# THE FOUNDATION AND SCOPE OF JUDICIAL REVIEW: A COMMENT ON *BULK GAS USERS GROUP* v *ATTORNEY-GENERAL*

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The recent decision of the New Zealand Court of Appeal in *Bulk Ga Users Group* v *Attorney-General*[1] opens the way to a more flexible, anc yet more soundly based, approach to exercise by the High Court of it inherent power to review decisions of inferior courts and tribunals. Th *Bulk Gas Users* case offers a means of escape from the problems o classification associated with adherence to the concept of jurisdiction a the foundation for the courts' inherent powers of review, and recognise a judicial discretion to choose between different standards of review accord ing to the nature of the particular decision-making function challenged Before proceeding to analyse the judgments delivered in *Bulk Gas User* it is necessary to provide a brief outline of the legal background agains which the case was decided.

The traditional constitutional justification for the courts' inherent powe to review decisions of inferior bodies exercising delegated statutory functions is implementation of the legislative will. The courts' inheren powers of review are distinguished from their statutory appellate powers. In review proceedings the court's concern is not with the substantive merit of a tribunal's decision but rather with its legality, the court's function be ing to ensure only that the tribunal stays within the designated area of powe conferred on it by Parliament. At the same time, however, the influenc of strong theories of the rule of law which assert the absolute constitutiona supremacy of the ordinary law as interpreted and administered by th ordinary courts over all other delegated governmental authority[2] have mad the courts extremely reluctant to give full literal effect to legislative attempt to confer unfettered discretionary powers on inferior bodies, or to remov the courts' inherent review powers by use of "ouster" or "privative" clauses

The tension between these two views of the proper constitutional rol of the courts in review proceedings has traditionally been minimised (o obscured) by use of the concept of "jurisdiction". According to orthodo theory, if Parliament lays down conditions (either of fact or of law) whic must be satisfied before the tribunal embarks upon its consideration o the "merits" of the very matter delegated to it for decision, those condition must be met objectively to the satisfaction of the reviewing court, and privative clause will not prevent the court from substituting its opinio for that of the tribunal in respect of such "preliminary", "collateral" o

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1 [1983] NZLR 129.

2 The best known (and most extreme) exponent of this theory was Dicey, *The Law of t Constitution* (1885).

"jurisdictional" questions. But if the tribunal answers these "jurisdictional" questions correctly, any error of law made during the course of its consideration of the "merits" of its inquiry is an error within the tribunal's jurisdiction which can be corrected only if it appears on the record of the tribunal's decision and no privative clause applies. In *Anisminic Ltd* v *Foreign Compensation Commission*[3] the House of Lords greatly extended the potential scope of review for jurisdictional error by holding that even although an authority has decided all preliminary or collateral questions correctly, it may still exceed its jurisdiction if a misconstruction of the terms of its empowering statute causes it to "ask the wrong question", "apply the wrong test" or take irrelevant considerations into account when addressing the merits of its inquiry. At the same time, their Lordships emphasised that the capacity for a tribunal to commit errors of law within its jurisdiction remained, although they provided little guidance as to how such errors were to be identified.

The advantage of adhering to the concept of jurisdiction as the foundation for exercise of the courts' inherent powers of review is that it allows the courts to pay lip-service to the doctrine of parliamentary sovereignty by conceding some notional field of operation to privative clauses, and preserving a theoretical distinction between review and statutory appeal on a point of law. The correlative disadvantage is, of course, that the courts are forced into something of a conceptual straight-jacket. In theory, a reviewing court is limited to a choice between substituting its opinion as to the "correct" meaning and application of the statutory criteria for that of the tribunal, or (at least in the presence of a privative clause or the absence of a reasoned decision) disclaiming any power of review at all; this choice being justified by reference to obscure distinctions between "collateral" questions and questions "going to the merits" of the inquiry, "asking the wrong question" and "asking the right question but providing the wrong answer".[4] Such an "all or nothing" approach to review is undesirable. The wide disparity between modern administrative agencies in terms of their composition and status, the nature and definition of their functions, their interal decision-making processes and the availability of alternative review procedures requires a reviewing court to enjoy more flexibility to adjust the standard of review to meet the needs of the particular occasion. In the United States, for instance, the courts enjoy a discretion to choose between a strict review test of "rightness" or "correctness" which involves substitution of the court's judgment as to the interpretation and application of statutory terms for that of the agency, and more relaxed standard of "reasonableness" which requires only that the

[1969] 2 AC 147.

For example, compare the judgments of Eveleigh LJ and Geoffrey Lane LJ in *Pearlman* v *Keepers and Governors of Harrow School* [1979] QB 56.

agency's determination possess a "rational basis" in light of the terms an object of the empowering statute.[5]

In reality, Commonwealth courts have used a number of devices to giv themselves a similar degree of flexibility. The vagueness of the distinctio between jurisdictional and non-jurisdictional errors meant that it wa readily capable of manipulation – in practice a judge who wished to sub stitute his opinion for that of the tribunal had no difficulty classifyin an irregularity in terms of one of the categories of jurisdictional erro identified in the *Anisminic* case.[6] At the same time, the courts hav manipulated the theoretical limitations on the recognised substantiv grounds of invalidity to justify a finding of no error in cases where th court was not disposed to substitute judgment and the tribunal's deter mination fell within acceptable bounds of reasonableness.[7] The courts als began to make freer use of their residual discretion to withhold public law remedies despite proof of a jurisdictional error.[8] In an earlier paper attempted to identify the main factors which influence a court's willing ness to subject an administrative determination to close scrutiny.[9] So i practice, English and New Zealand courts have for some years enjoyed discretion whether to substitute their opinion as to the meaning an application of a statutory term for that of a tribunal, or to content them selves with ensuring that the administrative determination is one whic a reasonable official might reach on the established facts. However th courts continued to feel compelled, particularly in the face of a widely

5 See the discussion by Davis in *Administrative Law Treatise* (1958) ch 30.14; *Admini trative Law of the Seventies* (1976) ch 30.00; *1982 Supplement to Administrative La Treatise* ch 30.00. See also Schwartz, *Administrative Law* (1976) ss 232-234. Davis identifi "three major factors" which guide the "exercise of the reviewing court's discretion choosing between substitution of judgment and use of the rational basis test in a particular case": (1) "the comparative qualification of court and agency to decide t particular issue"; (2) "the extent to which the legislative body has committed particul problems to administrative or to judicial determination"; and (3) "the tendency of t courts to substitute judgment on broad generalisations, especially important ones, a to avoid such substitution of judgment on narrow or unique applications of law *Administrative Law Treatise* (1958) ch 30.14.

6 See, eg, the discussion by Lord Denning MR in the *Pearlman* case, supra n 4 at 69-7 See also Smillie, "Judicial Review of Administrative Action – A Pragmatic Approac (1980) 4 Otago LR 417 at 421-432.

7 See Smillie, ibid at 447-452. To the list of "avoidance devices" identified and discuss in that paper should now be added use of the distinction drawn in *CREEDNZ In Governor-General* [1981] 1 NZLR 172 at 183 and in *Ashby* v *Minister of Immigrati* [1981] 1 NZLR 222 at 225-226, 231, 223-234 between "obligatory" relevant considerati to which the authority *must* have regard, and "permissible" relevant considerations wh the authority *may properly but need not* take into account.

8 Smillie, ibid at 452-456.

9 Smillie, ibid at 436-446, 452-456. I identified the following as major influencing fact (i) the terms of the empowering provision – how broadly or narrowly is the tribun function defined; (ii) the relative competence of the reviewing court and the tribuna respect of the subject matter of the decision challenged; (iii) the presence and terms a privative clause; (iv) administrative efficiency; (v) the effect of the decision on applicant's interests; (vi) the importance of the tribunal's error and the extent to wh it influenced the final result; (vii) the need to ensure that statutory powers are exerc in a fair and reasonably consistent manner; (viii) the conduct of the applicant for re (ix) the availability and adequacy of alternative remedies.

phrased privative clause, to justify their intervention in terms of the concept of jurisdiction.

In England, Lord Denning[10] and Lord Diplock[11] have indicated their willingness to abandon the notion of jurisdiction as the conceptual basis of the courts' inherent power to review decisions of administrative tribunals, and their lead has now been taken up and developed by a majority of the New Zealand Court of Appeal in *Bulk Gas Users Group* v *Attorney-General.*[12]

The applicants for review in the *Bulk Gas Users* case made bulk purchases of natural gas from the Auckland Gas Company Ltd, the sole supplier in their area. The Auckland Gas Company purchased its supplies from the Natural Gas Corporation of New Zealand. The applicants had requested an opportunity to be heard in respect of an application by the Corporation to the Secretary of Energy for an increase in the price which they could charge distributors such as the Auckland Gas Company. The Secretary declined this request on the ground that the applicants did not have a "direct interest in the matter" and thus failed to satisfy the statutory test of standing. The users group challenged this decision in review proceedings claiming that the Secretary had misinterpreted the term "direct interest" and had therefore erred in law. They argued that since an increase in the price charged to distributors by the Corporation would inevitably affect the price charged to them by the Auckland Gas Company, their interest in the Corporation's application satisfied the statutory test.

In the High Court[13] Davison CJ considered that the Secretary was correct in his view that only customers of an applicant for a price increase have a "direct interest" in the application. However the Chief Justice also indicated that even if the Secretary had misinterpreted the crucial words, his decision would be rendered immune from review by a privative clause in the empowering Act which provided that a decision of the Secretary shall not be reviewed in any court "except on the ground of lack of jurisdiction".[14]

On appeal, the Court upheld the validity of the Secretary's decision: while the bulk users had a substantial financial interest in the Corporation's application, it was not "direct". However the Court of Appeal were unanimously of the opinion that if the Secretary had misconstrued the term "direct interest", the privative clause would not have protected his decision. Sir Thaddeus McCarthy explained this result in orthodox terms: the misconstruction would have led the Secretary to "apply the wrong test",

10 In the *Pearlman* case, supra n 4 at 70.
11 In *re Racal Communications Ltd* [1981] AC 374 at 382-383 and *O'Reilly* v *Mackman* [1983] 2 AC 237 at 278, 283.
12 [1983] NZLR 129.
13 [1982] 2 NZLR 306.
14 Applying the decision of the Privy Council in *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 (PC), Davison CJ concluded that misconstruction by the Secretary of the term "direct interest" would be merely an error of law within his jurisdiction which would be protected from review by the privative clause.

an error which would deprive him of jurisdiction on the authority c *Anisminic*.[15]

Cooke J (with whose judgment Somers J agreed) adopted a much wid approach which, at least in the case of "administrative tribunals an authorities", seems to relieve the distinction between jurisdictional and no jurisdictional errors of all practical significance and remove privative claus of virtually all legal effect. According to Cooke J, the proper question f a reviewing court to ask is whether Parliament intended to empower a authority to decide a particular question of law conclusively. Only if suc Parliamentary intention is established independently of a privative clau will such a provision protect the authority's determination of that que tion from review. When interpreting the empowering Act to ascertain Parli ment's intention, the court should adopt the approach outlined by Lo Diplock in *re Racal Communications Ltd*[16] and apparently endorsed b a unanimous House of Lords in *O'Reilly* v *Mackman*:[17]

> [T]here is a "presumption that where Parliament confers on an administrative tribun or authority, as distinct from a court of law, power to decide particular questions defin by the Act conferring the power, Parliament intends to confine that power to answe ing the question as it has been so defined: and if there is any doubt as to what th question is, this is a matter for courts of law to resolve in fulfilment of their co stitutional role as interpreters of the written law and expounders of the common la and rules of equity."[18]

So there is a *presumption* that Parliament intends the High Court to revie an *administrative tribunal's* interpretation of its empowering statute an correct any misconstruction despite the presence of a privative claus However no such presumption applies where statutory powers of decisio are conferred on "one of the ordinary Courts, albeit of limited and 'inferio jurisdiction": a reviewing court may "rather more readily accept" that Parli ment did intend an inferior court to have power to decide a question c law conclusively so that a privative clause will exclude review.[19] Cooke concluded that, at least in the case of "administrative tribunals an authorities", a process of statutory interpretation supplemented by Lo Diplock's presumption will enable a court to ascertain Parliamen intention as to how ultimate responsibility for interpretation and applicati of a tribunal's statutory mandate should be allocated between tribunal a reviewing court with its "attention unclouded by a vague and probably u definable concept of 'jurisdiction'."[20]

The presumption of review for error of law which applies to "admi istrative tribunals and authorities" may be rebutted. Cooke J was prepar to assume that Parliament can, "either expressly or by necessa implication", empower a tribunal to determine a question of law c

15 [1983] NZLR 129 at 138-139.
16 [1981] AC 374 at 382-383.
17 [1983] 2 AC 237.
18 [1983] NZLR 129 at 133 per Cooke J.
19 Ibid.
20 Ibid at 136.

clusively,[21] but in order to oust the presumption in favour of review such intention must be conveyed clearly and unambiguously. It seems that neither the inclusion of a generally worded privative clause nor conferment of the power in subjective terms (as in this case) is relevant to this inquiry. Applying his approach to the legislation in question Cooke J concluded:[22]

> . . . it would be surprising if the legislature were to give a quintessentially administrative officer, however senior, such as the Secretary of Industries and Commerce or the Secretary of Energy, power to determine material questions of law conclusively; and s 97 of the Commerce Act [the privative clause] does not exhibit any such intention.

It seems, therefore, that the sole effect of a privative clause is to require the court to *consider the possibility* that Parliament may have intended the tribunal's determination of a particular question of law to be final and conclusive; it is entitled to no further weight in determining whether or not the legislation *does* clearly and unambiguously communicate that intention so as to rebut the presumption of review.

Cooke J did identify three factors which may support an implication that Parliament intended a tribunal to have power to decide a question of law conclusively.[23] First, he acknowledged that "there is a grey area where a line between administrative tribunals and inferior Courts may be hard to draw", and indicated that an implication of legislative intention to empower a tribunal to answer a question of law conclusively "might be established a little more readily in the case of a tribunal whose functions and status closely resembled those of a Court". Secondly, Cooke J recognised that "there are cases in which an error of law by an administrative tribunal is not significant enough in the context of the tribunal's reasoning as a whole to lead a reviewing Court to intervene". Thirdly, he indicated that "a Court of general jurisdiction may be unwilling to entertain judicial review proceedings where there is statutory provision for appeal on questions of law from the tribunal concerned".[24]

Up to this point, Cooke J had proceeded on the basis that a tribunal's determination of a question of law is to be reviewed according to a strict standard of "rightness": "if as a matter of interpreting the Act the Court can see that a definite test is laid down by Parliament, a decision by the Secretary will be invalid if he has not applied that test but some other."[25] However Cooke J made it clear that the court's power to substitute its opinion on a question of law for that of a tribunal is subject to limits. He emphasised that:[26]

21 Ibid. However it should be noted that Cooke J added a rather cryptic rider that Parliament's power may be subject to "limits that need not here be explored".
22 [1983] NZLR 129 at 136.
23 Ibid.
24 As Cooke J himself recognised, the second and third situations can be accommodated quite satisfactorily by exercise of the courts' discretion to refuse to issue a public law remedy.
25 [1983] NZLR 129 at 135.
26 Ibid at 136.

> The principle that the Courts of general jurisdiction have ultimately the function of interpreting Acts of Parliament will prevail only in so far as the material expression used in the Act in question – here "direct interest in the matter" – is to be interpreted as posing an ascertainable test. To the extent that there remains legitimate room for judgment in applying the test, the Secretary's opinion is made the statutory criterion. If he addresses himself to the correct test and the relevant facts . . . his decision will stand unless it can be put in the extreme category of a decision at which no reasonable authority in his position could have arrived. By the use of the words "in his opinion" the legislature has indicated that there may be a grey area where there is truly room for discretion as to whether or not the direct interest test is satisfied. In that area the Secretary's opinion will prevail.

So Cooke J made it clear that the court has a discretion to choose between a strict review standard of "rightness" involving substitution of judgment and a more relaxed standard of "reasonableness". The court should substitute its opinion only where the Act provides a clearly ascertainable test and the court has no doubt that its application to the established facts admits of only a single correct answer. This will be the case only where the statutory test is couched in reasonably clear and specific terms with which the ordinary courts are familiar[27] and the material facts are not disputed so that the tribunal is left little scope for value judgments based on wide-ranging policy considerations.[28] Where the statutory power is conferred in broad, open-ended terms which are not capable of precise legal definition and application of the criteria will necessarily require the tribunal to make broad value judgments and policy choices, the appropriate review standard is that of "reasonableness" which requires only that the tribunal has taken reasonable steps to apprise itself of all relevant facts and opinions and its ultimate conclusion falls within the range of those which a reasonable official could reach.[29] Choice of the lesser review standard of reasonableness will be reinforced where the statutory power is expressed in subjective terms or the tribunal enjoys an advantage of expertise in respect of the subject matter.

The approach taken by the majority of the Court of Appeal in *Bulk Gas Users* offers a number of advantages. The majority judgment provides open recognition of the fact that an "all or nothing" choice between substitution of the reviewing court's judgment for that of the tribunal and no review at all dictated by fine and essentially meaningless distinctions based on the concept of "jurisdiction" is no longer appropriate in view of the wide range of modern administrative agencies and functions. *Bulk Gas Users* enables reviewing courts to avoid the patent sophistry associated with the *Anisminic* treatment of privative clauses, whereby a provision that a tribunal's determination "shall not be called in question" applies only to a "real" determination and does not protect a "purported" determination rendered void *ab initio* by commission of an error which deprives the tribunal of its "jurisdiction". Reviewing courts should now proceed on the

27 Viz the statutory term is one which has an existing legal meaning or one can readily ascribed to it, or the term is one which the courts are used to interpreting and applying in different contexts.

28 See, eg, *Fiordland Venison Ltd* v *Minister of Agriculture and Fisheries* [1978] 2 NZLR 341; *Rowling* v *Takaro Properties Ltd* [1975] 2 NZLR 62.

29 See, eg, *CREEDNZ* v *Governor-General* [1981] 1 NZLR 172; *Ashby* v *Minister of Immigration* [1981] 1 NZLR 222.

basis that the ordinary courts have an established constitutional role to interpret the meaning of all statutory terms, and the effect of a privative clause is merely to require the court to consider the possibility that Parliament intends a tribunal's interpretation of a term of its empowering Act to be final and conclusive. Application of the strong presumption in favour of review will mean that very few decisions of administrative tribunals and authorities are completely immune from review for error of law, so that in all but a very few cases the court's attention will be focused on determining the *appropriate standard* for review of the particular decision challenged. The reviewing court can now choose openly between a strict review standard of "rightness" involving substitution of judgment and the more relaxed standard of "reasonableness" by reference to such factors as the status and composition of the tribunal, the susceptibility of the statutory terms to precise definition, the nature of the subject matter of the decision, the seriousness of the alleged error, the effect of the decision on the applicant's interests, and the need to preserve a reasonable level of overall consistency in the exercise of a statutory function. So at least in the case of "administrative tribunals and authorities" the decision in *Bulk Gas Users* should have the effect of diverting the courts' attention away from conceptual classification of "questions" and "errors" as "jurisdictional" or otherwise, and subtle manipulation of the substantive grounds of error, towards open appraisal of the nature and quality of the particular determination impugned and realistic assessment of the appropriate role of the court on review. The ability of reviewing courts to make an open choice between these different standards of review will also provide tribunals with a practical incentive to give full reasons for their decisions.[30] A fully reasoned decision which explains the tribunal's interpretation and application of its empowering provision in terms of the perceived statutory purposes is more likely to persuade a reviewing court that the decision falls within permissible bounds of reasonableness than a decision which consists merely of a bald recital of the statutory formula. Provision of fully reasoned decisions will, in turn, facilitate more realistic and better informed exercise of review powers.

Of course, the approach taken in *Bulk Gas Users* does give rise to a number of problems and uncertainties. The most obvious conceptual difficulty is that wide privative clauses which purport to exclude judicial review of decisions of administrative tribunals or confine such review to "the ground of lack of jurisdiction" will be left with virtually no area of meaningful legal effect. It seems that the sole effect of a privative clause is to require a reviewing court to *consider the possibility* that Parliament may have intended the tribunal's decision on a particular question of law to be final and conclusive; the clause is entitled to no weight in determining whether the legislation does in fact clearly and unambiguously communicate that intention. So Parliament must communicate its intention to make the tribunal's determination final and conclusive by some means *other* than inclusion of a privative provision. This means that a reviewing

30 In New Zealand inferior courts and tribunals are not subject to any general statutory (cf Tribunals and Inquiries Act 1958, s 12(1) (UK)) or common law (*R* v *Awatere* [1982] 1 NZLR 644 (CA)) obligation to give reasons for their decisions.

court is placed in the odd position of ignoring the clearest and most obviou expression of legislative intention. As Sir Thaddeus McCarthy correctl observed, the proposition that any error of law by an administrative tribuna is capable of review despite a privative clause "raises important questior of judicial policy relating to the proper boundaries of judicial and legis lative functions within the State".[31] In effect, the majority in *Bulk Ga Users* are saying that judicial supervision of administrative decision-makin is a fundamental constitutional safeguard which even Parliament canno completely remove, at least without some truly exceptional form of word which has not yet been devised.[32] As Professor Wade has observed, at thi point the policy of the courts comes close to one of "total disobedienc to Parliament".[33] Of course the one advantage of the *Anisminic* inter pretation of privative clauses was that such clauses were conceded som (albeit limited and uncertain) field of independent operation in respect o non-jurisdictional errors.

However there seems no good reason why our courts should have t choose between giving privative clauses full literal effect within som vaguely defined area, and denying them any meaningful effect at all. A more realistic judicial approach (and one which probably conforms rathe more closely with Parliament's true intention) would take the existence an terms of a privative clause into account as *one relevant factor* appropriat for consideration when the court decides which review standard to apply to the particular determination challenged. While a privative clause shoul not automatically determine this question in favour of the more relaxe standard of reasonableness,[34] its inclusion is surely entitled to some weigh as an indication that Parliament intended the tribunal to be given con siderable latitude in interpreting and applying its statutory mandate.

A second possible objection to *Bulk Gas Users* is that the effect of th majority's view that a reviewing court is entitled to substitute its opinio

31 [1983] NZLR 129 at 139.

32 In view of the Court of Appeal's analysis, a reviewing court may have some difficult justifying a refusal to give literal effect to a provision which states that a tribunal's inter pretation of a *particular specified* statutory term is to be "final and conclusive" and no subject to review in a court of law.

33 Wade, *Administrative Law* (5th ed 1982) 604.

34 Compare the approach taken in Canada where privative clauses in labour relations legis lation have been treated as limiting review of decisions of specialist labour boards o questions of law to an inquiry whether the board's interpretation is "so patently un reasonable that its construction cannot be rationally supported by the relevant legislation" *Canadian Union of Public Employees, Local 963* v *New Brunswick Liquor Corpor tion* (1979) 97 DLR (3d) 417 at 425 (SC Can); *Re Hughes Boat Works Inc and Unite Automobile etc Workers of America, Local 1620* (1979) 102 DLR (3d) 661 at 671 (O HC); *Re Attorney-General for Ontario and Keeling* (1980) 117 DLR (3d) 165 (Ont HC More recently the Supreme Court of Canada has held that the "patently unreasonabl standard of review should be applied to a labour arbitration board's interpretation statutory terms central to its specialised functions even in the absence of a strong privati clause: *Re Alberta Union of Provincial Employees and Board of Governors of Olds Colle* (1982) 136 DLR (3d) 1. See also *Re MacFarlane and Anchor Cap & Closure Corp. Canada Ltd* (1981) 124 DLR (3d) 303 at 309 (Ont HC) where Robins J indicated th the lower standard of patent unreasonableness should not be confined to labour boar but should also be applied to decisions of other expert tribunals charged with regulati specialised areas of activity even in the absence of a privative provision (but cf Her J at 311-312).

n questions of law coupled with an expansive judicial approach to the oncept of "error of law"[35] will be to produce an unwarranted level of ıtrusion into the administrative process by courts of general jurisdiction. ı court which is unwilling to subject a tribunal's decision to close scrutiny ıay be tempted to avoid the apparent implications of *Bulk Gas Users* by lassifying the process of interpreting and applying statutory criteria as ıising questions of "fact" which are either unreviewable, or reviewable only y reference to a more relaxed standard which does not permit full ubstitution of judgment.[36] This would be unfortunate. The experience of ıe United States courts demonstrates that the law/fact distinction is no ɔss uncertain and susceptible to manipulation than that between juris- ictional and non-jurisdictional errors,[37] and American courts now tend ɔ avoid using the distinction as the basis for their decisions as to the ppropriate standard for review.[38] Provided due regard is paid to the limita- ions imposed by Cooke J on the proper scope of review according to a trict standard of "rightness", any fear of unwarranted usurpation of an gency's function should prove to be unfounded. Review for "rightness" ıvolving substitution of the court's own judgment will be reserved for cases ıhere the court has no doubt that proper interpretation and application ·f the statutory criteria to the established facts admits of only one correct nswer, and possibly cases where a definitive interpretation of a statutory ɔst is required in order to ensure consistent application of the test by a

5 Traditionally, Commonwealth courts have treated as "errors of law" all forms of irregularity recognised as attracting a remedy in review proceedings. Thus the full range of "process" errors committed by a tribunal in the course of interpreting statutory criteria and drawing inferences in terms of those criteria from established primary facts are errors of law: eg "asking the wrong question", "applying the wrong test", taking irrelevant considerations into account, failing to consider relevant factors, acting to achieve an improper purpose. The concept of error of law also embraces two developing grounds of invalidity which permit judicial inquiry into the adequacy of the evidentiary basis for a tribunal's findings of primary fact: "no probative evidence" (*Re Erebus Royal Commission; Air New Zealand Ltd* v *Mahon* [1983] NZLR 662 at 671 (PC)) and "mistake or ignorance of material facts" (*Daganayasi* v *Minister of Immigration* [1980] 2 NZLR 130 at 147-148 per Cooke J; *CREEDNZ* v *Governor-General* [1981] 1 NZLR 172 at 200 per Richardson J; *Sezdirmezoglu* v *Acting Minister for Immigration and Ethnic Affairs* (1983) 51 ALR 561 (FC)). The "backstop" ground of "unreasonableness" which allows some review of the substantive quality of a tribunal's ultimate conclusion (see *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014; *Van Gorkom* v *Attorney-General* [1978] 2 NZLR 387) also raises a question of law.

One observation by Lord Diplock in *O'Reilly* v *Mackman* [1983] 2 AC 237 at 282 hints at such an approach:

> The facts [except in relation to statutory procedure or natural justice] . . . can seldom be a matter of relevant dispute upon an application for judicial review, since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in *Edwards* v *Bairstow* [1956] AC 14, 36 [viz that an inference drawn from primary facts will be reviewable as erroneous in point of law if the only reasonable conclusion open on the facts found contradicts the tribunal's determination].

See Davis, *Administrative Law Treatise* (1958) ch 30.02-30.04, 30.14; Schwartz, *Administrative Law* (1976) 642-649; Gellhorn and Byse, *Administrative Law* (4th ed 1974) 427-439.

See Davis, *Administrative Law in the Seventies* (1976) ch 30.10.

number of "equal" tribunals from which no right of appeal exists.[39] Where the statutory terms do not necessarily possess a single correct meaning and application of those terms to the facts admit of a number of possible answers, the court should limit its function on review to ensuring that the tribunal's conclusion has a rational basis in the sense that it is one which a reasonable tribunal could reach on the material properly before it. It is better that a reviewing court admit openly that it enjoys a discretion to choose between different standards of review, and explain the reasons for its choice, rather than conceal the essentially discretionary nature of its decision by resorting to classification of the particular administrative determination in terms of an uncertain distinction between "law" and "fact".

A third possible criticism of the majority judgment in *Bulk Gas Users* is that the proper role of the High Court on review of a decision of an "inferior court" remains somewhat uncertain. It has already been noted that Cooke J adopted the distinction drawn by Lord Diplock in the *Racal* case between "administrative tribunals or authorities" and courts of limited and "inferior" jurisdiction. The strong presumption in favour of review for error of law applies only to administrative tribunals; a reviewing court "may rather more readily accept" that the legislature intended an inferior court to decide a question of law conclusively. In *Racal* Lord Diplock suggested that where a decision of an inferior court is challenged, determination of the effect of a privative clause "may involve the survival of those subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not that did so much to confuse English administrative law before *Anisminic*",[40] and in *Bulk Gas Users* Cooke J limited his observation that it is no longer necessary to classify errors in terms of the concept of jurisdiction to decisions of administrative tribunals.[41]

Preservation of the distinction between jurisdictional and non-jurisdictional errors as the basis for judicial review of decisions of inferior courts protected by privative clauses would be highly undesirable. First, Cooke J has acknowledged that the concept of jurisdiction is "vague and probably undefinable"[42] and this description is no less apt in the case of inferior courts as it is in relation to administrative tribunals. Secondly, the judgments delivered in *Attorney-General* v *British Broadcasting Corporation*[43] demonstrate that there is no clear definition of an "inferior court", and Cooke J himself recognised that "there is a grey area where a line between administrative tribunals and inferior Courts may be hard to draw".[44] Thirdly, the rationale underlying a distinction for the purposes

39 As in the *Pearlman* case, supra n 4.

40 [1981] AC 374 at 383. In fact Lord Diplock expressly approved the manner in which th distinction had been applied in the *Pearlman* case to the decision of the county cou by the dissenting judge, Geoffrey Lane LJ.

41 [1983] NZLR 129 at 135-136.

42 Ibid at 136.

43 [1981] AC 303. Lord Edmund-Davies concluded at 351:

> At the end of the day it has unfortunately to be said that there emerges no sur guide, no unmistakable hall-mark by which a "court" or "inferior court" may un erringly be identified. It is largely a matter of impression.

44 Supra n 42.

f review between inferior courts and administrative tribunals is open to uestion. The underlying assumption seems to be that "inferior courts" re better qualified to decide questions of law than "administrative ibunals" and therefore their decisions are entitled to greater respect in view proceedings. Although this may often be the case, it is a mistake elevate such an impression into anything like a rule of general applica-on. As Cooke J concedes, the functions and status of many statutory ibunals closely resemble those of a court, and it cannot be assumed that uch bodies are more likely to err in law than an "inferior court". In fact can be argued that given the wide potential scope of review for error f law, considerations of relative expertise and familiarity with the subject-natter of decisions under review indicate that superior courts of general risdiction should exercise their review powers with more restraint in the ase of many specialised administrative tribunals than they do in respect f inferior courts.[45]

However there are encouraging signs that the courts will not fall into ne trap of preserving some limited field of operation for the concept of risdiction depending upon classification of the authority subject to review s an "inferior court" rather than an "administrative tribunal". In *O'Reilly Mackman*[46] Lord Diplock did not trouble to exclude inferior courts from ne ambit of his broad statement of principle. And while the majority in *ulk Gas Users* held that no presumption of review applies to decisions f inferior courts, it seems that a clear legislative intention to empower n inferior court to decide a question of law conclusively must still be found ndependently of a privative clause, and there is no good reason why the oncept of jurisdiction should have any bearing on that issue. Cooke J's eatment of the *South East Asia Fire Bricks* case[47] is instructive in this gard. In that case the Privy Council rejected Lord Denning's suggestion *Pearlman*[48] that distinctions based on the concept of jurisdiction should e abandoned, and declared that the Industrial Court of Malaysia could mmit errors of law within its jurisdiction which would be absolutely pro-cted from review by a privative clause. In *Bulk Gas Users* Cooke J conciled the decision in *Fire Bricks* with Lord Diplock's approach in *Racal* n the ground that the Malaysian Industrial Relations Act conveyed a clear gislative policy, demonstrated by reference to features of the legislation her than the privative clause, of keeping certain questions of law remitted the Industrial Court away from the ordinary courts. The Industrial Court is directed to have regard to wide-ranging policy questions (eg the ancial implications of an award for the industry concerned and for the onomy of the country generally) with which an ordinary court is ill-

In the past, reviewing courts have used the distinction between "judicial" and "administrative" functions to achieve quite the opposite result to that contemplated by Lord Diplock in *Racal* by indicating a greater willingness to review decisions of bodies performing functions analogous to those of the courts than authorities whose decisions turn more on broad considerations of policy: eg *R* v *Secretary of State for the Environment, Ex parte Ostler* [1977] QB 122 at 135; *South East Asia Fire Bricks* case, [1981] AC 363 at 373F. [1983] 2 AC 237 at 278.

Supra n 14.

Supra n 4.

equipped to deal; the Act provided for disputed questions of law to be referred to the Attorney-General whose opinion was to be binding; and a legislative policy of keeping industrial disputes away from the ordinary courts is a common one which is not unique to Malaysia. Only by way of conclusion did Cooke J add: "One would suppose too that the very fact that the Industrial Court was so designated by the legislature was some indication that it should not be seen simply as an administrative tribunal"[49] (to which, of course, the strong presumption of review would apply). Cooke J gave no indication that classification of questions of law remitted to the Industrial Court as jurisdictional or otherwise was in any way relevant or helpful in ascertaining whether the legislature intended to exclude review by the ordinary courts. When asked to review a decision of an inferior court to which a privative clause applies, the reviewing court should simply apply a normal process of statutory interpretation (in this case unaided by a strong presumption in favour of review) to determine "what questions of law, if any, have been remitted to the conclusive decision of the tribunal of limited jurisdiction".[50]

So, in the end, the implications of *Bulk Gas Users* for review of decisions of inferior courts seem clear and sensible. Distinctions based on the concept of jurisdiction have no more significance for review of inferior courts than for administrative tribunals. The absence of a strong presumption in favour of review means that a legislative intention to empower an inferior court to decide a question of law conclusively may be found more readily than in the case of an administrative tribunal. However it will seldom be appropriate for the High Court to disclaim completely its power of review. While an assumption that inferior courts are usually better qualified to decide questions of law than administrative tribunals may require a reviewing court to exercise its power to substitute judgment with more caution and restraint in the case of an inferior court, in all but a very few cases it will remain appropriate for a reviewing court to satisfy itself that an inferior court's interpretation and application of a statutory term at least satisfies minimum standards of reasonableness and rationality.

## *Conclusion*

It is inevitable that the courts will continue to encounter difficulties in determining how ultimate responsibility for interpretation and application of statutory terms should be allocated between reviewing courts of general jurisdiction and inferior decision-making authorities. However the majority judgment in the *Bulk Gas Users* case should at least enable New Zealand courts to approach this fundamental question in an open, realistic and functional manner free from the problems of classification associated with the concept of jurisdiction which have for so long frustrated rational understanding and coherent development of the law of judicial review.

49 [1983] NZLR 129 at 133.
50 Ibid.