scant attention to the traditional common law principle that an absence of evidence to sustain a finding or inference of fact gives rise to an error of law'.¹²⁹ The second is that the Act has been read in the context of the common law, where the grounds of judicial review are not well-defined and do overlap with one another. The common law developed rather as a set of general principles governing the applicability of the prerogative writs. There are inherent difficulties in trying to capture a flexible common law system in statutory form.

Conclusion

Against this background, it would be a mistake to expect dispositive guidance on the extent of the no evidence doctrine to emerge from the case law under the *AD(JR) Act*. Courts have been keen to emphasise that judicial review does not provide a surrogate appeals mechanism, but rather that it exists to ensure that decision-makers do not exceed or abuse their powers. Academics tend to be less impressed by the idea of drawing hard lines between appeal and review and the formulation of bright line rules of administrative law on this basis.¹³⁰ For a judge — however esteemed — merely to incant the undoubted fact that in a judicial review case the court is not acting as an appellate body does not take one very far. No one would seek to assert the contrary. It is the *content* given to the notion of review, and the legal concepts upon which it is based — including 'no evidence' — which is of far greater significance. A number of the cases discussed in this article have demonstrated that, if the 'no evidence' ground is applied in a generous fashion, the distinction between review and appeal on the merits can become blurred.

This leaves one with three possible options. The first would simply be to recognise that 'no evidence' is a largely indeterminate ground of judicial review.¹³¹ Perhaps it should just be accepted that judicial review is a jurisdiction which has been developed by the judiciary and is still being developed by judiciary.¹³² The extent to which judges are prepared to

129 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358.

130 See, for example, C Lewis, 'The Exhaustion of Alternative Remedies in Administrative Law' (1992) 52 *Cambridge LJ* 138, pp 141-2, 146.

131 See I Thynne and J Goldring (1987) *Accountability and Control: Government Officials and the Exercise of Power*, LBC, p 184. The same adjective could, of course, be applied to other grounds of judicial review.

132 *R v Secretary of State for Home Affairs; Ex parte Brind* [1991] 1 AC 696 at 722 per Lord Donaldson MR.

scrutinise the evidential basis of administrative decisions varies over time and from case to case. Bayne has made the point that 'the indeterminate nature of the grounds of review does not permit the merits of the matter to be isolated from the questions of legality'.¹³³ The unattractiveness of this option is its apparent equanimity with an uncertain law. This might suit academics and some applicants for judicial review, but would place decision-makers and their legal advisers in a difficult position. The second option is specific to the *AD(JR) Act*; it is that the grounds of judicial review in the Act should indeed be read as a code. This would mean that no evidence challenges would be restricted to ss 5(1)(h) and (3). This approach was rejected in *Bond*, but seems consistent with the tenor of some of the broader statements of principle in that case. This is the interpretation which would have to be given to the Act if one were serious about restricting the scope of judicial review. Such an approach would, of course, be unpalatable to most legal practitioners and academics (as well as largely futile, given the continued importance of the common law).

The third option would be to argue that courts can properly review findings of fact by decision-makers to a broader extent than most courts are prepared to admit to at present. The foundations are to be found in the *Tameside* case, where Scarman LJ spoke of 'misunderstanding or ignorance of an established and relevant fact',¹³⁴ and Lord Wilberforce of acting 'upon an incorrect basis of fact'.¹³⁵ As Wade and Forsyth have stated: 'decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy'.¹³⁶ Furthermore, the shift in the underlying justification of review from a formalist to a more substantive conception of the rule of law, and from the *ultra vires* rule towards the articulation of principles of good administration, would seem to require a corresponding change in the courts' attitude towards findings of fact.

An argument can therefore be made that the courts need to be better informed as regards questions of fact, so as to be able to review for mistakes of fact as well as law. Again, the distinction between administrative fact and legality can become blurred. A mistake of fact can be labelled as an error of law because the administrator made the decision in the absence of evidence or failed to take account of a relevant consideration, or it could stand by itself. As the continuance of a mistake of fact may be a cause of injustice to the individual affected by the administrative decision, then the courts have a responsibility to ensure that such mistakes are capable of correction. The notion of human dignity requires that administrative decisions affecting

133 P Bayne, 'The Courts, The Parliament and The Government: Reflections on the Scope of Judicial Review' (1991) 20 FLR 1, p 45.

134 [1977] AC 1014 at 1030.

135 *Ibid* at 1047.

136 HWR Wade and CF Forsyth (1994) *Administrative Law*, 7th edn, Clarendon Press, p 318. At p 317 n 70, they maintain that Australia already recognises this broader ground of review, in the form of s 5(3)(b) of the *AD(JR) Act*. The case law discussed in this article could not sustain this interpretation; cf Griffiths (1978) p 62.

individuals be based upon a correct assessment of fact. Furthermore, the development of a ground of review for mistake of fact would facilitate the correct application of the law by administrators, thereby fulfilling the requirements of the rule of law.

The objection may be made that, if the courts engage in a more intensive review of factual questions, they will be substituting their view of the merits for that of the administrator. There is always a tension between review of legality and appeal on the merits which may not be resolved simply by a retreat into judicial restraint. As the danger of conflating review and appeal always exists, it could be argued that review by courts fully informed of the evidential basis of decision-making is preferable to uninformed judicial review. Furthermore, if the courts continue to articulate a substantive control of legality, they should be equipped with the necessary procedural ability to do so.

While more intensive review of evidential and factual questions may not necessarily imply substitution of the merits, the courts will still have to tread carefully. As Craig has commented,

decision-makers tend to reach decisions on the basis of bounded rationality. They do not have and cannot have all the possibly relevant materials and evidence before them. No decisions would ever be made if this were to be demanded.¹³⁷

The courts will therefore have to adopt a realistic attitude towards reviewing findings of fact, combined with a sensitive appreciation of the demands of public administration. However, this should not be taken to justify the view that the courts should refuse to exercise any review of questions of fact. As in other areas, the courts need to develop an appropriate margin of appreciation to the administration in the achievement of its objectives.

The courts therefore have a constitutionally appropriate role in the review of mistakes of fact by administrators, but should sensitively handle the extension of their review in this regard. It is submitted that it would be more sensible for the courts to recognise the broader jurisdiction and begin to develop the legal principles appropriate to it.¹³⁸ This jurisdiction may come to be regarded as an important feature of the courts' constitutionally legitimate pursuit of errors of law.

137 PP Craig (1994) *Administrative Law*, 3rd edn, Sweet and Maxwell, p 372.

138 There is a brief discussion of how the (broader) *Tameside* review can be accommodated within the ambit of the *AD(JR) Act* in the judgment of the full Federal Court in *Bond v Australian Broadcasting Tribunal* (1990) 89 ALR 185 at 201. McMillan (1991) suggests that this can best be done under the unreasonableness head of judicial review, since this 'would make it easier to confine review ... to exceptional cases that portrayed a fundamentally mistaken exercise of power' (p 60).

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