PRESUMPTIONS UPON PRESUMPTIONS: PROBLEMS WITH THE THRESHOLD OF MATERIALITY

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The 'threshold of materiality' introduced by the High Court of Australia in Hossain v Minister for Immigration and Border Protection, and confirmed in subsequent cases, is a new presumption of statutory interpretation which universally qualifies the existing implied limitations on executive decision-making power. This article contends that the High Court did not adequately justify the presumption's creation. It surveys several prior decisions to demonstrate the presumption's doctrinal precariousness; criticises its lack of justification by reference to principles of statutory interpretation; and compares the Court's creation of the presumption to other cases which, it is argued, have more persuasively justified the evolution of interpretative presumptions. Finally, the article discusses issues of pragmatism, the presumption's reversal of the onus of proof, and the problematic residual discretion to refuse relief.

I INTRODUCTION

Hossain v Minister for Immigration and Border Protection ('*Hossain*') held that statutes which confer administrative decision-making powers are 'ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance'.[1] *Minister for Immigration and Border Protection v SZMTA*[2] ('*SZMTA*') confirmed that position, as have members of the Court in further judgments.[3] The 'threshold of materiality' is therefore now an established presumption of statutory interpretation which universally qualifies the existing implied limitations on executive decision-making power. We now have

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1 (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ) ('*Hossain*').

2 (2019) 264 CLR 421 ('*SZMTA*').

3 *Wehbe v Minister for Home Affairs* (2018) 92 ALJR 1033, 1037 [22] (Edelman J); *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091, 1104–5 [66] (Edelman J) ('*BVD17*'); *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140, 146 [15], 151–2 [47]–[48] (Kiefel and Gageler JJ), 163–4 [125]–[129] (Edelman J) ('*CNY17*'); *Nobarani v Mariconte* (2018) 265 CLR 236, 247 [38] (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ).

'presumptions upon presumptions, implications upon implications'[4] that limit, and qualify those limitations upon, such power.

Both *Hossain* and *SZMTA* concerned decisions of the Administrative Appeals Tribunal ('AAT') which had affirmed decisions made by a delegate of the Minister for Immigration and Border Protection to deny the applicants a visa. Mr Hossain was required to satisfy two criteria for his visa: *first*, he had to apply within 28 days of ceasing to hold a prior visa; and *secondly*, he must not have had outstanding debts to the Commonwealth. The decision-maker had a discretion to waive the 28 day criterion if satisfied that there were 'compelling reasons' to do so. The AAT held that Mr Hossain had not satisfied either criterion and affirmed the delegate's decision.[5] The debt criterion was applied correctly, however, the AAT applied the 'compelling reasons' assessment in error. The High Court held that that error was not jurisdictional because it could not have made a difference to the outcome in the light of the correctly applied debt criterion.[6] It did so by developing and applying the threshold of materiality.

SZMTA was a decision in three appeals concerning the visa applicants BEG15, SZMTA and CQZ15. In each case, the Secretary of the Department for Immigration and Border Protection had provided statutory notifications to the AAT which had sought to prevent disclosure of certain documents or information to the visa applicants. In each case the AAT had not disclosed the existence of the notification to the applicants,[7] and each claimed a denial of procedural fairness on that basis. In BEG15's case, the evidence established that the information in the documents was largely known to the applicant, was not relevant to the AAT's decision and had not in fact been taken into account by the AAT.[8] In respect of SZMTA's case, the documents the subject of the notification had previously been provided to the applicant in response to a freedom of information request.[9] In CQZ15's case, the Minister had attempted to tender the documents the subject of the notification in an effort to rely upon them to contend that the information they contained would have had no bearing on the AAT's decision. The Federal Circuit Court rejected the tender, but the Full Court of the Federal Court allowed the Minister's appeal.[10] In all cases, a majority of the High Court affirmed the threshold of materiality developed in *Hossain*.[11] Importantly, the majority also went further than *Hossain* in holding that materiality 'is a question of fact in respect of which [an] applicant … bears the onus of proof'.[12] The majority held that any breach of the obligation to accord procedural fairness in SZMTA and BEG15's proceedings was not jurisdictional because it could have made no difference to the outcome of those cases, and agreed with the Full Court of the

4 Lisa Burton Crawford, 'Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power' (2019) 30(4) *Public Law Review* 281, 294 ('Immaterial Errors').
5 *Hossain* (2018) 264 CLR 123, 128 [6] (Kiefel CJ, Gageler and Keane JJ).
6 Ibid 136 [35] (Kiefel CJ, Gageler and Keane JJ), 136 [39] (Nettle J), 149 [79] (Edelman J).
7 *SZMTA* (2019) 264 CLR 421, 446 [53], 448 [59], 450 [66] (Bell, Gageler and Keane JJ).
8 Ibid 448–9 [61].
9 Ibid 450 [66].
10 Ibid 446–7 [54]–[56].
11 Ibid 445 [45].
12 Ibid 433 [4].

Federal Court in *CQZ15* that the documents should have been admitted as they were potentially relevant to the materiality of the denial of procedural fairness in that case.[13]

The contention of this article is that the High Court's introduction of the presumption of the threshold of materiality was not adequately justified. Part II seeks to discern whether there is a basis in prior authority for the presumption. It surveys and analyses conflicting statements of principle in several cases relied upon by the Court in *Hossain* and *SZMTA*, and concludes that there is little support for the presumption in those cases.

Part III raises problems with justification, and is the heart of the article's argument. By reference to principles of statutory interpretation, in particular the plurality's admission in *Hossain* that those principles, in the context of judicial review, reflect the Court's 'qualitative judgments' about the 'appropriate limits' of administrative power, I criticise the presumption's lack of justification. In that Part, I discuss the interplay between the 'ultra vires debate' and the rise of the 'statutory approach' to judicial review, and conclude that the Court's statements in *Hossain* have created uncertainty in respect of both of those issues. I also compare the Court's introduction of the presumption with the approaches taken by the Court in *Bropho v Western Australia* ('*Bropho*')[14] and by Gageler J in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* ('*Probuild*'),[15] and argue that those approaches provide a more robust basis upon which principles of statutory interpretation may evolve.

Part IV addresses further criticisms made of the presumption, principally by reference to the judgment of Nettle and Gordon JJ in *SZMTA*. That Part considers whether pragmatism animated the Court's reasoning in *Hossain*, and argues that, even if it did so, the presumption is in fact decidedly un-pragmatic. I argue that it creates a diminished obligation upon decision-makers; they now must comply with the limits of their powers *only to the extent* any error they might make is material. I also consider Nettle and Gordon JJ's complaints about the consequences of the reversal on the onus of proof that the presumption has brought about, and problems with the Court's residual discretion to refuse relief. Part V concludes the discussion and poses further questions.

II PROBLEMS WITH PRIOR AUTHORITY

In 2014, Jeremy Kirk presciently observed that the concept of jurisdictional error might communicate some sense of materiality.[16] Prior statements of the High Court surveyed in this Part may be seen, on a superficial reading, to support some

13 Ibid 447 [56].
14 (1990) 171 CLR 1 ('*Bropho*').
15 (2018) 264 CLR 1 ('*Probuild*').
16 JK Kirk, 'The Concept of Jurisdictional Error' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 11, 31, referring to *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 570–1 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

such sense.[17] However, instead of justifying what Edelman J in *Hossain* termed the 'usual implication'[18] of materiality, it will be seen that those earlier authorities provide little support for the overlaying presumption the Court created; a presumption which universally qualifies the existing implied limitations on executive power.

At the point in *Hossain* where the presumption was introduced, the plurality cited no authority.[19] As will be explained in Part III, this in itself is not altogether surprising; it was introduced following reasoning which sought to pave the way for its creation. However, the plurality went on to cite various cases in support of what the Court saw as an application of the presumption that '[o]rdinarily … breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision'.[20] This Part surveys *Hossain* and *SZMTA*'s treatment of those cases and demonstrates that the presumption is doctrinally precarious.[21] It will be shown that the cases relied upon do not support the presumption; instead, its introduction was the result of a 'piecing together'[22] of disparate statements leading to a new development.[23]

A Procedural Fairness Authorities

1 Stead v State Government Insurance Commission

One line of cases the plurality in *Hossain* referred to was cited in support of this proposition: '[t]he threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of "the possibility of a successful outcome"'.[24] One of those cases is *Stead v State Government Insurance Commission* ('*Stead*'), in which the High Court said that

> not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. … All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome.[25]

17 There are also other cases, although not decided on the basis of the presumption, which may be possible to explain through the lens of materiality. For an interesting example, see the discussion of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 in Christopher Chiam, 'Editorial: Materiality and Jurisdictional Error' [2018] (4) *University of New South Wales Law Journal Forum* 1, 3.

18 *Hossain* (2018) 264 CLR 123, 149 [76].

19 Ibid 134 [28] (Kiefel CJ, Gageler and Keane JJ).

20 Ibid 135 [31].

21 Jules O'Donnell, 'A Threshold of Materiality for Judicial Review: Common Sense or Injustice? *Hossain* and *SZMTA*', *Opinions on High* (Blog Post, 11 June 2019) <https///blogs.unimelb.edu.au/opinionsonhigh/2019/06/11/odonnell-hossain-szmta/>.

22 Courtney Raad, '*Hossain v Minister for Immigration and Border Protection*: A Material Change to the Fabric of Jurisdictional Error?' (2019) 41(2) *Sydney Law Review* 265, 269.

23 Lisa Burton Crawford, 'Between a Rock and a Hard Place: Executive Guidance in the Administrative State' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 7, 16; Crawford, 'Immaterial Errors' (n 4) 283–4.

24 *Hossain* (2018) 264 CLR 123, 135 [30] (Kiefel CJ, Gageler and Keane JJ).

25 (1986) 161 CLR 141, 145, 147 (Mason, Wilson, Brennan, Deane and Dawson JJ) ('*Stead*').

Stead was a decision about the departure from the rules of natural justice within the ambit of an appeal,[26] and has been subsequently applied in such cases.[27] Nevertheless, prior to *Hossain* it had been applied in the judicial review context concerning the ground of a breach of the obligation to accord procedural fairness.[28] However, *Stead* was cited in those judicial review decisions as support for the proposition that it stood for in that case: that the breach must have some effect on the decision *in order to justify relief*. Further, as I explain below, those decisions were also decided upon the basis of the principle of 'practical injustice'. In *Stead*, the question for the Court was whether it should exercise its residual discretion to refuse to order a new trial because such a trial would be futile. The apparent futility in that case lay in the respondent's assertion that the trial judge's failure to allow the appellant to argue a point, which the judge ultimately relied on against him, would have made no difference to his decision.[29] The Court refused to exercise its residual discretion to order a new trial, holding that it could not be said that there was no possibility of a successful outcome in that case.[30] As will be explained in Part IV, this reasoning directs attention to the residual discretion to refuse relief, which is 'a different and separate exercise'[31] to the presumption of the threshold of materiality. In judicial review cases, the decision whether to exercise that discretion is to be determined *after* a jurisdictional error is found.[32] *Stead* therefore does not provide support for the Court's introduction of the presumption.

2 Minister for Immigration and Border Protection v WZARH

In *WZARH*, a case cited by the plurality in *Hossain*,[33] Gageler and Gordon JJ stated, citing *Stead*:

> Such a breach of the implied condition [of procedural fairness] which governs the exercise of the Minister's statutory powers of consideration is material, *so as to justify the grant of declaratory relief by a court of competent jurisdiction*, if it operates to deprive the offshore entry person of 'the possibility of a successful outcome'.[34]

At first blush, given the express use of materiality terminology, this passage may be seen to support the presumption of the threshold of materiality created in *Hossain*. However, as can be seen from the emphasised words, again the focus is on *relief*. Their Honours did not hold that a denial of procedural fairness that did

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26 Crawford, 'Immaterial Errors' (n 4) 285 n 30.

27 See, eg, *Nobarani v Mariconte* (2018) 265 CLR 236, 247 [38] (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ).

28 See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 116–17 [80] (Gaudron and Gummow JJ), 122 [104] (McHugh J) ('*Ex parte Aala*'); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 341 [56] (Gageler and Gordon JJ) ('*WZARH*').

29 *Stead* (1986) 161 CLR 141, 145 (Mason, Wilson, Brennan, Deane and Dawson JJ).

30 Ibid 146.

31 As it was put by Nettle and Gordon JJ in *SZMTA* (2019) 264 CLR 421, 457 [85].

32 As Edelman J explains in *Hossain* (2018) 264 CLR 123, 148 [73]–[74]; see also ibid. McHugh J referred to *Stead* in *Ex parte Aala* in the context of the residual discretion: *Ex parte Aala* (2000) 204 CLR 82, 122 [104]. *Stead* was also cited in *WZARH* in the same connection: *WZARH* (2015) 256 CLR 326, 341 [56] (Gageler and Gordon JJ).

33 *Hossain* (2018) 264 CLR 123, 135 [30] (Kiefel CJ, Gageler and Keane JJ).

34 *WZARH* (2015) 256 CLR 326, 341 [56] (Gageler and Gordon JJ) (emphasis added).

not deprive an applicant of the possibility of a successful outcome would be a non-jurisdictional error. Their Honours instead appeared to be confining any concept of materiality to the justification for, or the withholding of, relief.

Further support for this reading can be found in their Honours' reasoning that follows the passage. Gageler and Gordon JJ went on to consider the notion that procedural fairness is concerned to avoid 'practical injustice',[35] a notion concerned, as I will demonstrate in the next section, not with a threshold for the determination of whether an error is jurisdictional, but with whether procedural fairness was breached *at all*.

3 Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam

'Practical injustice' is a phrase that was introduced into this area of administrative law by Gleeson CJ. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* ('*Ex parte Lam*'), the Chief Justice stated:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.[36]

This passage has been cited with approval and applied in numerous judgments of the High Court concerning procedural fairness in both appellate[37] and judicial review contexts,[38] and was cited by the majority Justices in *SZMTA*. In *SZMTA*, the majority held that the relevant applicants had been denied procedural fairness. However, they cited the *Ex parte Lam* passage for the proposition that '[*f*]*or such a breach to constitute jurisdictional error* on the part of the Tribunal, however, the breach must give rise to a "practical injustice"'.[39] This statement contemplates that there can a breach of the obligation to accord procedural fairness that *is not* a jurisdictional error, and that the notion of 'practical injustice' is to be equated with the threshold of materiality; it is a threshold for whether an error is to be classified as jurisdictional. But this is not what the Chief Justice said in *Ex parte Lam*, or what the authorities that have applied that notion have held.

The notion of 'practical injustice' is simply a reflection of the long accepted principle that the requirements of procedural fairness are not fixed; their content must be determined by a process of statutory construction and with regard to the particular circumstances of each case.[40] In *WZARH*, a case in which a denial of

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35 Ibid 342–3 [57]–[60].

36 (2003) 214 CLR 1, 14 [37] ('*Ex parte Lam*').

37 See, eg, *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, 498 [12] (French CJ); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99–100 [156]–[157] (Hayne, Crennan, Kiefel and Bell JJ), 108 [188] (Gageler J).

38 See, eg, *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 66 [139] (Gummow J); *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 206–7 [82] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ); *WZARH* (2015) 256 CLR 326, 337 [36] (Kiefel, Bell and Keane JJ), 342 [57] (Gageler and Gordon JJ).

39 *SZMTA* (2019) 264 CLR 421, 443 [38] (Bell, Gageler and Keane JJ) (emphasis added).

40 *Kioa v West* (1985) 159 CLR 550, 612 (Brennan J). For a recent statement of the principle see *HT v The Queen* (2019) 93 ALJR 1307, 1321 [64] (Gordon J).

procedural fairness was found, the plurality distinguished *Ex parte Lam* on the basis that in *Ex parte Lam* '"[t]he applicant lost no opportunity to advance his case" and *it was for that reason* that no practical injustice was held to have occurred'.[41] Thus, the plurality in *WZARH* accepted that in *Ex parte Lam* no practical injustice had occurred *because* there had been no denial of procedural fairness. This is contrary to the majority's proposition in *SZMTA* which proceeds on the basis that practical injustice is to be determined *after* procedural fairness has been breached. This reading of *Ex parte Lam* led Gageler and Gordon JJ in *WZARH* to acknowledge that a denial of procedural fairness is established by *nothing more* than the failure of a decision-maker to afford a fair opportunity to be heard.[42] Nettle and Gordon JJ in *SZMTA* emphasised this acknowledgement,[43] concluding that a breach of the obligation of procedural fairness, *without more*, constitutes jurisdictional error.[44]

With respect, Nettle and Gordon JJ's approach was entirely orthodox when one considers the statement of principle set out by Gaudron and Gummow JJ in *Re Refugee Review Tribunal; Ex parte Aala* ('*Ex parte Aala*'): '[t]he issue always is whether or not there has been a breach of the obligation to accord procedural fairness and, if so, *there will have been jurisdictional error* for the purposes of s 75(v)'.[45] There can therefore be no 'trivial breaches'[46] of procedural fairness, and it has been subsequently said that 'partial compliance' with its requirements cannot constitute a valid decision.[47]

The notion of 'practical injustice', then, provides little support for the proposition that a breach of the obligation to accord procedural fairness will not be jurisdictional unless it meets the threshold of materiality. Instead, the notion can be seen as a threshold of its own; if an error does not meet it there will have been no denial of procedural fairness *at all*.

4 Minister for Immigration and Citizenship v SZIZO

Justice Perram has noted extra-curially that *Minister for Immigration and Citizenship v SZIZO*[48] provides an example of the 'gymnastics' courts have had to engage in when faced with the issue of whether a denial of procedural fairness has

41 *WZARH* (2015) 256 CLR 326, 337 [36] (Kiefel, Bell and Keane JJ), quoting *Ex parte Lam* (2003) 214 CLR 1, 14 [38] (Gleeson CJ), 38–9 [122] (Hayne J); see also *WZARH* (2015) 256 CLR 326, 342 [57] (Gageler and Gordon JJ) (emphasis added).

42 *WZARH* (2015) 256 CLR 326, 342–3 [60].

43 *SZMTA* (2019) 264 CLR 421, 454 [77] (Nettle and Gordon JJ), quoting ibid.

44 *SZMTA* (2019) 264 CLR 421, 454 [78].

45 *Ex parte Aala* (2000) 204 CLR 82, 109 [59] (Gaudron and Gummow JJ) (emphasis added).

46 Ibid.

47 *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 294, 321 [77] (McHugh J), 354–5 [208] (Hayne J) ('*SAAP*'); see also *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928, 953 [99] (Gordon J) ('*ABT17*'). Members of the Full Court of the Federal Court have acknowledged the inconsistency of the statements in *Hossain* and *SZMTA* with this orthodox position in two recent cases: *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134, 160–3 (Mortimer J) ('*DP117*'); *DKX17 v Federal Circuit Court of Australia* (2019) 268 FCR 64, 77 [71] (Rangiah J, Reeves J agreeing at 67 [1], Bromwich J agreeing at 83 [109]).

48 (2009) 238 CLR 627 ('*SZIZO*').

occurred.[49] Justice Edelman in *Hossain* cited this case as support for the presumption of the threshold of materiality.[50] The case concerned an alleged denial of procedural fairness in circumstances where certain provisions of the *Migration Act 1958* (Cth) ('*Act*') required the tribunal to provide notice of a hearing to an applicant's authorised representative. The respondents were notified within time, appeared at the hearing, but their authorised representatives had not been notified. They claimed a denial of procedural fairness on that basis. The unanimous High Court judgment noted that 'the *manner* of providing timely and effective notice of hearing is not an end in itself',[51] and that holding that the condition of procedural fairness had been breached in these circumstances would be, as the respondents accepted, 'absurd'.[52] The Court noted that it did not follow from the *Act*'s prescription of those requirements that the legislature intended 'that any departure from those steps would result in invalidity without consideration of the extent and consequences of the departure'.[53] The Court continued:

> The admitted absurdity of the outcome is against acceptance of the conclusion that the legislature intended that invalidity be the consequence of departure from any of the procedural steps leading up to the hearing … No question arises, in the case of an applicant who has received timely and effective notice of the hearing, of the loss of an opportunity to advance his or her case.[54]

The Court concluded that the provisions regulating the manner in which the applicant is notified about the hearing are not 'inviolable restraints conditioning the Tribunal's jurisdiction to conduct and decide a review'.[55]

As both Justice Perram and Dr Lisa Burton Crawford have noted, this reasoning is ambiguous.[56] Parts of the reasoning present an answer couched in the classic terms of *Project Blue Sky Inc v Australian Broadcasting Authority* ('*Project Blue Sky*'):[57] the legislation does not evince an intention that a breach of the provision in question would lead to invalidity, and thus it cannot be that those requirements are inviolable restraints on the exercise of power. The reference to a consideration of the 'extent and consequences of the departure', however, points to an assessment of the *gravity* of a breach of those requirements. On a superficial reading, that language appears to support some form of materiality threshold. However, the last sentence of the extracted quote suggests that no breach of the rules of procedural fairness had been made out in any event. This appears to suggest that the Court found that the appellants suffered no 'practical injustice', in the correct way that notion is to be understood, as outlined above.

Notwithstanding its ambiguity, on the whole it appears that the reasoning in *SZIZO* proceeded on the basis that breach of the provisions in that case would not

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49 Justice Nye Perram, '*Project Blue Sky*: Invalidity and the Evolution of Consequences for Unlawful Administrative Action' (2014) 21(2) *Australian Journal of Administrative Law* 62, 69.

50 *Hossain* (2018) 264 CLR 123, 146–7 [68]–[69].

51 *SZIZO* (2009) 238 CLR 627, 639 [34] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (emphasis in original).

52 Ibid 640 [35].

53 Ibid.

54 Ibid.

55 Ibid 640 [36].

56 Perram (n 49) 68; Crawford, 'Immaterial Errors' (n 4) 285.

57 (1998) 194 CLR 355 ('*Project Blue Sky*').

amount to a denial of procedural fairness, and thus not generate jurisdictional error. No materiality threshold was therefore required.

5 Minister for Immigration and Border Protection v WZAPN

The plurality's citation in *Hossain*[58] of *Minister for Immigration and Border Protection v WZAPN*[59] may be dealt with briefly. One issue in that case was the respondent's claim to have been denied procedural fairness because the tribunal had not afforded him an opportunity to make submissions in relation to a High Court authority it had relied upon against him. There was already an alternative basis to uphold the tribunal's decision, but the respondent claimed that the denial of procedural fairness infected that alternative basis. While accepting that such a claim may be made out,[60] the Court held there was no denial of procedural fairness in any event.[61] Although the Court opined that there may not have been any utility in entertaining the argument in the light of the alternative basis for the decision,[62] as no breach of the obligation to accord procedural fairness was made out this decision provides little support for the presumption of materiality.

6 Concluding Comments on Procedural Fairness Authorities

The decisions above are not authority for the proposition that materiality is an issue to be confronted *after* a denial of procedural fairness is found. Let alone are they authority confirming that that is an issue that will or will not result in a finding that jurisdictional error has occurred.

But this lack of support in authority is not confined to procedural fairness cases.

B Other Authorities

1 Minister for Aboriginal Affairs v Peko-Wallsend Ltd

The plurality in *Hossain* quotes Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* ('*Peko-Wallsend*')[63] in support of the following proposition:

> The threshold would not ordinarily be met, for example, … where a decision-maker failed to take into account a mandatory consideration which in all the circumstances was 'so insignificant that the failure to take it into account could not have materially affected' the decision that was made.[64]

It is important first to remember that *Peko-Wallsend* concerned the ground of review of failing to take into account a relevant consideration pursuant to section 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'). Although the ground found in that section is 'substantially declaratory of the

58 *Hossain* (2018) 264 CLR 123, 135 n 37 (Kiefel CJ, Gageler and Keane JJ).
59 (2015) 254 CLR 610 ('*WZAPN*').
60 Ibid 637 [78] (French CJ, Kiefel, Bell and Keane JJ), citing *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190, 1198 [29] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).
61 *WZAPN* (2015) 254 CLR 610, 637–8 [78] (French CJ, Kiefel, Bell and Keane JJ).
62 Ibid 635–6 [73].
63 (1986) 162 CLR 24 ('*Peko-Wallsend*').
64 *Hossain* (2018) 264 CLR 123, 135 [30] (Kiefel CJ, Gageler and Keane JJ), quoting ibid 40.

common law',[65] the case predates the Court's finding that the grounds of review are all jurisdictional errors.[66] Thus, no issue arose in that case as to whether the error in question was jurisdictional.[67] It may be accepted that Mason J's statement is accepted doctrine and one of general principle,[68] and thus it is arguable that it supports the threshold of materiality. However, as Crawford explains, 'the jurisdictional error/non-jurisdictional error distinction is largely irrelevant' in the context of that ground under the *ADJR Act*.[69]

Accepting this to be the case, however, it must be noted that in making his observation in *Peko-Wallsend*, Mason J referred[70] to several English authorities,[71] three of which[72] pre-dated that jurisdiction's effective abandonment of the concept of jurisdictional error.[73] On that basis, may it be said that his Honour's statement remains relevant to the concept of jurisdictional error? Arguably, two of those authorities may suggest that materiality is relevant to whether a decision is infected with jurisdictional error.[74] However, the third authority was directed again to the issue of whether *relief* should be granted. As Lord Denning said in that case, *Baldwin & Francis Ltd v Patents Appeal Tribunal*:

> The failure to take [a vital matter] into consideration is, I think, a ground on which certiorari *may* be granted. But should it be? The general rule is undoubted that the issue of certiorari is a matter of discretion for the High Court.[75]

Taken as a whole, it cannot be said that *Peko-Wallsend* provides strong support for the materiality threshold in the ascertainment of jurisdictional error.

2 Kirk v Industrial Court (NSW)

In 2012, two years after *Kirk v Industrial Court (NSW)* ('*Kirk*')[76] was decided, Justice Basten, writing extra-curially, noted that since *Kirk* '[i]t is now clear that a criterion of jurisdictional error must either be extremely flexible or it will fail in its purpose'.[77] Part of that flexibility came from the Court in *Kirk*'s eschewing of

65 *Peko-Wallsend* (1986) 162 CLR 24, 39 (Mason J).
66 Perram (n 49) 67.
67 Crawford, 'Immaterial Errors' (n 4) 284–5.
68 Ibid 285; Perram (n 49) 67.
69 Crawford, 'Immaterial Errors' (n 4) 285.
70 *Peko-Wallsend* (1986) 162 CLR 24, 40.
71 *R v Bishop of London* (1889) 24 QBD 213; *Baldwin & Francis Ltd v Patents Appeal Tribunal* (1959) AC 663; *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999; *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227; *R v Rochdale Metropolitan Borough Council; Ex parte Cromer Ring Mill Ltd* [1982] 3 All ER 761.
72 *R v Bishop of London* (1889) 24 QBD 213; *Baldwin & Francis Ltd v Patents Appeal Tribunal* (1959) AC 663; *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999.
73 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Hull University Visitor; Ex parte Page* [1993] AC 682, 701–2 (Lord Browne-Wilkinson); *R (Cart) v Upper Tribunal* [2012] 1 AC 663, 683 [39] (Baroness Hale), 702 [110] (Lord Dyson).
74 *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999, 1020 (Megaw J); *R v Bishop of London* (1889) 24 QBD 213, 227 (Lord Esher MR).
75 *Baldwin & Francis Ltd v Patents Appeal Tribunal* (1959) AC 663, 695 (emphasis in original).
76 *Kirk* (2010) 239 CLR 531.
77 Justice John Basten, 'Jurisdictional Error after *Kirk*: Has It a Future?' (2012) 23(2) *Public Law Review* 94, 95 ('Jurisdictional Error after *Kirk*').

any notion that *Craig v South Australia*[78] 'provid[ed] a rigid taxonomy of jurisdictional error'.[79] Another part was provided for by the Court's embrace of the writings of Louis Jaffe,[80] a Professor at Harvard Law School. The work of Jaffe's that the Court cited in *Kirk* was his 1957 article in the *Harvard Law Review*, in which he discussed the concept of jurisdiction as simply expressing the 'gravity of an error', a concept that is 'almost entirely functional: it is used to validate review when review is felt to be necessary'.[81] The Court in *Hossain* again referred to passages from this same article,[82] and noted the approval by the Court in *Kirk* of those passages.[83] These concepts of 'functionality' and 'gravity' are what Jeremy Kirk has referred to as communicating 'some sense of *materiality*' in the concept of jurisdictional error.[84] But neither the decision in *Kirk*, nor the writings of Jaffe of which that case and the plurality in *Hossain* approve, support the creation of the presumption of the threshold of materiality. It may be accepted that the Court in *Kirk* and *Hossain* approved of Jaffe's conception of 'gravity' as a criterion for the ascertainment of jurisdictional error. However, that approval does not explain *why* the Court in *Hossain* developed the presumption that it did. The plurality in *Hossain* went on to say that the question of whether an error is of such gravity, or magnitude, depends on the construction of the statute.[85] But their Honours did not say why materiality was required to be superimposed as its own freestanding interpretative presumption which informs, and qualifies, that construction process. Materiality is but one manifestation of the concept of gravity.[86]

Edelman J in *Hossain*, however, attempted to show that *Kirk* does have this import. In providing examples of what he termed to be the 'common manner' in which materiality is implied, his Honour referred to a passage from *Kirk* which he said contemplated 'that a non-material departure from the rules of evidence might not be … a jurisdictional error'.[87] That passage is as follows:

> It may be that some departures from the rules of evidence would not warrant the grant of relief in the nature of certiorari. That issue need not be explored. The departure from the rules of evidence in this case was substantial. It was not submitted that either the nature of the departure, or the circumstances in which it occurred, were such as to warrant discretionary refusal of relief.[88]

78 (1995) 184 CLR 163 ('*Craig*').
79 *Kirk* (2010) 239 CLR 531, 574 [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
80 Ibid 570–1 [64].
81 Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70(6) *Harvard Law Review* 953, 963.
82 *Hossain* (2018) 264 CLR 123, 130–1 [18], 133 [25] (Kiefel CJ, Gageler and Keane JJ).
83 Ibid 131 [20] (Kiefel CJ, Gageler and Keane JJ), 144 [64] (Edelman J).
84 Kirk (n 16) 31. Aaron Moss has also referred to this concept of 'functionality': Aaron Moss, 'Tiptoeing through the Tripwires: Recent Developments in Jurisdictional Error' (2016) 44(3) *Federal Law Review* 467, 471, 479, 487, 489.
85 *Hossain* (2018) 264 CLR 123, 133–4 [27] (Kiefel CJ, Gageler and Keane JJ).
86 As Justice Robertson opined extra-curially in 2016, some years before the decision in *Hossain*, gravity of error 'relates to the *quality of the error* as going to the root of the exercise of the power': Justice Alan Robertson, 'Is Judicial Review Qualitative?' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Bloomsbury, 2016) 243, 246.
87 *Hossain* (2018) 264 CLR 123, 146–7 [69].
88 *Kirk* (2010) 239 CLR 531, 565–6 [53] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

The first thing to note is that this passage was in obiter. Secondly, although it may be accepted that the passage does contemplate some form of intensity, or gravity, review, similarly to the above analysis in respect of *Stead* and *WZARH*, the focus here is upon *relief*, not a threshold of materiality. Indeed, the above passage from *Kirk* cites the example of *Re McBain; Ex parte Australian Catholic Bishops Conference*,[89] a decision which dealt extensively with the residual discretion to refuse relief.[90] Justice Edelman's reasoning then, in seeking support from *Kirk*, appears inconsistent with his Honour's further statements in *Hossain*, and more recently in *CNY17 v Minister for Immigration and Border Protection*: materiality and the residual discretion are to be distinguished;[91] they are 'different senses' in which the concept of materiality is used.[92]

3 Craig v South Australia and Minister for Immigration and Multicultural Affairs v Yusuf

Edelman J in *Hossain* sought further support for the threshold of materiality from two statements of the High Court in *Craig* and *Minister for Immigration and Multicultural Affairs v Yusuf* ('*Yusuf*').[93] In relation to *Craig*, his Honour referred[94] to the Court's classic enumeration of examples of types of errors that could be jurisdictional errors. His Honour emphasised *Craig*'s statement that those errors will be jurisdictional if 'the tribunal's exercise or purported exercise of power is *thereby affected*'.[95] His Honour then referred[96] to a statement of McHugh, Gummow and Hayne JJ in *Yusuf*, which similarly said that for a decision-maker to make an error '*in a way that affects the exercise of power* … results in the decision-maker exceeding the authority or powers given by the relevant statute' and thus they had no jurisdiction to make their decision.[97] Edelman J concluded that materiality is to be understood 'in this sense of affecting the exercise of power'.[98]

It may be accepted that for a jurisdictional error to be established the exercise of power must be affected. But, with respect, this begs the question. As has been widely noted, to label an error as jurisdictional is a statement of conclusion[99]

89 (2002) 209 CLR 372 ('*Re McBain*').

90 See ibid 417–23 [98]–[113] (McHugh J), 453–7 [219]–[234] (Kirby J), 472–3 [281]–[285] (Hayne J, Gaudron and Gummow JJ agreeing at 410 [80]).

91 *Hossain* (2018) 264 CLR 123, 148 [73]–[74].

92 *CNY17* (2019) 94 ALJR 140, 164 [128], referring to Paul Daly, 'A Typology of Materiality' (2019) 26(3) *Australian Journal of Administrative Law* 134.

93 (2001) 206 CLR 323 ('*Yusuf*').

94 *Hossain* (2018) 264 CLR 123, 147 [70].

95 *Craig* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ), quoted in ibid (emphasis altered).

96 *Hossain* (2018) 264 CLR 123, 147 [71].

97 *Yusuf* (2001) 206 CLR 323, 351 [82] (emphasis added).

98 *Hossain* (2018) 264 CLR 123, 147 [72].

99 See, eg, *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43, 49 [27] (Hill, Branson and Stone JJ); Justice Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38(2) *Australian Bar Review* 139, 144, 149–51; Basten, 'Jurisdictional Error after *Kirk*' (n 77) 105; Robertson (n 86) 245; JJ Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21(2) *Public Law Review* 77, 85–6; Kirk (n 16) 12; Leighton McDonald, 'Jurisdictional Error as Conceptual Totem' (2019) 42(3) *University of New South Wales Law Journal* 1019, 1025.

reached after a process of statutory construction.[100] To say that an error affects an exercise of power is to say that the error is jurisdictional. It is to say the same thing. To reason from this premise, then, to the conclusion that a non-material error is not jurisdictional is similarly to state a conclusion.[101] It takes us no further in understanding *why* materiality must be the litmus test. Neither *Craig* nor *Yusuf* provide the answer.

4 Wei v Minister for Immigration and Border Protection

The final case to note is *Wei v Minister for Immigration and Border Protection* ('*Wei*').[102] The plurality and Edelman J in *Hossain* each quote with approval[103] the following statement by Gageler and Keane JJ in *Wei*:

> Jurisdictional error, in the sense relevant to the availability of relief under s 75(v) of the *Constitution* in the light of s 474 of the *Migration Act*, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act.[104]

What is curious about the introduction of the term 'material' in this passage and others in *Wei*[105] is that that term, in the sense explained in *Hossain* and *SZMTA* in respect of whether an error had an effect on the ultimate outcome, seemingly had no work to do in that case; that sense of materiality was not in issue in *Wei*. Equally curious is that their Honours' reasoning turned upon the characterisation of the particular statutory duty in that case as 'imperative'.[106] Gageler and Keane JJ in *Wei* discussed the language of 'imperative' (or 'mandatory') and 'directory' statutory duties in some detail,[107] including acknowledging[108] the note of caution expressed about that language by the Court in *Project Blue Sky*. In that case, the High Court unanimously disparaged the use of that distinction,[109] with the joint judgment noting that the terms 'are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid'.[110]

However, Gageler and Keane JJ in *Wei* called in aid[111] comments of Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* in which the Chief Justice appeared to proceed on the basis that there is utility in maintaining the distinction.[112] The

100 *Hossain* (2018) 264 CLR 123, 133–4 [27] (Kiefel CJ, Gageler and Keane JJ), 144 [64] (Edelman J).
101 See Harry Aniulis, 'Materiality: Marking the Metes and Bounds of Jurisdictional Error?' (2020) 27(2) *Australian Journal of Administrative Law* 88, 102.
102 (2015) 257 CLR 22 ('*Wei*').
103 *Hossain* (2018) 264 CLR 123, 135 [31] (Kiefel CJ, Gageler and Keane JJ), 147 [71] (Edelman J).
104 *Wei* (2015) 257 CLR 22, 32 [23].
105 Ibid 34 [28], 35 [32]–[33].
106 Ibid 35 [32].
107 Ibid 32–4 [24]–[28].
108 Ibid 33 [25].
109 *Project Blue Sky* (1998) 194 CLR 355, 374 [38]–[40] (Brennan CJ), 389–90 [92]–[93] (McHugh, Gummow, Kirby and Hayne JJ).
110 Ibid 390 [93] (McHugh, Gummow, Kirby and Hayne JJ).
111 *Wei* (2015) 257 CLR 22, 33 [25].
112 (2003) 211 CLR 476, 488–9 [20]–[22] ('*Plaintiff S157*'). While his Honour also acknowledged *Project Blue Sky*'s disfavour with the terms, the Chief Justice had discussed the terms in that case by reference to a series of decisions of Dixon J which the Court had subsequently accepted as authoritative: at 488–9 [20]–[22], citing *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399–400; *R v Metal Trades*

plurality in *Plaintiff S157* may also be seen to have at least implicitly accepted the utility of classifying some duties as 'imperative', equating them with 'inviolable limitations or restraints' which if breached resulted in jurisdictional error.[113]

Even if it may be accepted for present purposes that there is utility in characterising legislative conditions as imperative, what further underscores the elusive nature of Gageler and Keane JJ's resort to materiality in *Wei* is how they expressed a *breach* of such provisions. Their Honours noted that the statutory requirement in that case was 'properly characterised as an imperative duty, in the sense that *material non-compliance* with the requirement will result in an invalid exercise of the power'.[114] With respect, this is inconsistent with their Honours' own reasoning and with authority. In support of their adoption of the imperative/directory distinction, Gageler and Keane JJ had quoted from *Clayton v Heffron* where a plurality of the High Court had said that 'statutory provisions [are] imperative *when any want of strict compliance* with them means that the resulting act … is null and void'.[115] Gravity and materiality are wholly inapplicable on this account; if a provision requires strict compliance, the intensity of any breach must be necessarily irrelevant. Similarly, Gleeson CJ in *Plaintiff S157* incorporated no intensity review into his conception of a breach of an imperative duty.[116] Historically, the only notion of any form of gravity or intensity review in the imperative/directory classifications was in respect of *directory* duties, where it was common for it to be sufficient to 'substantially comply' with such duties. The Court in *Project Blue Sky* expressly rejected the usefulness of that notion.[117]

In summary, in addition to the fact that the distinction between imperative and directory duties has long since been thought abandoned after *Project Blue Sky*, it simply adds further confusion to incorporate a requirement of materiality into the determination of a breach of an *imperative* duty. In any event, materiality in the sense described in *Hossain* and *SZMTA* was not necessary for the conclusion reached in *Wei*. That case therefore does not support the presumption's creation.

Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section (1951) 82 CLR 208, 248.

113 *Plaintiff S157* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), citing *R v Coldham; Ex Parte Australian Workers' Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J). The necessary corollary of such a classification being, of course, that some duties may be 'violable' limitations or restraints, which, by another name, would be 'directory' duties.

114 *Wei* (2015) 257 CLR 22, 35 [32] (emphasis added).

115 (1960) 105 CLR 214, 247 (Dixon CJ, McTiernan, Taylor and Windeyer JJ) (emphasis added).

116 *Plaintiff S157* (2003) 211 CLR 476, 488–9 [20]–[22]. And nor did the plurality: at 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

117 *Project Blue Sky* (1998) 194 CLR 355, 374, 389–90 [92]–[93] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted):

> In *R v Loxdale*, Lord Mansfield CJ said '[t]here is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory'. As a result, if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity. However, statements can be found in the cases to support the proposition that, even if the condition is classified as directory, invalidity will result from non-compliance unless there has been 'substantial compliance' with the provisions governing the exercise of the power. But it is impossible to reconcile these statements with the many cases which have held an act valid where there has been no substantial compliance with the provision authorising the act in question.

C Concluding Comments on Prior Authority

By referring to and citing from the numerous cases listed above, members of the Court in *Hossain* and *SZMTA* sought support for the presumption of the threshold of materiality from existing authority. As is demonstrated by the foregoing analysis, however, what the Court in fact did was to effect a change in the common law by creating a new presumption of statutory interpretation unsupported by that authority. By doing so the Court instead appears to have been attempting to rationalise disparate strands of existing principle. Of course, the High Court may, and often does, develop the law in this way.[118] However, because such development involves judicial discretion the Court must have good reasons to do so and has a responsibility to be candid. Although it has been held that '[t]he purpose of judicial development of legal principle is to keep the law in good repair',[119] as Sir Anthony Mason over 20 years ago observed, 'if a judge decides to change the rules, he or she must be satisfied that there are very strong arguments and advantages to be gained' by doing so.[120] On a practical level, a failure of the judiciary to be so satisfied and to communicate those strong arguments and advantages, in the context of administrative law, could lead to the establishment of what Moss has described as judicial 'tripwires', which may be triggered by unwary decision-makers.[121]

So did such strong arguments and advantages exist to support the Court's creation of the presumption of the threshold of materiality? And if so, were they adequately communicated to justify the course the Court took?

III PROBLEMS WITH JUSTIFICATION

As has been noted above, the concept of jurisdictional error is a statement of conclusion reached after a process of statutory interpretation. As such, it has no definable content of its own. That interpretative process involves asking the classic *Project Blue Sky* question of 'whether it was a purpose of the legislation that an act done in breach of the provision should be invalid'.[122] However, that question is part of the reason why the concept of jurisdictional error has been said to exhaust and exasperate;[123] it does not provide much of a baseline position in the event the legislative regime in question provides little guidance.[124] The question has therefore been criticised as an exemplar of the 'fiction … that the Parliament has

118 Sir Anthony Mason has observed that the common law may develop to achieve '[t]he rationalisation of general principle with a view to bringing more unity and symmetry to the general law': Sir Anthony Mason, 'The Judge as Law Maker' (1996) 3 *James Cook University Law Review* 1, 3 ('The Judge as Law Maker').

119 *Gala v Preston* (1991) 172 CLR 243, 262 (Brennan J).

120 Mason, 'The Judge as Law Maker' (n 118) 7. Further, as Moss (n 84) 468 observes: 'Changes in the Court's jurisprudence … play both a directory and educative role, simultaneously demarcating the boundaries of acceptable administration, and educating administrators regarding their future actions'.

121 See generally Moss (n 84).

122 *Project Blue Sky* (1998) 194 CLR 355, 390 [93] (McHugh, Gummow, Kirby and Hayne JJ).

123 McDonald (n 99) 1019.

124 O'Donnell (n 21).

told the courts what to do when unlawful administrative action is discovered – when it quite clearly has not'.[125] As members of the High Court have noted, however, the process of construction 'is shaped by reference to principles and traditions of the common law'.[126] The 'promise of much needed clarity'[127] held out by the threshold of materiality, then, is that it can be seen to serve two functions: it provides some form of minimum content for the ascertainment of jurisdictional error,[128] giving the courts a touchstone of guidance in the interpretative task;[129] and it acts as a part of that suite of principles and traditions of the common law in the form of a brand new interpretative presumption – or as it has been described, a 'meta-level principle'[130] – which universally qualifies the existing interpretative limitations on the exercise of executive power. Jeremy Kirk again presciently foreshadowed the opportunity for such functions to be encompassed within the concept of gravity when he noted:

> [A]s the quotation from Jaffe illustrates, when the concept of jurisdictional error is understood as a label of conclusion then that leaves the door open for the evolution of administrative law. That evolution may occur at the particular level, relating to the various types of grounds of review or species of legal error recognised as jurisdictional. But it may also occur at an intermediate level, *where principles have room to develop which may inform and animate what types of error will be recognised as jurisdictional*.[131]

The threshold of materiality can be seen as one such development. However, as has been demonstrated above, there is no sound foundation in prior authority supporting the presumption. In these circumstances we are left with the questions recently posed by Chief Justice Allsop concerning the presumption: '[W]hat authority has the court? By what judicial technique does it work?'[132]

In the following sections I seek to answer these questions by reference to principles of statutory interpretation.

A Statutory Interpretation

1 Presumptions of Statutory Interpretation

The principles which inform the task of statutory interpretation include a number of interpretative presumptions which require the legislature's clear words to displace. Some examples of such presumptions include

> those relating to the construction of a statute which would abolish or modify fundamental common law principles or rights, which would operate retrospectively, which would deprive a superior court of power to prevent an unauthorised

125 Perram (n 49) 63.
126 *SZMTA* (2019) 264 CLR 421, 456 [83] (Nettle and Gordon JJ).
127 Crawford, 'Immaterial Errors' (n 4) 285.
128 O'Donnell (n 21).
129 See Chiam (n 17) 3.
130 McDonald (n 99) 1037.
131 Kirk (n 16) 32 (emphasis added).
132 Chief Justice James Allsop, 'The Foundations of Administrative Law' (Speech, Annual Whitmore Lecture, Council of Australasian Tribunals (NSW Chapter), 4 April 2019) 20.

> assumption of jurisdiction, or which would take away property without compensation.[133]

The principle of legality, referred to in the passage above concerning common law principles or fundamental rights, has an especially rich and growing High Court jurisprudence[134] and has been the subject of much recent academic and extra-judicial commentary.[135] There are a number of administrative law-specific presumptions, including: that parliament did not intend to deny procedural fairness to persons affected by the exercise of executive power;[136] that executive decisions are to be exercised reasonably;[137] and the overarching presumption that a decision-maker is to proceed by reference to correct legal principles, correctly applied.[138] Brennan J has stated that these interpretative presumptions reflect 'an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power'.[139] Reconciling the operation of these presumptions with the *Project Blue Sky* statutory question is simply a matter of recognising that the 'process of construction does not occur in a vacuum';[140] it encompasses an application of the relevant principles of statutory interpretation, including any applicable presumptions.

Nevertheless, the demands on the Court as interpreter to adhere to statutory text, context and purpose, whilst at the same time observing and applying such overlaying presumptions has given rise to complexity.

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133 *Bropho* (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (citations omitted).

134 See, eg, *Coco v The Queen* (1994) 179 CLR 427; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 ('*Electrolux*'); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ('*Saeed*'); *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v NSW Crime Commission* (2013) 251 CLR 196; *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569.

135 Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413; Jeffrey Goldsworthy, 'The Principle of Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46; Bruce Chen, 'The French Court and the Principle of Legality' (2018) 41(2) *University of New South Wales Law Journal* 401; Chief Justice James Spigelman, 'The Common Law Bill of Rights' (Speech, McPherson Lectures, University of Queensland, 10 March 2008); Chief Justice Robert French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons' (Speech, Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, 5 July 2012).

136 See, eg, *Kioa v West* (1985) 159 CLR 550; *Ex parte Aala* (2000) 204 CLR 82; *WZARH* (2015) 256 CLR 326.

137 See, eg, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ('*Li*'); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541.

138 See, eg, *Plaintiff M61/2010E v Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319, 354 [78] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Offshore Processing Case*'); *Hossain* (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ).

139 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 ('*Quin*').

140 *SZMTA* (2019) 264 CLR 421, 456 [83] (Nettle and Gordon JJ); Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28(2) *Federal Law Review* 303, 312–13.

2 Ultra Vires Debate and the Statutory Approach

One question that has vexed the common law world for some decades has been whether these principles and presumptions have a common law or statutory source. As McDonald has explained, the distinction gave rise to the 'ultra vires debate':

> According to the ultra vires approach, administrative law's norms are to be understood as implied legislative conditions on statutory powers; whereas, on the common law theory, the substantive norms of administrative [law] are judge-made, imposed by an exercise of judicial, not legislative, power.[141]

Kioa v West[142] is one of the clearest Australian examples of the opposing views at work. In that case, Mason J preferred to say that the principle of natural justice was a 'common law doctrine',[143] whereas Brennan J stated that 'courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention'.[144] While Brennan J accepted in *Attorney-General (NSW) v Quin* that it was 'too restrictive' to assert 'that the doctrine of ultra vires defines the scope of judicial review', his Honour nevertheless accepted the proposition that it was 'a powerful constitutional justification for judicial control and a useful organizing principle for the creation of a coherent subject'.[145] On the other hand, Sir Anthony Mason has disparaged the ultra vires approach on several bases, including that it cannot explain the *judicial* development of the grounds of judicial review,[146] and neither can it explain judicial review of prerogative power.[147] It is not necessary for the purposes of this article to fully explore this debate,[148] but it suffices to note that the Australian approach, at least pre-*Plaintiff S10/2011 v Minister for Immigration and Citizenship* (which I discuss in the next section below),[149] appeared to have come down on the side of Brennan J; judicial review jurisprudence can be seen to reflect the rise of the 'statutory approach' to judicial review.[150] As Bateman and McDonald have noted, this statutory approach 'stipulates a focus on the particulars of statutory text and purpose', and *Project Blue Sky* can be seen to represent the maturing of the foundations of Brennan J's project.[151] On this approach, then, a central role is played by the concept of legislative intention. And concomitantly, the 'grounds' of review should thus be understood as presumptions of statutory interpretation,

141 McDonald (n 99) 1032.
142 *Kioa v West* (1985) 159 CLR 550.
143 Ibid 582.
144 Ibid 609.
145 *Quin* (1990) 170 CLR 1, 35, quoting Jack Beatson, 'The Scope of Judicial Review for Error of Law' (1984) 4(1) *Oxford Journal of Legal Studies* 22, 22.
146 Sir Anthony Mason, 'The Foundations and the Limitations of Judicial Review' (2001) 31 *Australian Institute of Administrative Law Forum* 1, 9.
147 Ibid 8; see also Bradley Selway, 'The Principle behind Common Law Judicial Review of Administrative Action: The Search Continues' (2002) 30(2) *Federal Law Review* 217, 221.
148 A comprehensive analysis can be found in Selway (n 147).
149 (2012) 246 CLR 636 ('*Plaintiff S10*').
150 See especially Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153; see generally Crawford, 'Immaterial Errors' (n 4) 290–4.
151 Bateman and McDonald (n 150) 155, 169.

rebuttable on the basis of a legislative intention that they not apply.[152] But how is legislative intention to be discerned?

3 Legislative Intention and the Source and Rationale for Interpretative Principles

The concept of, and the identification of legitimate methods for discerning, legislative intention is a subject that has given rise to another debate in the academic literature.[153] However, the debate has been largely settled in High Court jurisprudence, until, as I will contend in the next section, the decision in *Hossain*.

The academic debate pits proponents of 'intentionalism' against the adherents of the High Court's 'alternative approach'. Intentionalists assert that the rules of statutory interpretation are designed to achieve the object of discovering the intentions of Parliament, and that such intentions are real, ascertainable and indispensable to the process of interpretation.[154] Proponents of the alternative approach dispute that legislative intention is any of these things, and defend the High Court's current position on the issue.[155] That position starts from the premise that the legislature has no psychological state of mind. As legislative intention is an 'attributed or imputed characteristic',[156] the concept is something of a 'fiction'.[157] Proceeding from that premise, in the 2009 case of *Zheng v Cai*, a unanimous High Court stated:

> [J]udicial findings as to legislative intention are *an expression of the constitutional relationship between the arms of government* with respect to the making, interpretation and application of laws. … [T]he preferred construction by the court of the statute in question is reached *by the application of rules of interpretation accepted by all arms of government* in the system of representative democracy.[158]

But that conceptualisation did not begin with *Zheng v Cai*. In the 2004 case of *Electrolux Home Products v Australian Workers Union*, again in the context of the principle of legality, Gleeson CJ said that that principle 'is a working hypothesis, the existence of which is *known both to Parliament and the courts*, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law'.[159]

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152 Crawford, 'Immaterial Errors' (n 4) 291.

153 See, eg, Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39; Justice Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1; Jamie Blaker, 'Is Intentionalist Theory Indispensable to Statutory Interpretation?' (2017) 43(1) *Monash University Law Review* 238; Patrick Emerton and Lisa Burton Crawford, 'Statutory Meaning without Parliamentary Intention: Defending the High Court's "Alternative Approach" to Statutory Interpretation' in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart, 2019) 39.

154 See generally Ekins and Goldsworthy (n 153).

155 See generally Emerton and Crawford (n 153).

156 Gageler, 'Legislative Intention' (n 153) 7.

157 See, eg, *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J), 345–6 (McHugh J), both quoting with approval Dawson J's statement in *Mills v Meeking* at 234.

158 (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ) (emphasis added).

159 *Electrolux* (2004) 221 CLR 309, 329 [21] (emphasis added).

Echoing that understanding, the language of *Zheng v Cai* was then picked up in 2011 in two further cases concerning the principle of legality.[160] Subsequently, that understanding was deployed in the context of judicial review principles. In *Plaintiff S10/2011 v Minister for Immigration and Citizenship* ('*Plaintiff S10*'), a case concerning procedural fairness, Gummow, Hayne, Crennan and Bell JJ stated:

> The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, *are part of the common law*. In Australia, they are the product of what in *Zheng v Cai* was identified *as the interaction between the three branches of government established by the Constitution*.[161]

Their Honours went on to say that '[i]t is in this sense that one may state that "the common law" usually will imply, as a matter of statutory interpretation' the condition of procedural fairness.[162]

Pausing here, it must be acknowledged that this knowledge and acceptance rationale is not without its weaknesses. First, the principle of legality has operated in some judicial review cases, somewhat controversially, to restrain parliament's clear attempt to legislate away such common law rights and protections.[163] Take, for example, the rejection in *Saeed v Minister for Immigration and Citizenship* of what the Court itself acknowledged in that case was the legislature's '[plain] response'[164] to the Court's earlier decision[165] that section 51A of the *Migration Act 1958* (Cth) had not ousted procedural fairness. In that case, even where the Court acknowledged that the legislature had expressly attempted to curtail the application of procedural fairness by the enactment of the provision in issue, the Court deployed a strict and robust approach to the application of the principle of legality to circumvent that attempt, and was unforgiving of the legislative drafting.[166] Secondly, and more broadly, it is overly simplistic to assert that parliament has detailed knowledge of the interpretative principles employed by the Courts, let alone that legislation is drafted on the basis of parliament's acceptance of such principles.[167]

Be that as it may, the notion that common law principles of statutory interpretation are known and accepted by, and reflect an interaction between, all arms of government has two consequences for the principles of judicial review. *First*, the notion settled the ultra vires debate 'without having to pick a side';[168] indeed the Court in *Plaintiff S10* said that debate proceeded upon a false

160 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 44–5 [38] (French CJ), 85 [146] (Gummow J, Hayne J agreeing at 123 [280]), 210 [545] (Crennan and Kiefel JJ).

161 *Plaintiff S10* (2012) 246 CLR 636, 666 [97] (emphasis added).

162 Ibid.

163 My thanks to Dr Janina Boughey for her suggestion on this point.

164 *Saeed* (2010) 241 CLR 252, 263 [26] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

165 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

166 Chen (n 135) 414.

167 There has been some extensive empirical research in the United States which bears out this proposition: see generally Abbe R Gluck and Lisa Schultz Bressman, 'Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I' (2013) 65(5) *Stanford Law Review* 901. My thanks to Aaron Moss for alerting me to this research.

168 Crawford, 'Immaterial Errors' (n 4) 293.

dichotomy.[169] *Secondly*, and more importantly, further constitutional legitimacy is bestowed on the common law principles of judicial review. Moreover, such legitimacy is not inconsistent with the Court's determinedly statutory approach[170] to judicial review; both can be explained by a commitment to parliamentary supremacy. Thus, on this account, parliamentary supremacy provides the rationale for the concept of jurisdictional error itself.[171] As Boughey and Crawford have explained, the 'core of the case' for jurisdictional error is 'to respect the legislative supremacy of Parliament, and its power to define the scope of statutory power as it thinks fit'.[172] It is thus because parliaments have power to determine that scope and the *consequences of a breach* of such power (provided they act within constitutional limits), the common law principles of statutory interpretation are justified by the principle of parliamentary supremacy.

But what the Court did in *Hossain* may have somewhat upset this understanding.

4 The Shift in Hossain

The plurality in *Hossain* said the following:

> The common law principles which inform the construction of statutes conferring decision-making authority reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary.[173]

It is not an overstatement to say that the Court here took a radically different approach to explaining the justification for the application and the source of judicial review's interpretative principles. As explained above, before *Hossain* the position was that those principles were justified by the constitutional structure and the *interaction between and acceptance of* all arms of government. However, the High Court now says that those principles are justified by what the *Court* deems to be the appropriate limits of the exercise of administrative power, based on its own *qualitative judgments* to which a legislature can be *taken to adhere*. As I explain further below,[174] this new approach was not entirely un-foreshadowed, however in *Hossain* it was not explained on the basis of any prior authority. Instead, the Court cited support for this proposition to a chapter by Justice Robertson of the Federal Court of Australia.[175] In that chapter, his Honour makes reference to the importance of assessing the gravity of an error [176] and acknowledges that Courts make qualitative judgments which 'may be expected to increase' given Brennan J's description of the 'increasingly sophisticated' implied

169 *Plaintiff S10* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).
170 See McDonald (n 99) 1027.
171 See generally Janina Boughey and Lisa Burton Crawford, 'Jurisdictional Error: Do We Really Need It?' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 395.
172 Ibid 414.
173 *Hossain* (2018) 264 CLR 123, 134 [28] (Kiefel CJ, Gageler and Keane JJ).
174 Part III(B)(2) below.
175 *Hossain* (2018) 264 CLR 123, 134 [28] n 32 (Kiefel CJ, Gageler and Keane JJ); Robertson (n 86).
176 Robertson (n 86) 246, 264.

limitations on statutory power.[177] However, the focus of that chapter is on the Court's exercise of those judgments whilst *applying* judicial review principles to the review of an exercise of administrative power.[178] It is not concerned with the *source or evolution* of those principles, as *Hossain* suggests.

The immediate consequences of *Hossain*'s radical reassessment of the Court's stated rationale for its interpretative principles appear to be twofold: *first*, it may be seen as a further shot across the bow in the long thought settled ultra vires debate; and *secondly*, it has weakened the parliamentary supremacy rationale for the Court's judicial review principles.

As to the first, the ultra vires account provided that the function of judicial review was no more than the Court declaring and enforcing the limits of executive power as expressed in legislation.[179] This has been the orthodox and accepted role of courts exercising judicial review in accordance with Brennan J's classic statement in *Quin*.[180] On the other hand, the appeal of the common law side of the debate was that common law principles are inherently flexible,[181] and thus could account for the inconsistencies Sir Anthony Mason has identified. As has been explained, *Plaintiff S10* put to rest this 'false dichotomy'. However, by apparently shifting the locus of authority for those principles from an accepted interactivity between the courts and parliament to the Court itself, the Court in *Hossain* appears to have come down even closer to the common law position, potentially cleaving the debate back open.

As to the second, and linked to the first, Bradley Selway has noted that the proponents of the ultra vires approach contend that 'administrative law could be viewed as merely an aspect of the proper role of the courts in both recognising and enforcing parliamentary sovereignty'.[182] As discussed above, the pre-*Hossain* account of the source of judicial review principles is not inconsistent with the statutory approach to judicial review, and reflects that those principles are justified by resort to the overarching concept of parliamentary supremacy. The statement in *Hossain* now challenges that rationale. If the source of authority for the principles of judicial review does not come from the supremacy or sovereignty of parliament, but from the qualitative judgments of the Court, by what rationale are those principles now justified?

This remains an unanswered question. In the meantime, can justification for what the Court said in *Hossain* be found in the authority of the Court to develop and evolve interpretative presumptions?

177 Ibid 243.
178 See, eg, ibid 249.
179 Selway (n 147) 219.
180 *Quin* (1990) 170 CLR 1, 35–6: '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'.
181 Gageler (n 140) 306.
182 Selway (n 147) 218.

B Evolution of Interpretative Presumptions

1 Bropho v Western Australia

Notwithstanding the Court's pre-*Hossain* position concerning the knowledge and acceptance of principles of statutory interpretation, those principles can and do evolve.[183] *Bropho*[184] is one of the most notable examples of the High Court expressly changing such a principle.[185] In that case, the High Court considered the presumption of the immunity of the Crown from the operation of statute. The Court held that the existing presumption operated too stringently, and in doing so it gave a justification for why and how such presumptions can change. After referring to the principle of legality, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ stated:

> If such an assumption be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear.[186]

The plurality described in detail the historical application of the presumption of the immunity of the Crown from statute.[187] On the prior account, that presumption could be rebutted only on the basis that it was 'manifest from the very terms of the statute' that the legislature intended that the Crown should be bound.[188] In ascertaining that legislative intention, the presumption also operated by what the plurality termed an 'eye of the needle test': that 'it was *apparent from its terms* that its beneficent purpose must be *wholly* frustrated unless the Crown were bound'.[189] In applying its interpretative approach, the plurality noted that at the time the presumption was first invoked and applied, and throughout its history, 'the Crown encompassed little more than the Sovereign, his or her direct representatives and the basic organs of government'.[190] In such circumstances the plurality said this eye of the needle test was justified.

However, it was recognised that modern times are different in that 'the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour'.[191] In such vastly different circumstances, the plurality held that the historical roots of the presumption now held little relevance. However, the stringent form of the presumption had one redeeming feature: the weight of authority that had upheld it. The plurality surmounted this obstacle by emphasising three principle considerations: *first*, there had been growing judicial statements of disquiet in intermediate appellate courts and in the

183 Emerton and Crawford (n 153) 60–2.
184 *Bropho* (1990) 171 CLR 1.
185 Stephen Gardiner, 'What *Probuild* Says about Statutory Interpretation' (2018) 25(4) *Australian Journal of Administrative Law* 234, 248.
186 *Bropho* (1990) 171 CLR 1, 18.
187 Ibid 14–17 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
188 Ibid 17.
189 Ibid (emphasis in original).
190 Ibid 18.
191 Ibid 19.

United Kingdom concerning the applicability of the stringent test in the modern age; *secondly*, the contemporary approach to statutory construction, both common law and via applicable interpretation acts, had since emphasised the primacy of legislative purpose; and *thirdly*, the modern expansion of the administrative state had made it inevitable that the legislative intent of many statutes was to bind all persons indifferently.[192] Their Honours therefore held that the old test could no longer stand, and instead that the presumption was to apply 'depend[ing] upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises'.[193]

2 Portents of Hossain's Approach to Reassessment? Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd

The shift in *Hossain* of the Court's attempted justification for the evolution of interpretative presumptions concerning limits on executive power was not entirely un-foreshadowed.[194] In *Probuild*, Gageler J observed:

> The common law principles of interpretation applicable to determining whether legislation manifests an intention that a decision or category of decisions not be quashed or otherwise reviewed are not static. As with other common law principles or so-called 'canons' of statutory construction, they have contemporary interpretative utility to the extent that they are reflective and protective of stable and enduring structural principles or systemic values which can be taken to be respected by all arms of government. And as with other common law principles of statutory construction, they are not immune from curial reassessment and revision.[195]

His Honour cited *Bropho* at the end of this passage. Although it may be noted that his Honour refers to the *respect* that all arms of government have for common law principles of statutory construction, a rationale reminiscent of that put forward by the Court in *Plaintiff S10*, the passage recognises, in a similar fashion as did the Court in *Bropho*, that those principles *evolve*, and they do so based on *curial reassessment and revision*. The reassessment and revision that Gageler J undertook in *Probuild*, unlike the plurality in that case, was to reject the 'anomalous'[196] 'accident of legal history'[197] that is the presumption that certiorari is available to quash administrative decisions for non-jurisdictional error of law on the face of the record.

His Honour began his analysis by noting that as early as the 19th century, certiorari had been used to call up and quash the public record of a repository of statutory decision-making authority for error of law 'where it could be shown that the person or body had acted in excess of their statutory authority'.[198] His Honour

192 Ibid 20–1.
193 Ibid 23.
194 As Crawford and McDonald have each recently explained, it is possible that the influence of Justice Gageler has played a role in the shifts identified above: Crawford (n 4) 'Immaterial Errors' 295; McDonald (n 99) 1035.
195 *Probuild* (2018) 264 CLR 122 [58].
196 Ibid 30 [77], quoting *Re McBain* (2002) 209 CLR 372, 470 [276] (Hayne J).
197 *Probuild* (2018) 264 CLR 1, 30 [77], quoting *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257, 262 (Lord Diplock).
198 *Probuild* (2018) 264 CLR 1, 24 [64].

observed, however, that prior to 1950 that remedy had not been available to quash a decision of a repository of statutory decision-making authority for *non*-jurisdictional error on the face of the repository's record.[199] His Honour recorded that in 1952, the English Court of Appeal in *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*[200] had affirmed on appeal, for the first time, a decision that a speaking order made by a statutory tribunal was available to be called up and quashed for error of law that had not taken the tribunal beyond its jurisdiction.[201] After noting the time in Australia during which that decision was made, Gageler J then emphasised that the availability of certiorari to quash a non-jurisdictional error of law on the face of the record was therefore 'uncritically accepted' by the High Court of Australia.[202] His Honour observed that although the availability of certiorari in such circumstances had been subsequently recognised by the High Court as having practical and conceptual difficulties,[203] it had nevertheless in effect calcified into a presumption of statutory interpretation.[204] He then placed emphasis on an important change in the jurisprudence which, in his Honour's view, weighed in favour of the abandonment of the presumption in modern times. That change was the 'turning point' wrought by three cases in the decade between 1990 and 2000[205] which had culminated in a new presumption of statutory interpretation: a statutory conferral of decision-making authority is conditioned by 'an implied statutory requirement that the person or body can validly exercise that authority only on a correct understanding of the law applicable to the decision to be made'.[206]

Given such a settled presumption, Gageler J held that to persist with the earlier presumption that certiorari is available for non-jurisdictional error of law on the face of the record 'would at best be supererogation and at worst be conducive of incoherence'.[207] Unlike the plurality, which had held that the legislative regime in that case had evinced 'a clear legislative intention' to rebut the presumption,[208] Gageler J therefore did not need to find that the presumption had been rebutted; he dismissed its role entirely.[209]

As can be seen, this reasoning for eschewing the presumption provides a similarly robust rationale as the Court's change to the presumption in *Bropho*. His Honour in effect held that if modern understandings of the principles of judicial review have shifted and evolved, then Australian jurisprudence should not be

199 Ibid 25–6 [66].
200 [1952] 1 KB 338.
201 *Probuild* (2018) 264 CLR 1, 26 [67].
202 Ibid 26–7 [68], and the authorities cited at n 109.
203 Ibid 27 [69].
204 Ibid 30–1 [78].
205 *Quin* (1990) 170 CLR 1; *Craig* (1995) 184 CLR 163; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 ('*Enfield City Corporation*').
206 *Probuild* (2018) 264 CLR 1, 29–30 [75] (Gageler J).
207 Ibid 31 [78].
208 Ibid 15 [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
209 Gardiner (n 185) 242.

hamstrung by any anachronistic eccentricities of the prerogative writs.[210] In doing so, he directly applied his stated approach to the reassessment of interpretative presumptions in the passage extracted above.

3 The Shift in Hossain Was Not Adequately Justified

The approach taken by the plurality in *Hossain* serves as an example of what Crawford and Emerton have recently asserted, that 'it must be possible for new interpretive constraints to be discovered'.[211] Similarly, although they were a loosening or abandonment of such constraints, the twin approaches to reassessment and revision by the plurality in *Bropho* and by Gageler J in *Probuild* may be seen as another such example. Those approaches may also be seen as an application of the method of legal reasoning averted to by the High Court in *Ebner v Official Trustee in Bankruptcy*, where Gleeson CJ, McHugh, Gummow and Hayne JJ observed as follows:

> Legal thought and reasoning has a temporal dimension. It is a well-recognised method of legal reasoning to return to authority which is said to control the formulation of presently applicable principle, and to ascertain the conditions and problems of earlier times to which that authority responded, and the legal institutions which then controlled the formulation of principle. With the appreciation of such matters which is then acquired, 'a measure of reconceptualisation' may provide a better foundation for the present development of the law.[212]

Accordingly, the Court in *Bropho* justified overturning the settled application of the presumption in that case by reference to significant changes to the Australian approach to statutory interpretation, and in the nature and functions of the administrative state. And in rejecting the utility of continuing to observe and apply the presumption in consideration in *Probuild*, Gageler J deployed similar reasoning by reference to numerous historical factors.

These persuasive justifications find no equivalent in the Court's decision in *Hossain*. Unlike *Bropho* and *Probuild*, the Court in *Hossain* did not adequately justify *why* prior authority should be sidelined, or reconceptualised, for a reassessment resulting in the creation of the threshold of materiality. It may be conceded that *Hossain* concerned the creation of a new presumption whereas *Bropho* concerned the reading down of one, and Gageler J's approach in *Probuild* was to reject a presumption's continuing application. However, the creation of a new universal presumption which qualifies the 'longstanding' limits on the exercise of executive power will arguably have a more dramatic effect on the interpretation of statutes conferring such power. Moreover, unlike *Bropho* and *Probuild*, the Court in *Hossain* provided minimal guidance as to *what factors* militated in favour of the introduction of the presumption.

However, one clue as to such factors might lie in this passage in the plurality's reasoning:

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210 Janina Boughey, 'Resolving Some "Anomalies" and "Snares" in Judicial Review: *Probuild Constructions*', *AusPubLaw* (Blog Post, 6 April 2018) <https://auspublaw.org/2018/04/resolving-some-anomalies-and-snares-in-judicial-review/>.

211 Emerton and Crawford (n 153) 61.

212 (2000) 205 CLR 337, 352 [43].

> Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. They are not so delicate or refined in their operation that sight is lost of the fact that '[d]ecision-making is a function of the real world'.[213]

This passage immediately follows the statement extracted above concerning common law judicial review principles being a reflection of the Court's 'qualitative judgments', and it was directly after this passage that the materiality threshold was introduced.[214] Taken together, however, this tranche of reasoning is ambiguous and may be read in two ways. *First*, do their Honours mean that the threshold of materiality is a new common law principle that the Court has qualitatively adjudged to be an 'appropriate limit' upon the exercise of administrative power?[215] Or *secondly*, was the notion of 'longstanding qualitative judgments' only invoked in respect of such presumptions as procedural fairness, unreasonableness and that 'a decision-maker must proceed by reference to correct legal principles, correctly applied'?[216] That is, does this passage merely serve to highlight that the threshold of materiality is a *qualification* upon those 'appropriate' limits, or is it conceived of as its own limit? Although this might be dismissed as an exercise in semantics, the distinction is important for understanding how the Court justified the creation of the presumption. On the second interpretation, the qualification is apparently justified by the conception the Court invoked about the 'real world'. As explained further in Part IV, however, if that interpretation is correct then we have been given very little basis for the presumption aside from that opaque invocation.[217] If the first interpretation is the better reading, however, then the threshold of materiality might be the Court's direct *application* of its chosen approach to reassessment as a new 'appropriate limit'. This would at least provide a basis, albeit still unclear, for understanding *how* the Court came to light on the threshold of materiality. Even on that basis, however, we are still left with a justification problem. For all the discussion of gravity by reference to Jaffe, the Court in *Hossain* did not explain, in a similarly compelling way as did the plurality in *Bropho* and Gageler J in *Probuild*, *why* its chosen approach should result in the creation of this new presumption of statutory interpretation. As Justice McHugh explained some 20 years ago, it is 'incumbent on the judiciary, when giving judgment in cases which break new legal ground, to explain clearly how and why the change has occurred'.[218] It is for this reason that the Court in *Hossain* needed to adequately justify why the gravity of an error should include its materiality, and why such a threshold of materiality should now be considered a presumption of statutory interpretation informing the ascertainment of jurisdictional error. It did not.

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213 *Hossain* (2018) 264 CLR 123, 134 [28] (Kiefel CJ, Gageler and Keane JJ), quoting *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458, 469 (Hill J) ('*Enichem*').

214 *Hossain* (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ).

215 Ibid 134 [28].

216 Ibid 134 [28], [29], quoting *Offshore Processing Case* (2010) 243 CLR 319, 354 [78] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

217 Crawford, 'Immaterial Errors' (n 4) 296.

218 Justice MH McHugh, 'The Judicial Method' (1999) 73(1) *Australian Law Journal* 37, 43.

IV FURTHER PROBLEMS: THE VIEWS OF NETTLE AND GORDON JJ

A Pragmatism

1 An Exercise in Pragmatism?

The plurality in *Hossain*'s statement that '[d]ecision-making is a function of the "real world"'[219] directs attention to the question of whether their Honours' development of the presumption of the threshold of materiality was informed by pragmatism. That statement is quoted from the judgment of Hill J in *Enichem Anic Srl v Anti-Dumping Authority* ('*Enichem*'),[220] a 1992 decision of the Full Court of the Federal Court. The legislative provision in issue in that case relevantly empowered the Minister to impose certain duties upon goods if satisfied that the export price of those goods was less than their 'normal value', resulting in threatened or actual material injury to an Australian industry.[221] Duty was imposed on the appellants' goods on that basis. The appellants' complaint was that the respondent authority failed to take into account a relevant consideration, being that the first appellant had in Italy a 'natural monopoly' which enabled it to achieve, in that country, a higher return than would otherwise have been available as 'normal value' by reference to Italian domestic sale prices. In dispatching this submission, Hill J considered that it was not enough for the appellant to merely assert to the respondent that there existed such a monopoly, without making out a case that 'the existence of the monopoly had some effect on the relevant market'.[222] It did not do so. It was not, therefore, incumbent upon the respondent to make further inquiries to ascertain whether the appellants' assertion was correct. In coming to that conclusion, Hill J said:

> Decision-making is a function of the real world. A decision-maker is not bound to investigate each avenue that may be suggested to him by a party interested. Ultimately, a decision-maker must do the best on the material available after giving interested parties the right to be heard on the question.[223]

In applying that proposition, his Honour went on to hold that, in circumstances where the respondent authority had afforded the appellants a fair hearing, the respondent had no further duty to inquire and it therefore had not failed to take into account a relevant consideration.[224]

It is true that Hill J's reasoning in *Enichem* provided for a pragmatic resolution of that case. However, in coming to that resolution, Hill J's use of the terminology of the 'real-world' was no more than his Honour adopting an expression apt to focus attention upon the well-established limitations upon the principle of a 'duty

219 *Hossain* (2018) 264 CLR 123, 134 [28] (Kiefel CJ, Gageler and Keane JJ), quoting *Enichem* (1992) 39 FCR 458, 469 (Hill J).

220 *Enichem* (1992) 39 FCR 458, 469 (Gummow J agreeing at 459, O'Connor J agreeing at 471).

221 *Customs Act 1901* (Cth) s 269TG.

222 *Enichem* (1992) 39 FCR 458, 468–9.

223 Ibid 469.

224 Ibid.

to inquire'. As his Honour noted, by reference[225] to the decision of *Prasad v Minister for Immigration and Ethnic Affairs*, such a duty is strictly limited.[226]

Although it can be said that each of *Hossain* and *SZMTA* was a pragmatic decision in the result, whether the development of the presumption was influenced by a drive to be pragmatic is unclear. It is understandable that the Court in *Hossain* sought support from the statement in *Enichem* in the context of the operation of common law principles which inform the construction of statutes conferring decision-making authority. But again, this notion of the 'real world' speaks of the *operation* of such principles; it says little, and nor does *Enichem*, of *why and how* that notion justifies the creation of a threshold of materiality in the ascertainment of jurisdictional error. Even if it may be accepted that the concern of pragmatism contributed to the introduction of the presumption, the Court gave little guidance as to why it did so.

Nevertheless, as Crawford has noted, it is possible to draw comparisons between *Hossain* and decisions of the English courts that have more expressly delivered judgments infused with the spirit of pragmatism.[227] A telling example of that approach can be found in *R (Cart) v Upper Tribunal*.[228] In that case, Baroness Hale, President of the Supreme Court of the United Kingdom, stated that 'a certain level of error is acceptable in a legal system which has so many demands upon its limited resources'.[229] As Crawford notes, perhaps the Court in *Hossain* was animated by that broad issue as to how courts should seek to balance the competing 'demands of legality with the practical realities of the administrative state'.[230] But is that what animated the Court in *Hossain* in extending the *Stead* principle of the 'possibility of a successful outcome' to the determination of jurisdictional error? We do not know because the Court did not tell us. Perhaps the concept of gravity espoused by Jaffe could be also said to be pragmatic, asserting as it does the entreaty to eschew any notion that the concept of jurisdiction is some kind of 'metaphysical absolute'.[231] But the fact is we just really do not know if such pragmatism influenced the Court's creation of the presumption. Again, the Court was silent.

2 Pragmatism's Antithesis?

However, what we do know from Nettle and Gordon JJ's joint judgment in *SZMTA*, and more recently from each of their Honours' separate reasons in *ABT17*

225 Ibid.
226 (1985) 6 FCR 155, 169–70 (Wilcox J).
227 Crawford, 'Immaterial Errors' (n 4) 295–6.
228 [2012] 1 AC 663.
229 Ibid 684 [42]. Recently, Baroness Hale gave a speech in which she discussed this issue: Lady Hale, 'Principle and Pragmatism in Public Law' (Speech, Sir David Williams Lecture, Cambridge, 18 October 2019). Her Honour said that '[t]here is plainly scope for pragmatism to play a part in the determination of what fairness requires in a particular context': at 18. Although she was there discussing the doctrine of legitimate expectations, the same might be said of the High Court's approach to procedural fairness in its application of 'practical injustice' from *Ex parte Lam*, as discussed in Part II(A)(3) above.
230 Crawford, 'Immaterial Errors' (n 4) 281.
231 Jaffe (n 81) 963.

v Minister for Immigration and Border Protection,[232] is that the threshold of materiality has sidelined what may be said to be a competing pragmatic concern. To take one ground of review as an example, as Gordon J noted in *ABT17*, the principle of procedural fairness, as now overlaid with the materiality threshold, 'has been changed'; it now requires a decision maker to 'accord procedural fairness if (and only if) to do so would make a difference to the ultimate decision. The guarantee of procedural fairness is removed'.[233] More broadly, in *SZMTA* Nettle and Gordon JJ observed:

> Parliament cannot be taken to intend that a decision-maker need only comply with laws to the extent that failure to comply would not bring about a different result. Any such conception would be contrary to the notion, central to the conceptual foundations of judicial review, that everyone (including a decision-maker) is bound by the law.[234]

Pausing here, it is well to deal first with a recent criticism of this passage. Crawford has argued that the passage is not consistent with the accepted conceptualisation of jurisdictional error in Australia.[235] Her criticism proceeds from the premise that their Honours were impliedly asserting that 'a non-jurisdictional limit on power is not legally binding'.[236] From that premise, Crawford says it is a step too far for their Honours to have impliedly asserted that 'the possibility of non-jurisdictional error is contrary to the basic concept of the rule of law'.[237] That is said to be because 'the distinction between jurisdictional and non-jurisdictional errors of law is a firmly rooted principle of Australian administrative law that shows no sign of being abandoned any time soon'.[238]

But, with respect, that passage cannot be sensibly read in the way Crawford suggests. Their Honours at the end of that passage cited[239] the following statement of Brennan J in *Quin*:

> The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government.[240]

Nettle and Gordon JJ's argument is consistent with this statement. Further, their Honours' observation is entirely consistent with what Gaudron and Gummow JJ stated in *Ex parte Aala* was the 'animating principle'[241] set out by Gaudron J in

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232 *ABT17* (2020) 94 ALJR 928.

233 Ibid 437 [104].

234 *SZMTA* (2019) 264 CLR 421, 458–9 [90]. In *ABT17* (2020) 94 ALJR 928, 953 [98] (emphasis in original), Gordon J further stated:

> The statute sets the playing field and the rules. Those rules apply to everybody: they apply to all people within Australia, including administrative decision-makers and the judiciary. The statute is *prospective*. That is, it sets those rules *in advance*. … The statute ensures that decision-makers know what is required of them when carrying out their tasks.

235 Crawford, 'Immaterial Errors' (n 4) 297.

236 Ibid.

237 Ibid.

238 Ibid.

239 *SZMTA* (2019) 264 CLR 421, 458–9 [90] n 128.

240 *Quin* (1990) 170 CLR 1, 35.

241 *Ex parte Aala* (2000) 204 CLR 82, 107 [55].

Enfield City Corporation v Development Assessment Commission, where her Honour had said:

> [W]ithin the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. *The rule of law requires no less*.[242]

Thus, it cannot be said that Nettle and Gordon JJ were impliedly asserting that the new presumption's classification of an error as non-jurisdictional, if it does not meet some threshold of materiality, is wrong in principle *for the reason* that the classification of *any* error as non-jurisdictional is contrary to the rule of law and fundamental judicial review principles. As Crawford herself recognises, their Honours did *not* suggest that the distinction between jurisdictional and non-jurisdictional errors should be abandoned. Their Honours were instead concerned with the creation by this new presumption of *this new species* of non-jurisdictional error, a species which they felt was – and with respect, is – contrary to well-established fundamental principle.

Be all that as it may, it is clear that Nettle and Gordon JJ's passage provides a strong basis for the conclusion that it is decidedly *un*-pragmatic to create a diminished obligation upon decision-makers to comply with the limits of their powers *only to the extent* any error they make is material. As Aniulis has observed, '[s]uch a principle arguably opens the door for non-compliance' when compliance both improves administrative efficiency and promotes the public interest.[243] Further, although their Honours did not couch their concern in this way, such a diminished obligation may create more confusion for decision-makers as to the precise bounds of their power.[244] Of particular concern is how the current constitution of the AAT may contribute to such confusion. In circumstances where a growing percentage of the migration division of that tribunal is comprised of political appointments who are not legally trained,[245] the threshold of materiality creates a concern for the due administration of the law. Indeed, the potential for 'distorted positions' in tribunals 'preoccupied with special problems or staffed by individuals of lesser ability' was adverted to by Jaffe[246] and by the Court in *Kirk*, in which the plurality stated that it was important to avoid such positions.[247] The migration division of the AAT, armed with this new presumption, may develop such positions and create uncertainty in its application.

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242 *Enfield City Corporation* (2000) 199 CLR 135, 157 [56] (emphasis added).

243 Aniulis (n 101) 100, quoting *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, 529 [65] (Kiefel CJ, Bell, Gageler and Keane JJ).

244 As Moss has observed more generally concerning the lack of judicial direction as to jurisdictional error's inherent content, such confusion 'harms the rule of law, good governance, and public confidence in administration generally': Moss (n 84) 474.

245 See IDF Callinan, 'Review: Section 4 of the *Tribunals Amalgamation Act 2015 (Cth)*' (Report, 23 July 2019) 85 [6.79].

246 Jaffe (n 81) 963.

247 *Kirk* (2010) 239 CLR 531, 570 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

B Reversing the Onus of Proof

Nettle and Gordon JJ in *SZMTA*, and Gordon J more recently in *ABT17* (with whom Nettle J agreed) make a compelling case against the main development in *SZMTA*. That development was the plurality's assertion that '[w]here materiality is put in issue … it is a question of fact in respect of which the applicant for judicial review bears the onus of proof'.[248] In *SZMTA* Nettle and Gordon JJ expressed two concerns with that shift in the onus of proof, a shift that their Honours felt was reason enough to reject the threshold of materiality.[249] *First*, their Honours noted it would challenge 'the fundamental principle that a statutory power is to be exercised under, and according to, the terms of the statute'.[250] For their Honours, the presumption would require identification of materiality by an applicant *after* the decision was made, as opposed to under the statute.[251] This was an important factor for their Honours because, as will be discussed further in the next section, a finding of jurisdictional error means that the decision is a nullity, or 'no decision at all'.[252] It is for this reason that their Honours emphasised, similarly to what McHugh J observed in *SAAP*,[253] that a decision 'cannot be a little bit invalid or a little bit beyond power'.[254] And that being so, if a decision is found to be invalid it is then for the decision-maker to seek for the Court to exercise its residual discretion to refuse relief, and in so doing it must establish the futility of any such relief. As Nettle and Gordon JJ noted: '[t]he playing field is set by the statute, not the decision-maker or the court on review'.[255] In *ABT17*, Gordon J expanded upon this proposition, noting that the statute's 'playing field' is known in advance, and thus '[t]he statute ensures that decision-makers know what is required of them when carrying out their tasks'. [256] Further, her Honour observed that the determination of any error is to be ascertained at the time of a decision-maker's exercise of power.[257] Her Honour observed that these two principles 'have an important consequence', being that 'judicial power does not permit a court to inquire, in hindsight, whether an error was "material", thereby modifying the statute'.[258]

Secondly, their Honours in *SZMTA* and in *ABT17* cautioned that the onus shift would create the risk that judicial review will become a form of merits review.[259] The threshold of materiality will see applicants putting on evidence going to that issue, seeking to show how they may have conducted themselves should the error not have occurred. This has implications for a slide into merits because, in such

248 *SZMTA* (2019) 264 CLR 421, 433 [4] (Bell, Gageler and Keane JJ).
249 Ibid 459 [93].
250 Ibid.
251 Ibid 459–60 [93].
252 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 615 [51] (Gaudron and Gummow JJ) ('*Bhardwaj*').
253 *SAAP* (2005) 228 CLR 294, 321 [77] (McHugh J).
254 *SZMTA* (2019) 264 CLR 421, 460 [94].
255 Ibid 460 [93].
256 *ABT17* (2020) 94 ALJR 928, 953 [98], [100].
257 Ibid 953–4 [101].
258 Ibid 954 [102].
259 *SZMTA* (2019) 264 CLR 421, 460 [95] (Nettle and Gordon JJ); Ibid 429–30 [72] (Nettle J), 437 [105] (Gordon J).

circumstances, a court may need to consider how that evidence may affect the merits of the case[260] to determine what a particular outcome 'would' have been but for the error.[261] Although the determination of counterfactuals is a commonplace judicial technique in many areas of the law, such a determination in the context of administrative law is of acute concern: the High Court has consistently warned of the danger of the elision of judicial review with merits review.[262] As Brennan J famously stated in *Quin*: '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'.[263] It is true that there are criticisms of the strict merits/legality divide given the 'inevitable elision of facts and law'.[264] Nevertheless, it must be borne in mind that '[t]he line between merit review and jurisdictional error may not be a "bright line", but it is nevertheless an essential one'.[265] Nettle and Gordon JJ have made a persuasive case against the adoption of a presumption that could, even potentially, cross that line.

These are compelling reasons to reject, at the very least, the shift in onus of proof now established by the threshold of materiality.

For completeness, it should be noted that at the time of writing, the High Court was reserved on a decision (incidentally from a grant of special leave by Nettle and Gordon JJ)[266] in which the appellant has sought to challenge the shift in the onus of proof wrought by *SZMTA* and has urged the Court to adopt the reasoning of Nettle and Gordon JJ in that case.

C Residual Discretion to Refuse Relief

As I have discussed above,[267] much of the prior authority relied upon by the plurality in *Hossain* and *SZMTA* was authority for the proposition that an error which did not deprive the party of a successful outcome may justify the refusal of relief by the exercise of the Court's residual discretion.[268]

260 O'Donnell (n 21).

261 Aniulis (n 101) 104.

262 See, eg, *Quin* (1990) 170 CLR 1, 36 (Brennan J). See generally Robin Creyke, 'Judicial Review and Merits Review: Are the Boundaries Being Eroded?' (2017) 45(4) *Federal Law Review* 627 and the cases discussed therein.

263 *Quin* (1990) 170 CLR 1, 36; see also *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ) ('*Wu Shan Liang*').

264 Creyke (n 262) 651. It may be further said that, as the court on judicial review has no function of re-exercising the powers of the original decision-maker, its fact finding function is limited only to what is necessary to exercise its judicial review mandate. On that basis, considering whether a particular error is material to the outcome does not blur the merits/legality divide: see Margaret Allars, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41(2) *Federal Law Review* 197, 223ff. With thanks to Christopher Chiam for this point.

265 *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 77 ALD 402, 408 [20] (Mansfield, Selway and Bennett JJ), citing *Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

266 *MZAPC v Minister for Immigration and Border Protection* [2020] HCATrans 113.

267 See generally Part II.

268 See generally Daly (n 92) 139 (emphasis in original).

In *Re McBain*, McHugh J set out the historical background to the Court's discretion to refuse the issue of certiorari.[269] His Honour noted that by the mid-17th century, although the King's Bench had jurisdiction to quash a decision by the issue of certiorari, that quashing was a 'favour of the Court'.[270] A classic statement of the non-exhaustive[271] grounds for the Court's exercise of discretion was set out in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*, where five members of the Court relevantly observed, in discussing the discretion to refuse mandamus, that that writ may not be granted 'if no useful result could ensue'.[272] And in *Ex parte Aala*, Gaudron and Gummow JJ noted that, although the discretion is not to be exercised lightly,[273] the text and structure of the *Constitution* support the view that all of the constitutional writs are attended by discretion.[274]

Nettle and Gordon JJ in *SZMTA*, and both writing separately in *ABT17*, emphatically endorsed the approach that the exercise of the residual discretion to refuse relief should be the course adopted for errors of the kind in contemplation in such cases. Their Honours noted in *SZMTA* that 'a different and separate enquiry … which should not be confused' with the identification of jurisdictional error is 'whether to exercise the residual discretion to refuse relief, *after* jurisdictional error has been established, if no useful result could ensue'.[275] Conceptually, this would be the most principled approach to the determination of the consequences that should flow from a non-material breach. This is plain for the reasons given by Nettle and Gordon JJ, set out above, in respect of the onus of proof, and, as I have demonstrated, for the reason that no persuasive justification has been advanced by the Court for the presumption of the threshold of materiality, either on the basis of prior authority or on the basis of the Court's power to evolve its interpretative presumptions.

However, the residual discretion to refuse relief has its own potential problem: it is difficult to reconcile with the concept of jurisdictional error.[276] Given the High Court's frequent approval[277] of the principle that a decision infected by

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269 *Re McBain* (2002) 209 CLR 372, 417–23 [98]–[112]; see also *Ex parte Aala* (2000) 204 CLR 82, 136–7 [145]–[149] (Kirby J).

270 *Re McBain* (2002) 209 CLR 372, 419 [100], citing William Style, *Regestrum Practicale: Or the Practical Register, Consisting of Rules, Orders, and Observations Concerning the Common-Laws, and the Practice Thereof* (Printed by AM for Charles Adams, 1657) 272, cited in Edith G Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press, 1963) 107.

271 *Ex parte Aala* (2000) 204 CLR 82, 108 [56] (Gaudron and Gummow JJ).

272 (1949) 78 CLR 389, 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ); see also *SAAP* (2005) 228 CLR 294, 322 [80] (McHugh J).

273 *Ex parte Aala* (2000) 204 CLR 82, 107 [55].

274 Ibid 107 [54]; see also at 89 [5] (Gleeson CJ).

275 *SZMTA* (2019) 264 CLR 421, 457 [85] (emphasis in original); see also *ABT17* (2020) 94 ALJR 928, 948 [72] (Nettle J), 953 [97] (Gordon J).

276 Lisa Burton Crawford and Janina Boughey, 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30(1) *Public Law Review* 18, 29.

277 See, eg, *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 206 [52] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ); *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231, 246 [31] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ); *Hossain* (2018) 264 CLR 123, 133 [24] (Kiefel CJ, Gageler and Keane JJ).

jurisdictional error is, in law, 'no decision at all',[278] how can a court refuse to grant relief to a decision that does not exist? Justice Perram has referred to this complexity:

> [I]f one has accepted that Parliament intended decisions of that kind to be invalid how can one, in the same breath, conclude that a court can decline relief? By refusing to set aside the decision one is giving effect to the very thing which one has just concluded Parliament has said must not be given effect. This makes no sense; it is internally inconsistent.[279]

However, there is arguably a further link in the chain: 'a decision must be found to be invalid by a court with the jurisdiction and power to do so'.[280] *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*[281] is illustrative of this proposition. In that case, the Full Court of the Federal Court interpreted the reference to a 'decision' in section 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) as a reference to nothing more than 'a decision in fact made, regardless of whether or not it is a legally effective decision'.[282] That construction had the consequence that a decision made beyond power is still subject to the review powers conferred by that provision.[283] When this principle is borne in mind, then, it can be seen that the statement that a decision infected by jurisdictional error 'is properly to be regarded, in law, as *no decision at all*'[284] may be correct as far as it goes, but it does not gainsay that a decision infected by jurisdictional error is still a decision which continues to exist *in fact*.[285] As such, if the Court refuses to grant relief to quash such a decision, it is akin to the Court saying 'we are content to let the existing state of affairs continue'.[286] On that basis, then, the continued resort to the residual discretion may be justified.

Nevertheless, as it stands at present the position in the authorities is not entirely satisfactory. Perhaps, then, this state of affairs was one of the driving reasons for the course the Court took in creating the presumption of the threshold of materiality: to reduce courts' reliance upon the residual discretion, or to push it toward falling into desuetude. If that was the case, however, the Court did not tell us. As explained above,[287] indeed Justice Edelman himself made clear that the distinction between materiality and the residual discretion must be maintained.[288]

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278 See, eg, *Bhardwaj* (2005) 228 CLR 294, 615 [51] (Gaudron and Gummow JJ).

279 Perram (n 49) 69; see also Crawford and Boughey (n 276) 29.

280 Crawford and Boughey (n 276) 30.

281 (1979) 41 FLR 338 ('*Brian Lawlor*').

282 Ibid 342 (Bowen CJ); see also ibid 370 (Smithers J).

283 The '*Brian Lawlor* construction' has been recently applied by the High Court in the context of the 'fast track reviewable decision' regime set out in pt 7AA of the *Migration Act 1958* (Cth): *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, 236–7 [52] (Gageler, Keane and Nettle JJ), 244 [82] (Gordon J).

284 *Bhardwaj* (2002) 209 CLR 597, 616 [53] (Gaudron and Gummow JJ) (emphasis added).

285 As Hayne J noted in *Re McBain* (2002) 209 CLR 372, 473 [284] (citations omitted): '[T]he act of a public authority that is beyond its power is, as a general rule, of no legal effect. But in the case of superior courts of record, other considerations intrude. Orders of a superior court, even if erroneous, bind the parties to them until set aside'.

286 My thanks to Aaron Moss for this way of putting it.

287 See Part II(B)(2).

288 *Hossain* (2018) 264 CLR 123, 146–7 [69].

V CONCLUSION

In this article I have sought to demonstrate that the presumption of the threshold of materiality is not grounded in a legitimate justification: it is not supported by prior authority; it raises more questions than answers concerning the source, development and application of the principles of statutory interpretation; and in practice it has unintended consequences. Conclusions are supposed to conclude, hopefully with the benefit of some answers. However, the presumption leaves many further questions. These include: what is the significance of the statements in certain English authorities,[289] referred to by Edelman J in *Hossain*[290] and by Nettle and Gordon JJ in *SZMTA*,[291] that have incorporated a notion of materiality, especially in circumstances where, as all of those judges have recognised, the distinction between jurisdictional and non-jurisdictional error in that jurisdiction has been reduced to a 'vanishing point'?[292] Further, as Mortimer J has asserted, are procedural fairness and unreasonableness review not encompassed within the bounds of the presumption?[293] Or will an application of those grounds see the presumption rebutted? Or at least will an 'extreme case of denial of procedural fairness', as adverted to by Edelman J in *Hossain*,[294] be sufficient to displace it? Finally, much has been said about the potential for the statutory approach to swallow up the grounds of review,[295] an issue arguably made more stark after *Minister for Immigration and Citizenship v Li*.[296] Is materiality another step in that direction?

These are all large questions, the answers to which will no doubt play out in future cases and the academic literature in the fullness of time.

289 *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299, 1314 [31], [33] (Lord Hope), 1325 [69] (Baroness Hale); *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 275 [68] (Lord Dyson), 312 [207] (Baroness Hale); *R (Cart) v Upper Tribunal* [2012] 1 AC 663, 702 [110] (Lord Dyson); *HK (Turkey) v Secretary of State for the Home Department* [2007] EWCA Civ 1357; *Glynn v Keele University* [1971] 1 WLR 487; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1582 (Lord Reid), 1594–5 (Lord Wilberforce), 1600 (Lord Simon); *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180; *R v Chief Constable of Thames Valley Police; Ex parte Cotton* [1990] IRLR 344, 350–1 (Slade LJ).

290 *Hossain* (2018) 264 CLR 123, 144 [65].

291 *SZMTA* (2019) 264 CLR 421, 459 [91].

292 Ibid, citing *Hossain* (2018) 264 CLR 123, 144 [65] (Edelman J).

293 *DPI17* (2019) 269 FCR 134, 160–3 [96]–[107]; see Aniulis (n 101) 110.

294 *Hossain* (2018) 264 CLR 123, 147–8 [72].

295 See, eg, Justice John Basten, 'Separation of Powers: Dialogue and Deference' (2018) 25(2) *Australian Journal of Administrative Law* 91; McDonald (n 99) 1027; Justice John Basten, 'Judicial Review: Can We Abandon Grounds?' (Keynote Address, Australian Institute of Administrative Law National Conference, University of New South Wales, 27 September 2018).

296 *Li* (2013) 249 CLR 332, 365–6 [72] (Hayne, Kiefel and Bell JJ).