

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION — A PRAGMATIC APPROACH

J A SMILLIE*

I INTRODUCTION

The decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*¹ was hailed by many commentators as removing the conflict and confusion which had long been a feature of the law relating to judicial review of administrative action. In 1969 I wrote:²

[T]he *Anisminic* decision confers such wide powers of judicial review on jurisdictional grounds that [non-jurisdictional] error of law on the face of the record as a ground for certiorari would appear to be unnecessary and redundant. Any error of construction which a court considers to be "dominant" or "substantial" in the sense of materially affecting the ultimate decision is now *capable* of being treated as resulting in any one of a number of jurisdictional errors: taking an irrelevant consideration into account, failing to consider a relevant factor, exercising the power for an improper purpose, imposing an unwarranted condition, asking the wrong question, applying the wrong test. [Emphasis added.]

Provided due emphasis is placed upon the word *capable*, this remains an accurate statement of the law ten years later. It is clear that *Anisminic* has given the courts a very wide discretion to review decisions of inferior tribunals. *Anisminic* provided the conceptual tools by which a reviewing judge can, *if he wishes*, describe any error by a tribunal in terms of a jurisdictional error which renders the resulting decision ultra vires and a nullity.

However it is also clear that most contemporary writers (including myself) gave insufficient notice to the more cautious statements in the majority judgments which emphasise that there still remains a place for errors of law within jurisdiction. In fact the judgment of Lord Wilberforce, whose endorsement of the wide approach to jurisdictional review was more cautious and reserved than that of the other members of the majority in *Anisminic*, has received consistent reference and approval in subsequent decisions. Lord Wilberforce observed:³

A tribunal may quite properly validly enter upon its task and in the course of carrying it out may make a decision which is invalid—not merely erroneous. This may be described as "asking the wrong question" or "applying the wrong test"—expressions not wholly satisfactory since they do not, in themselves, distinguish between doing something which is not in the tribunal's area and doing something wrong within that area—a crucial distinction which the court has to make.

* LL.M (Otago), LL.M, J.S.D (Yale), Senior Lecturer in Law, University of Otago, Visiting Professor, Duke University School of Law

1 [1969] 2 AC 147.

2 Smillie, "Jurisdictional Review of Abuse of Discretionary Power" (1969) 47 Can Bar Rev 623, 639. For similar appraisals of the implications of *Anisminic* see eg Wade, "Constitutional and Administrative Aspects of the *Anisminic* Case" (1969) 85 LQR 198; Gould, "Anisminic and Jurisdictional Review" [1970] Public Law 358; Diplock, "Judicial Control of the Administrative Process" [1971] Current Legal Probs 1; Diplock, "Administrative Law: Judicial Review Reviewed" [1974] CLJ 233, 242-243.

3 *Supra* n 1 at 210.

Although there have been very few reported cases since *Anisminic* in which relief has been refused on the ground that a proved or assumed error did not take the tribunal outside its jurisdiction,⁴ almost every judge who has considered the question has accepted that *Anisminic* did not abolish the distinction between jurisdictional and non-jurisdictional errors.

Not surprisingly, however, judges and academics have found it extremely difficult to identify non-jurisdictional errors, or even to provide a rational and workable basis for distinguishing jurisdictional errors from errors within jurisdiction. The judgment of Lord Wilberforce in *Anisminic* provides little assistance in this regard. Lord Wilberforce was content to distinguish between two broad kinds of powers. First, the case where "the legislature, while stating general objectives, is prepared to concede a wide area to the authority it establishes: this will often be the case where the decision involves a degree of policy-making rather than fact-finding, especially if the authority is a department of government or the Minister at its head."⁵ Lord Wilberforce suggests that the nature of this kind of power gives rise to an inference that Parliament intended construction of the terms of the power to fall within the exclusive jurisdiction of the tribunal, so that a proved error of interpretation should be viewed as an error of law within jurisdiction which can be protected from judicial review by an appropriately worded privative or ouster clause.

To be distinguished from this first kind of power is the case where the form and subject matter of the legislation make it "apparent that Parliament is itself directly and closely concerned with the definition and delimitation of certain matters of comparative detail and has marked by its language the intention that these shall accurately be observed."⁶ Lord Wilberforce suggests that normally it will be appropriate to treat any error in construing the terms of a power in this second category as a jurisdictional error which provides grounds for review despite the existence of an ouster clause.

But while his Lordship's distinction between two broad kinds of statutory functions draws attention to one of the relevant factors for consideration by a judge when he assesses the extent to which he should subject an exercise of power to close scrutiny, this distinction has not provided (nor should it provide) a sound and consistent basis for distinguishing jurisdictional errors from errors within jurisdiction. A recent survey of post-*Anisminic* decisions in four Commonwealth countries led one writer to conclude that "the field of jurisdictional review remains as confused as ever."⁷

The full extent of this confusion has now been demonstrated in the judgments delivered by the English Court of Appeal in *Pearlman v Keepers and Governors of Harrow School*.⁸ More important, the *Pearlman* case provided the occasion for Lord Denning MR to advocate the ultimate pragmatic solution to the problem—complete abandonment of

4 See *R v The Small Claims Tribunal and Syme, Ex p Barwiner Nominees Pty Ltd* [1975] VR 831; *R v Secretary of State for the Environment, Ex p Ostler* [1977] QB 122; *Watt v Lord Advocate* 1977 SLT 130; *Penthouse International Ltd v Minister of National Revenue* (1977) 75 DLR (3d) 737 (C).

5 *Supra* n 1 at 209.

6 *Ibid* at 209-210.

7 McInnes. "Jurisdictional Review after *Anisminic*" (1977) 9 VUWLR 37, 57.

8 [1979] QB 56.

the troublesome distinction between jurisdictional errors and errors of law within jurisdiction. The facts of *Pearlman* focused attention upon the difficulties involved in drawing any distinction between jurisdictional and non-jurisdictional errors in the light of *Anisminic*. The *Pearlman* case involved an application for certiorari to quash the decision of a county court judge who had held that installation by a tenant of a central heating unit did not constitute work "amounting to structural alteration, extension or addition" in terms of Schedule 8 of the Housing Act 1974, with the result that the tenant was not entitled to a reduced rateable valuation for the purposes of the Leasehold Reform Act 1967. The Leasehold Reform Act gave tenants of rented houses the right to purchase the freehold on favourable terms provided the rateable value of the house did not exceed the statutory limit. In an earlier case another county court judge had held that installation of a similar heating system did involve "structural alteration".

Clearly the crucial term was open to two different interpretations, neither of which could be said to be completely irrational or unreasonable.⁹ Although the county court judge in *Pearlman* did not attempt a precise definition of the term, it seems that he interpreted "structural alteration" as meaning an alteration to the load-bearing elements of the house. The Court of Appeal were unanimous in favouring a wider meaning (alteration to the fabric of the house as distinct from provision of decorations, equipment and fittings) which would include installation of the heating system, and held that the judge had erred in law by misinterpreting the provision. However the Court of Appeal could not agree as to the nature of this error. The need to classify the error as jurisdictional or non-jurisdictional was raised by the absence of any right of appeal and the existence of a wide privative clause in section 107 of the County Courts Act 1959.

Geoffrey Lane LJ held that the judge's error of construction was an error of law within his jurisdiction and the privative clause operated to exclude certiorari. His Lordship appeared to distinguish the *Anisminic* case on the ground that in *Anisminic* the misconstruction of the empowering provision resulted in the Commission *adding to* the number of requirements which, on a true interpretation, the applicant must satisfy in order to succeed, thereby asking itself and deciding a question it had no right to consider; whereas in *Pearlman* the judge's error consisted merely of misinterpreting one of the properly applicable requirements or "hurdles" in the way of the applicant. Geoffrey Lane LJ concluded:¹⁰

The judge is considering the words in the Schedule which he ought to consider. He is not embarking upon some unauthorised or extraneous or irrelevant exercise. All he has done is to come to what appears to this court to be a wrong conclusion on a difficult question. It seems to me that, if this judge is acting outside his jurisdiction, so then is every judge who comes to a wrong decision on a point of law.

Eveleigh LJ held that the judge's misinterpretation of his empowering provision resulted in a jurisdictional error so that the privative clause, even if properly applicable to the present case, did not operate to exclude the court's power to quash the decision. However his discussion of the concept of jurisdiction demonstrates considerable confusion.

⁹ Ibid at 60 per Lord Denning MR.

¹⁰ Ibid at 76. See also *infra* nn 17, 18.

First, Eveleigh LJ treated the question whether the work amounted to "structural alteration" as a question collateral to the merits of the county court judge's inquiry, and on that basis asserted the right to substitute his decision on that question for that of the judge. This approach cannot be supported. On any view of the narrow "collateral question" approach to jurisdictional review, the question whether particular work amounted to structural alteration went to the merits of the county court judge's inquiry—determination of this question was the very matter delegated to the judge for decision. Indeed Eveleigh LJ appears to concede this point by moving to a much wider ground for review based on *Anisminic*. As the county court judge had expressly rejected what Eveleigh LJ regarded as the correct meaning of the term "structural alteration", his Lordship reasoned that the judge must have "asked himself the wrong question", an error which was, on the authority of *Anisminic*, a jurisdictional error which rendered the decision a nullity. Clearly, however, there is considerable merit in Geoffrey Lane LJ's response that the judge had asked the right question (viz does the work amount to structural alteration?) but had simply reached the wrong answer. Indeed, as Geoffrey Lane LJ appreciated, if a wrong but not capricious or unreasonable interpretation by an official of a term of his authorising instrument takes him outside his jurisdiction, there can be no place left for non-jurisdictional error of law.

Lord Denning MR clearly appreciated the force of this argument. Therefore he made no attempt to justify his finding of jurisdictional error by reference to *Anisminic*. Lord Denning declared that *Anisminic* has made the distinction between jurisdictional error and error within jurisdiction so fine and so capable of manipulation that in reality:¹¹

... the High Court has a choice before it whether to interfere with an inferior court on a point of law. If it chooses to interfere, it can formulate its decision in the words: "The court below had no jurisdiction to decide this point wrongly as it did." If it does not choose to interfere, it can say: "The court had jurisdiction to decide it wrongly, and did so."

Therefore Lord Denning proposed that the traditional distinction should now be discarded:¹²

The way to get things right is to hold thus: no [inferior] court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.

So Lord Denning, after a long judicial career in which he has consistently maintained that an inferior tribunal may err in law without going outside its jurisdiction,¹³ has finally recanted.

Unfortunately, it appears that the respondent in *Pearlman* has decided not to appeal¹⁴ so that there will be no immediate opportunity for the House of Lords to resolve the problem of the proper scope of jurisdictional review.

11 Ibid at 70. For similar expressions of judicial opinion see *infra* n 72.

12 Idem.

13 See eg *R v Northumberland Compensation Appeal Tribunal, Ex p Shaw* [1952] 1 KB 338, 346; *Director of Public Prosecutions v Head* [1959] AC 83, 112; *R v Paddington Valuation Officer, Ex p Peachey Property Corporation Ltd* [1966] 1QB 380, 402; *R v Secretary of State for the Environment, Ex p Ostler* [1977] QB 122, 135.

14 See [1979] CLJ 15; (1979) 95 LQR 165.

It is submitted that in *Pearlman* Lord Denning has finally reached the right conclusion, and the purpose of this paper is to support Lord Denning's proposition that the traditional distinction between jurisdictional and non-jurisdictional error no longer serves any useful purpose and should now be abandoned. The thesis which the writer will attempt to develop is as follows:

- 1 Every past attempt to provide a conceptual basis for distinguishing between jurisdictional errors and errors within jurisdiction is in some respect defective and unsatisfactory.
- 2 The distinction is unnecessary. It bears little relevance to the existing practice of most Commonwealth courts in the exercise of their inherent powers of judicial review. The obstacles to abolition of the distinction are conceptual rather than practical, and these can be overcome.
- 3 The distinction is undesirable because it tends to obscure the realities of judicial review. The attention of writers, counsel and judges should be directed at identifying and balancing the relevant policy considerations which influence the willingness or reluctance of a judge to subject a particular administrative decision to close scrutiny, and assessing the nature and scope of "avoidance devices" available to a judge to justify a policy decision not to intervene.

II DEFICIENCIES OF EXISTING ATTEMPTS TO DISTINGUISH BETWEEN JURISDICTIONAL AND NON-JURISDICTIONAL ERRORS

As soon as one moves away from the so-called "pure" theory of jurisdiction applied in nineteenth century cases such as *R v Bolton*¹⁵ (an approach which has been consistently rejected as too restrictive of the courts' powers of review), there is no basis for distinguishing between jurisdictional and non-jurisdictional errors which is capable of fair and consistent application in practice. All subsequent attempts to provide a clear basis for the distinction have proved to be unsatisfactory.

The "collateral question" or "jurisdictional fact" approach to jurisdictional review has a sound logical basis. However it is incapable of consistent application in practice due to the wide discretion left to the court in distinguishing between questions preliminary or collateral to the issue left to the tribunal for determination (which must be answered correctly to the satisfaction of the reviewing court), and questions "going to the merits" of the tribunal's authorised inquiry in respect of which the tribunal has jurisdiction to err.¹⁶ The one undisputed conclusion which can be drawn from *Anisminic* is that the majority of the House of Lords rejected this narrow approach to jurisdictional review in favour of a wider and more flexible approach. However, attempts to reconcile the wide range of errors regarded by the majority in *Anisminic* as taking a

¹⁵ (1841) 1 QB 66.

¹⁶ Eg compare *Van de Water v Bailey* [1921] NZLR 122; *Manawatu-Oroua River Board v Barber* [1953] NZLR 1010; and the judgments delivered in *Manning v Thompson* [1976] 2 NSWLR 382, [1977] 2 NSWLR 249, (1979) 25 ALR 129 (PC). See also Lord Denning MR in *Pearlman* supra n 8 at 69-70. In the United States the doctrine of "jurisdictional fact" gave rise to similar confusion, and has now been virtually abandoned: see eg Schwartz, *Administrative Law* (1976) 628-642.

Linking "errors of discretion" with errors of fact raises difficult problems. The term "discretion" is used in a number of different senses. A particular function may be described as a "discretionary power" as distinct from a "mandatory duty". This means that the statutory provision which authorises the function is couched in permissive rather than mandatory terms, indicating that Parliament does not require the function to be performed in every case in which the express requirements for its exercise are satisfied. Rather the legislature intends to leave the administrator with an element of choice whether or not to exercise the function even although all the statutory prerequisites are satisfied.⁶⁴ If Cooke J's statement is intended to mean that errors committed by a public official in the exercise of such a discretionary power will sometimes, or often, or usually be non-jurisdictional errors then, it is submitted, his statement is inaccurate and misleading. On three occasions the House of Lords has emphasised that there is no such thing as a completely unfettered, unreviewable discretionary power.⁶⁵ Some limitations upon the exercise of a discretionary power will always be imposed by the courts. Where a discretionary power is conferred without any express limitations or qualifications a reviewing court may imply limitations as to relevance and purpose to confine the official's discretion. The courts have asserted the power to construe the empowering Act as a whole in order to ascertain by implication the true object and policy of the Act. The court will then examine the reasons and purposes which motivated the official and inquire whether those reasons are relevant to, and will produce a result consistent with, achievement of the objects and purposes of the empowering statute. If the official's reasons are found to be inconsistent with the true objects and purposes of the Act, the official will be held to have exercised his discretion on the basis of irrelevant considerations or for an improper purpose and thereby exceeded his power.⁶⁶ Even a complete absence of evidence as to the reasons which in fact motivated the official will not necessarily exclude the possibility of review on this basis. If the action taken appears, on the face of it, to run contrary to the court's assessment of the true object and purpose of the empowering provision, and the official refuses to supply any relevant and authorised reason for his decision, the court may infer that he must have exceeded his jurisdiction by exercising the power to achieve an improper

64 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610; cf *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341.

65 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030, 1053-1055, 1060; *British Oxygen Co Ltd v Minister of Technology* *ibid* at 624; *Tameside* [1977] AC 1014. In New Zealand, see *Rowling v Takaro Properties Ltd* [1975] 2 NZLR 62; *Van Gorkom v Att-Gen* [1978] 2 NZLR 387; *Fiordland Venison Ltd* *ibid*; *Kumar v Immigration Department* [1978] 2 NZLR 553, 558; *Movick v Att-Gen* [1978] 2 NZLR 545.

66 *Eg Padfield* *ibid*; *Rowling v Takaro Properties Ltd* *ibid*; *Van Gorkom v Att-Gen* *ibid*; *Fiordland Venison Ltd* *ibid*; *Re Multi-Malls Inc and Minister of Transportation and Communications* (1976) 73 DLR (3d) 18 (Ont CA). It is clear from *Rowling* and *Fiordland Venison* that where the official does not volunteer clear reasons for his decision the courts are now prepared to consider any available evidence which may provide the basis for an inference as to the official's true motives. As Cooke J has observed extra-judicially, "modern Courts are readier to go to the heart of administrative law issues." [1975] NZLJ 529, 531.

It is submitted that in *Pearlman* Lord Denning has finally reached the right conclusion, and the purpose of this paper is to support Lord Denning's proposition that the traditional distinction between jurisdictional and non-jurisdictional error no longer serves any useful purpose and should now be abandoned. The thesis which the writer will attempt to develop is as follows:

- 1 Every past attempt to provide a conceptual basis for distinguishing between jurisdictional errors and errors within jurisdiction is in some respect defective and unsatisfactory.
- 2 The distinction is unnecessary. It bears little relevance to the existing practice of most Commonwealth courts in the exercise of their inherent powers of judicial review. The obstacles to abolition of the distinction are conceptual rather than practical, and these can be overcome.
- 3 The distinction is undesirable because it tends to obscure the realities of judicial review. The attention of writers, counsel and judges should be directed at identifying and balancing the relevant policy considerations which influence the willingness or reluctance of a judge to subject a particular administrative decision to close scrutiny, and assessing the nature and scope of "avoidance devices" available to a judge to justify a policy decision not to intervene.

II DEFICIENCIES OF EXISTING ATTEMPTS TO DISTINGUISH BETWEEN JURISDICTIONAL AND NON-JURISDICTIONAL ERRORS

As soon as one moves away from the so-called "pure" theory of jurisdiction applied in nineteenth century cases such as *R v Bolton*¹⁵ (an approach which has been consistently rejected as too restrictive of the courts' powers of review), there is no basis for distinguishing between jurisdictional and non-jurisdictional errors which is capable of fair and consistent application in practice. All subsequent attempts to provide a clear basis for the distinction have proved to be unsatisfactory.

The "collateral question" or "jurisdictional fact" approach to jurisdictional review has a sound logical basis. However it is incapable of consistent application in practice due to the wide discretion left to the court in distinguishing between questions preliminary or collateral to the issue left to the tribunal for determination (which must be answered correctly to the satisfaction of the reviewing court), and questions "going to the merits" of the tribunal's authorised inquiry in respect of which the tribunal has jurisdiction to err.¹⁶ The one undisputed conclusion which can be drawn from *Anisminic* is that the majority of the House of Lords rejected this narrow approach to jurisdictional review in favour of a wider and more flexible approach. However, attempts to reconcile the wide range of errors regarded by the majority in *Anisminic* as taking a

¹⁵ (1841) 1 QB 66.

¹⁶ Eg compare *Van de Water v Bailey* [1921] NZLR 122; *Manawatu-Oroua River Board v Barber* [1953] NZLR 1010; and the judgments delivered in *Manning v Thompson* [1976] 2 NSWLR 382, [1977] 2 NSWLR 249, (1979) 25 ALR 129 (PC). See also Lord Denning MR in *Pearlman* supra n 8 at 69-70. In the United States the doctrine of "jurisdictional fact" gave rise to similar confusion, and has now been virtually abandoned: see eg Schwartz, *Administrative Law* (1976) 628-642.

tribunal outside its jurisdiction with their Lordships' insistence that it remains possible for a tribunal to err within jurisdiction has given rise to a bewildering range of different tests of jurisdictional error.

1 "Asking the wrong question" as distinct from "answering the right question wrongly"

One writer has attempted to explain *Anisminic* by drawing a distinction between a misconstruction of the empowering provision which results in the tribunal either adding to or reducing the number of requirements which, on a true interpretation, a party must satisfy in order to succeed (a jurisdictional error), and a misconstruction of the terms of one of the properly applicable requirements or "hurdles" in the way of the party (an error of law within jurisdiction).¹⁷ This distinction provided the basis for the conclusion of Geoffrey Lane LJ in *Pearlman*.¹⁸ However, as the *Pearlman* case demonstrates, this test is readily capable of manipulation and is therefore uncertain in its application. By going a step further than Geoffrey Lane LJ, Eveleigh LJ was able to describe the county court judge's misinterpretation of the term "structural alteration" as having led the judge to "ask the wrong question"—viz did the work involve alteration to the load-bearing elements of the house?

2 A distinction between "substantive" errors and "procedural" irregularities

In *R v Secretary of State for the Environment, Ex p Ostler*¹⁹ one of the reasons given by the Court of Appeal (Lord Denning delivering the leading judgment) for holding that a time limit privative clause operated to exclude the courts' powers of review was that the errors alleged (bad faith and denial of natural justice) were non-jurisdictional errors which rendered the resulting decision merely "voidable" rather than void. The Court appeared to draw a distinction between "substantive" grounds of invalidity (whether the decision was one which the tribunal was entitled to reach on a true interpretation of the empowering Act), and irregularities in the process by which the decision was reached. Only the former are jurisdictional errors which will preserve the courts' powers of review in the face of a wide privative clause.²⁰ This approach runs contrary to *Anisminic*, and the weight of modern authority supports the view that a breach of natural justice is a jurisdictional error which renders the

17 See Taylor, "Judicial Review of Improper Purposes and Irrelevant Considerations" [1976] CLJ 272, 280-281.

18 Supra n 10. Geoffrey Lane LJ's approach was approved by Speight J in *Eastern (Auckland) Rugby Football Club Inc v Licensing Control Commission* [1979] 1 NZLR 367, 373-374. The same distinction was drawn by Lord Dunpark in *Watt v Lord Advocate* 1977 SLT 130, 135 and by Arnup JA (dissenting) in *Re CSAO National (Inc) and Oakville Trafalgar Memorial Hospital Association* [1972] 2 OR 498, 503-505.

19 [1977] QB 122.

20 This approach derives support from the majority speeches in *Smith v East Elloe Rural District Council* [1956] AC 736. See also the obiter statement of the New Zealand Court of Appeal in *Att-Gen v Car Haulways (NZ) Ltd* [1974] 2 NZLR 331, 338: "... we think it may be arguable that even an incorrect formulation of a principle of adjective law for his own guidance would fall within the ambit of the authority's jurisdiction."

resulting decision *ultra vires* and void.²¹ However the concept of voidness is not an absolute one and the courts are not obliged to grant a remedy in respect of every administrative decision which is technically *ultra vires* and void.²² The courts retain the power to refuse relief to an applicant who lacks standing, or to exercise their discretion against granting a remedy.²³ As Wade observes,²⁴ in such a case "the 'void' order remains effective and is, in truth, valid."

3 *Anisminic* and the New Zealand Court of Appeal

In New Zealand the effect of *Anisminic* has been considered by the Court of Appeal on two occasions. The first of these cases is *Attorney-General v Car Haulways (NZ) Ltd.*²⁵

(a) *Attorney-General v Car Haulways (NZ) Ltd*

In the Supreme Court²⁶ Cooke J, after expressing the view that the majority opinions in *Anisminic* should be accepted as authoritative in New Zealand, proceeded to assess the effect of *Anisminic*. This statement consisted of an attempt to classify certain kinds of error as non-jurisdictional and therefore immune from review in the face of a wide privative clause. Cooke J said:

If an Act plainly empowers an Authority or other tribunal to decide a question of law conclusively (such as a given question of statutory interpretation) or if in exercising its true jurisdiction the tribunal decides a purely incidental question of law, I am disposed to think that such a [privative] clause makes the decision immune from challenge, even though an error of law may be apparent on the record. That is not explicitly laid down in the *Anisminic* case but appears to be in accordance with the speeches of Lord Reid, Lord Pearce and Lord Wilberforce. So . . . unless the errors of law contended for by the plaintiff go to jurisdiction, they are not redressible; although strictly speaking it is unnecessary for me to decide the point. A fortiori, findings of fact on the very question which the tribunal is set up to decide, and conclusions based on an evaluation of the evidence bearing on such questions, would be immune.

On appeal this statement of principle was accepted by both parties and was quoted, apparently with approval, by the Court of Appeal.²⁷ However upon analysis of each of the categories of non-jurisdictional error identified by Cooke J, this classification can be seen as rather arbitrary and as providing little clear guidance for subsequent courts.

- (i) "If an Act plainly empowers an Authority . . . to decide a question of law conclusively", an erroneous determination of that question will be an error of law within the authority's jurisdiction.

21 See eg *Ridge v Baldwin* [1964] AC 40; *Hoffman-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, 358, 365; *Stininato v Auckland Boxing Association* [1978] 1 NZLR 1, 8, 24; *Calvin v Carr* [1979] 2 WLR 755, 763 (PC). See also *Firman v Ellis* [1978] QB 886, 908 per Lord Denning MR. Cf *Durayappah v Fernando* [1967] 2 AC 337.

22 See Wade, *Administrative Law* (4th ed 1977) 299-300; *Reid v Rowley* [1977] 2 NZLR 472, 483-484; *Calvin v Carr* *ibid* at 763; *Stininato v Auckland Boxing Association* *ibid*.

23 See generally, *infra* pp 452-456.

24 Wade, *supra* n 22 at 300.

25 [1974] 2 NZLR 331.

26 *Car Haulways (NZ) Ltd v Att-Gen* unreported, Supreme Court, Auckland, 8 August 1973, A 8/73.

27 *Supra* n 25 at 333-334.

Unfortunately Cooke J gave no indication as to when an Act should be read as having this effect. The clearest indication of legislative intention to reserve all questions of interpretation to the tribunal alone is a wide privative clause of the kind under discussion in *Anisminic*. Yet a majority of the House of Lords held that such a clause did not preclude the courts from reviewing the Commission's interpretation of its empowering instrument. Perhaps Cooke J is suggesting that the courts may give literal effect to a strongly worded clause directed specifically to a particular term of an authorising statute.²⁸ Or perhaps Cooke J merely intends the legislative intention to be ascertained by reference to the sort of broad criteria outlined by Lord Wilberforce in *Anisminic*.²⁹

- (ii) "[I]f in exercising its true jurisdiction the tribunal decides a purely incidental question of law" erroneously, it does not exceed its jurisdiction.

Once again, the description of this category of error is so vague that it provides a reviewing court with no real assistance. The qualifying phrase "if in exercising its true jurisdiction" merely begs the question of what is the tribunal's "true" jurisdiction. The term "purely incidental question of law" is also open to various interpretations. If Cooke J simply means that a proved error will not justify judicial intervention if the error is trivial in the sense that it had no significant effect on the final decision, this is quite orthodox and acceptable.³⁰ In his Supreme Court judgment Cooke J seemed to regard two "errors" or "mistakes" by the Appeal Authority as being "incidental" in this sense. However nothing is achieved by using this distinction between trivial errors and errors "on which the decision of the case depends"³¹ as the basis for distinguishing jurisdictional errors from errors within jurisdiction. A trivial error which has no significant effect on the final decision provides no grounds for review irrespective of a privative clause. Certiorari will not issue for a *patent* error of law even in the absence of a privative clause unless the error materially influenced the final result.³² Thus classification of such an irregularity as jurisdictional or non-jurisdictional is irrelevant—in truth, no ground for review is established in such a case.

- (iii) "[Erroneous] findings of fact on the very question which the tribunal is set up to decide" do not take a tribunal outside its jurisdiction.

28 See eg *Executors of the Woodward Estate v Minister of Finance* (1972) 27 DLR (3d) 608 (SC): "ratification" clause directed to decisions on a specific question of law given full literal effect. But compare Cooke J's extra-judicial comments in [1975] NZLJ 529, 530. See also Cooke J in the *Engineers Union* case [1976] 2 NZLR 283, 301, discussed at p 429 *infra*.

29 *Supra* nn 5, 6 and accompanying text.

30 See de Smith, *Judicial Review of Administrative Action* (3rd ed 1973) 287-290, 297-298; Smillie, *supra* n 2 at 634-635; *Pearlman supra* n 8 at 60 per Lord Denning MR.

31 *Pearlman ibid*.

32 See eg *R v Industrial Appeals Court, Ex p Henry Berry & Co (Australasia) Ltd* [1955] VLR 156, 170; *R v Tennant, Ex p Woods* [1962] Qd R 241, 260-261; *R v Manitoba Labour Board, Ex p Invictus Ltd* (1967) 65 DLR (2d) 517, 520; *NZRVF Association v Luxford* [1967] NZLR 453, 457; *R v Alberta Oil and Gas Conservation Board, Ex p Mountain Pacific Pipelines Ltd* (1965) 55 DLR (2d) 189, 192-193. See also *Barry v Auckland City Corporation* [1975] 2 NZLR 646, 651 (appellate review on question of law).

Even assuming that Cooke J is referring only to findings of *primary* fact³³ on a question which is properly classified as "going to the merits" of the tribunal's authorised inquiry, this statement is neither particularly helpful nor strictly accurate. Although a reviewing court will normally be reluctant to subject a tribunal's findings of primary fact to close scrutiny, particularly where the facts are of a specialised or technical nature and the tribunal has some expertise in the field, or where the finding turns on assessment of credibility and the tribunal has had the advantage of hearing and observing the witnesses,³⁴ such findings are not completely immune from review. It is clear that the courts are becoming more prepared to review findings of fact by administrative bodies. If there is no evidence to support a finding of fact crucial to the decision, or the finding is one which no reasonable tribunal could reach on the evidence before it, there is authority for the proposition that the tribunal will commit an error of law which takes it outside its jurisdiction.³⁵ Dicta in recent cases raise the possibility of a new and wider ground for review of fact-finding: "misunderstanding or ignorance of an established and relevant fact"³⁶ or acting "upon an incorrect basis of fact".³⁷ As Wade³⁸ points out, if this ground of review becomes established an official will have to show not only that his findings of fact are reasonable on the information before him, but also that he had the relevant information before him in correct form.³⁹

- (iv) Erroneous "conclusions based on evaluation of the evidence bearing on [the very question which the tribunal is set up to decide]" do not take a tribunal outside its jurisdiction.

33 Viz a finding that a particular event or state of affairs has happened or will happen quite independent of any finding as to its legal effect.

34 See *infra* p 439. Even in a case of general appellate review on the merits a reviewing court will be slow to reverse a tribunal's findings in such circumstances: see Keith, "Appeals from Administrative Tribunals. The Existing Judicial Experience" (1969) 5 VUWLR 123, 128-130.

35 Eg *R v Roberts* [1908] 1 KB 407, 423; *Wajnberg v Raynor and Melbourne & Metropolitan Board of Works* [1971] VR 665, 679-680; *Westburne Industrial Enterprises Ltd v Labour Relations Board* [1973] 6 WWR 451, 455-456, *aff'd* [1974] 1 WWR 572; *Re Sisters of Charity, Providence Hospital and Labour Relations Board* [1951] 3 DLR 735; *R v Labour Relations Board, Ex p Gorton-Pew (New Brunswick) Ltd* [1952] 2 DLR 621; *R v British Columbia Labour Relations Board, Ex p Columbia Auto Customs Ltd* (1964) 48 DLR (2d) 266; *R v Council of the Pharmaceutical Association of British Columbia, Ex p Windt* (1967) 65 DLR (2d) 132; *Re International Woodworkers and Sooke Forest Products Ltd* (1968) 1 DLR (3d) 622; *R v Ontario Racing Commission, Ex p Taylor* (1970) 15 DLR (3d) 430, 434. Cf *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 (PC). For a full discussion of the Canadian cases see Elliott, "No Evidence: A Ground of Judicial Review in Canadian Administrative Law?" (1972) 37 Saskatchewan LR 48, 65-87. It has also been suggested that a complete absence of probative evidence in support of a finding constitutes a breach of natural justice which takes the tribunal outside jurisdiction: *R v Deputy Industrial Injuries Commissioners, Ex p Moore* [1965] 1 QB 456, 488 per Diplock LJ.

36 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1030 per Scarman LJ (giving examples).

37 *Ibid* at 1047 per Lord Wilberforce. See also Lord Diplock *ibid* at 1065; *Laker Airways Ltd v Department of Trade* [1977] QB 643, 705-706 per Lord Denning MR; *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 QB 455, 493 per Lord Denning MR.

38 *Administrative Law* (4th ed 1977) 282.

39 In the *Tameside* case, *supra* n 36 at 1065, Lord Diplock favoured the perhaps lesser standard of whether the Minister took "reasonable steps to acquaint himself with the relevant information. . . ."

Once the primary facts are established, the next step which the tribunal must take in order to reach a decision is determine whether the established primary facts satisfy the legal standards set out in the empowering instrument to guide or dictate the exercise of the authorised function. In many cases the ultimate decision will depend on the relative weight attributed by the tribunal to the various relevant factors and items of evidence considered.⁴⁰ Cooke J appears to be expressing the view that in drawing from the primary facts inferences and conclusions in terms of the applicable statutory standards, assessment of the relative weight placed on the relevant facts and considerations is a matter within the exclusive jurisdiction of the tribunal. In other words, provided there is *some* probative evidence which, standing alone, tends to support the tribunal's conclusion, and the tribunal applies its mind to all relevant considerations and excludes from its consideration all irrelevant matters, the tribunal's decision will be immune from review for excess of jurisdiction.

It is clear that a tribunal will commit an *error of law* if its conclusion couched in terms of the applicable statutory standard is one which no reasonable tribunal properly instructed in the law could reach on the material before it.⁴¹ If a privative clause were held to exclude completely the courts' power to review the tribunal's evaluation of the relevant evidence and matters considered, the scope of review for excess of jurisdiction would be significantly narrower than that for error of law, and an exclusive field of operation would be preserved for non-jurisdictional error of law on the record as an independent ground of invalidity.

But while the courts sometimes have cause to resort to the principle embodied in Cooke J's proposition to justify a finding of no reviewable error,⁴² it is clear that a reviewing court can, if it wishes, utilise the concept of reasonableness to justify review of a tribunal's evaluation of the relevant material before it. It is hornbook law that a discretionary power (a power to choose between two alternative conclusions) must always be exercised "reasonably".⁴³ Often the term "unreasonableness" has been used in a general sense to describe any decision which is *ultra vires* for failure to comply with implied limitations as to relevance or purpose: ie the tribunal has ignored or failed to recognise the true object and purpose of the power and its decision therefore runs contrary to that object and purpose.⁴⁴ However it is clear that unreasonableness has some independent scope as a ground of invalidity wider than other recognised heads of abuse of discretion. This was expressly recognised by Lord Greene MR in the *Wednesbury* case:⁴⁵

The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have

⁴⁰ See eg the discussion of *Car Haulways* at pp 449-451 *infra*.

⁴¹ See eg *Edwards v Bairstow* [1956] AC 14; *R v Medical Appeal Tribunal, Ex p Gilmore* [1957] 1 QB 574, 582; *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1326.

⁴² See *infra* pp 449-451.

⁴³ See generally Wade, *supra* n 22, ch 12.

⁴⁴ Eg *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229.

⁴⁵ *Ibid* at 233-234. See also the concession by counsel for the Minister in the *Tameside* case [1977] AC 1014, 1030.

kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.

So even in a case where it cannot be proved that the tribunal based its decision on an irrelevant consideration, or ignored a relevant matter, or exercised its power to achieve an unauthorised purpose, it remains open for the court to conclude that the decision is *ultra vires* on the ground that no reasonable authority could have reached that decision having proper regard to the facts established in evidence and the terms and true object and purpose of the empowering provision.⁴⁶ Lord Greene did emphasise that "to prove a case of that kind would require something overwhelming"⁴⁷ and this has been taken to mean that there is very little scope for unreasonableness as a separate and independent ground of invalidity. But Lord Greene's qualification merely serves to emphasise the essential distinction between "reasonableness" and "rightness", and to caution the courts against substituting their own opinions for others which are nevertheless consistent with a reasonable and rational application of the statutory criteria to the established facts.⁴⁸

Furthermore, there are indications that the courts are moving towards recognition of a general ground of jurisdictional error based upon the concept of reasonableness which involves open assertion by the courts of the power to review the administrator's assessment of the relative weight to be given to the relevant material when drawing required inferences of law. In *Ashbridge Investments Ltd v Minister of Housing and Local Government*⁴⁹ Lord Denning MR declared that the court could "interfere with the Minister's decision if he acted on no evidence; or if he came to a conclusion to which on the evidence he could not reasonably come. . . ." Although this case involved statutory review pursuant to a provision which clearly included review for non-jurisdictional errors of law, some courts have treated Lord Denning's statement as an accurate description of the courts' *inherent* powers of review under the *ultra vires* principle.⁵⁰ In *Coleen Properties Ltd v Minister of Housing and Local*

46 This residual supervisory power is particularly valuable in a country such as New Zealand where administrative tribunals are subject to no general duty to provide reasoned decisions: compare Tribunals and Inquiries Act 1971, s 12 (UK). Where a decision for which no sound reason is given is unreasonable in the sense described above, the court may simply declare the decision *ultra vires* on that ground alone (eg *Allied Distributors Ltd v Att-Gen*, noted [1977] NZ Recent Law 2; *Van Gorkom v Att-Gen* [1978] 2 NZLR 387, 393 (CA)), or infer that the official must have exceeded his jurisdiction by basing his decision on an irrelevant consideration or acting to achieve an authorised purpose (eg *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1032-1033 per Lord Reid, 1061-1062 per Lord Upjohn).

47 *Supra* n 44 at 230. See also *Kruse v Johnson* [1898] 2 QB 91, 100 per Lord Russell CJ: bylaws to be "benevolently construed" so that courts should be slow to find them *ultra vires* for unreasonableness.

48 See the detailed discussion of the legal standard of reasonableness in the *Tameside* case [1977] AC 1014, 1025-1026 per Lord Denning MR, 1032 per Scarman LJ, 1064 per Lord Diplock, 1074-1075 per Lord Russell. See also *Re W (An Infant)* [1971] AC 682, 700 per Lord Hailsham LC.

49 [1965] 1 WLR 1320, 1326.

50 *Re Watch House, Boswinger* (1967) 66 LGR 6, 20-21; *AB Motor Co of Hull Ltd v Minister of Housing and Local Government* (1969) 67 LGR 689, 699-701; *General Electric Co Ltd v Price Commission* [1975] ICR 1, 12; *British Dredging (Services) Ltd v Secretary of State for Wales and Monmouthshire* [1975] 1 WLR 687, 691.

*Government*⁵¹ Buckley LJ expressly held that because there was "no sufficient material" before the Minister to "justify a reasonable man in reaching the conclusion which the Minister reached", the order was "not within the powers of the Act" and was therefore ultra vires and void. Similarly, in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*⁵² the New Zealand Court of Appeal declared the Minister's action ultra vires on the ground that "there was no evidence on which the respondent could reasonably or properly determine that he was not satisfied of the matters prescribed by the regulations".⁵³ Further adoption and consolidation of this approach will make the courts' inherent powers of review for excess of jurisdiction indistinguishable from appellate review for error of law,⁵⁴ and very close to the powers of review exercised by American courts under the substantial evidence rule.⁵⁵

(b) *The Engineers Union case*⁵⁶

In the *Engineers Union* case the presence of a wide privative clause once again raised the question of the proper scope of jurisdictional review. The appellant union argued that the Court of Arbitration had fallen into error in a number of respects, including (a) misinterpreting the terms of an industrial award, (b) failing to address its mind to the statutory definition of the term "industry" in its empowering Act, and (c) refusing to consider four submissions made to it by the union. In the event, the Court of Appeal held that the alleged errors had not been proved. However their Honours did make some obiter comments on the effect of the privative clause and the scope of jurisdictional error.

The short judgment of McCarthy P indicates that he saw the courts' power to review decisions of the Court of Arbitration as being extremely limited. He referred with approval to *New Zealand Waterside Workers Federation Industrial Association of Workers v Frazer*⁵⁷ where the Full Supreme Court held that an identical privative section did not remove the courts' power to quash for jurisdictional error. However in *Frazer* the court had proceeded on the basis of the narrow "collateral question" or "jurisdictional fact" concept of jurisdictional error. In the *Engineers* case McCarthy P suggested that the wider scope of jurisdictional review favoured in *Anisminic* should have no application to this particular privative section.⁵⁸ Consequently the errors alleged, even if proved, would be errors within jurisdiction and the privative clause would operate to exclude the courts' powers of review.

51 [1971] 1WLR 433, 441, 442.

52 [1978] 2 NZLR 341.

53 *Ibid* at 353 per Cooke and Woodhouse JJ. The same broad approach to review was adopted by the House of Lords in the *Tameside* case [1977] AC 1014, 1052 per Lord Wilberforce, 1062 per Viscount Dilhorne, 1072 per Lord Salmon. For other cases supporting this approach, see *Osgood v Nelson* (1872) LR 5 HL 636, 646-654; *Allinson v General Medical Council* [1894] 1 QB 750, 760, 763, 766; *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, 345; *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 QB 455, 493-494, 499, 511; *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473, 479-481, 485.

54 *Edwards v Bairstow* [1956] AC 14, and see generally Wade, *supra* n 22 at 774-779.

55 Administrative Procedure Act 1946, 5 USC s 706. Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion": *Consolidated Edison Co v NLRB* 305 US 197, 229 (1938).

56 *New Zealand Engineering etc Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283.

57 [1924] NZLR 689.

58 *Supra* n 56 at 285.

Richmond J, obiter, was of the same opinion in respect of the first error alleged by the union. He expressed the view that even if the Court of Arbitration had misconstrued the terms of the industrial award, this would be merely an error of law within jurisdiction which would be protected by the privative section.⁵⁹ With regard to the alleged failure by the Court of Arbitration to address its mind to relevant provisions of its own empowering Act, Richmond J did concede that in *Anisminic* the House of Lords seemed to take a wider view of the field of jurisdictional error than did the Full Court in *Frazer*. However he doubted whether a proved failure by the Court to consider a relevant matter of this kind would necessarily amount to a jurisdictional error even under the wider *Anisminic* approach.⁶⁰ With regard to the argument that the Court of Arbitration had exceeded its jurisdiction by refusing to consider four relevant submissions made to it by the union, Richmond J conceded:⁶¹ "It may be that in certain circumstances a refusal by a tribunal to consider submissions made to it could amount to a refusal by the tribunal to exercise its true jurisdiction." On the facts, however, his Honour found that the union had failed to prove that the submissions in question were both relevant and ignored by the Court. Accordingly, there was no need for him to attempt to classify the alleged errors in jurisdictional terms.

Cooke J limited himself to two broad comments on the subject of jurisdictional review. He said:⁶²

First, my present opinion is that if *Anisminic* . . . widened the field of jurisdictional review or jurisdictional error, it did so in the sense of preferring one of two long-competing lines of reasoning and authority to the other. Secondly, I think the courts of general jurisdiction should be slow to hold that when establishing a court or tribunal of limited jurisdiction Parliament meant it to have authority to determine conclusively for the purposes of any given case the meaning of provisions in the Act by which it is constituted and under which it operates. Questions of fact or discretion are in a different category.

The first comment, viewed in the context of Cooke J's previous endorsement of *Anisminic* in *Car Haulways* and McCarthy P's apparent preference for the narrow "collateral question" approach to jurisdictional error in relation to the privative section in question, may be taken as an expression of Cooke J's preference for the wider *Anisminic* approach in all cases.

Cooke J's second observation may be seen as a modification and refinement of his own previous assessment of the effect of *Anisminic* in *Car Haulways*. He now suggests that the courts should be slow to give effect to statutory provisions which purport to exclude or limit the courts' inherent power to review a tribunal's interpretation of its own empowering instrument. Thus errors of law consisting of or resulting from misconstruction by a tribunal of its authorising statute should normally be classified as jurisdictional errors. But placing "errors of fact or discretion" in a "different category" suggests that such errors will sometimes, or often, or usually be non-jurisdictional errors. The reference to "errors of fact" can be related back to Cooke J's statement in *Car Haulways*, which has already been discussed.⁶³

59 Ibid at 288.

60 Ibid at 295.

61 Ibid at 296.

62 Ibid at 301.

63 Supra p 425.

Linking "errors of discretion" with errors of fact raises difficult problems. The term "discretion" is used in a number of different senses. A particular function may be described as a "discretionary power" as distinct from a "mandatory duty". This means that the statutory provision which authorises the function is couched in permissive rather than mandatory terms, indicating that Parliament does not require the function to be performed in every case in which the express requirements for its exercise are satisfied. Rather the legislature intends to leave the administrator with an element of choice whether or not to exercise the function even although all the statutory prerequisites are satisfied.⁶⁴ If Cooke J's statement is intended to mean that errors committed by a public official in the exercise of such a discretionary power will sometimes, or often, or usually be non-jurisdictional errors then, it is submitted, his statement is inaccurate and misleading. On three occasions the House of Lords has emphasised that there is no such thing as a completely unfettered, unreviewable discretionary power.⁶⁵ Some limitations upon the exercise of a discretionary power will always be imposed by the courts. Where a discretionary power is conferred without any express limitations or qualifications a reviewing court may imply limitations as to relevance and purpose to confine the official's discretion. The courts have asserted the power to construe the empowering Act as a whole in order to ascertain by implication the true object and policy of the Act. The court will then examine the reasons and purposes which motivated the official and inquire whether those reasons are relevant to, and will produce a result consistent with, achievement of the objects and purposes of the empowering statute. If the official's reasons are found to be inconsistent with the true objects and purposes of the Act, the official will be held to have exercised his discretion on the basis of irrelevant considerations or for an improper purpose and thereby exceeded his power.⁶⁶ Even a complete absence of evidence as to the reasons which in fact motivated the official will not necessarily exclude the possibility of review on this basis. If the action taken appears, on the face of it, to run contrary to the court's assessment of the true object and purpose of the empowering provision, and the official refuses to supply any relevant and authorised reason for his decision, the court may infer that he must have exceeded his jurisdiction by exercising the power to achieve an improper

64 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610; cf *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341.

65 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030, 1053-1055, 1060; *British Oxygen Co Ltd v Minister of Technology* *ibid* at 624; *Tameside* [1977] AC 1014. In New Zealand, see *Rowling v Takaro Properties Ltd* [1975] 2 NZLR 62; *Van Gorkom v Att-Gen* [1978] 2 NZLR 387; *Fiordland Venison Ltd* *ibid*; *Kumar v Immigration Department* [1978] 2 NZLR 553, 558; *Movick v Att-Gen* [1978] 2 NZLR 545.

66 *Eg Padfield* *ibid*; *Rowling v Takaro Properties Ltd* *ibid*; *Van Gorkom v Att-Gen* *ibid*; *Fiordland Venison Ltd* *ibid*; *Re Multi-Malls Inc and Minister of Transportation and Communications* (1976) 73 DLR (3d) 18 (Ont CA). It is clear from *Rowling* and *Fiordland Venison* that where the official does not volunteer clear reasons for his decision the courts are now prepared to consider any available evidence which may provide the basis for an inference as to the official's true motives. As Cooke J has observed extra-judicially, "modern Courts are readier to go to the heart of administrative law issues." [1975] NZLJ 529, 531.

purpose or basing his decision on irrelevant considerations.⁶⁷ Even in a case where the court feels unable or unwilling to ascribe any particular object or policy to the empowering Act which can be used as a basis for implied limitations as to relevance and purpose, the official's discretion is still not completely unfettered. In *British Oxygen Co Ltd v Minister of Technology*⁶⁸ Lord Reid emphasised that even such an "unqualified discretion" was not completely beyond the courts' supervisory powers: "It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion."⁶⁹ Thus it seems clear that there are no completely unreviewable discretions. There are simply discretions of greater or lesser width, subject to implied restrictions which vary in number and specificity. If an official infringes an implied limitation on his discretion and that error has an important effect on the final decision, the error should be classified as a jurisdictional error which vitiates the decision.

Cases do arise where all express requirements for exercise of a discretionary power are complied with, the court is unable or unwilling to imply further limitations which dictate a particular result, and there is no suggestion of bad faith. In such a case the official may find himself in a position where two or more alternative decisions are open to him, each being consistent with a reasonable and rational exercise of the power in the circumstances of the case. Only in such a case is it proper to describe the official as having a true and complete discretion. But Cooke J cannot have had this narrow class of case in mind when he spoke of "errors of discretion" because in exercising a free choice of this kind the official is incapable of committing an error of any kind, jurisdictional or otherwise.⁷⁰

It follows that there can be no such thing as a "non-jurisdictional error of discretion". If an official fails to comply with a restriction to which his discretion is made subject by Parliament, either expressly or by implication, he will have misconstrued his empowering Act and committed a jurisdictional error of law which vitiates his decision. If infringement of such a restriction upon an official's power cannot be proved, the official is guilty of no error at all and his decision will be valid for all purposes. Together, the *Anisminic*, *Padfield*, *Tameside* and

67 *Padfield* *ibid* at 1032-1033, 1049, 1053-1054, 1061-1062; *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 QB 455, 493-494; *Ross-Clunis v Papadopoulos* [1958] 1 WLR 546, 560; *Maradana Mosque Trustees v Mahmud* [1967] AC 13. Presumably the same circumstances would justify a finding that the discretion was exercised so unreasonably as to take the official outside his jurisdiction: *Fiordland Venison Ltd* *ibid* at 353.

68 [1971] AC 610.

69 *Ibid* at 624. See also *Kumar v Immigration Department* *supra* n 65; *Movick v Att-Gen* *supra* n 65 at 549-550, 551-552.

70 In a case where an official has a true discretionary choice of this kind, his decision would be immune even from *appellate* review for error of law (which, of course, includes non-jurisdictional errors of law). In appellate review proceedings the court may justify its decision to dismiss the appeal by classifying the question for decision as one of "fact and degree" and not one of law, rather than by holding that no error has been proved: see *Wade* *supra* n 22 at 777-779. However the result is the same in each case.

Fiordland cases provide ample authority for this logical approach. This approach is also consistent with the American law relating to review of discretionary powers.⁷¹

It is submitted, therefore, that all existing attempts to find a sensible and workable conceptual basis for distinguishing between jurisdictional and non-jurisdictional errors have failed. In particular, any attempt to draw a clear distinction for this purpose between errors of law, fact and discretion is fraught with difficulty. It is submitted that in *Pearlman* Lord Denning was right. By treating such a wide range of errors as going to jurisdiction yet at the same time affirming the continued existence of errors within jurisdiction, the majority speeches in *Anisminic* are so open to manipulation that in reality reviewing courts enjoy a complete discretion whether to treat a proved irregularity as taking a tribunal outside its jurisdiction.⁷²

III A DISTINCTION BETWEEN JURISDICTIONAL AND NON-JURISDICTIONAL ERROR IS BOTH UNNECESSARY AND UNDESIRABLE

It is necessary to consider what possible arguments can be raised in favour of perpetuating a distinction which is so uncertain as to be incapable of consistent application. The most obvious obstacles to abolition of the distinction are conceptual rather than practical, and it is submitted that these can be overcome by adoption of a realistic, pragmatic approach to judicial review.

One obvious consequence of abolishing the distinction would be to remove any field of operation for non-jurisdictional error of law on the face of the record as an independent ground for judicial review. Some may regard this as a retrograde step which justifies retention of the distinction between jurisdictional errors and errors within jurisdiction.⁷³ That argument can be met on a number of grounds. First, non-jurisdictional error of law on the record as a ground for review was overlooked for almost one hundred years⁷⁴ before being revived in 1951 as a means of extending the courts' powers of judicial review in the face of a

71 See eg Schwartz, *Administrative Law* (1976) 606-616. The Federal Administrative Procedure Act 1946, 5 USC s 706 provides that agency action shall be set aside if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The test of validity is the same as that required to satisfy the substantial evidence rule in respect of findings of fact: the question asked by the reviewing court is whether the decision is reasonable in the light of the object and purpose of the empowering provision and the evidence presented. Although s 701 (a) excludes judicial review where "agency action is committed to agency discretion by law", the courts are slow to construe a statute as having this effect: see eg *Barlow v Collins* 397 US 159, 165-167 (1970).

72 On two recent occasions New Zealand Supreme Court judges have conceded that "the question of whether there has been an excess of jurisdiction or merely an error of law within jurisdiction, in the end can only be a value judgment and it is a question as to how much latitude the Court is prepared to allow": *James Aviation Ltd v Air Services Licensing Authority* [1979] 1 NZLR 481, 489 per Vautier J; *Bay of Islands Timber Co Ltd v Transport Licensing Appeal Authority* unreported, Supreme Court, Auckland, 4 April 1977, A 1569/75, Barker J.

73 See eg *Anisminic Ltd v Foreign Compensation Commission* supra n 1 at 182 per Lord Morris (dissenting).

74 In 1944 the English Court of Appeal denied the existence of error of law on the record as an independent ground for review: *Racecourse Betting Control Board v Secretary of State for Air* [1944] Ch 114.

restrictive approach to the concept of jurisdictional error.⁷⁵ Now that the justification for its revival has gone, there is no good reason why error of law on the record should not be consigned back to the jurisprudential limbo in which it languished for so long. Secondly, the requirement that the error of law must be disclosed on the record is both artificial and increasingly ineffective as a limitation on the scope of review. Since *Anisminic* it has been relatively easy for applicants to describe their complaints in terms of errors which the House of Lords classified as jurisdictional errors, and then introduce extrinsic evidence to prove them. It is clear that the courts will no longer be reluctant to go behind the bare terms of administrative decisions. Where the official provides no reasons or explanation for his decision the courts are increasingly prepared to admit any relevant evidence to provide the basis for inferences as to the official's true reasons and motives. If, after such an inquiry, the court considers that the official has misconceived his powers, his decision will be set aside for jurisdictional error.⁷⁶ Further, both courts⁷⁷ and legislatures⁷⁸ have moved to extend the scope of the "record" of a decision for the purposes of review on this ground, and in some Commonwealth countries⁷⁹ the requirement that a non-jurisdictional error of law appear on the record has been abolished by statute.

The second broad argument which could be advanced in favour of maintaining the distinction between jurisdictional errors and errors within jurisdiction is that abolition of the distinction would make the courts' inherent powers of review as wide as their appellate powers of review on a question of law. But, in reality, many Commonwealth courts have already gone this far.⁸⁰ Once again the answer to this argument is that the feared result has, in practical terms, already been reached.

A third argument is that abolition of the distinction would render ouster or privative clauses completely ineffective, and "thereby threaten to expose the courts to a direct confrontation with Parliament."⁸¹ Traditionally the courts have interpreted statutory provisions by which Parliament purports to remove the courts' inherent powers of judicial review as excluding review for non-jurisdictional errors only. But, it is argued, "if every error is now to be jurisdictional, ouster clauses will have no sphere of operation at all, and the judicial attitude will be exposed as one

75 *R v Northumberland Compensation Appeal Tribunal, Ex p Shaw* [1952] 1 KB 338.

76 See supra n 66.

77 See the progressive widening of the scope of the record through the following cases: *R v Northumberland Compensation Appeal Tribunal, Ex p Shaw* supra n 75 at 352 per Denning LJ; *R v Medical Appeal Tribunal, Ex p Gilmore* [1957] 1 QB 574, 582 per Denning LJ; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663, 690 per Lord Denning; *R v Board of Industrial Relations (Alberta), Ex p ITT (Canada) Ltd* (1967) 62 DLR (2d) 736, 742 per Kirby J; *R v Southampton Justices, Ex p Green* [1976] 1 QB 11; *Re Martin* (1978) 20 OR (2d) 455, 463 per Morden J; *R v Preston Supplementary Benefits Appeal Tribunal, Ex p Moore* [1975] 1 WLR 624, 628 per Lord Denning MR. Cf *Clark v Wellington Rent Appeal Board* [1975] 2 NZLR 24, 31 per O'Regan J.

78 Tribunals and Inquiries Act 1971, s 12 (UK); Statutory Powers Procedure Act 1971, s 20 (Ont); Judicature Amendment Act 1977, s 14 (j) (NZ); Judicial Review Procedure Act 1976, s 1 (Br Col).

79 Federal Court Act 1970, s 28 (1) (b) (Can); Administrative Decisions (Judicial Review) Act 1977, s 5 (1) (f) (Cth of Aust).

80 See supra p 428.

81 Griffiths, [1979] CLJ 11, 14.

of naked disobedience to Parliament.”⁸² Once again the response is a realistic, pragmatic one. Since *Anisminic* the distinction between jurisdictional and non-jurisdictional error has been so open to manipulation that in practice the existence of a privative clause imposes no effective legal restraint on the courts’ powers of review. If the court considers that the tribunal has been guilty of an error of sufficient importance to warrant the decision being quashed, it will have no difficulty describing the irregularity as a jurisdictional error to which the privative clause has no application. The only real, practical significance of a privative clause is that it provides an indication that Parliament intended the courts to give the tribunal a fair amount of latitude in interpreting and applying its statutory mandate. It is submitted that the true and proper significance of a privative clause is that it should be considered, along with all other indications of Parliamentary intent, when the reviewing court considers how closely it should scrutinize the exercise of the statutory function in question.⁸³ Thus abolition of the concept of non-jurisdictional error will not necessarily mean that the courts deny any relevance or effect at all to privative clauses. On the contrary, it would have the beneficial effect of giving open recognition to the real practical relevance and effect of such provisions.

It is submitted that the obvious conceptual obstacles to abolition of the distinction between jurisdictional and non-jurisdictional error are not insurmountable. It remains to consider whether the distinction serves any *practical* purpose which justifies its retention. Clearly the only *practical* advantage of maintaining the concept of non-jurisdictional error is that it provides a reviewing court with a device which can be used to justify a refusal to quash in a case where, although some irregularity has been proved, the court considers that it is not appropriate to intervene.

However it is submitted that it is neither desirable nor necessary for the courts to preserve the concept of non-jurisdictional error for use as an “avoidance device” of this kind. The distinction between jurisdictional errors and errors within jurisdiction is conceptually unsound. The fundamental constitutional principle on which judicial review is based is that the courts’ proper role is to ensure that officials who exercise delegated powers act within the limits laid down by Parliament, either expressly or by implication. If an official fails to observe a limitation imposed by Parliament to confine his power and that failure has a significant effect on his decision the official goes outside his statutory authority and the decision is unlawful. On the other hand, if the official acts within the limits of his power, his decision is lawful and enforceable for all purposes. Classification of a proved error as non-jurisdictional in order to justify a policy decision by the court not to intervene threatens to undermine public confidence in both the administration and the judiciary. The court finds it difficult, in the light of *Anisminic*, to explain the basis of its classification.⁸⁴ It must be even more difficult for counsel to explain to the satisfaction of his unsuccessful client that although it was proved that the official committed an error which influenced the decision under challenge, that error was within the official’s jurisdiction and because a privative clause applied or the error did not appear on the record

82 Wade, (1979) 95 LQR 163, 166.

83 See *infra* n 1 and accompanying text.

84 See eg *R v The Small Claims Tribunal and Syme, Ex p Barwiner Nominees Pty Ltd* [1975] VR 831, 839-841.

of the decision no remedy is available. Not only is it undesirable for policy reasons to use the concept of non-jurisdictional error as an "avoidance device"; the practical opportunities for use of this device are becoming increasingly limited due to judicial extension of the scope of the record for review purposes, statutory abolition of the requirement that an error of law appear on the record, and a growing tendency for legislatures to confer rights of appeal from administrative decisions.⁸⁵

There is no practical need to maintain the concept of error within jurisdiction to describe a proved irregularity which did not affect the final decision. If an applicant cannot prove, on a balance of probabilities, that a proved irregularity had a significant effect on the ultimate decision, he will have no grounds for certiorari even if the error appears on the record and no privative clause applies.⁸⁶ In truth, such an irregularity is not a reviewable error of any kind.

The serious problems and disadvantages associated with the concept of non-jurisdictional error, together with its increasingly limited field of operation, have deterred the courts from using it as a device for upholding administrative decisions in the face of proved errors. Since *Anis-minic*, there have been very few reported cases in which a court has denied relief on the ground that an error was within the tribunal's jurisdiction.⁸⁷ Yet many applications for review are unsuccessful and there are very few decisions which seem to be clearly wrong or unjust. The obvious conclusion is that it is not necessary to retain the distinction between jurisdictional and non-jurisdictional error for use as an "avoidance device", and abolition of this distinction would have little impact upon the existing practice of Commonwealth courts in the exercise of their inherent powers of judicial review. Reviewing courts frequently decide on policy grounds not to interfere with administrative decisions but very rarely do they justify their refusal to intervene by classifying the error as within the tribunal's jurisdiction. Thus attempts to find a conceptual basis for distinguishing between jurisdictional errors and errors within jurisdiction are essentially sterile academic exercises.

In fact, preoccupation with the distinction tends to obscure and divert attention from the realities of judicial review. The energies of academics, counsel and judges should be directed at identifying and assessing the policy considerations which should properly influence a judge's willingness or reluctance to review and set aside a particular administrative act, and the nature and scope of the "avoidance devices" available to him to justify his refusal to grant a remedy. Appreciation of these matters should enable counsel to predict the outcome of review proceedings with more confidence, and if the case does go to hearing, to direct their submissions to the particular features of the case which will (or should) determine the court's approach.

85 Eg *Tribunals and Inquiries Act 1971*, s 13 (UK); *Judicature Amendment Act 1968* (NZ); *Administrative Appeals Tribunal Act 1975* (Cth of Austl).

86 See *infra* pp 451-452

87 See *R v The Small Claims Tribunal and Syme, ex p Barwiner Nominees Pty Ltd* *supra* n 84; *R v Secretary of State for the Environment, Ex p Ostler* [1977] QB 122.

IV FACTORS WHICH INFLUENCE THE WILLINGNESS OF A JUDGE TO SUBJECT AN ADMINISTRATIVE DECISION TO CLOSE SCRUTINY IN REVIEW PROCEEDINGS

A number of factors are relevant in this context. They can be regarded as providing indications of the extent to which Parliament intended the exercise of a particular delegated function to be subject to judicial supervision and scrutiny. The proper role of the reviewing judge is to assess the application of each relevant factor to the facts of the individual case before him. In many cases each factor will indicate the same approach. In difficult cases, where the application of different factors indicates different approaches, the court must balance the competing factors.

1 *The terms of the empowering provision—how broadly or narrowly is the tribunal's function defined?*

Parliament's purpose in delegating statutory functions varies across a broad spectrum and this is reflected in the terms of empowering provisions and the nature of the powers conferred. The distinction drawn by Lord Wilberforce in *Anisminic*⁸⁸ between two broad kinds of powers is relevant in this context. At one extreme lies the situation where Parliament decides to subject a particular field of activity to regulation but is unable or unwilling to make the crucial policy choices necessary to define the form which such regulation should take, or even the specific objectives which such regulation should seek to achieve. In these situations a popular solution is to create an administrative tribunal and confer upon it a broad power of regulation without any meaningful standards or guidelines to indicate the manner in which the power should be exercised. Often the tribunal is simply directed to regulate the activity "in the public interest".⁸⁹ In such cases it is clear that Parliament intends the tribunal to make broad value judgments and policy choices on a case by case basis with a minimum of judicial interference. Parliament expects that the tribunal will gradually, as its familiarity with the subject matter increases through repeated contact, develop more specific standards, principles and rules which can be applied to regulate the activity in a systematic orderly manner which accords with broad governmental policies and objectives.⁹⁰

Governments tend to find this solution particularly attractive in two broad kinds of situations. First, where the activity in question is the subject of controversy and debate, and any form of regulation will inevitably attract strong opposition from some important interest group. In

⁸⁸ See supra nn 5, 6 and accompanying text.

⁸⁹ Frequently the statute will go on to direct the tribunal to have regard to a number of *relevant aspects* of the public interest in determining what the *overall* public interest requires. However these broadly defined "public interest considerations" almost invariably conflict when applied to specific fact situations and the Act seldom provides any indication of the relative weight to be given to them. See eg the discussion of the Transport Act 1962, s 123 (NZ) at p 450 *infra*.

⁹⁰ For a discussion of who (government, courts, tribunals) ought to make different kinds of policy decisions, see Ganz, "Allocation of Decision-Making Functions" [1972] Public Law 215 and [1972] Public Law 299. For a discussion of the advantages and disadvantages of limiting discretion by reference to rules and adjudicatory process, see Jowell, "The Legal Control of Administrative Discretion" [1973] Public Law 178.

this situation political expediency may dictate delegation of a broad regulatory power to an "independent" tribunal. This device allows the government to test the feeling of the electorate with minimal risk of losing political support. If conditions change or it becomes clear that the policies developed by the tribunal are not supported by a majority of the electorate, the government can step in and abolish the tribunal or prescribe new legislative standards to change the tribunal's direction.⁹¹

The second situation in which Parliament may favour delegating broad policy-making functions to an administrative tribunal is where the subject matter requiring regulation is very new, or highly complex or technical. It may be beyond the resources of the government and its departmental advisers even to identify in advance all the problems created by the activity, far less to formulate specific practical solutions to those problems. In this situation it may be wise to create a specialised tribunal and delegate to it the function of gradually subjecting the activity to rules by dealing with individual concrete problems on a case by case basis. Once again the tribunal's powers will be limited only by reference to vague standards such as "the public interest".⁹²

When called upon to review the exercise of these kinds of delegated statutory functions the courts are naturally and properly reluctant to subject the broad policies and standards formulated by the tribunal to close scrutiny. Clearly Parliament contemplates that in making the necessary policy choices and developing broad standards for its own future guidance the tribunal should be subject to legislative rather than judicial supervision. Furthermore, the subject matter of the tribunal's decision is likely to deter the reviewing court from intervening. The subject matter is likely to be so complex and technical, or to involve such a degree of policy choice and value judgment, that the court feels ill-equipped to

91 New Zealand legislation in regard to four politically sensitive areas of regulation provides good illustrations of this process.

(i) Minimum wage fixing: Industrial Conciliation and Arbitration Act 1936, s 3; Minimum Wage Act 1945, s 2; Economic Stabilisation Regulations (SR 1952/20), reg 5; Economic Stabilisation Regulations (SR 1953/50), reg 3; General Wage Orders Act 1969, ss 3, 5; General Wage Orders Act 1977, s 6.

(ii) Censorship of films, publications and broadcasting: Indecent Publications Act 1910, ss 5, 6; Indecent Publications Act 1963, s 11; Cinematographic Films Act 1961, ss 14, 98; Cinematographic Films Act 1976, ss 26, 28, 29, 84; Broadcasting Act 1976, ss 24-26, 91, 95.

(iii) Rent control: Tenancy Act 1948, s 9; Tenancy Act 1955, s 21; Rent Review Regulations (SR 1972/277), reg 5; Rent Appeal Act 1973, s 8; Economic Stabilisation (Rent) Regulations (SR 1976/122), reg 3.

(iv) Shop trading hours: Shops and Offices Act 1921-1922, ss 31, 32; Shops and Offices Act 1955, ss 3, 10 (6) Shop Trading Hours Act 1977, s 20.

See also Broadcasting Act 1976, s 80 (licensing of private broadcasting stations); Contraception, Sterilization and Abortion Act 1977, s 14 (delegation to independent tribunal of the function of administering an unsatisfactory compromise scheme of regulation).

92 For New Zealand examples of such legislation, see eg Commerce Act 1975, ss 20, 21, 61, 78, 80; Transport Act 1962, ss 119, 123; Air Services Licensing Act 1951, s 18; Sale of Liquor Act 1962, ss 10, 11; Medical Practitioners Act 1968, ss 43, 58; Law Practitioners Act 1955, ss 34, 35; New Zealand Ports Authority Act 1968, ss 11, 12; Patents Act 1953, s 17; Securities Act 1978, s 44; Reserve Bank of New Zealand Act 1964, ss 34, 34A; Fisheries Amendment Act 1977, s 123 (1); Wanganui Computer Centre Act 1976, ss 15-17, 23 (adjudicative and policymaking functions vested in three separate specialist bodies); Agricultural Chemicals Act 1959, ss 19, 20; Cinematographic Films Act 1976, ss 54, 65.

question the judgment of the expert tribunal,⁹³ or the case may be at the centre of a political controversy with which the court is naturally reluctant to become identified. In such cases the courts are likely to allow the tribunal a large amount of effective discretion in formulating broad policies and standards, insisting only that the tribunal adopt a fair procedure and that its decisions are made in good faith and are not completely unreasonable.⁹⁴ As the tribunal formulates more detailed standards and rules and a body of case law develops, reviewing courts can be expected to look more closely at the application of these rules to specific fact situations, in particular insisting upon consistent treatment of like cases.⁹⁵ Practical realities dictate that even bodies which enjoy appellate powers of review on the merits approach the exercise of their powers in this manner.⁹⁶

At the other end of the spectrum is the situation where, in Lord Wilberforce's terms, it is "apparent that Parliament is itself directly and closely concerned with the definition and delimitation of certain matters of comparative detail and has marked by its language the intention that these should be accurately observed."⁹⁷ A reviewing court is likely to subject the exercise of a power of this kind to much closer scrutiny. Here Parliament has made the basic policy decisions as to the extent to which and the manner and form in which the activity should be regulated, and has expressed its intention in reasonably specific terms. The detailed nature of the express restrictions imposed by the legislation to limit the scope of the delegated power support a clear inference that Parliament intended the courts to play an active part in ensuring that these limitations are observed. In most cases of this kind the court will also feel competent to review the substance of the tribunal's decision. The function delegated to the tribunal will leave little scope for broad value judgments and policy choices. Exercise of the power will require the tribunal to make findings of fact and decide whether those facts satisfy reasonably specific statutory criteria. These are functions with which the courts are familiar and feel competent to perform.

2 *The relative competence of the court and the tribunal in respect of the subject matter of the decision under challenge*

Obviously this second factor overlaps with the first to the extent that a court of general jurisdiction will usually feel ill-equipped to question the decision of a specialised tribunal charged with making important value judgments based on broad considerations of policy and expediency.

93 *Eg Re Western Ontario Credit Corp Ltd and Ontario Securities Commission* (1975) 59 DLR (3d) 501, 511 per Hughes J: where a tribunal "makes an order in the public interest with the experience and understanding of what that interest consists of in a specialized field accumulated over many years, the Court will be especially loath to interfere."

94 *Eg British Oxygen Co Ltd v Minister of Technology* [1971] AC 610. This tendency will be enhanced where the power is vested in an elected body which is subject to political checks; see *eg Manukau City v Ati-Gen, ex rel Burns* [1973] 1 NZLR 25; *R v Barnet and Camden Rent Tribunal, Ex p Frey Investments Ltd* [1972] 2 QB 342. See also the *Tameside* case [1977] AC 1014, 1033 per Scarman LJ.

95 See *infra* pp 444-446.

96 See Brennan, "The Future of Public Law — the Australian Administrative Appeals Tribunal" (1979) 4 Otago LR 286, 294-298; Keith, *supra* n 34 at 128-130.

97 *Anisminic* [1969] 2 AC 147, 209-210.

However situations may arise where even although the statutory power is expressed in relatively specific terms so that the question for decision by the tribunal is relatively narrow and confined, the case turns on issues which the tribunal is better qualified to decide than a judge. A reviewing court is unlikely to question a finding of primary fact which turns on assessment of the credibility of witnesses where the tribunal, but not the court, has had the advantage of seeing and hearing the witnesses. Similarly a court will be reluctant to question a finding by an expert tribunal on a highly complex or technical question which is outside the normal experience and competence of a judge.⁹⁸ Here the judge will normally see his proper function as being to ensure that there is some evidence to support the tribunal's findings and that the decision is not completely arbitrary or unreasonable.

On the other hand, where the decision under challenge relates to matters which fall within the normal range of experience and competence of a judge and the tribunal appears to have no advantage of expertise, the judge will, quite properly, be prepared to subject the tribunal's reasoning to much closer scrutiny, and he will be more likely to substitute his view for that of the tribunal if he feels the decision is wrong. Indeed in some situations the judge may feel that he is better qualified than the tribunal to decide the crucial issue. This may be the case where the decision requires findings of fact which do not turn on credibility, and the application to those primary facts of legislative standards which leave little room for policy choice.⁹⁹

3 *The presence of a wide ouster or privative clause*

It has already been argued that privative clauses, however wide their terms, do not automatically impose any legal limitations on the courts' inherent powers of review, and that the courts should recognise this fact. However this does not mean that such provisions should be denied any practical significance or effect. Inclusion of a privative clause indicates that Parliament intended a reviewing court to give the tribunal considerable latitude in interpreting and applying its statutory mandate. The proper significance of a privative clause is that its existence should be considered, along with all other relevant factors, when the reviewing court determines the extent to which it should, consistent with Parliament's intention, examine the tribunal's findings and reasoning.¹

4 *Administrative efficiency and expediency*

Traditionally the courts have been reluctant to give express recognition to the fact that they are influenced by considerations of administra-

98 *Eg GEC v Price Tribunal* [1975] ICR 1, 11 per Lord Denning MR.

99 *Eg Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014 (whether local education authority's proposals were "unreasonable"); *Fiordland Venison Ltd v Minister of Agriculture* supra n 64; *Padfield v Minister of Agriculture* supra n 65; *Pearlman v Keepers and Governors of Harrow School* supra n 8.

1 When reviewing decisions of specialist Labour Relations Boards, some Canadian courts have given considerable weight (but not literal effect) to privative clauses by limiting their inquiry to whether the Board's conclusion was reasonably open to it on the evidence rather than completely arbitrary and unreasonable: *eg Labour Relations Board for British Columbia v Canada Safeway Ltd* [1953] 3 DLR 641, 652, 646, 649 (SC); *Parkhill Bedding & Furniture v Int'l Molders & Foundry Workers Union* (1961) 26 DLR (2d) 589, 593; *Re Service Employees Int'l Union and Manitoba Labour Board* (1978) 90 DLR (3d) 255.

tive efficiency and expediency when deciding how closely they should scrutinise the exercise of delegated statutory functions. However this attitude is now changing. Considerations of administrative efficiency assume major importance in two broad kinds of situations.

First, an important justification for delegating statutory powers of decision to administrative tribunals rather than the ordinary courts is to prevent the courts from becoming overloaded, and to ensure that administrative decisions are made as speedily and as inexpensively as possible. So where a statutory power of decision which involves large numbers of cases raising broadly similar issues is vested in a tribunal created specially for this purpose, considerations of efficiency and convenience will make the courts reluctant to assume anything more than a very broad supervisory role. The courts' natural reluctance to intervene in this kind of case will be strengthened where the tribunal already has, or can be expected to acquire rapidly, considerable familiarity and expertise in respect of the subject matter of the power. The English Court of Appeal placed considerable weight on these considerations in *R v Preston Supplementary Benefits Appeal Tribunal, Ex p Moore*.² Lord Denning declared:³

It is plain that Parliament intended that the Supplementary Benefit Act 1966 should be administered with as little technicality as possible: It should not become the happy hunting ground for lawyers. The courts should hesitate long before interfering by certiorari with the decisions of the appeal tribunals. Otherwise the courts would become engulfed with streams of cases . . .

He concluded that the courts should intervene only "to lay down the broad guidelines" necessary to ensure that the Act is applied in a reasonable and consistent manner. But "[i]ndividual cases of particular application must be left to the tribunals."⁴

The second class of case in which considerations of efficiency and expediency assume major importance is where the administrative decision authorises expensive and far-reaching action which must be undertaken without delay. In this situation the public interest in the finality of the administrative decision may be given overriding and decisive weight. The most obvious example is a decision which authorises a major scheme for the use and development of land, whether to be undertaken by a public authority responsible for public works or by a private developer. Economic considerations dictate that major land use decisions be implemented as quickly as possible and continued without interruption. Where work involving substantial expenditure has already been completed and private third party rights have already accrued, the decision of a court to quash the administrative authorisation will obviously result in considerable financial loss and social disruption. In this situation the public interest in efficiency and expediency will often outweigh the competing public and private interests in favour of rigorous enforcement of the rule of law, and a reviewing court will be anxious to find a justification for refusing to set the decision aside.

2 [1975] 1 WLR 624. See also *R v Barnsley Supplementary Benefits Appeal Tribunal, Ex p Atkinson* [1976] 1 WLR 1047; *R v Industrial Injuries Commissioner, Ex p Amalgamated Engineering Union (No 2)* [1966] 2 QB 31; *R v National Insurance Commissioner, Ex p Michael* [1977] 1 WLR 109, 112.

3 Ibid at 631.

4 Ibid at 632.

In the area of land use planning the United Kingdom Parliament has sought to balance these competing interests by devising the "time limit clause"—a statutory provision which purports to exclude judicial review of ministerial planning decisions upon expiry of a six week period from the date of the decision.⁵ The problems presented by these time limit provisions were illustrated in *R v Secretary of State for the Environment, Ex p Ostler*.⁶ In that case the applicant applied for certiorari to quash ministerial compulsory purchase orders on the grounds that the department had acted in bad faith and had denied him a fair opportunity to exercise his right of objection in breach of the requirements of natural justice. The applicant did not discover these irregularities until long after the statutory six week period for review had expired. His application was made nineteen months after the orders had been confirmed, by which time eighty per cent of the necessary property had been acquired, ninety per cent of the demolition work had been completed, and large sums of money had already been spent. The Secretary moved to strike out the application on the ground that the statutory time limit clause operated to exclude the courts' powers of review. The applicant relied on *Anisminic* for the proposition that bad faith and breach of natural justice are jurisdictional errors which rendered the decision a nullity so that the time limit clause was not effective to exclude the courts' power to quash.

Naturally the Court of Appeal was anxious to preserve the validity of the orders. However the Court's reasoning was far from satisfactory. The Court relied on three grounds to distinguish *Anisminic* and justify giving full literal effect to the time limit clause. First, the privative clause in *Anisminic* purported to completely exclude the courts' powers of review, whereas the time limit clause was "more in the nature of a limitation period than of a complete ouster."⁷ Secondly, *Anisminic* involved a decision of a "truly judicial body" whereas the orders challenged in *Ostler* were administrative decisions. Thirdly, *Anisminic* concerned a substantive error which took the Commission outside its jurisdiction. However the errors alleged in *Ostler* (bad faith and breach of natural justice) related only to "the validity of the process by which the decision was reached." These were non-jurisdictional errors which rendered the decision merely "voidable" rather than a nullity. The second and third grounds run contrary to the weight of recent authority and are wrong in principle.⁸ Indeed Lord Denning has since recanted,⁹ expressing the wish that his judgment in *Ostler* had rested on his last paragraph:¹⁰

Looking at it broadly, it seems to me that the policy underlying the statute is that when a compulsory purchase order has been made, then if it has been wrongly obtained or made, a person aggrieved should have a remedy. But he must come promptly. He must come within six weeks. If he does so, the court can and will entertain his complaint. But if the six weeks exp're without any application being made, the court cannot entertain it afterwards.

5 Eg Town and Country Planning Act 1971, ss 242-245; Acquisition of Land (Authorisation Procedure) Act 1946, 1st Schedule, Part IV, para 15 (UK).

6 [1977] QB 122.

7 Ibid at 135 per Lord Denning MR. Goff LJ expressly doubted whether this was a valid ground of distinction: ibid at 138.

8 See Gravells, "Time Limit Clauses and Judicial Review—The Relevance of Context" (1978) 41 MLR 383, 390-393; Note, (1977) 93 LQR 8, 10. See also supra pp 422-423.

9 Lord Denning, *The Discipline of the Law* (1979) 108.

10 [1977] QB 122, 136.

The reason is because as soon as that time has elapsed, the authority will take steps to acquire property, demolish it and so forth. The public interest demands that they should be safe in doing so. Take this very case. The inquiry was held in 1973. The orders made early in 1974. Much work has already been done under them. It would be contrary to the public interest that the demolition should be held up or delayed by further evidence or inquiries

Here, of course, Lord Denning was on much firmer ground; on the particular facts of *Ostler* the public interest in finality clearly outweighed the competing interests in strict adherence to the rule of law. However it may be neither necessary nor desirable to give strict literal effect in every case to such a time limit clause. In a case where the time limit had expired before the applicant became aware that grounds for review exist but little or no action has been taken in reliance upon the decision, little expenditure has been incurred, and third party rights have not vested, the policy considerations in favour of finality may not be sufficiently strong to outweigh the public interest that an aggrieved citizen should have a remedy in respect of invalid administrative action.¹¹ It is submitted that time limit clauses, like normal privative clauses, should not be given automatic literal effect. Such a provision could be treated as giving rise to a *presumption* that upon expiry of the prescribed period the public interest in finality is of overriding importance, but leaving it open to an applicant to rebut the presumption by showing that granting him a remedy would not result in significant loss or hardship to persons who have already acted reasonably in reliance upon the decision under challenge.¹²

In a case where the public interest in finality is of overriding importance but the relevant statute contains no time limit clause,¹³ the court can still give full weight to the need for finality by exercising its discretion to deny the applicant a remedy. In the past the courts have shown an understandable reluctance to give administrative convenience and expediency as the sole reason for exercising their discretion to withhold relief in the face of a proved jurisdictional error. Consequently the courts have used other devices to justify their refusal to intervene. However, recent cases indicate that the courts are now more prepared to assert the discretionary nature of the public law remedies and to exercise their discretion in a more flexible manner.¹⁴ Provided the court is prepared to explain its reasoning fully, it is perfectly acceptable for the court to withhold public law remedies in the exercise of its discretion where the public interest in finality is of overriding importance. This course is much more

11 The standard six week period for commencing review proceedings has been criticised as being too short, and imposed too indiscriminately in contexts where such a limitation upon review is not justified: see Wade, "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 LQR 198, 208; Wade, *Administrative Law* (4th ed 1977) 582; Trice, "The Problems of Time Limits for Judicial Challenge in Planning Law" [1973] JPL 227.

12 See Gravells, *supra* n 8 at 396. In New Zealand the National Development Act 1979, s 17 (5) imposes a 21 day time limit for review, but s 17 (10) empowers the court to waive that limitation if it considers that review proceedings "will not materially affect or delay the construction or operation of the work."

13 Eg the Town and Country Planning Act 1977, s 162 (NZ) imposes a time limit of one month for the filing of appeals from decisions of the Planning Tribunal to the Administrative Division of the Supreme Court on a point of law. However the Act makes no attempt to oust or restrict the Supreme Court's inherent jurisdiction to review decisions of the Planning Tribunal.

14 See *infra* 454.

desirable than giving effect to the interest in finality by resorting to the device of classifying a proved error as non-jurisdictional.¹⁵ While the public interest may well justify the court's refusal to quash the decision, it does not justify depriving a person who has suffered loss as a result of an invalid administrative act of any opportunity to recover compensation in a private law action. If a reviewing court justifies its refusal to intervene by straining principle to find that no error was proved, or that a proved error was within jurisdiction, the decision may set up a *res judicata* which estops the unsuccessful applicant from challenging the validity of the decision in a subsequent private law action for damages against the official.¹⁶ By recognising that the decision under challenge was technically *ultra vires* the official's statutory power but refusing to grant a public law remedy in the exercise of its discretion, the reviewing court can preserve the practical public law validity and binding nature of the decision but allow the applicant to claim compensation for his loss by pursuing any available private law cause of action.¹⁷

5 The effect of the decision on the applicant's interests

Naturally, a reviewing court is likely to scrutinise more closely an administrative decision which has a serious and direct adverse effect on the legitimate interests of the applicant. Where the effect of the decision on the applicant's interests is relatively slight, or less immediate and more speculative, the court will tend to give greater weight to considerations of administrative efficiency and expediency, and will be less inclined to interfere with the administrator's decision. The importance of this factor has long received express recognition in natural justice cases. At one time the application of implied procedural requirements was limited to powers which affected individual "rights" rather than mere "privileges" or "licences".¹⁸ Two of the three factors identified by the Privy Council in *Durayappah v Fernando*¹⁹ as relevant in determining whether procedural safeguards should be implied relate to the seriousness of the effect of exercise of the power on the interests of those sub-

15 As in *R v Secretary of State for the Environment, Ex p Ostler* supra n 6.

16 Where implementation of a decision causes interference with recognised private law rights, proof that the decision was *ultra vires* is necessary to overcome the defence of statutory authority. Proof of an *ultra vires* act is an essential element of the tort of "misfeasance in a public office", and also of the developing cause of action for negligent exercise of statutory discretionary powers: see *Anns v Merton London Borough Council* [1978] AC 728; *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314. Although Wade points out that there is some doubt whether decisions in proceedings for prerogative remedies are technically judgments to which the doctrine of *res judicata* applies, he adds that "in reality it is plain that the court gives a decision, and there is no reason why the ordinary objections to relitigation should not apply": *Administrative Law* (4th ed 1977) 234-235.

17 Wade, supra n 16 at 561, maintains that while refusal of certiorari and prohibition in the exercise of discretion can never give rise to *res judicata*, refusal to issue a declaration or injunction, even in the exercise of discretion, is *res judicata* so that the applicant will be estopped from challenging the validity of the administrative act in later proceedings. With respect, the latter observation appears to be wrong: see *Vitosh v Brisbane City Council* (1955) 93 CLR 622; *James v Commonwealth* (1935) 52 CLR 570; Spencer-Bower and Turner, *The Doctrine of Res Judicata* (1969) 54, 155-156.

18 *Eg Nakkuda Ali v Javaratne* [1951] AC 66; *Modern Theatres (Provincial) Ltd v Peryman* [1960] NZLR 191.

19 [1967] 2 AC 337, 349.

ject to it. This consideration continues to influence the courts' application of the new and more flexible requirement of procedural "fairness" to the facts of individual cases.²⁰ Although the seriousness of the effect of the administrative determination on the applicant seldom receives express recognition as a relevant factor in cases involving allegations of substantive error, the decisions themselves reflect the importance of this consideration.²¹

6 *The importance and effect of the alleged error*

Naturally, a court's response to a challenge to the validity of an administrative decision is influenced by the importance of the alleged irregularity and the extent to which it influenced the final result. If the reviewing court regards the alleged error as relatively trivial and is satisfied that the same decision would have been reached irrespective of the irregularity, it will naturally be reluctant to put the administrator and any affected third parties to the trouble and expense of starting afresh.²²

7 *The need to promote consistency in administrative decisionmaking*

There is a strong public interest in favour of consistent and uniform exercise of statutory powers to ensure that like cases are dealt with in the same manner. Consistency in administrative decisionmaking serves a number of valuable purposes. First, consistent decisionmaking promotes certainty and predictability. As in any other area of the law, it is desirable that individual citizens who are subject to a regulatory power should be able to organise their own affairs with a reasonable degree of confidence and certainty. In this context, the weight given to the need for consistency will obviously be greatest where the decision will have a retrospective adverse effect on the affairs of the individual.²³

Secondly, a certain degree of consistency is a necessary element of the fundamental requirement of administrative fairness. While a doctrine of

20 Eg compare *Furnell v Whangarei High Schools Board* [1973] AC 660 (suspension from employment pending full hearing); *R v Gaming Board for Great Britain, Ex p Benaim and Khaida* [1970] 2 QB 417, 429-431 (refusal of initial application for occupational licence); *R v Race Relations Board, Ex p Selvarajan* [1975] 1 WLR 1686 (investigatory proceeding culminating in report which had no binding legal effect); with *Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125, 131-132 (revocation of occupational licence); *Re Bachinsky and Sawyer* (1973) 43 DLR (3d) 96; *Chisholm v Jamieson* (1974) 47 DLR (3d) 754; *Stevenson v United Road Transport Union* [1977] 2 All ER 941 (dismissal from employment for cause).

21 Eg *Rowling v Takaro Properties Ltd* [1975] 2 NZLR (minister's decision forced applicant company into receivership and resulted in substantial financial loss); *Padfield* [1968] AC 992 (minister's decision denied regional milk producers their only opportunity to pursue a genuine and substantial complaint of unfair price fixing by a statutory marketing board); *Fiordland Venison* [1978] 2 NZLR 341 (minister's decision removed the applicant's right to process venison for a lucrative foreign market). Compare *R v Preston Supplementary Benefits Appeal Tribunal, Ex p Moore* supra n 2: the reluctance of the court to intervene may have been influenced not only by the specialised nature of appeal tribunals and their large case loads, but also by the gratuitous nature of supplementary benefits and the relatively small sums of money involved.

22 See generally infra pp 451-452. *Stininato v Auckland Boxing Association* [1978] 1 NZLR 1 provides an example of a case where the combined effect of factors 5 and 6 induced the Court of Appeal to refuse relief in the exercise of its discretion in respect of a proved breach of natural justice.

23 See *HTV Ltd v Price Commission* [1976] ICR 170.

binding precedent has no place in administrative decisionmaking, previous decisions of administrators give rise to legitimate expectations in persons affected by the exercise of public functions that subsequent analogous cases will be treated in the same manner unless the administrator can point to some overriding public interest which justifies a change of approach and the affected party is given a fair opportunity to argue against it. To this extent, consistency in administrative decision-making is necessary in order to maintain public confidence in the administration of government and in established institutions generally.

Thirdly, promotion of consistent decisionmaking has a beneficial effect on the performance of officials and tribunals exercising broadly defined statutory powers which involve such a degree of policymaking and value choice that a wide area of effective discretion is left in their hands. In this context, insistence upon consistent and uniform decisionmaking encourages the tribunal to make and articulate the basic policy choices necessary for effective discharge of its function as quickly as is practically possible. The need for consistency will compel the tribunal to develop increasingly specific standards and rules which will operate to limit the area of its effective discretion, and to give careful consideration to the full implications of a change in the tribunal's basic policies or objectives.²⁴

The courts may feel compelled to intervene in support of consistent administrative decisionmaking in a number of different situations. The most obvious situation is where a tribunal previously has adopted a clear and unequivocal approach to some aspect of its function and a party has acted reasonably in ordering his conduct or affairs in reliance upon continuation of that approach. Where a change of approach by the tribunal will cause significant and irreversible harm to the individual, the interest in favour of continuing the established practice is strong and a reviewing court is likely to intervene on the ground of unfairness unless the tribunal can point to some compelling reason for its change of approach. This situation arose in *HTV Ltd v Price Commission*²⁵ where the English Court of Appeal, led by Lord Denning MR, relied on inconsistency amounting to unfairness to justify setting aside a decision of the Price Commission on an issue which Lord Denning had previously described as "so technical and so complex that [it] can only be well determined by . . . the Price Commission."²⁶ In *HTV* Lord Denning declared:²⁷

It is, in my opinion, the duty of the Price Commission to act with fairness and consistency in their dealings with manufacturers and traders. Allowing that it is primarily for them to interpret and apply the code, nevertheless if they regularly interpret the words of the code in a particular sense—or regularly apply the code in a particular way—they should continue to interpret it and apply it in the same way thereafter unless there is good cause for departing from it. At any rate they should not depart from it in any case where they have, by their conduct, led the manufacturer or trader to believe that he can safely act on that interpretation of the code or on that method of applying it, and he does so act on it. It is not permissible for them to depart from their previous interpretation and application where it would not be fair or just to do so. It has been often said, I know, that a public body, which is entrusted by Parliament with the exercise of powers for the public

²⁴ In Professor Davis' terms, judicial insistence upon a reasonable degree of consistency forces administrators to develop and articulate meaningful standards, policies and rules which will "confine" and "structure" their discretion: K C Davis, *Discretionary Justice* (1969).

²⁵ [1976] ICR 170.

²⁶ *GEC v Price Commission* [1975] ICR 1, 11.

²⁷ *Supra* n 25 at 185.

good, cannot fetter itself in the exercise of them. It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers: and it is a misuse of power for it to act unfairly or unjustly towards a private citizen when there is no overriding public interest to warrant it.

On the facts before him, Lord Denning regarded the established practice of the Commission as giving rise to something akin to an estoppel which could be invoked by the aggrieved party.

Even where there has been no actual reliance by the aggrieved party on the former practice of the official, the impact of a departure from the normal practice on the interests of the individual may be so great as to justify judicial intervention to secure consistent treatment of like cases. Consistency may be seen as a minimum requirement for fair and valid exercise of extremely broad discretionary powers with a high policy content. In *Kumar v Immigration Department*²⁸ the New Zealand Court of Appeal declared that the executive discretion to prosecute must be exercised in a consistent manner: "A discriminatory exercise of discretion without authority infringes the fundamental principle of equal treatment under the law and the equal protection of the laws for every person which has long been recognised as an essential pillar of the rule of law."

Finally, the need for judicial intervention to secure consistent decision-making may arise where the same statutory function is vested in a number of different tribunals or officials who cannot agree on a uniform approach to the exercise of the power. This, of course, is the situation which arose in the *Pearlman* case.²⁹ In *Pearlman* Lord Denning made it quite clear that his assertion of the courts' inherent power to quash the county court judge's decision for error of law was prompted by the need to ensure that availability of the tenants' statutory right to purchase does not vary according to the particular county court judge who decides the case. Where different judges interpret and apply the same statutory criteria in completely different ways the High Court must have power to declare one interpretation to be correct and insist upon consistent application of that interpretation in all cases.³⁰ The same view has been expressed by the Court of Appeal when reviewing decisions made pursuant to the Supplementary Benefit Act 1966. Although these were considered to be clear cases where the courts should exercise their powers of review with great restraint, Lord Denning took care to point out:³¹

[I]t must be realised that the Act has to be applied daily by thousands of officers of the commission: and by 120 appeal tribunals. It is most important that cases raising the same points should be decided in the same way. There should be uniformity of decision. Otherwise grievances are bound to arise. In order to ensure this, the courts should be ready to consider points of law of general application.

V "AVOIDANCE DEVICES" AVAILABLE TO A JUDGE TO JUSTIFY A REFUSAL TO SET ASIDE AN ADMINISTRATIVE DECISION

Where consideration of the policy factors examined in the preceding section of this paper lead a reviewing judge to the conclusion that it is

28 [1978] 2 NZLR 553, 558. See also *Tongia v Minister of Immigration* unreported, Supreme Court, Auckland, 2 July 1979, A 655/79, Barker J.

29 [1979] QB 56.

30 Ibid at 66-67, 70.

31 *R v Preston Supplementary Benefits Appeal Tribunal, Ex p Moore* [1975] 1 WLR 624, 632. See also *R v National Insurance Commissioner, Ex p Michael* [1977] 1 WLR 109, 112, 114-115.

inappropriate to interfere with the administrator's decision, what "avoidance devices" are available to him to justify his refusal to grant a remedy? Obviously, the opportunity to describe an error of law as non-jurisdictional provides the court with one such device. However it has already been argued that it is both undesirable and unnecessary to use the concept of non-jurisdictional error for this purpose. The courts already have at their disposal a number of preferable alternative devices which can be used to justify a policy decision not to interfere with an administrative decision. All but one of these alternative devices are based on the theoretical limitations upon the substantive grounds of invalidity, and therefore result in a finding that no recognised ground of invalidity has been proved. Consequently they are free from the disadvantages that follow from classification of an established error as being within jurisdiction so that the decision is merely "voidable" rather than "void". Further, each of these devices bears a recognisable relationship with the policy considerations which militate against judicial intervention. It remains to identify these alternative avoidance techniques.

1 *No basis for implication of limitations as to relevance and purpose*

This technique provides a justification for refusal to adopt the liberal judicial approach to implication of restrictions as to relevance and purpose exemplified by the decision in *Padfield's* case.³² The speech of Lord Reid in *British Oxygen Co Ltd v Minister of Technology*³³ provides a good illustration of this device. The Industrial Development Act 1966 provided that if certain prescribed conditions were satisfied, the Board of Trade "may make to any person carrying on a business in Great Britain a grant towards approved capital expenditure by that person in providing new machinery or plant for use in Great Britain". Although the plaintiff's application for a grant in respect of single gas cylinders met the express eligibility requirements, the Board refused the grant by applying its own established policy not to pay a grant in respect of any item of plant costing less than £25. The plaintiff company sought a declaration that it was entitled to the grant. The company relied on the *Padfield* approach, arguing that the policy and object underlying the empowering Act was to promote the modernisation of machinery and plant. Therefore the Board could properly exercise its discretion to deny a grant to an applicant who satisfied the express eligibility requirements only where it considered that eligible expenditure would not promote the object of modernisation. By refusing the grant on the ground that the items of plant cost less than £25 each the Board had exercised its discretion to achieve an unauthorised purpose, or alternatively had based its decision on an irrelevant consideration.

Lord Reid agreed that, in terms of *Padfield*, it was appropriate for the court to ask:³⁴

Does the Act read as a whole indicate any policy which the Board is to follow or even give any guidance to the Board? If it does then the Board must exercise its discretion in accordance with such policy or guidance.

32 *Supra* n 65.

33 [1971] AC 610. Lords Morris, Diplock and Wilberforce concurred in Lord Reid's judgment. Viscount Dilhorne delivered a separate concurring judgment.

34 *Ibid* at 623.

However Lord Reid held that the terms of the Act, read as a whole, did not support the inference that the sole object and purpose of the Act was to promote modernisation of machinery and plant. While the Board might be well advised to exercise its discretion as the plaintiff suggested, Lord Reid could find nothing in the Act to support an inference that it was required to act in that way. Clearly the House of Lords was not prepared to interfere with the Board's opinion that there was a need for some minimum cut-off point for grants under the Act. Their Lordships justified their refusal to intervene by holding that the terms of the Act did not disclose a single overriding policy which would provide the basis for implied restrictions on the scope of the Board's discretion.³⁵ However, Lord Reid emphasised that such an "unqualified discretion" was not completely immune from the courts' powers of review:³⁶ "It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion."

2 *The court defines the relevant factors which the tribunal must consider in very broad terms*

Although a reviewing court may not be prepared to conclude (as their Lordships did in *British Oxygen*) that it is impossible to ascribe any fundamental policy or object to the empowering Act so that there is no basis for an implication that certain unexpressed factors are relevant to the tribunal's inquiry and others are irrelevant, the court may nevertheless construe the empowering Act in a very broad liberal manner and define the relevant factors which the tribunal must consider in similarly broad terms. The court can then insist that the tribunal has a complete discretion as to the more detailed criteria to which it has regard in the course of considering those broad relevant factors. By use of this technique the court can easily justify a conclusion that the tribunal has properly considered all relevant factors and has not been influenced by any irrelevant factors. The judgment of North P and Turner J in *Shand v Minister of Railways*³⁷ provides a good illustration of the use of this device. This case involved review of the exercise by the Minister of his statutory power to close a railway line "on being satisfied that [the line] . . . can continue to be operated only under conditions that will result in the revenue therefrom being insufficient to cover the working expenses thereof". In fact their Honours held that the statutory provision did not limit the power of the Minister, acting for the Government in its capacity as owner of the railway system, to close any line at any time. However the Court also felt it desirable to justify the Minister's decision in terms of the statutory power. The plaintiffs alleged that the Minister had ignored a relevant factor when calculating the loss sustained from operation of the line, and had therefore acted ultra vires his power. The Minister had stated publicly that the branch line was operating at a loss

35 For further examples of the use of this device, see eg *Asher v Secretary of State for the Environment* [1974] Ch 208; *Lucas v Coleman and Att-Gen* unreported, Supreme Court, Wellington, 27 March 1975, M 134/75, O'Regan J, noted [1975] NZ Recent Law 180; *Manukau City v Att-Gen, ex rel Burns* [1973] 1 NZLR 25, 34, 39; *R v Barnet and Camden Rent Tribunal, Ex p Frey Investments Ltd* [1972] 2 QB 342, 368 per Stamp LJ.

36 *Supra* n 33 at 624.

37 [1970] NZLR 615 (CA).

of \$43,000 per year. The plaintiffs claimed that if the revenue derived from feeder traffic (traffic between stations on the branch line and outside stations) were taken into account, the net loss from operation of the line was only \$7,400. North P and Turner J held that even if the Minister had completely ignored the revenue derived from feeder traffic, this did not amount to a reviewable error. Their Honours defined the relevant matter to which the Minister must have regard in very broad terms—simply, did the cost of operating the branch line exceed the revenue derived from it? The specific criteria to which the Minister should have regard when considering that crucial question were for the Minister alone to decide. As the plaintiffs agreed that even on their calculations costs exceeded revenue by \$7,400 a year, there was sufficient evidence to support the Minister's findings on what their Honours regarded as the only relevant question—whether the line was running at a loss. Their Honours concluded:³⁸

[T]he Minister did consider the reports that were furnished to him by his advisers and did come to the conclusion on adequate material that the time had arrived when the revenue from the Fairlie branch line was insufficient to cover the working expenses thereof. . . . [T]he Minister had before him all the figures on which [the plaintiffs] relied and even if the Minister was wrong in using . . . the figure supplied to him regarding the loss on the branch line alone, in our opinion that circumstance does not advance the [plaintiffs'] case. This Court is not sitting as a Court of Appeal on the Minister's decision; it has no right to do so.

3 *The Court will not review the tribunal's assessment of the relative weight to be given to the relevant factors considered*

The courts have often asserted that in order to establish "failure to consider a relevant factor" as a ground of invalidity, it must be established that there has been a complete failure by the official to apply his mind to the relevant factor. Provided the official applies his mind to all matters which the reviewing court considers relevant to the exercise of his statutory function and excludes from his consideration all irrelevant matters, the weight to be given to the relevant factors considered is a matter for the official alone to decide. Such statements are, of course, rather too sweeping: the courts can review a tribunal's assessment of the relative weight to be given to relevant matters under the head of unreasonableness, and under the developing ground of "insufficient evidence".³⁹

Nevertheless, where a reviewing court wishes to uphold a decision challenged on the ground of failure to consider a relevant factor, it is easy for the court to find that the official did not completely ignore the relevant matter—he merely gave it little or no weight, and there remains a sufficient evidential basis for the final decision to justify a reasonable official coming to it.⁴⁰

The judgments of Cooke J and the Court of Appeal in *Attorney-General v Car Haulways (NZ) Ltd*⁴¹ demonstrate how easy it is for a reviewing court to manipulate the ground of "relevance" in order to

38 Ibid at 634-635.

39 See supra pp 427-428.

40 See eg *Mitchell v NZBC* [1970] NZLR 314, 316; *Gibson v Manukau City* [1968] NZLR 404, 410; *R v Barnet and Camden Rent Tribunal, Ex p Frey Investments Ltd* [1972] 2 QB 342, 360, 365; *Shand v Minister of Railways* supra n 37 at 636 per McCarthy J; *New Zealand Engineering Union v Court of Arbitration* [1976] 2 NZLR 283, 297 per Richmond J.

41 [1974] 2 NZLR 331.

justify a result which gives effect to the court's policy decision as to whether or not it is desirable to intervene. The Transport Licensing Appeal Authority had rejected Car Haulaways' application for further licences to transport new motor vehicles from assemblers to distributors. The Authority's empowering provision (section 123 of the Transport Act 1962) is particularly clumsy and difficult. It directs the Authority to have regard to a number of conflicting aspects of the public interest, but in the end provides no clear guidance as to how these conflicting interests should be balanced or resolved. The Act requires the Authority, in considering applications for licences, to have regard to (1) the interests of the public generally, including primarily the interests of users of transport services and secondarily those of transport operators, and (2) the ability of the applicant to provide the proposed service. If, having regard to those matters, the Authority is satisfied (a) that the proposed service is desirable in the public interest, and (b) that the service would not operate adversely to the public interest where it involves exemption from regulations protecting the government railways, the Authority is directed to grant the application. However this direction is subject to a further proviso—the licence shall not be granted if the proposed service would "injure materially the economic stability of transport services of any kind", or would "prejudice the provision or maintenance of a reasonable standard of living and satisfactory working conditions in the transport industry."

One of the grounds on which the Railways had opposed Car Haulaways' application was that grant of the licences would cause the Railways to lose business, resulting in a situation of reduced profitability which would be contrary to the overall public interest. However the Railways did not produce any hard evidence to support this claim. Car Haulaways attempted to meet the Railways' argument by introducing evidence to show that many car dealers who would use their proposed service presently preferred to drive new vehicles from assembly plants to their places of business rather than use the Railways' service. Therefore granting the licences would not make any significant impact on the Railways' profitability. The Appeal Authority gave no weight to Car Haulaways' evidence on this point and refused the licences.

In the Supreme Court, Cooke J quashed the Appeal Authority's decision. Despite the specialised nature of the subject matter and the tribunal and the lack of clear statutory guidelines, Cooke J felt that it was improper for the Appeal Authority to refuse to place any weight on Car Haulaways' evidence in the absence of any hard evidence to the contrary produced by the Railways. He concluded that the Appeal Authority had "in substance" or "in effect" denied the relevance of dealer preference for the "drive-away" method of delivery, and had therefore exceeded his jurisdiction by failing to consider a relevant factor.⁴²

The Court of Appeal took a very different view of the proper role of the reviewing court in this context. It emphasised that the Authorities "acquire an expertise in the specialised field of transport and . . . can properly reach conclusions with the aid of their peculiar knowledge, especially when adjudicating between recurrent competitive contentions."⁴³ The Court also emphasised the broad unstructured nature of the Authority's legislative mandate, noting that "the requirement of con-

42 Ibid at 338.

43 Ibid at 335.

sideration of the public interest recurs twice in s 123 and again in s 139.”⁴⁴ Clearly the Court of Appeal regarded Parliament as having sufficiently indicated its intention that Transport Licensing Authorities should be given a relatively free hand to regulate the developing transport industry in accordance with changing needs and requirements, and that the courts should be slow to interfere with their decisions. The Court was not disposed to interfere with the Authority’s assessment of the relative weight which should be given to the many factors relevant to the general public interest in this area, or with the Authority’s requirements as to evidence in respect of those relevant matters.

Having decided, on policy grounds, to restore the Appeal Authority’s decision, the Court of Appeal had little difficulty justifying this result. The Court found that the Authority did not reject the relevance of drive-away and its effect on the profitability of the Railways. The Authority did consider these factors and the evidence introduced in respect of them, but after subjecting Car Haulways’ evidence to critical examination he merely decided to give it no weight. This the Authority was entitled to do. The Court of Appeal concluded:⁴⁵ “So far from ignoring these factors, the Authority appears to have devoted considerable attention to such aspects and to have reached a definite conclusion thereon after a judicial appraisal of their importance.”

The *Car Haulways* case demonstrates: (1) that assessment of the same fundamental policy considerations can sometimes lead different courts to quite different conclusions as to the extent of judicial supervision appropriate in a particular case, and (2) that the extremely flexible nature of “relevance” as a ground of invalidity gives the courts great scope to give effect to their own policy decisions as to the desirability of judicial intervention.

4 *The requirement of causation—the error must influence the final decision*

In order to justify a finding that an official has exceeded his jurisdiction a sufficient link must be established between a proved substantive error and the decision under challenge. Where an irrelevant consideration or improper purpose was the sole reason for the decision this requirement poses no difficulty. But where the official’s motives were mixed—ie, the official took the action in question for a number of reasons, some relevant and proper for his consideration and others irrelevant and unauthorised—the reviewing court must determine whether the improper reasons had a sufficiently important influence on the final result to warrant quashing the decision. Different courts have used different terms to describe the extent to which a proved error of this kind must influence the decision in order to take the official outside his jurisdiction.⁴⁶ However the most sensible view is that the reviewing court should be satisfied that the irrelevant or improper reason was the dominant reason in the sense that but for it the decision probably would have

44 *Ib’id* at 339.

45 *Idem*.

46 See de Smith, *Judicial Review of Administrative Action* (3rd ed 1973) 287-290; Smillie, “Jurisdictional Review of Abuse of Discretionary Power” (1969)

47 *Can Bar Rev* 623, 634-635.

been different.⁴⁷ Occasionally it has been suggested that this requirement may provide the basis for a distinction between jurisdictional errors and errors of law within jurisdiction.⁴⁸ However this view cannot be supported. On many occasions the courts have made it clear that errors of law which exert no substantial influence on the final decision do not provide good grounds for the issue of certiorari even if they appear on the record of the decision.⁴⁹

This requirement of causation provides the courts with yet another device which can be used to justify policy decisions not to interfere with administrative action. This device is particularly useful where the court wishes to express its disapproval of the tribunal's reasoning on a particular point in order to provide guidance for future cases, but considers that the delay and expense involved in forcing reconsideration by the tribunal is not justified because the result would be the same.

In the case of procedural errors it is much more dangerous for the court to speculate about whether the final decision would have been different if the applicant had been afforded a full and fair hearing. Megarry J has observed:⁵⁰

As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

Although some courts have said that there is no breach of natural justice (ie, no error at all) if the court is satisfied that nothing that the aggrieved party could have said would have made any difference to the final result,⁵¹ the better view is that denial of a fair hearing always amounts to a jurisdictional error which provides grounds for certiorari.⁵² However, if the court is satisfied that the procedural irregularity made no difference to the final result and the applicant was not in fact prejudiced by it, it may be proper for the court to give weight to this fact when it considers whether to exercise its discretion to withhold the remedy sought.⁵³

5 *Exercise of the courts' discretion to withhold public law remedies*

The public law remedies are discretionary. Even where it is proved that a tribunal committed a jurisdictional error so that its decision is, in theory, ultra vires and void, the court still retains a discretion to refuse

47 This appears to be the most favoured judicial approach: see Wade, *Administrative Law* (4th ed 1977) 371-372; Smillie, *ibid* at 634-635. Cf de Smith, *ibid* at 298 who suggests that a less restrictive test (substantial cf dominant influence) may be applied where influence by irrelevant considerations is proved.

48 *Eg R v Paddington Valuation Officer, Ex p Peachey Property Corporation Ltd* [1966] 1 QB 380, 403; *Att-Gen v Car Haulways (NZ) Ltd* *supra* p 423 n 27.

49 See *supra* p 424 n 32.

50 *John v Rees* [1970] Ch 345, 402.

51 *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1595 per Lord Wilberforce; *Byrne v Kinematograph Renters Society Ltd* [1958] 1 WLR 162, 785; *Davis v Carew-Pole* [1956] 1 WLR 833, 840.

52 See *eg General Medical Council v Spackman* [1943] AC 627, 644-645 per Lord Wright; *Kanda v Government of Malaya* [1962] AC 322, 337; *Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945, 956; *John v Rees* *supra* n 50.

53 *Eg Glynn v Keele University* [1971] 1 WLR 487; *Wislang v Medical Practitioners' Disciplinary Committee* [1974] 1 NZLR 29; *Stininato v Auckland Boxing Association* [1978] 1 NZLR 1.

the applicant a remedy if it thinks fit. Where the court exercises its discretion to withhold a remedy the administrative decision will, in a practical public law sense at least, remain valid and binding.⁵⁴ This residual discretion provides the reviewing court with a further means by which it can give effect to a policy decision not to interfere with an administrative determination.

A number of broad considerations have been identified as being relevant to the exercise of the courts' discretion to withhold relief.⁵⁵

- (a) "The nature of the irregularity with particular reference to whether any different result would have been arrived at."⁵⁶

Where, particularly in the case of a breach of natural justice, the proved error is of a minor, technical nature and the court is satisfied that the irregularity made no difference to the final result, the court may properly exercise its discretion against the applicant.⁵⁷

- (b) The conduct of the applicant.

The court may exercise its discretion to withhold relief if the applicant's conduct is patently unmeritorious,⁵⁸ or if his own conduct contributed to the error,⁵⁹ or if the applicant is regarded as having "acquiesced in" or "impliedly waived" the error by participating in proceedings without raising or reserving the right to raise an objection to the jurisdiction of the tribunal of which he was aware at the time,⁶⁰ or if the applicant has been guilty of unreasonable delay in commencing review proceedings after he became aware that grounds for review existed.⁶¹

- (c) Existence and use of alternative remedies.

Here the fundamental question is "how satisfactory is the alternative remedy?" An aggrieved person is not normally required to pursue any rights of administrative review or appeal to the court before seeking a public law remedy from the High Court in the exercise of its inherent review jurisdiction. In most cases an application for review will provide the cheapest and most expeditious method of challenging the decision. However in some cases, particularly where a decision is challenged for

54 See generally Wade, *Administrative Law* (4th ed 1977) 300.

55 See the full discussion by Speight J in *Wislang v Medical Practitioners' Disciplinary Committee* [1974] 1 NZLR 29, 42-45. In *Reid v Rowley* [1977] 2 NZLR 472, 483 Cooke J, delivering the leading judgment, approved the approach of Speight J in *Wislang* while emphasising that the judge's list of relevant considerations should not be treated as exhaustive. See also *Hoffman-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, 320 per Lord Denning MR. See generally de Smith, supra n 46 at 372-377; Wade, supra n 54 at 560-561.

56 *Wislang* ibid at 42.

57 *Eg Wislang* ibid; *Stininato* supra n 53; *Glynn v Keele University* supra n 53; *Lamond v Barnett* [1964] NZLR 195. Cf *Reid v Rowley* supra n 55, where a serious breach of natural justice was proved and there was no substantial likelihood that the same decision would have been reached but for the error.

58 *Eg Fullbrook v Berkshire Magistrates' Courts Committee* (1970) 69 LGR 75. See also the cases cited by de Smith, supra n 46 at 374, n 84.

59 *Eg Wislang* supra n 55 at 43.

60 *Eg R v Williams, Ex p Phillips* [1914] 1 KB 608.

61 *Eg R v Aston University Senate, Ex p Roffey* [1969] 2 QB 538; *Turner v Allison* [1971] NZLR 833. See also the cases cited by de Smith, supra n 46 at 374, n 82.

breach of natural justice, no useful purpose will be served by quashing the decision and compelling a rehearing because it is certain that the unsuccessful party will then exercise his right to a full rehearing *de novo* before an appellate tribunal. In such a case, to compel the tribunal of first instance to rehear the matter simply results in unwarranted delay and expense. The court should refuse to quash the decision in the exercise of its discretion and leave the applicant to pursue his right of appeal.⁶²

Where an applicant for review has already appealed unsuccessfully from the decision under challenge the court may be more disposed to exercise its discretion against the applicant, particularly if he appealed without taking or reserving the point of which he now complains.⁶³ However the crucial question remains whether the appellate hearing afforded the applicant a full and fair opportunity to present his case. In deciding this question the court will consider a number of relevant factors: the nature of the proceedings,⁶⁴ whether the appeal was a general appeal on the merits or something less, whether there was any onus on the appellant to show that the decision appealed from was wrong, whether the appellate proceedings involved a full rehearing *de novo* with the right to introduce fresh evidence, whether any further right of appeal was available.⁶⁵

(d) Administrative expediency—the need for finality.

In many cases, the fact of delay in instituting review proceedings has been considered exclusively from the point of view of the applicant for relief. The court simply inquires whether the applicant was guilty of inexcusable or unreasonable delay in commencing review proceedings after he acquired knowledge of the error complained of.⁶⁶ It may be that in *Ostler's* case⁶⁷ the Court considered that there was no basis in principle for withholding a remedy in the exercise of discretion on the grounds of convenience and expediency when the delay was in no way due to the fault of the applicant.⁶⁸

However it is submitted that the exercise of the courts' discretion should not depend merely on whether the applicant acted unreasonably in "sitting on his rights". The effect of delay must also be considered from the point of view of other parties to the decision, and third parties with whom they have dealt in reliance on the validity of the decision. It has already been argued that where successful parties have acted reasonably in reliance on an administrative decision by incurring substantial expenditure and undertaking dealings with third parties whose rights have accrued, the public interest in preserving the finality of the decision

62 Cf *Anderton v Auckland City Council* [1978] 1 NZLR 657. But see *Town and Country Planning Act 1977*, s 166 (NZ).

63 See *Reid v Rowley* supra n 55 at 483.

64 See *Calvin v Carr* [1979] 2 WLR 755, 766, 769-770 (ie domestic or statutory).

65 See generally *Wislang* supra n 55 at 44, approved in *Reid v Rowley* supra n 55.

66 Eg *R v Sheward* (1880) 9 QBD 741; *R v Glamorgan Appeal Tribunal, Ex p Fricker* [1914] 33 TLR 152; *R v Stafford JJ, Ex p Stafford Corporation* [1940] 2 KB 33; *R v Aston University Senate, Ex p Roffey* supra n 61.

67 Supra n 6.

68 See eg *Bradbury v Enfield LBC* [1967] 1 WLR 1311, 1324 per Lord Denning MR: "Even if chaos should result, still the law must be obeyed. . . ." See also *R v Paddington Valuation Officer, Ex p Peachey Property Corporation Ltd* [1966] 1 QB 380, 418, 419.

may outweigh the competing interest in rigorous enforcement of the rule of law.⁶⁹ In particular, this may sometimes be the case where the decision is challenged on procedural grounds and there is no assurance that a full and fair hearing would have led to a different result. *Ostler* is a clear case of this kind. It has also been argued that it is better for a reviewing court to give effect to such an overriding interest in finality by exercising its discretion to withhold public law remedies, rather than by straining principle to justify a finding of no error or unreviewable error within jurisdiction. When the court recognises that the official was guilty of a jurisdictional error but refuses a remedy in the exercise of discretion the practical public law validity of the decision is preserved, but there is no risk of the court's decision giving rise to a *res judicata* which may estop the aggrieved party from challenging the validity of the administrative determination in a subsequent tort action for damages.⁷⁰

There are some recent indications that the courts may be moving towards this position. In *Turner v Allison*⁷¹ applicants for review of a planning decision did not commence review proceedings until nearly a year after they acquired all the material evidence of their allegation of bias. In the Supreme Court Wilson J held that this delay was excusable and not unreasonable, and exercised his discretion in favour of the applicants. The Court of Appeal held that Wilson J had exercised his discretion on wrong principles and vacated the order of certiorari. First, the Court held that the delay was inexcusable and unreasonable. Secondly, Wilson J had erred in considering the justification for the delay exclusively from the point of view of the applicants. Turner J declared:⁷² "He should have considered the matter from the point of view of the appellants, and have directed his mind to inquiring whether they had been led to alter their position to their detriment in reliance on the respondents' apparent acceptance of the Board's decision: and he did not." In fact the appellants had already undertaken considerable preparatory work for the development, had incurred considerable expense, and had entered into binding contracts with third parties in reliance on the decision.

It is instructive to compare *Turner v Allison* with the Court's exercise of discretion in *Reid v Rowley*.⁷³ The plaintiff had been found guilty of misconduct after a hearing before a sub-committee of the New Zealand Trotting Conference. The sub-committee had acted in breach of natural justice by considering a highly prejudicial report without disclosing it to the plaintiff for comment and rebuttal. The plaintiff had appealed from that decision, but after a full and fair hearing the appeal judges of the Conference dismissed his appeal. The existence of the undisclosed report did not come to the plaintiff's notice until after this appeal had been dismissed. However the plaintiff delayed commencing proceedings to challenge the Conference's decision until two years eight months after he first obtained knowledge of the report. Despite this long delay (fourteen months of which was completely inexcusable), and the lack of any complaint about the fairness of the appellate hearing, the Court of Appeal granted the remedies sought by the plaintiff. Although the Court agreed

69 See supra pp 440-443.

70 See supra p 443.

71 [1971] NZLR 833 (CA).

72 *Ib'd* at 854.

73 [1977] 2 NZLR 472.

that the long delay "told considerably against" the plaintiff, it emphasised that the Trotting Conference was in no way prejudiced by the delay while the plaintiff continued to be severely prejudiced by the decision.⁷⁴

The approach of the Court of Appeal in both *Turner v Allison and Reid v Rowley* is sensible and fair. The mere fact of delay, whether excusable or completely unjustifiable, should not determine the exercise of the courts' discretion. The crucial factor should be whether others have acted reasonably in taking action in reliance on the validity of the decision so that quashing the decision would result in substantial economic loss, administrative chaos or interference with accrued third party rights. Only in such a case should the public interest in finality override the interest in enforcing the rule of law.

VI SUMMARY AND CONCLUSION

It is submitted that the courts should adopt the proposition of Lord Denning in the *Pearlman* case and abandon the distinction between jurisdictional error and error within jurisdiction. In support of this proposition, the writer has sought to demonstrate that:

- 1 All existing attempts to provide a satisfactory conceptual basis for distinguishing jurisdictional errors from errors within jurisdiction have failed.
- 2 A distinction between jurisdictional and non-jurisdictional error is unnecessary. Abolition of the distinction would have little practical impact on the existing practice of Commonwealth courts in the exercise of their inherent powers of judicial review. The major obstacles to abolition are conceptual rather than practical, and these can be overcome by adoption of a realistic pragmatic approach to judicial review.
- 3 The distinction is undesirable because it tends to obscure and divert attention from the realities of judicial review.
- 4 Writers, counsel and judges should be concerned with identifying and assessing the policy considerations which should properly influence the willingness or reluctance of a judge to review and set aside a particular administrative decision, and with the nature and scope of the "avoidance devices" available to a judge to justify a policy decision not to intervene. The writer has attempted to deal with these issues in parts IV and V of this paper.

Editor's Postscript:

Since submitting this article for publication, the author has drawn attention to the decisions of the Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 3 WLR 318 and of the House of Lords in *Re Racal Communications Ltd* [1980] 3 WLR 181, which were handed down after the article was written. His lengthy postscript on these cases reached me too late for inclusion in this issue. However, readers will be interested in his concluding comment that the decisions "Serve to confirm the writer in his view that the only realistic and workable approach to the judicial review of decisions of both administrative decisions and inferior courts is that suggested by Lord Denning in *Pearlman*".

74 Ibid at 484 per Cooke J delivering the judgment of the Court on this point.