By Mark P Cleary

APPEALS from tribunals and inferior courts on questions of law

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In Australia, judicial review of the decisions of statutory tribunals is generally limited to errors of law,[1] as are some appeals from inferior courts.[2]

In essence, successfully applying for judicial review of a tribunal (or appeal from an inferior court) on the ground of an error of law involves a finding that the body did not have the legal power that it purported to exercise or, if it did, that it was not entitled to use the power in the way that it did.

There are many potential grounds of error of law. The most commonly invoked are:

- denial of procedural fairness (or denial of natural justice);
- ignoring relevant material;
- constructive failure to exercise a statutory function or obligation;
- applying the wrong test/asking the wrong question;
- error of fact involving an error of law;
- unreasonable decisions (or *Wednesbury* unreasonableness); and
- jurisdictional error.

DENIAL OF PROCEDURAL FAIRNESS (OR DENIAL OF NATURAL JUSTICE)

Denial of procedural fairness or of natural justice is probably the most common ground of judicial review. It has now been accepted by the Full Federal Court, in an appeal from a decision of the AAT on a question of law, the full Federal Court has now accepted that denial of procedural fairness is an error of law.[3]

Procedural fairness in its broadest sense requires that a tribunal or court hear a person who will be affected by its decision. The extent and content of this obligation generally depend upon the terms of the legislation under which the decision-making power is exercised. In the common law, the 'fair hearing' or 'natural justice hearing' rules govern the exercise of statutory power (except where legislation states otherwise).

Depending on the particular legislation that applies, the entitlement to procedural fairness does not extend to all matters being considered by the tribunal or court. The obligation generally extends only to identifying issues critical to the decision, but not those that have an obvious answer, and allowing the affected party an opportunity to comment upon those issues.

An example of where procedural fairness may oblige the decision- >>

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maker to give an affected party the opportunity to address an issue is where the tribunal is unlikely to accept that documents provided to the tribunal, which are on their face genuine, are a forgery.[4]

However, as the full court in *Commissioner for Australian Capital Territory Revenue v Alphaone*[5] held, this does not mean that the tribunal is obliged to expose its thought processes of decision-making to comment or criticism by the parties.

That said, the distinction between non-obvious issues and the reasoning process is not always clear and discernible. As the High Court recently found in *SZBEL v MIMIA*,[6] the reasoning process can sometimes mask issues that are not obvious but critical to the decision being made. In *SZBEL*, the tribunal found the applicant's evidence implausible. The High Court held that there were a number of factual (non-obvious) issues that underpinned the tribunal's implausibility finding (that is, its reasoning process); procedural fairness required that the party affected by the decision should have been given an opportunity to address those non-obvious issues prior to the decision. The decision was set aside because the party affected by the decision was not given that opportunity.

IGNORING RELEVANT MATERIAL

Where a decision-maker ignores material s/he is required to consider, this constitutes an error of law. The leading authority for this proposition is the oft-cited decision, *Minister v Peko-Wallsend Ltd.*[7] The High Court in *MIMIA v Yusuf*[8] observed that ignoring relevant material, or relying upon irrelevant material, means that the tribunal or court has exceeded its statutory authority or power.

Whether the tribunal or court has ignored material it was required to consider is usually determined by reference to the relevant legislation and the decision-maker's reasons. The absence of any reference to material that it was bound to take into account would be a basis for an appeal on the ground of an error of law (as in *Peko-Wallsend*).

The important questions here are (i) whether on the proper construction of the legislation governing the decision-maker's power, s/he was bound to take it into account, and (ii) the significance of the material and whether it could have materially affected the decision.

It is important to distinguish a failure to take into account from giving little or no weight to that material. As French J observed in *Lee v* MIMIA,[9] a tribunal is entitled to accept or reject or give such weight to material proffered as it thinks appropriate in the circumstances.

CONSTRUCTIVE FAILURE TO EXERCISE A STATUTORY FUNCTION

A failure on the part of a tribunal or court to consider a claim that is properly supported by the material can give rise to an error of law, and amounts to a constructive failure to exercise jurisdiction.[10] It is also a common ground of judicial review, giving rise to jurisdictional error. Constructive failure to exercise jurisdiction has nothing to do with merits review. It is, rather, a failure on the part of the tribunal or court to discharge its statutory duty.

A ground of error of law alleging such a failure is usually framed in the following terms: that, in the discharge of its function, a tribunal misunderstood the way that a claim was submitted, or ignored a claim that arose squarely from the material before the tribunal. Such a ground alleges that, by so misunderstanding a claim in this way, the tribunal has neglected to carry out the very legislative function that it is purporting to perform.[11]

APPLYING THE WRONG TEST/ ASKING THE WRONG QUESTION

It is an error of law to misconstrue the legislation or statutory power under which the decision is being made. Where a tribunal or court is misdirected in this way and asks itself the wrong legal question, this can amount to a failure to exercise the jurisdiction vested in it.

This ground essentially involves an error in statutory construction, and the effect or construction of a term whose meaning or interpretation is being established is a question of law.[12]

For example, it will be an error of law for a tribunal to incorrectly interpret a statutory provision, then proceed to make a decision based on the facts as found using the mistaken interpretation. Whether the facts as found fall within the provision is generally a question of law. However, the ordinary meaning of a word in a statutory provision is a question of fact.

ERRORS OF FACT INVOLVING ERRORS OF LAW

Findings of fact are not usually able to be challenged on an appeal limited to questions of law. In judicial review, findings of fact are usually the domain of the administrative decision-maker and not for the reviewing court to upset, or substitute new findings. Findings as to a witness's credit are the classic example of this rule.[13]

But the exception is where the finding of fact involved (or was vitiated by) an error of law.

In the High Court decision of *Australian Broadcasting Tribunal v Bond*,[14] the Court found that where a decision-maker makes a finding of fact or draws an inference but no evidence supports such a finding, then the finding of fact involves an error of law.

What is less clear is where the finding of fact is based on relevantly flawed or illogical reasoning. In *Azzopardi v Tasman UEB Industries Ltd*,[15] the NSW Court of Appeal held that factual conclusions that were perverse, illogical or marred by patent error did not involve an error of law.

However, more recently the High Court has suggested that where an administrative decision-maker's factual conclusions or inferences are seriously irrational or illogical, this may amount to jurisdictional error.[16] This is a ground of error of law that will no doubt develop over time as a consequence of the High Court decision in *Applicant S20*.

What is clear, however, is that there is no error of law in simply making a wrong finding of fact. That is a factual or non-jurisdictional error.

UNREASONABLE DECISIONS

A decision that is manifestly unreasonable involves an error of law. This ground of error of law is sometimes referred to as '*Wednesbury*' unreasonableness (after the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*[17]). It is an increasingly common ground of error of law, and judicial review.

In Australia, the courts have to some extent been suspicious of this ground of error of law because the principle as evinced in the UK decision is imprecise in its application. It has been said that to describe reasoning as illogical, unreasonable or irrational may merely be an emphatic way of expressing disagreement with the decision.[18] This expression of caution has led to a recalibration of the way in which the ground of error of law is understood in Australia.

The High Court has recently limited the scope of this ground of error of law to cases involving the exercise of a statutory discretion. Now the ground seems to be framed in terms of whether the exercise of discretion was irrational, illogical and not based on findings or inferences of fact supported by logical grounds.[19]

However, despite its increased popularity as a ground of appeal and judicial review, very few cases in Australia have been set aside on the ground of '*Wednesbury*' unreasonableness.

JURISDICTIONAL ERROR

Historically, jurisdictional error as a ground of review encompassed only errors made by statutory tribunals as to whether or not they had jurisdiction. In recent times, the courts (especially the High Court and the Federal Court) have developed the concept of jurisdictional error to encompass all of the grounds of error of law.

This expanded concept of jurisdictional error began with the High Court decision in *Craig v South Australia*.[20] Here, the High Court said:

> 'If... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'[21]

Since *Craig*, the concept of jurisdictional error has been developed and refined in a number of cases.

In *Re Refugee Review Tribunal ex parte Aala*,[22] the High Court expanded jurisdictional error to include a breach of the rules of natural justice.

In *Plaintiff S157/2002 v Commonwealth*, the High Court held that the privative clause in the *Migration Act* did not operate to prevent judicial review of decisions that involved jurisdictional error. Such decisions were not validly made and were therefore never decisions properly made to start with.

In *SAAP v Minister*,[23] the High Court held that a breach of a mandatory statutory requirement of a tribunal (in this case, failing to give written notice to an applicant as required) was a jurisdictional error that rendered the decision invalid.

Jurisdictional error is also a unique ground of judicial review, since its constitutional basis has meant that attempts by the federal parliament to limit it have been unsuccessful. The decisions of *Yusuf* and *Plaintiff S157* are examples of the unsuccessful attempts by federal parliament to limit jurisdictional error as a ground of appeal.

As the gap between the boundaries of jurisdictional error and conventional error of law is becoming less significant (if there is any gap now at all), the jurisprudence relating to jurisdictional error will contribute greatly in the future to the general law relating to errors of law in tribunal and inferior court decisions. ■

Notes: **1** For example, federally, the Administrative Appeals Tribunal, or in NSW the Administrative Decisions Tribunal. While, federally, judicial review now has an expanded statutory and constitutional basis, for the purpose of this article I have focused only on error of law as a basis for judicial review. **2** For example, the Local Court of NSW or the Australian Industrial Relations Commission. **3** *Clements v Independent Indigenous Advisory Committee* [2003] FCAFC 143. **4** *WACO v MIMIA* (2003) 77 ALD 1. **5** (1994) 49 FCR 576. **6** (2006) 231 ALR 592. **7** (1986) 162 CLR 24. **8** (2001) 206 CLR 323. **9** [2005] FCA 464. **10** *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 per Rich, Dixon and McTiernan JJ at 242-3 and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 81-83 per Gaudron J. See also *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at [78]. **11** *NABE v MIMIA* (2004) 144 FCR 1. **12** *Collector of Customs v Agfa-Gaevaert Ltd* (1996) 186 CLR 389. **13** *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407. **14** (1990) 170 CLR 321. **15** (1985) 4 NSWLR 139. **16** See the High Court decision of *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 (*Applicant S20*). See also M Aronson et al, *Judicial Review of Administrative Action* (3rd edn) at pp245-51. **17** [1948] 1 KB 223. **18** *Re MIMIA ex parte S20/2002* (2003) 198 ALR 59. **19** *MIMIA v SGLB* (2004) 207 ALR 12. **20** (1995) 184 CLR 163. **21** (1995) 184 CLR 163 at p179 **22** (2000) 204 CLR 82. **23** (2005) 215 ALR 162.

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