‘NO EVIDENCE’ AND ‘MISTAKE OF FACT’: A RECONSIDERATION

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I Introduction

With the advent of the separation of powers doctrine impliedly arising from the Commonwealth Constitution, it has become trite law that the federal judiciary may only exercise federal judicial power.[1] The implication is that the federal judiciary may not concern itself with the exercise of administrative power by the Executive branch of the Commonwealth and today this principle remains stalwart, ensuring the judiciary’s determinations of its own limitations accord with its constitutional foundations.

However, a need to ensure the Executive’s administration is not exercised arbitrarily but rather in accordance with the law prescribed by parliament has given rise to a corresponding need for judicial intervention. One ground for checking potentially capricious Executive activity originally derived from the common law and now also statutorily enacted, arises when the executive is considered to make a decision in the absence of evidence to support it. This ‘no evidence’ ground raises particular attention because its sole concern with the degree of evidence supporting a decision means that the ground reflects the extent to which the judiciary can classify otherwise legally correct and commonplace decisions as erroneous in law. In this way it also raises the issue of the extent to which the judiciary should intervene in a particularly acute form and in doing so exposes the tensions underlying a constitutional system of government premised on both a tripartite separation of powers doctrine and the principle that its people are to be ruled by legislation and not individual arbitrariness – an integral aspect of the rule of law.[2]

This paper explores the present limits to and problems with the ‘no evidence’ doctrine in Australia as it manifests itself in the form of both a lack of evidence ground (hereafter the ‘no evidence’ ground) and a ‘mistake of fact’ ground. This is the composition of Parts II, III and IV. Part V comprises an examination of the analogous provisions in domestic jurisdictions overseas for the purpose of considering whether alternative formulations of the ground could legitimately resolve any of the problems with Australia’s formulations. The final part returns us to the theoretical foundations for judicial review in Australia and re-examines the present grounds for both doctrines in this context and in light of the law overseas. It is concluded that the common law doctrine should be abrogated and that the two doctrines should instead be re-codified in the *Administrative Decisions (Judicial Review) 1977* (AD(JR)) Act with new formulations and as separate, distinct heads of review.

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II 'No evidence' and 'mistake of fact' at common law

A. The 'no evidence' doctrine

At common law, the leading High Court case on 'no evidence' in Australia is *Australian Broadcasting Tribunal v Bond*[3]. The facts are well known, but will be worth iterating here.

Bond held a shareholding in a company that conferred on him the capacity to determine the boards of directors of Bond Media Ltd. and several subsidiary companies possessing commercial licences under the *Broadcasting Act 1942* (Cth). Upon inquiring into certain transactions Bond was involved in through his subsidiaries, including the settling of a libel claim with the then Queensland Premier and an alleged threat made to an AMP Society executive, the Tribunal made five preliminary findings of fact from which it concluded that Bond was guilty of improper conduct and accordingly not a 'fit and proper person' to hold a broadcasting licence under the Act.

Bond sought judicial review for 'error of law' under s 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[4] in regard to *inter alia* the finding that the licensee companies were not fit and proper persons to hold licences. In this regard it was held that it was *not* the case that there was 'no probative evidence' or any other error of law in the tribunal's preliminary finding that Bond deliberately misled their 1986 inquiry.[5] In what has been considered the case's leading judgment,[6] Mason CJ (with whom Brennan J agreed) in this case accordingly concluded that the Federal Court erred in setting aside the Tribunal's decision that the licensees were relevantly unfit persons.

In reaching this conclusion Mason CJ observed that 'the making of findings and the drawing of inferences in the absence of evidence is an error of law',[7] however:

> at common law, according to Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.8

It is submitted that the degree of evidence Mason CJ specifies that a decision-maker is required to possess for his or her decision to avoid being considered an error of law is ambiguous in this passage. On one view, Mason CJ's assertion that 'want of logic is not synonymous with error of law' indicates that consideration of the decision-maker's reasoning ('logic') will not found an error of law, despite how implausible it is considered to be; it is only when there is a complete absence of evidence (facts) from which that reasoning proceeds that such an error exists.

Alternatively, Mason CJ's requirement there be '*some* basis' may suggest Mason CJ meant that there must be *more* than 'a little' or 'a scintilla' of evidence. Similarly, his reference to the requirement that the relevant inference must be '*reasonably* open' may suggest that he is stating that it is not enough if the inference proceeding from the evidence is merely open, it has to be *reasonably* open, even if there is 'some' evidence from which the inference could be drawn.

Nor is this ambiguity resolved by Mason CJ's reference to the need for there to be some 'probative evidence' before the decision-maker:

> In accordance with what I have already said, a finding of fact will then be reviewable on the ground that there is *no probative evidence* to support it and an inference will be reviewable on the ground that it was not *reasonably open* on the facts, which amounts to the same thing.[9]

Again it may seem to make sense to interpret 'probative' with some positive content for the alternative would treat the inclusion of 'probative' as meaning no more than evidence that 'tends to prove the existence or non-existence of some fact', therefore adding nothing to the meaning of 'evidence' which denotes this already.[10] Accordingly, 'probative evidence' would possess a higher probative value than mere evidence: it being only the existence of the former that suffices to avoid committing an error of law.

However the *Evidence Act 1995* (Cth) defines 'probative value' in neutral terms: 'probative value' is '*the extent* to which the evidence *could* rationally affect the assessment of the probability of the existence of a fact in issue'.[11] It accordingly says nothing about what that extent is or whether that extent is positive[12] and so 'probative evidence' indeed may be tautologous given the above definition of 'evidence'.[13]

Furthermore, the ground providing for review where an inference is not 'reasonably open' has been interpreted strictly so as to be equivalent to 'unreasonable' in the *Wednesbury* sense.[14] Such an interpretation would consistently also suggest a narrow reading of 'some basis' and 'no probative evidence'. With similar implications, the Full Federal Court has also cautioned against a liberal interpretation of the term 'reasonable', noting in adopting the words of Phillips JA in *Powley v Crimes Compensation Tribunal*[15] that the term may actually be distracting:

> The word 'reasonable' is used in this context, I suggest, just to emphasise that, when judging what was open and what was not open below, we are speaking of rational tribunals acting according to law, not irrational ones acting arbitrarily. The danger of using the word 'reasonably' lies in its being taken to suggest that a finding of fact may be overturned, on an appeal which is limited to the question of law, simply because that finding is regarded as 'unreasonable'. That is not the law as I understand it, at least in Australia.16

Given this authority and given Mason CJ expressly states that 'want of logic is not synonymous with error of law', it seems that if a narrower interpretation of the terms 'some basis' and 'probative evidence' is viable it should adopted.[17]

This view is also consistent with comments Mason CJ's has since made *ex curially* where it is clear that Mason CJ considers 'no evidence' to mean 'complete absence of' evidence in contradistinction to 'insufficient' evidence:

> Likewise, absence of evidence ('no evidence') to support a finding of fact either gives rise to a question of law or is reviewable as such on that specific ground. Insufficient evidence has not generally been recognised as a ground of review.[18]

It is submitted then that it is only when there is no basis at all for a particular finding or inference, because there is a complete absence of evidence that judicial intervention on the ground of 'no evidence' will arise according to Mason CJ.

As in Mason CJ's judgment, the immediate context of Deane J's use of the adjective 'probative' does little to identify whether his Honour intended the term to import some additional positive probative value to the 'material' that the finding must be supported by:

> It would be both surprising and illogical if such a duty [a duty of procedural fairness] involved mere surface formalities and left the decision-maker free to make a completely arbitrary decision. If the actual decision could be based on considerations which were irrelevant or irrational or on findings or inferences of fact which were *not supported by some probative material or logical grounds*, the common law's insistence upon observance of such a duty would represent a guarantee of little more than a potentially futile and misleading façade.[19]

However compared to Mason CJ, Deane J's interpretation of the requirement that there be some 'probative and relevant material' derives from the common law duty 'to act judicially' or

in accordance with 'procedural fairness' - a requirement, Deane J emphasises, that extends to a consideration of the 'substance as well as form' of the decision.[20] Moreover, Deane J's separate judgment is significant because it resembles his leading remarks in an earlier Federal Court case, *Minister for Immigration and Ethnic Affairs v Pochi*[21], where his Honour elaborated on the 'no evidence' ground:

> …any conduct alleged against Pochi which was relied upon as a basis for sustaining the deportation order should be established, on the balance of probability, to its satisfaction by some *rationally probative evidence* and not merely raised before it as a matter of suspicion or speculation or left, on the material before it, in the situation where the Tribunal considered that, *while the conduct may have occurred, it was unable to conclude that it was more likely than not that it had*.[22]

In stating that evidence relied on must be 'rationally probative' and not leave the tribunal in a situation where they could only conclude that a fact *may* have occurred Deane J's test assumes that certain evidence will *not* be said to give rise to some findings of fact. In turn, this means that certain types of reasoning on the basis of such evidence will be 'illogical' and reviewable, making it clear that his Honour is not merely concerned with whether there is *any* evidence present but also with the probative value arising from it in relation to the intended fact.

Despite Deane J's affirmation of this determination in *Bond*, Mason CJ expressly advises that this view, so far, has not been accepted.[23] The High Court has since had the opportunity to clarify the standard of the common law ground of 'illogicality' in *Re Minister for Immigration and Multicultural Affairs; ex parte Application S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs*[24] however the issue before the Court there was whether illogicality arose because of a failure to attribute weight to evidence supporting the contrary conclusion, not whether illogicality arose because of insufficient evidence to support the decision made. Accordingly, four justices did not consider the issue of the degree of evidence required in detail.[25] Furthermore Gleeson CJ seems to have affirmed both views:

> If, in a particular context, it is material to consider whether there has been an error of law, then it will not suffice to establish some faulty inference of fact: Bond per Mason at 356. On the other hand, where there is a duty to act judicially, a power must be exercised "according to law, and not humour"… and irrationality of the kind described by Deane J in Bond at 367 may involve non-compliance with the duty.[26]

Accordingly, as Jackson QC observes the law since *S20* still remains uncertain, at least at the High Court level.[27]

At the Full Federal Court level the law has been stated clearly. In a unanimous, but ultimately unpersuasive judgment in *Minister for Immigration and Multicultural Affairs v Epeabaka*[28] the Court reversed a decision by Finkelstein J in the Federal Court where his Honour followed the decisions of Brennan and Deane JJ in the two *Pochi* cases.[29] The Full Court[30] agreed with an earlier determination[31] that affirmed Mason CJ's reasoning in *Bond* rather than affirming 'what might be seen as the broader position articulated by Deane J in *Pochi* and relied upon by the learned primary Judge in this case…'.[32]

Their Honours also noted that although want of logic in drawing inferences will not of itself constitute an error of law, 'it may sound a warning note to put one on inquiry as to whether there was indeed any basis for the inference drawn.'[33] However the court did not explain why they disagreed with Finkelstein J's determination that Mason CJ in *Bond* did not go so far as to overrule *Pochi* nor did their Honours justify their authoritative regard for Mason CJ's judgment.

Nevertheless, since *Epeabaka* there has been a line of unanimous Full Federal Court authority citing their Honours' judgment as authority for the proposition that Mason CJ's judgment is correct and that illogicality in drawing an inference of fact will not of itself constitute an error of law.[34] Notably, in *NACB v Minister For Immigration & Multicultural & Indigenous Affairs*[35] the Full Court considered whether there was reason to determine the Full Court was 'clearly wrong' in this approach. Their Honours concluded after referring to *S20* that 'there is nothing in these remarks which would warrant a departure from the earlier line of decisions in this Court to the effect that illogical reasoning does not of itself constitute an error of law or jurisdictional error.'[36] Given it is likely the High Court will treat such a line of unanimous cases as at least persuasive it is submitted that regardless of the view one adopts such an outcome is unfortunate given the lack of explanation of the Court's preference of Mason CJ in *Bond* and *Bond* over *Pochi* in the initiating case of *Epeabaka*.

B. The 'mistake of fact' doctrine

As the doctrine of separation of powers limits the scope of judicial review to a review of the legality of executive decision-making and not its factual findings it is commonly cited that 'there is no reviewable error simply in making a wrong finding of fact'.[37] However where the decision-maker *based* his or her decision on an incorrect fact it has been held that a reviewable ground arises.[38] There is scant authority for the doctrine in Australia principally because the ground has been codified[39] and such mistakes of fact may arise in any event under the grounds of relevant consideration[40] and unreasonableness.[41]

III 'No evidence' and 'mistake of fact' under the AD(JR) Act

Two provisions relevantly arise under the AD(JR) Act potentially encapsulating the 'no evidence' and 'mistake of fact' doctrines. In s 5(1)(f) a person aggrieved by a proper decision may apply to the Federal Court for an order of review on the ground of 'error of law'.[42]

In contrast, s 5(1)(h) provides for review on the ground:

> (1)(h) that there was no evidence or other material to justify the making of the decision.

This provision is to be read in accordance with paragraph (3) of the same section:

> (3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
>
> (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which s/he was entitled to take notice) from which s/he could reasonably be satisfied that the matter was established; or
>
> (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.[43]

In *Bond*, Mason CJ advised that it had been accepted prior to the AD(JR) Act that 'the making of findings and the drawing of inferences in the absence of evidence is an error of law.'[44] Accordingly, his Honour reasoned that the strict common law interpretation of 'no evidence' arises in s 5(1)(f) and not s 5(1)(h)[45] and this, it is submitted, is a desirable interpretation given the inclusion of certain requirements in (1)(h) that are unfamiliar to the common law doctrine.[46]

In analysing s 5(1)(h) and 5(3) several issues arise, the most significant being whether applicants have the burden of proving (1)(h) in addition to either paragraph (a) or (b) in s 5(3). In *Bond* Mason CJ commented that '[t]he effect of s 5(3) is to limit severely the area of

operation of the ground of review in s 5(1)(h).'[47] As McHugh and Gaudron JJ note it is unclear what Mason CJ meant by this[48] and in any event Mason CJ's comments on s 5(1)(h) in *Bond* were *obiter dicta* as the applicants in that case relied on s 5(1)(f).

For this reason, the leading High Court judgments on ss 5(1)(h) and 5(3) derive from *Minister for Immigration and Multicultural Affairs v Rajamanikkam*[49] where the Court was required to interpret identical provisions in the Migration Act.[50] In *Rajamanikkam*, Gleeson CJ (with whom Callinan J agreed on this point[51]) observed:

> Black CJ [in *Curragh Qld Mining Ltd v Daniel*52] also pointed out, however, that it is not enough to satisfy the requirements of s 5(3)(b) alone, as to do so would ignore the language of the ground provided for by s 5(1)(h). In relation to the Act, it is s 476(1)(g) that provides the ground of review. That provision is qualified by s 476(4), but satisfaction of s 476(4)(a) or s 476(4)(b), while necessary, is not sufficient.53

In contrast, in their joint judgment McHugh and Gaudron JJ opined that the provisions in the Migration Act on this point could be distinguished from the provisions in the AD(JR) Act because the provision for 'error of law' in the Migration Act could not be expressed to include the common law doctrine of 'no evidence' as espoused by Mason CJ in *Bond*. The corollary for their Honours was that s 476(1)(e) (the 'error of law' provision) could not attribute meaning to s 476(1)(g) and it therefore need not be approached on the basis that it was 'limited' by the paragraphs in s 476(4). Accordingly, their Honours concluded:

> The better approach, in our view, is to treat the words of s 476(1)(g) as having introduced a new and discrete ground of review, with its precise content identified in s 476(4) of the Act.[54]

Kirby J's view has been subject to various interpretations on this point,[55] however at [110] his Honour's opinion is clear:

> Secondly, as I would read the interaction of s 476(1)(g) with s 476(4), *the latter is not a qualification of the application of the "primary" requirement for judicial review stated, as such, in s 476(1)(g), so much as a statement of the content of that application, that is, an exposition of the particular circumstances in which, for these statutory purposes, a "no evidence" ground is taken to apply*. Viewed in this light – which appears to be the way Mason CJ treated the AD(JR) Act equivalent ground in Bond – the statutory "no evidence" ground of judicial review is both wider and more specific than was the case with "no evidence" grounds for judicial review at common law. *This does not read s 476(1)(g) out of the Act. It simply gives that paragraph particular content.*[56]

From the segments emphasised, it appears clear that Kirby J adopted a view similar to McHugh and Gaudron JJ, accordingly forming a 3:2 majority in favour of a liberal interpretation of the provision.

However, in again a line of authorities in the Federal and full Federal Court the judiciary has proceeded by adopting a restrictive interpretation.[57]

It is nevertheless submitted that the more liberal interpretation is preferable. Aronson comments that if (1)(h) is to be proven in addition to either of paragraphs (a) and (b) then 'it would seem to be a pointless piece of drafting, because a literalist version of 'no evidence' would seem to be subsumed by s 5(1)(f)'s "error of law" ground.'[58] To the extent that (1)(h) provides for a strict ground of review it would seem this is correct. This is especially the case given that in *Re Minister For Immigration & Multicultural & Indigenous Affairs; Ex Parte Applicants S134/2002*[59] the High Court endorsed Kirby J's assertion in *Rajamanikkam* that the AD(JR)'s no evidence provisions were meant to expand the common law remedy of want of evidence;[60] this could not be the case if the standard in (1)(h) nevertheless *expressed* that strict common law standard *in addition* to requiring proof of either paragraph (3)(a) or (b).

With respect, however Aronson's view seems to overlook the possibility that s 5(1)(h) may, if required to be proven, demand a more liberal standard than its common law counterpart. As Aronson himself notes the phrase 'to justify' in (1)(h) may import a less rigid standard to the criterion.[61] Such an interpretation however raises it owns problems upon a closer analysis of the requirements of (3)(b).

For this provision, 'particular fact' is interpreted as meaning a fact 'critical to the making of the decision'[62] and will arise if it is but a 'small factual link in a chain of reasoning… and there are no parallel links.'[63] Accordingly, it is not just any fact that the decision will be based on that will give rise to proof of (3)(b), the fact has to be *critical* in the sense that it is a finding of fact 'without which the decision in question either could not or would not have been reached.'[64] When this is the case however it would already seem that by definition there could not then be 'sufficient evidence' to justify the decision. Proof of (1)(h) would be a corollary of proof of (3)(b), rendering the separate establishment of (1)(h) unnecessary even on the liberal interpretation.[65] Thus, the construction it is suggested that the High Court adopted in *Rajamanikkam* is not only consistent with the AD(JR) Act's intention to expand the common law ground but also makes sense of the provision given the stringent requirements of (3)(b).

In examining the content of (1)(h) as then exhaustively defined in s 5(3), it is to be noted that s 5(3)(a), is only satisfied in a case where the establishment of a particular fact 'is a precondition in law to the decision',[66] where a fact existing as only one of a number of factors that may be considered will not give rise to a 'necessary precondition'.[67] It is however unclear whether a complete absence of evidence of that particular matter is required or whether insufficient evidence of the matter will suffice.

In *obiter dictum* Mason CJ in *Bond* advised:

> Within the operation of par (a) it is enough to show an absence of evidence or material from which the decision–maker could reasonably be satisfied that the particular matter was established, *that being a lesser burden* than that of showing an absence of evidence (or material) to support the decision.[68]

It is uncertain from this in what way paragraph (a) exacts a lesser burden. It is possible it is a lesser burden to prove (a) than the common law test because 'no evidence' need only be shown in regards to the particular matter and not the decision as a whole.

Alternatively, or indeed additionally, it may impose a lesser burden because the actual standard requires 'sufficient' evidence of that particular matter rather than proof of a complete absence of evidence. In this regard it may be thought that firstly, if Mason CJ meant it was a lesser burden for both reasons one would think he would have expressly referred to this. Secondly, it may be thought that given Mason CJ expresses the strict common law test in similar language – 'that the particular inference is reasonably open' – his use of 'reasonableness' here may similarly be no more than a distraction as the court warned in *Epeabaka*. In any event the use of similar language suggests that for Mason CJ paragraph (a) does not exact a lesser burden by imposing a more liberal standard of 'no evidence'. Accordingly, it is submitted that his Honour meant it was a lesser burden because a complete absence of evidence need only be shown with respect to the relevant precondition.[69]

The content of paragraph (b) largely reflects the doctrine of 'mistake of fact' arising in the law overseas and slenderly authorised in Australian common law. As Wilcox J notes in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal*[70] the explanatory memorandum to the AD(JR) Bill states that:

> The inclusion of this ground as formulated may have the effect of widening the grounds on which the courts would grant relief in Australia. The formulation is intended to embody the reasons for decision of the House of Lords in the *Tameside* case.[71]

'Tameside' refers to *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*[72] wherein the Minister for Education purported to overrule the Tameside Council's decision to postpone changes to five grammar schools that would transform them into 'comprehensive' schools. Under s 68 of the Education Act the Minister could give directions to any local education authority if satisfied that they acted 'unreasonably' with respect to any power conferred on them.[73] The Minister thought that changes to the five schools had gone too far ahead to be reversed and to try to do so would create 'considerable difficulties'[74] – namely in selecting 240 pupils to attend the grammar schools. Accordingly, the issue before the House of Lords was whether the decision to postpone the changes was 'unreasonable', such that the Minister could be satisfied of this.

In considering this question Wilberforce LJ, in an oft-cited passage, laid down the basis for reviewing such a decision:

> If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge…[75]

Wilberforce LJ concluded that as several of the points made by the Minister in support of continuing with the changes were 'completely exploded',[76] the only possible remaining factual basis supporting the Minister's decision was the view that in the time remaining it would not be possible to select 240 students. In turn, the only possible factor preventing selection being possible would be the continuing non-compliance of a number of teachers' unions. In this regard however it was held that given the teachers are public servants and possess responsibilities to the children, it was unlikely that their unions would continue their non-compliance after their Lordships decision and accordingly, the Council's decision could not be said to be unreasonable.

If s 5(3)(b) *is* intended to embody the *ratio decidendi* in *Tameside* it may be used to shed light on a prevailing issue with the provision. Where a conclusion is not reached by progressing through a linear chain of facts, but is rather simply deduced from the existence of a combination of factors, *Rajamanikkam* is authority for the proposition that the lack of proof of two of eight factors will not necessarily mean that the decision is flawed for mistake of fact. There is however a compelling reason to consider otherwise. As Kirby J remarks in his dissenting judgment in that case to consider the remaining six factors as still providing a sufficient basis for the decision is to make a factual assessment, and this seems to be correct.[77] If this issue is considered in light of the reasoning in *Tameside* however it seems the majority's interpretation on this point in *Rajamanikkam* should prevail for it is clear from Wilberforce LJ's judgment in *Tameside* that where a decision is 'based on' several factors, proof of the lack of substance of some of those factors may not necessarily render the decision flawed.[78]

IV Critique

It can be seen from the foregoing review that the law on 'no evidence' and 'mistake of fact' in Australia raises a number of problems. The availability of both a common law and legislative provision for 'no evidence' means that applicants can establish there was 'no evidence' in one application and not in another. Furthermore, there are still fundamental problems involved in interpreting the AD(JR) provision. Both of these problems can be rectified by an

amendment to s 5(1)(h) and the abrogation of the common law grounds. However the fact that the common law ground was retained at all is evidence the law is uncertain of how to develop. The problem therefore remains as to whether in regards to the 'no evidence' doctrine a complete absence of evidence is preferable to a ground providing for a test of 'sufficient' or 'substantial' evidence.

V 'No evidence' and 'mistake of fact' overseas

A. England

In England there is authority for the 'no evidence' doctrine at common law, however the precise test remains uncertain. In the significant case of *Edwards (Inspector of Taxes) v Bairstow*[79] the proposition was established that an inference based on a complete absence of evidence will give rise to a misdirection in law. In *Edwards,* Radcliffe LJ opined:

> But, without any such misconception appearing ex facie, *it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal*. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law…80

Since *Edwards* it has appeared that the House of Lords have expanded this basis for intervening to one where they are presently willing to intervene where the relevant evidence alleged to be absent is not 'sufficient'.[81] In *Armah v Government of Ghana and Another*[82], Reid LJ in a 3:2 majority conducted an extensive review of the authorities in this regard before concluding: 'the court can and must interfere if there is insufficient evidence to satisfy the relevant test…'[83] While Reid LJ's determination is still to be followed in case law, *Armah* has been referred to as authority for this point in *Bond*[84] and the test of sufficient evidence has more recently been confirmed in the House of Lords.[85]

Moreover the proposition that the 'no evidence' doctrine arises from procedural fairness as determined in *R v Deputy Industrial Injuries Commissioner; ex p Moore*[86] has also more recently been affirmed by the House of Lords in *Mahon v Air New Zealand Ltd*[87]. In that case their Lordships also stated that decisions:

> must be based on *some material* that *tends logically to show the existence of facts* consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.88

As the phrase 'tends logically to show the existence of' is, like 'probative evidence', open to multiple interpretations it is considered here that this test is still open to a strict interpretation synonymous with that of the common law in Australia. However their Lordships application of the test suggests they intended it to require intervention even if there was *some* evidence for the relevant inference: in *Mahon* it was accepted that certain witnesses gave false testimony, however their Lordships determined that this finding could not give rise to the inference that there was a cover up.[89] Accordingly, whether or not the House of Lords goes on to consider 'no evidence' as deriving from the principles of procedural fairness, *Mahon* can also be taken as further authority for the separate existence of a 'no sufficient evidence' doctrine.[90]

Similarly, the doctrine of 'mistake of fact' has been slow to find influential judicial support despite its elucidation in *Tameside*. In part this is due to authority still maintaining that it is the duty of the court to leave decisions of fact to the relevant repository except where they are acting perversely.[91] It is however clear that the court will consider the relevant fact if it constitutes a condition precedent.[92]
It also seems clear as Bradley and Ewing observe[93] that with the advent of the *Human Rights Act 1998* the courts will have the authority to control essential findings of fact in

respect of tribunal decisions affecting civil rights.[94] Moreover in recent years the courts have accumulated ample authority for both the existence of the ground and for its authority as a separate head of review.[95] Indeed as Wade notes: '[the doctrine] is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy.'[96] The House of Lords have quoted this very passage[97] in *R v Criminal Injuries Compensation Board; ex parte A*[98] where Slynn LJ (with whom four members of the House of Lords agreed) determined that there was jurisdiction to quash the Board's decision on the ground of 'material error of fact',[99] but ultimately his Lordship preferred to decide the matter on the ground of procedural unfairness.[100] *CICB* has also relevantly been unanimously affirmed by the Court of Appeal in *E v Secretary of State for the Home Department*[101] where their Lordships also expressed their view of the content of the ground:

> Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake.102

Given such authority and the relevant literature that also supports the doctrine as an independent ground[103] it seems that if the ground does not exist yet, the law is certainly moving in that direction.

B. Canada

At the federal level in Canada the doctrine of 'no evidence' exists both at common law and statutorily. In the leading case of *Skogman v The Queen*[104], a 4:3 majority determined that the 'no evidence' doctrine requires that there be 'some evidence' on all points essential to making the relevant determination:

> [A] committal of an accused at a preliminary, in the absence of evidence on an essential ingredient in a charge, is a reviewable jurisdictional error. [105]

The Court however continued, the result in *Skogman* implying that this requirement will not be easily established:

> This evidence approaches the traditional expression "a scintilla of evidence" but falls short of what may be classified as fanciful. Consequently, there can be gleaned from the record 'some evidence' to support the action of committal.[106]

The common law in Canada has therefore adopted a threshold similar to the common law in Australia of absolutely no evidence.[107] However, as *Skogman* requires there be some evidence on 'all the essential elements'[108] relevant to the finding, ultimately the test will be more liberal than the present common law in Australia. Under *Skogman* applicants need only show that there was no evidence with respect to one essential point of the decision to succeed compared with an applicant in Australia who is required to show that there was no evidence for the whole decision. Accordingly, the test in *Skogman* is more similar to s 5(3)(a) of the AD(JR) Act as interpreted in this paper.[109]

Unlike in Australia, the federal statutory provisions in Canada have been interpreted, albeit at a provincial level, as going no further than what was permissible under the common law doctrine of 'no evidence'.[110]

Section 18.1(4) of the *Federal Court Act 1990* specifies that:

> The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal-
>
> …

> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;…

In *Kershaw (P.) v Canada*[111] the Court of Appeal followed the *ratio* of *Edwards*, concluding that where there is an absence of evidence to support a tribunal decision the Court may assume that the tribunal erred in law.[112] Thus, it would seem that s 18.1(4)(c) includes errors of the kind appearing in *Skogman*. In any event it has been noted that the grounds in s 18.1(4) overlap and that a decision based on a finding of fact that is not supported by any evidence is also liable to be set aside on the ground that it was without jurisdiction (s 18.1(4)(a)) or, possibly, in breach of the rules of natural justice (s 18.1(4)(b)).[113]

Section 18.1(4)(d) in contrast authorises review under what has been entitled here the doctrine of 'mistake of fact'. However, it has been cautioned that under s 18.1(4)(d) the Court cannot merely substitute its view of the facts for that of a board.[114] For this reason the finding of fact must be 'truly'[115] or 'palpably'[116] erroneous and be made capriciously or without regard to the evidence. Furthermore the decision must be *based* on the erroneous finding.[117]

C. The United States

The law in the United States is derived from the *Federal Administrative Procedures Act* (APA). Provision 5 USCS §706 states:

> To the extent necessary to decision and when presented [sic], the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-
>
> (1)…
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> …
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or…

Grounds (2)(A) and (2)(E) are closely related, though treated separately. The standard of 'arbitrary' or 'capricious' in (2)(A) requires that the relevant agency's decision have a 'rational basis in law'.[118] To uphold agency action, the court must ensure that the agency has demonstrated a 'rational connection between facts found and choice made'.[119] It therefore seems that this ground encompasses the 'no evidence' doctrine for whether there is a rational connection between the facts found and the relevant decision depends on the existence of the relevant facts (i.e. evidence) for that decision. Indeed to an extent the US judiciary have embraced this approach: the ground arises where 'an agency's explanation for its decision runs counter to evidence before the agency'.[120] This however in itself seems to prescribe a more difficult standard to establish compared to the common law 'no evidence' doctrine in Australia for it requires positive evidence against the decision-maker's explanation for their decision.

However, it has been held that the 'abuse of discretion' standard expressed in (2)(A) will be found 'only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law'.[121] Moreover, in this context the term 'no evidence' 'cannot be interpreted to mean "any" evidence no matter how little.'[122] Rather, if there is not some 'reliable evidence' an abuse of discretion will arise.[123] Thus it seems that quite apart

from (2)(E) there is a ground of review available at least where the applicant can show that there is less than some 'reliable evidence', available for the relevant decision.

It also appears that (2)(A) provides a ground of relief for a doctrine similar to that of 'mistake of fact'. It has been determined that an agency will be considered to have acted arbitrarily and capriciously if it has 'entirely failed to consider an important aspect of the problem'[124] or where there is a 'clear error in judgment'.[125] In this regard however it is again commonly cautioned that courts may not substitute their judgment for that of an agency rather the 'Court's inquiry must be searching and careful, especially in highly technical cases'[126] and that the scope of review under arbitrary and capricious standard of 5 USCS § 706 is 'narrow' and to be 'deferential.'[127] The corollary has been that something more than mere error is necessary to meet the test of arbitrary and capricious.[128]

The ground in (2)(A) then contrasts with (2)(E) in a number of significant ways. Firstly, (2)(E) only applies to cases subject to ss 556 and 557, ultimately cases subject to formal proceedings.[129] However, in *Citizens to Preserve Overton Park, Inc. v Volpe*[130] a decision in a hearing determined by the Court to be 'nonadjudicatory' and 'not designed to produce a record' was still required to conform to the standard prescribed by s 706(2)(A).[131] Accordingly, decisions made in informal proceedings and proceedings without a hearing are still required to be based on some 'reliable evidence' and to avoid 'clear errors in judgment'.

Secondly, judicial inquiry on the ground in (2)(E) is limited to determining whether such findings are supported by 'substantial evidence'.[132] The meaning of this standard has since been clarified in its interpretation under the APA as meaning 'something between the weight of the evidence and a mere scintilla'[133] and something more than 'hearsay alone, or… hearsay corroborated by a mere scintilla.'[134] However before the APA it was relevantly interpreted to mean 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'[135] and this interpretation has also remained authoritative.[136]

As Schwartz notes,[137] this latter interpretation led to a test of 'reasonableness':

> The finding will be based on substantial evidence when having considered the evidence reflected on the record as a whole an inference of the existence of the fact may be drawn reasonably.[138]

Furthermore the possibility of drawing two inconsistent conclusions from the evidence will not preclude one such conclusion from being drawn 'reasonably'.[139] Despite this, it is still said that the court is only concerned with whether there is evidence to support the finding and not with the weight to be attributed to it.[140] The courts stress that they are only concerned with the *reasonableness* of the decision and not with the *rightness* of the decision, thus leaving room for a difference in opinion.[141] However, in interpreting whether or not a reasonable inference can be drawn from the evidence the courts must firstly *weigh* the evidence to determine that it amounts to more than a 'scintilla' and the reason this is typically left to the executive is because ascertaining the quality of the facts is tantamount, if not identical to, fact-finding itself. Indeed it is *a fortiori* in the US where determining whether there is substantial evidence or not for a decision, requires not only evaluating the evidence in favour of the finding to see if it is 'substantial' but also in evaluating that evidence that is unfavourable to see if it sufficiently detracts from the weight of the evidence.[142] Thus, it is submitted that just because the judiciary's consideration of the evidence leaves room for opinions to differ on the relevant conclusions to be drawn from it does not mean that they have not exercised a function typically reserved for the administration.[143]

VI On limiting the scope of 'no evidence' and 'mistake of fact'

At the outset it was determined that the judiciary could not engage in administrative functions in Australia without infringing the principle in *Boilermakers*: a principle which Mason CJ has since advised seems 'to be set in concrete.'[144]

Indeed there are other good reasons the judiciary should refrain from engaging in the fact-finding process:

- Firstly, insofar as the executive is concerned, it has been observed that extensive judicial review or the demand of exactitude would reduce the efficiency of government.[145]

- Secondly, as Bennett QC notes, some executive decisions go beyond a consideration of the interests of the immediate parties concerned to policy decisions.[146] Given that the executive is ultimately responsible to parliament they are more suitable than the judiciary to make such determinations.

- Thirdly, tribunals often possess an expertise and experience in their defined field when assessing issues of credibility, reliability and the technicality of evidence during the fact-finding process that is not to be equated with the lay opinion of a jury.[147] The courts should accordingly be more wary for this reason of intervening in findings of fact.[148]

- Fourthly, the preservation of the role of fact-finding for the executive gives effect to the doctrines of representative and responsible government as it allows the government to live up to its mandate.

- Also, insofar as the judiciary is concerned, as Mullan notes, by refusing to concern itself with fact-finding, the judiciary avoids subjecting its scarce resources to matters of comparatively small significance thereby also preserving the integrity of the judicial process.[149]

- Finally, such a refusal also preserves the judiciary's integrity by ensuring the judiciary does not engage in political decisions that may give rise to an apprehension of bias.[150]

The foregoing considerations in addition to the doctrine of separation of powers have accordingly led to a distinction being drawn between the legality and the merits of proceedings:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone. [151]

As Bennett QC notes however, while the law in this regard is commonly cited the distinction it forms is not easily observed.[152] This is because the nature of the judicial process and administrative decision-making is one in which the relevancy of the facts to be found is determined by the law; the two are inextricably linked. To assist the court for this reason a general distinction is drawn between primary and secondary facts. As Denning LJ asserts:

> Primary facts are facts which are observed by witnesses and proved by oral testimony, or facts proved by the production of a thing itself, such as an original document. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them.[153]

The inferences deduced from reasoning from primary facts are accordingly considered 'secondary' facts. Thus, for example, in *Bond* it will be recalled the Tribunal made five preliminary findings of fact in relation to the evidence adduced, including that Mr Bond deliberately gave misleading evidence to the Tribunal in an earlier inquiry. This finding would be a finding of primary fact, while the inference from this and the other preliminary findings - that Bond was guilty of improper conduct - and the further inference that he was accordingly not a fit and proper person, would be findings of secondary fact.

The problem with classifying certain findings as giving rise to either errors of law or fact can therefore be seen in regard to secondary findings. While these findings of fact are found (or inferred) - that Bond was not a 'fit and proper person' – they are only inferred because the relevant law requires there be a 'fit and proper person'. Accordingly such findings are also on one view conclusions of law: a view that has provoked disagreement as to whether this should be the case.[154]

However the difficulty of determining whether such findings should amount to an error of law or not is a concern beyond the scope of this paper and the more relevant question of whether two specific grounds of review should be available can be considered instead.

A. 'Mistake of fact' reconsidered

There is authority for the 'mistake of fact' doctrine in all the jurisdictions considered so far. It is expressly appreciated in Canadian legislation and similarly interpreted into the standard of 'arbitrary, capricious or abuse of discretion,' in the US. It has developed more tentatively in England and indeed in New Zealand,[155] no doubt because of a concern for the doctrine of separation of powers. However, as Brennan J notes, review of the fact-finding procedure is permitted contrary to the separation of powers doctrine in relation to assessing whether the decision is unreasonable.[156] Moreover it can be seen that the other reasons for limiting the scope of review noted above are less convincing in light of a consideration of the purported elements of the doctrine and indeed regardless of whether the finding is primary or secondary.

Firstly, in regard to the executive, deferring to the decision-maker's determination because of their relative experience and expertise becomes irrelevant because the mistake has been proven. Moreover, the concerns for the judiciary interfering with the ideal of a representative and responsible government and executive policy development do not arise because the decision-maker's determination is based on different findings of fact. The efficiency of government would still be impeded but this is controlled: the consensus in the jurisdictions considered limits reviewable findings to those that are in some way 'critical' to the decision.[157]

Insofar as the judiciary is concerned, there is less reason for being concerned that the matter will be of small significance because the doctrine requires positive proof of a mistake so it will therefore be clear that there has been an error. Due to the same requirement, public confidence in the judicial system would hardly diminish if the judiciary intervened and remitted the matter back to the decision-maker to re-determine the case without making the same mistake. Indeed public confidence could diminish in certain cases if the judiciary declared it *did not* have the power to rectify factual errors.

Accordingly, it is submitted that where the mistake is proven and critical the judiciary should intervene even if the error is considered to be one of fact and even if intervention would be considered to encroach upon the ground of the executive.

B. 'No evidence' reconsidered

The doctrine of 'no evidence' also arises in some form in the jurisdictions considered. In England there is authority for a doctrine of 'sufficient evidence' which may resemble the ground enacted in the APA in the US that requires the decision-maker's conclusions be supported by 'substantial evidence' for formal hearings. Conversely, in New Zealand a strict interpretation of *Mahon* was adopted in *Isaac v Minister of Consumer Affairs*[158] and so only a complete absence of evidence will suffice to establish a ground of judicial review as is similarly the case in Canada. The problem with determining that anything more than 'some' evidence is required was considered in respect of the US approach where it was concluded that such a ground fails insofar as it purports to consistently maintain that it is not for the judiciary to weigh the evidence. Those considerations are reinforced in regard to findings of primary fact.

> The decision-maker will usually have advantages over the reviewing judge in evaluating evidence and submissions. Those advantages will include the conventional ones of seeing any parties and witnesses who are heard and having time to reflect upon all of the material.[159]

These advantages apply *a fortiori* to expert tribunals and cannot accordingly be transferred to a court conducting judicial review by recourse to transcripts of the evidence.

Thus, in regard to findings corresponding to evidence proven by oral testimony it is inappropriate for the judiciary to attempt to weigh the evidence to any extent and accordingly inappropriate to allow review where the decision-maker's conclusions are based on at least some evidence. The only appropriate ground for intervention would accordingly be where there is a complete absence of evidence, as Denning LJ concluded above. While such occurrences will likely be rare: 'only when it appears that no witness whatever has said a thing… will it fall to be discussed',[160] it is submitted it is preferable to limit the scope of intervention in this way to avoid the courts weighing evidence they did not have the privilege nor the same experience in witnessing themselves.

Compared to primary findings, findings of secondary fact are not concerned with issues of credibility but rather more concerned with a process of reasoning from primary findings: a process therefore more akin to the functions of the judiciary.[161] As with the doctrine of 'mistake of fact' however the clear deterrent of the 'insufficient evidence' doctrine is a concern for infringing the doctrine of separation of powers by engaging in a process of weighing up whether there is more than 'some' evidence available.[162] The strict standards of 'absolutely no evidence' under the common law and in s 5(3)(a) of the AD(JR) Act also reflect this concern. It is however submitted that this concern *alone* is uncompelling. An infringement of the doctrine is already built into the Westminster system of government, by the executive being a part of the legislature[163] and it is clear that the courts are willing to find or imply there is an error of law for fact-finding in other circumstances.[164] Moreover, the doctrine of 'substantial evidence' has been operating in the US since 1912 without an attenuating amendment[165] and so it would seem that instead of blindly adhering to the separation of powers doctrine, the other policy considerations favouring the maintenance of the executive's independence should be evaluated as well.

In regards to the Executive, it has firstly already been noted that the decision-maker's relative expertise and experience is of less relevance to findings of secondary fact. Indeed as Blackwell observes, a more general expertise and further detachment from the type of cases the decision-maker is used to considering can be more beneficial.[166] This it is submitted would be especially so when it comes to reviewing secondary inferences that rely more on skills of reasoning than evaluations of evidence.

Secondly, while judicial intervention may interfere with the government's capacity to be properly representative and responsible, in regard to secondary inferences, the argument is again less convincing. It may not, for example, necessarily be assumed that the public intended that inferences drawn on an insubstantial or insufficient primary fact basis could be so 'representative'.

Thirdly, it is arguable that for the very reason that the Executive may use individual cases as a basis for policy development it is preferable that this is grounded in a basis of substantial evidence rather than in a scintilla of it. By doing so it protects both the individuals concerned to the case and those ultimately affected by the policy.

Insofar as the judiciary is concerned, as long as it confines its remarks and evaluation to one concerned with weighing up whether there is more than a scintilla of evidence available for the purportedly erroneous inference it would seem the court could remain apolitical. Finally, while it may be regarded by some that the court would be engaging in cases that were comparatively small, this would be a matter of perception. Indeed it may in any event be preferable for the courts to have the power to intervene, so that where the stakes were high, as for example in the issuing of protection visas, the judiciary could, upon application, analyse the relevant inferences being drawn.

On this analysis a concern for impeding the efficiency of government would still arise as it always will when it is contended that a ground of judicial review needs expanding. Ultimately however if the field of primary findings is already exclusively assigned to the Executive, then the real basis for checking the capriciousness of government activity is in the realm of secondary findings. The problem with a test demanding no more than 'some' evidence for a relevant inference is that 'some' evidence can almost always be found to support a decision, as both Joseph and Schwartz argue.[167] This is especially so given that as Radcliffe LJ noted in *Edwards*: 'many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur'.[168]

Accordingly, it is submitted that as most cases of an erroneous fact-finding will arise where there are nevertheless (neutral) facts that could be interpreted to give rise to a scintilla of evidence, the threshold should concern itself with ensuring that there is at least *more* than a scintilla of that evidence available.

VII Conclusions

The separation of powers doctrine is a bulwark of constitutional law and one of the 'twin pillars'[169] of judicial review. However the error of law and fact distinction that has traditionally followed from it fails to clearly demarcate the scope of judicial review. Indeed even if the 'mistake of fact' and 'no evidence' doctrines were considered to transgress the principle, it is a principle derived from a Constitution that expressly transgresses it as well and so it cannot be seen as absolute. In this context it can be seen that other policy reasons for justifying a conformation with the law and fact distinction are also diminished in light of objective proof of mistakes of fact and in light of the process of determining secondary inferences.

The distinction accordingly drawn between primary and secondary facts is not uncommon in the literature,[170] but it fails to be expressly enacted in legislation in Australia and overseas. This may be because the distinction itself is too technical, yet it is a distinction that has been employed at common law in Australia in *Bond*,[171] and in Canada,[172] and indeed the case law in England has gone further and distinguished between different types of secondary findings for the purpose of determining whether an 'error of law' in general has arisen.[173]

Given these considerations a revised provision for 'no evidence' and 'mistake of fact' can be submitted:

S 5(1) A person who is aggrieved by a decision… may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision on any one or more of the following grounds:

…

(h) that in relation to:

(i) primary findings of fact there was a complete absence of evidence and other material to justify the making of the decision.

(ii) secondary findings of fact there was not substantial evidence or other material to justify the making of the decision.

(i) that the person who made the decision based the decision on the existence of a particular and critical fact that has been proven not to exist and in circumstances where it was not the applicant who caused the decision-maker's mistake as to that fact.

…

s 5(3) For the purposes of s 5(1)(h) and s 5(3):

(a) 'primary findings of fact' means findings determining the existence or non-existence of a fact in relation to oral evidence.

(b) 'secondary findings of fact' means findings drawn on the basis of primary or secondary findings of fact.

(c) 'substantial evidence' means any evidence of greater probative value than a scintilla of evidence.

(d) 'probative value' has that definition assigned to it in the Evidence Act 1995 (Cth).

Endnotes

1 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; (1956) ALR 163 ('Boilermakers').
2 Dicey, A.V. *Introduction to the Study of the Law of the Constitution* (8th ed. London: Macmillan, 1959) at 183-84; Mason, Sir A. 'The Tension Between Legislative Supremacy and Judicial Review' (2003) 77 *Australian Law Journal* 803 at 805.
3 (1990) 170 CLR 321; (1990) 94 ALR 11 ('Bond').
4 Hereafter the 'AD(JR) Act'.
5 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 364; (1990) 94 ALR 11 at 44.
6 See *Minister for Immigration and Multicultural Affairs v Epeabaka (1999) 84 FCR 411* at [22] and [23].
7 That the making of findings and drawing of inferences amount to an error of law is in fact controversial as discussed in Part VI, but for present purposes it will suffice to indicate that as an 'error of law' such findings and inferences will fall within the province of the judiciary and be capable of review if also within the court's jurisdiction.
8 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356; (1990) 94 ALR 11 at 38 (emphasis added).
9 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 359-60; (1990) 94 ALR 11 at 40 (emphasis added).
10 Martin, E.A. & Law, J. (eds.) *Oxford Dictionary of Law* (6th ed. Oxford: Oxford University Press, 2006) at 205.
11 *Evidence Act 1995* (Cth) Schedule: Dictionary (emphasis added). See also Garner, B.A. (Chief ed.) *Black's Law Dictionary* (8th ed. US: Thomson West, 2004), at 1240 and Nygh, P.E & Butt, P. (eds), *Butterworths Concise Australian Legal Dictionary* (Butterworths: 1998) at 350 for similar neutral definitions.
12 Indeed Garner's definition: 'tending to prove or disprove' accordingly admits the possibility that 'probative' evidence may disprove the alleged fact. Garner, B.A. (Chief ed.) *Black's Law Dictionary* (8th ed. US: Thomson West, 2004), at 1240.
13 Creyke, R. also makes this point: 'the adjective "probative" is superficially appealing, because it means "affording proof".' See Creyke, R., McMillan J. & Reynolds, R. *Control of Government Action: Text, cases and commentary* (Sydney: Butterworths, 2005) at 675.
14 *Nuchapohn Detsongiarus v Minister for Immigration, Local Government and Ethnic Affairs* (unreported, delivered 19 September 1990 SCACT per Pincus J).
15 (1996) 11 VAR 146.
16 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at [24].
17 Cf. Bayne who suggests that Mason CJ equates the 'no probative evidence' test with a 'no sufficient evidence' test where Mason CJ states: 'It remains to be seen whether these statements [statements

supporting a no 'sufficient evidence' test] convey any more than a "no probative evidence" test' (at (1990) 170 CLR 321 at 356; (1990) 94 ALR 11 at 38). In this regard it is submitted that in this quoted passage Mason CJ is not equating the two for the purposes of his judgment in *Bond*, but merely noting the possibility that those 'no sufficient evidence' statements may not possess their perceived meaning in the judgments they are stated in. Thus in both contexts the 'no probative evidence' test remains for Mason CJ a test of whether there is a complete absence of evidence or material supporting a specified decision. See Bayne, P. 'Administrative Law: Judicial review of questions of fact' (1992) 66 *The Australian Law Journal* 96 at 96.

18 Mason, A. 'Lecture 2: The Scope of Judicial Review', *AIAL Forum* (31) Nov. (2001) 21 at 32.

19 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366; (1990) 94 ALR 11 at 46 (emphasis added).

20 Ibid (1990) 170 CLR 321 at 368; (1990) 94 ALR 11 at 47.

21 (1980) 44 FLR 41 at 67; 31 ALR 666 at 689 ('Pochi').

22 Ibid (1980) 44 FLR 41 at 62 (emphasis added).

23 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357; (1990) 94 ALR 11 at 38.

24 (2003) 198 ALR 59 ('S20').

25 McHugh and Gummow JJ merely state that the R.R.T.'s decision was not illogical or irrational without specifying the relevant standard of evidence required to avoid illogicality. Kirby J similarly affirms the doctrine of illogicality without elaborating on the specific test to be applied. Callinan J agreed with McHugh and Gummow JJ. Cf. Gillard J 'the law has moved on since 1990. The High Court in [S20] considered the question and four of the five judges held that extreme irrationality or illogicality in a decision maker's fact finding process can amount to a jurisdictional error' *Byrne v Law Institute of Victoria* [2005] VSC 50 at [81]. Indeed his Honour in that case concludes that despite the existence of some evidence for the inference that there was no costs agreement, the L.I.V.'s reasoning process leading to this conclusion was illogical.

26 Ibid at [9].

27 Jackson QC, D.F. 'Development of Judicial Review in Australia Over the Last 10 Years: The Growth of the Constitutional Writs' (2004) 12 *Australian Journal of Administrative Law* 22 at 29.

28 (1999) 84 FCR 411.

29 *Re Pochi & Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482; (1979) 26 ALR 247; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41.

30 Black, von Doussa and Carr JJ.

31 per Batt J in *Roads Corporation v Dacakis* [1995] 2 VR 508.

32 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at [23].

33 Ibid at [26]. See also *R v Board of Stevedoring; Ex parte Melbourne Stevedoring Pty Ltd* (1953) 88 CLR 100 at 120.

34 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 per Heerey, Goldberg & Weinberg JJ*; Wade of 2001 v Minister for Immigration & Multicultural Affairs* (2002) FFC per Branson, Goldberg and Allsop JJ; *Gamaethige v Minister for Immigration & Multicultural Affairs* (2001) 109 FCR 424 per Hill, Finkelstein and Stone JJ; *WAJW v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 330 per Nicholson, Jacobson and Bennett JJ. See also *Lark v Nolan* [2006] TASSC 12 and *Gombac Group Pty Ltd v Vero Insurance Ltd.* [2005] VSC 442.

35 [2003] FCAFC 235.

36 Ibid at [29].

37 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J; affirmed in *Bond* per Mason CJ: (1990) 170 CLR 321 at 356; (1990) 94 ALR 11 at 38.

38 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; Affirmed in *Barbaro v Minister for Immigration and Ethnic Affairs* (1982) 71 FLR 198 at 201; (1982) 46 ALR 123 at 127 per Smithers J.

39 See Part III ''No Evidence' and 'Mistake of Fact' under the AD(JR) Act'.

40 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24; 66 ALR 299.

41 See Mason, Sir A. 'Lecture 2: The Scope of Judicial Review', *AIAL Forum* (31) November 2001: 21 at 29: 'It is legitimate, in demonstrating unreasonableness, to show that a material fact has been wrongly found.' On this point see also: Griffiths SC J. 'Commentary on Professor Aronson's article "Is the ADJR Act hampering the development of Australian administrative law?" (2005) 12(2) *Australian Journal of Administrative Law* 98 at 99 and McMillan, J. 'Developments under the ADJR Act: The Grounds of Review' [1991] 20 *Federal Law Review* 50 at 60 where the author contends that the mistake of fact doctrine should be incorporated into the ground of 'unreasonableness' to confine its application to exceptional cases.

42 AD(JR) Act s5(1)(f).

43 AD(JR) Act ss5(1)(h) and 5(3). See also s6(1)(h) and 6(3). Similar provisions appear in the Judicial Review Act 2000 (Tas), ss17(2)(h) and 21; AD(JR) Act 1989 (ACT) ss5(1)(h), 5(3); Judicial Review Act 1991 (Qld) ss20(2)(h), 24.

44 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-6; (1990) 94 ALR 11 at 37-8.

45 Ibid (1990) 170 CLR 321 at 358; (1990) 94 ALR 11 at 39.

46 That (1)(h) provides a ground of review that differs from the common law ground of 'no evidence' was also recently affirmed by the ARC Report No. 47 (April, 2006) at 13. It is to be noted however that there is a second school of thought that reasons that an allowance for review on the ground of 'no evidence' under (1)(f) would render s 5(3) superfluous (*Western Television Ltd. v Australian Broadcasting Tribunal* (1986) 69

ALR 465 at 479). This is supported by Mason CJ's opinion that the specific heads of review in s 5(1) should be read in the context of the others and not as free-standing grounds (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358; (1990) 94 ALR 11 at 39). However given that s 5(3) demands certain requirements that are unfamiliar to the common law doctrine it would seem that s 5(3) could only be superfluous if the very same common law test overshadowed s 5(3), as possibly in (1)(h). This however as will be demonstrated is ultimately an implausible interpretation of (1)(h). See below at pp 11-12.

47 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357; (1990) 94 ALR 11 at 39.

48 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [51] ('Rajamanikkam').

49 (2002) 210 CLR 222.

50 Note, these were considered analogously applicable to the AD(JR) provisions: *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [34] per Gleeson CJ; at [53] per McHugh and Gaudron JJ.

51 Ibid at [151].

52 (1992) 34 FCR 212. *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [34]

54 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [53]-[54].

55 *NALF of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 348; Aronson, M., Dyer, B., & Groves, M. *Judicial Review of Administrative Action* (3rd ed. NSW: Lawbook Co., 2004) cf. *VAAW of 2001 v Minister of Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 202; *SGFB v Minister For Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 422 ('SGFB').

56 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [110]-[111] (emphasis added).

57 *Dunstan v Human Rights and Equal Opportunity Commission (No 2)* [2005] FCA 1885; *MLC Investments Ltd v Commissioner of Taxation* (2003) 137 FCR 288; (2003) 205 ALR 207 per Lindgren J; *VAAW of 2001 v Minister of Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 202 (unanimous per Spender, Tamberlin and Kenny JJ); *SGFB v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 422 (unanimous per von Doussa, O'Loughlin and Selway JJ). Unfortunately space restrictions prevent the inclusion of an analysis of the two Full Federal Court interpretations here. Suffice it to say that in regards to *VAAW* the Full Court's emphasis at [36]-[37] on Kirby J's statement, as evidence for the need to separately consider (1)(h), omits the significance of 'that is', in the emphasised section, as expressing an identity relationship rather than being used as a coordinating conjunction and as an identity relationship it does not expressly incorporate the requirement for proof of (1)(h). In regards to *SGFB*, the inconsistency alleged to arise from Kirby J's caution against engaging in 'merits review' and Kirby J's former paragraph cited above dissipates once it is seen that Kirby J was referring to 'merits' in the sense of reviewing a critical fact rather than the decision as a whole. It then becomes clear that his Honour meant that review via par (b) does not amount to merits review because the court is not substituting its decision for that of the decision-maker – but rather setting it aside to refer to the decision-maker to make the 'true decision', as his Honour goes on to say in that passage. See *SGFB* at [20].

58 Aronson, M., Dyer, B., & Groves, M. *Judicial Review of Administrative Action* (3rd ed. NSW: Lawbook Co., 2004) at 241.

59 (2003) 211 CLR 441; (2003) 195 ALR 1.

60 Ibid per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ (2003) 211 CLR 441 at [36]; (2003) 195 ALR 1 at [36].

61 Aronson, M., Dyer, B., & Groves, M. *Judicial Review of Administrative Action* (3rd ed. NSW: Lawbook Co., 2004) at 241.

62 per Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357-8; (1990) 94 ALR 11 at 39 unanimously affirmed by the High Court in *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222; (2002) 190 ALR 402.

63 *Curragh Qld Mining Ltd v Daniel* (1992) 34 FCR 212; 27 ALD 181 at 188.

64 per Gaudron and McHugh JJ in *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222; (2002) 190 ALR 402 at [56].

65 Similarly, the Supreme Court of Canada has ruled that if there is no evidence of an essential element of an alleged crime there could not be 'sufficient evidence' of that crime either. *Skogman v The Queen* [1984] 2 S.C.R. 93.

66 Television Capricornia Pty. Ltd. v Australian Broadcasting Tribunal (1986) 13 FCR 11; (1986) 70 ALR 147 at 151 per Wilcox J.

67 Ibid (1986) 70 ALR 147 at 155; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [577].

68 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358; 94 ALR 11 at 39 (emphasis added).

69 See Jones, T.H. & Thomas, R., 'The 'No Evidence' Doctrine and the Limits to Judicial Review', *Griffith Law Review* 8(1) (1999) 102 at 114-5 where the authors contend that the it is difficult to classify paragraph (a) as either expansive or limiting in relation to the common law test. On this analysis it is both expansive and limiting: it is expansive insofar as 'no evidence' need only be shown with respect to a particular matter and not the decision as a whole, and limiting insofar as the decision must require that the particular matter be established as a precondition in law.

70 (1986) 13 FCR 511; (1986) 70 ALR 147.
71 Ibid (1986) 13 FCR 511 at 520; (1986) 70 ALR 147 at 156.
72 [1977] AC 1014; [1976] 3 All ER 665.
73 Ibid [1976] 3 All ER 665 at 681.
74 Ibid [1976] 3 All ER 665 at 683.
75 Ibid [1976] 3 All ER 665 at 681-682.
76 Ibid at 684.
77 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [125]; (2002) 190 ALR 402 at [125].
78 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; [1976] 3 All ER 665 at 684.
79 [1956] AC 14; [1955] 3 All ER 48 ('Edwards').
80 Ibid [1955] 3 All ER 48 at 57 (emphasis added).
81 *Armah v Government of Ghana and Another* [1966] 3 All ER 177; *Reid v Secretary of State for Scotland* [1999] 1 All ER 481 at 505; [1999] 2 WLR 28 at 54 per Clyde LJ.
82 [1966] 3 All ER 177 ('Armah').
83 Ibid at 188.
84 per Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356; (1990) 94 ALR 11 at 38.
85 *Reid v Secretary of State for Scotland* [1999] 1 All ER 481 at 505; [1999] 2 WLR 28 at 54 per Clyde LJ. See also *Coleen Properties Ltd v Minister of Housing* [1971] 1 All ER 1049 where while Denning LJ's view on this point is still open to interpretation, Buckley LJ's view at 1055 clearly favours a test requiring the decision-maker have sufficient evidence.
86 [1965] 1 All ER 81 at 94.
87 [1984] AC 808; [1984] 3 All ER 201 ('Mahon').
88 Ibid [1984] 3 All ER 201 at 210 (emphasis added).
89 Ibid at 213.
90 For academic support for the doctrine of 'no sufficient evidence' in England see Wade, HWR & Forsyth CF *Administrative Law* 9th ed (Oxford: OUP, 2004) at 473 and De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (London: Sweet & Maxwell, 1995) at 561.
91 *Pulhofer v Hillingdon London Borough Council* [1986] 1 AC 484 at 518 per Brightman LJ (with whom Keith, Roskill, Brandon and Mackay LJJ agreed).
92 *Khera v Secretary of State for the Home Department; Khawajah v Secretary of State for the Home Department* [1984] 1 AC 74. Here it was decided that the detention and removal of a person entering the country with *ex facie* valid permission could only be ordered if it was established the person was an 'illegal entrant'. Interestingly, Wilberforce LJ held that the Court could intervene where the evidence of the condition 'does not justify the decision reached' (at 105). Accordingly in *Khera*, while there was some evidence that Khera was an 'illegal entrant' it was 'not sufficient' to establish the condition precedent.
93 Bradley, A. W. & Ewing, K.D., *Constitutional and Administrative Law* 13th Ed. (Harlow: Longman, 2003) at 710.
94 This accordingly ensures compliance with Art 6(1) European Convention on Human Rights.
95 *R v Criminal Injuries Compensation Board, Ex parte A* [1999] 2 AC 330; *R (Alconbury Developments Ltd) v Environment Secretary* [2003] 2 AC 295*; E v Secretary of State for the Home Department; R v Secretary of State for the Home Department* [2004] QB 1044; [2004] 2 WLR 1351. See also *Hollis v Secretary of State for the Environment* (1982) 47 P & CR 351; *The Trustees of the Bristol Meeting Room Trust v Secretary of State for the Environment* (unreported) Dec. 13 1989 (Q.B.D) as cited in Jones, T.H. 'Mistake of Fact in Administrative Law' [1990] *Public Law* 507 at 516.
96 Wade, H.W.R. & Forsyth, C.F. *Administrative Law* 9th ed. (Oxford: OUP, 2004) at 277. Also quoted variously elsewhere: *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59 at [165] per Kirby J; Jones, T.H. 'Mistake of Fact in Administrative Law' [1990] *Public Law* 507 at 512; Southey, H., *Judicial Review: A practical guide* (Bristol: Jordans, 2004) at 74.
97 Notably, Wade, in turn, has also acknowledged this in his latest edition, ultimately concluding that 'it now seems clear it [the doctrine of mistake of fact] has arrived.' Wade, H.W.R. & Forsyth C.F. *Administrative Law* 9th ed (Oxford: OUP, 2004) at 278.
98 [1999] 2 AC 330 ('CICB').
99 Ibid at 344.
100 Slynn LJ has also affirmed his own view in *R (Alconbury Developments Ltd) v Environment Secretary* [2003] 2 AC 295 where Clyde and Nolan LJJ also acknowledge the court's competence to review mistaken facts.
101 [2004] 2 WLR 1351 per Lord Phillips MR, Mantell & Carnwath LJJ.
102 *E v Secretary of State for the Home Department* [2004] 2 WLR 1351 per Lord Phillips MR, Mantell & Carnwath LJJ at [66].
103 De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (London: Sweet & Maxwell, 1995) at 288; Jones, T.H. 'Mistake of Fact in Administrative Law' [1990] *Public Law* 507; Bradley, A. W. & Ewing, K.D., *Constitutional and Administrative Law* 13th Ed. (Harlow: Longman, 2003) at 702; Southey, H., *Judicial Review: A practical guide* (Bristol: Jordans, 2004) at 74; Mason, Sir A. 'Lecture 2: The Scope of Judicial Review', *AIAL Forum* (31) November 2001: 21 at 34.

104 [1984] 2 S.C.R. 93 (SCC) ('Skogman'). Subsequently affirmed by the Supreme Court of Canada in *Hawkshaw v The Queen*, [1986] 1 S.C.R. 668 at 676 and *Russell v The Queen* [2001] 2 S.C.R. 804 at [48].
105 *Skogman v The Queen* [1984] 2 S.C.R. 93 (SCC) at 108.
106 Ibid at 109.
107 The Canadian literature also supports the proposition that only a complete absence of evidence is reviewable. See Mullan, D. *Administrative Law* (Toronto: Irwin Law, 2001) at 80, 92; Blake, Sara, *Administrative Law in Canada* (Toronto and Vancouver: Butterworths, 1990) at 179; and Elliot, D.W. '"No Evidence": A Ground of Judicial Review in Canadian Administrative Law?' (1972) 37 *Saskarian Law Review* 48 at 73-74 where the author observes that almost all of the Canadian cases recognising 'no evidence' since *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 refer to the doctrine in terms of 'some' or 'no' evidence instead of 'sufficient' or 'insufficient' evidence.

108 *Skogman v The Queen* [1984] 2 S.C.R. 93 (SCC) at 108.
109 i.e. that s5(1)(h) does not need to be proven separately per McHugh, Gaudron and Kirby JJ in *Rajamanikkam* and that the requirement in s5(3)(a) - that the decision-maker '*reasonably* be satisfied that the matter was established' - is interpreted narrowly. See Part III: 'No Evidence' and 'Mistake of Fact' Under the AD(JR) Act at pp.10-13.
110 In *Re Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.) the original provisions specifying grounds for judicial review (now replicated in the Federal Court Act 1990) were interpreted accordingly.
111 [1992] 1 C.T.C. 301; 140 N.R. 382; 46 D.T.C. 6240 (Fed. C.A.).
112 Ibid 92 D.T.C. 6240 at 6244. In *Hristova v Canada (Minister of Employment & Immigration)* (1994), 23 *Immigration Law Review* (2d) 278, as well the court held that s18.1(4) allows review of a federal board's evidentiary findings where there was no evidence to support the findings, or where on an assessment of the evidence as a whole, the findings are unreasonable.
113 *C.U.P.W. v Healy* (2003), 311 N.R. 96.
114 *Javadimia v Canada (Min. of Citizenship & Immigration)* (2002), 23 Immigration Law Review (3d) 126.
115 *Rohm & Haas Can. Ltd. v Anti-dumping Tribunal* (1978), 22 N.R. 175, at 178.
116 *Javadimia v Canada (Min. of Citizenship & Immigration)* (2002), 23 Immigration Law Review (3d) 126 at 131.
117 *Rohm & Haas Can. Ltd. v Anti-dumping Tribunal* (1978), 22 N.R. 175, at 178.
118 *Hurley v United States* 575 F2d 792 at 799 (1978, CA).
119 *Wawszkiewicz v Department of Treasury* 216 US App DC 138 at 144 (1981, App DC).
120 Id.
121 *Song Jook Suh v Rosenberg*, 437 F.2d 1098 at 1102 (9th Cir. 1971). Affirmed in *Jaimez-Revolla v Bell*, 598 F.2d 243 at 246 (1979).
122 *Digilab, Inc. v Secretary of Labor*, 357 F Supp 941 at 942 (1973).
123 *First Girl, Inc. v Regional Manpower Administrator of U. S. Dept. of Labor*, 499 F.2d 122 at 123 (C.A.7 (Ill.) 1974).
124 *RSR Corp. v Environmental Protection Agency* 588 F Supp 1251 at 1255 (1984, ND Tex).
125 *Western & Southern Life Ins. Co. v Smith* 859 F2d 407 at 410 (1988, CA6 Ohio).
126 *American Paper Institute v Train* 177 US App DC 181, 543 F2d 328 at 329 (1976, App DC).
127 *County of Rockland v U.S. Nuclear Regulatory Commission* 709 F2d 766 at 776 (1983, CA).
128 *Plaza Bank of West Port v Board of Governors of Federal Reserve System* 575 F2d 1248 (1978, CA).
129 5 USCS § 554.
130 401 US 402 (1971).
131 Id.
132 First stated in *ICC v Union Pac R.R* 222 US 541 at 548 (1912).
133 *Consolidated Edison Co v National Labor Relations Board* 305 US 197 at 217 (1938, USSC) per Hughes CJ.
134 *Willapoint Oysters, Inc. v Ewing* 174 F2d 676 at 678 (1949, CA9).
135 *Consolidated Edison Co v National Labor Relations Board* 305 US 197 at 217 (1938, USSC).
136 *Consolo v Federal Maritime Commission* 383 US 607 (1966).
137 Schwartz, B. *Administrative Law* (2nd ed. Boston: Little, Brown, 1984) at 599-600.
138 *Stork Restaurant Inc v Boland* 282 NY 256 at 273 (1940).

139 *St. Elizabeth Community Hospital v Heckler* 745 F2d 587 at 592 (1984, CA).
140 *Alabama Highway Express, Inc. v United States* 241 F Supp 290 at 293 (1965).
141 *Cusson v Firemen's and Policemen's Civil Service Commission of San Antonio*, 524 SW 2d 88 at 90 (1975).
142 *Universal Camera Corporation v NLRB* 340 US 474 (1951).
143 Cf. Schwartz 'Under the substantial evidence rule, the court should not ask, "Should we have found the same fact?" but only whether there is room on this record for a reasonable finding such as that made by the agency: Could the agency fairly and reasonably find the facts as it did?' Schwartz, B. *Administrative Law* (2nd ed. Boston: Little, Brown, 1984) at 601.
144 Mason A. 'Lecture 1: The Foundations and the Limitations of Judicial Review' *AIAL Forum* (31) November 2001: 1 at 13.
145 Creyke, R., McMillan J. & Reynolds, R. *Control of Government Action: Text, Cases and Commentary* (Sydney: Butterworths, 2005) at 661.

146 Bennett QC, D. 'Balancing Judicial Review and Merits Review', *Administrative Review* 53 September 2000 3 at 7.

147 *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59 at [58] per McHugh and Gummow JJ; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* 136 ALR 481 at 506 per Kirby J; Sackville J 'The limits of Judicial Review: Australia and the United States' (2000) 28 *FLR* 315; Beatson, J. 'The Scope of Judicial Review for Error of Law', Vol. 4 No.1. *Oxford Journal of Legal Studies* 22.

148 See Flick, G.A., 'Error of Law or Error of Fact?' *University of Western Australia Law Review* 15 Dec 1983: 193 where Flick indeed argues that greater consideration should be paid to tribunals' expertise before judicial intervention occurs.

149 Mullan, D. *Administrative Law* (Toronto: Irwin Law, 2001) at 482.

150 Mason, Sir A. 'Lecture 1: The Foundations and the Limitations of Judicial Review', *AIAL Forum* (31) November 2001: 1 at 13-14.

151 *Attorney General v Quin* 170 CLR 1 at 35-6 per Brennan J; cited by majority *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* 136 ALR 481.

152 Bennett QC, D. 'Balancing Judicial Review and Merits Review', *Administrative Review* 53 September 2000 3 at 3.

153 *Metropolitan Borough of Battersea v British Iron and Steel Research Association; British Launderers' Research Association v Borough of Hendon Rating Authority* [1949] 1 KB 434; [1949] 1 All ER 21 at 25 per Denning LJ (with whom the Court agreed).

154 On this point see Beatson, J. 'The Scope of Judicial Review for Error of Law', Vol. 4 No.1. *Oxford Journal of Legal Studies* 22 where the author outlines the problems concerning both what has been entitled the 'analytic' view and the 'pragmatic' view towards classifying secondary inferences as errors of law. Indeed in this regard, Beatson concludes that the problems with both views are so serious that the distinction between errors of law and fact should be discarded. See also: Endicott, T. 'Questions of Law' (1998) 114 *The Law Quarterly Review* 292; Flick, G.A., 'Error of Law or Error of Fact?' *University of Western Australia Law Review* 15 Dec 1983: 193; Emery & Smythe 'Error of Law in Administrative Law', (1984) 100 *The Law Quarterly Review* 612; Caldwell, J. 'Judicial Review: Review of the Merits?' *New Zealand Law Journal* October 1995: 343.

155 The oft-cited case in New Zealand in this regard is *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 ('Daganayasi') where Cooke J (as he then was) followed Scarman LJ in *Tameside* declaring at 149 that an administrative decision could be 'invalid on the ground of mistake'. However, at 132 and 149 Richmond P and Richardson J respectively, reserved their opinion, stating the law was 'far from settled'. Cooke J has since reaffirmed his view in several cases but the unanimity of the court has not yet been obtained. See *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136; *Budget Rent A Car Ltd. v Auckland Regional Authority* [1985] 2 NZLR 414 at 417; *NZ Fishing Industry Association Inc. v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552*; Auckland City v Minister of Transport* [1990] 1 NZLR 264 at 293; *Southern Ocean Trawlers Ltd v DG of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA) at 61. cf. *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) per Richardson P at 568.

156 *Attorney-General v Quin* (1990) 170 CLR 1 at 36. See also: Sackville J 'The Limits of Judicial Review: Australia and the United States' (2000) 28 *FLR* 315 at 321; Bennett QC, D. 'Balancing Judicial Review and Merits Review', *Administrative Review* 53 September 2000 3 at 8.

157 With the exception of New Zealand, which is yet to confirm the 'mistake of fact' as a reviewable ground, the doctrine is similarly restricted in the other states reviewed here. In England the mistake 'must have played a *material*… part' in the decision (emphasis added) *E v Secretary of State for the Home Department* [2004] 2 WLR 1351 at [66]; In Canada the decision must be 'based' on the erroneous finding per s18.1(4)(d); In the US, aside from the relevant consideration ground, there must be a 'clear error of judgment', though something more than mere error is necessary *Plaza Bank of West Port v Board of Governors of Federal Reserve System* 575 F2d 1248 (1978, CA8).

158 [1990] 2 NZLR 606.

159 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* 136 ALR 481 at 506. See also Legomsky in Bayne, P. 'Administrative Law: Judicial review of questions of fact' (1992) 66 *The Australian Law Journal* 96 at 100: 'One who adjudicates many cases in the same field might acquire familiarity with the more frequently employed expert witnesses and thus an enhanced accuracy in judging credibility. Expertise can permit more knowledgeable assessment of technical data drawn from fields like economics, science, medicine, or engineering. Even in non-technical fields the repetition can bolster the decision-makers' understanding of the common sources of evidence in the particular subject area and the degree to which the source influences the weight that the evidence deserves'.

160 *R v Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, at 149-50 per Sumner LJ.

161 Indeed Taylor states that in regards to 'reasoning processes' courts are by definition superior to the authority reviewed except where the evidence admits of more than one available conclusion or where 'there is something about the authority being reviewed, or the subject-matter it works with' such as for example where the authority is a specialist in its area. Taylor, G.D.S. *Judicial Review: A New Zealand Perspective* (Wellington: Butterworths, 1991) at 317-8.

162 Mason, Sir A. 'Administrative Review: The Experience of the First Twelve Years' [1989] 18 *Federal Law Review* 122 at 126.; Elliot, D.W. '"No Evidence": A Ground of Judicial Review in Canadian Administrative Law?' (1972) 37 *Saskarian Law Review* 48 at 70-71; Tracy RR S 'Absence or Insufficiency of Evidence and Jurisdictional Error', *Australian Law Journal* 50 (11) November 1976: 568 at 573; McMillan, J. 'Developments under the ADJR Act: The Grounds of Review' [1991] 20 *Federal Law Review* 50 at 59.

163 s64 of The Commonwealth of Australia Constitution Act 1900 (UK) requires members of the Federal Executive Council to sit in parliament.

164 Consider for example, the doctrine of unreasonableness, jurisdictional fact, mistake of fact and notably the doctrine of complete absence of evidence.

165 Indeed in 1946 its scope was expanded with the enactment of the APA. Schwartz, B. *Administrative Law* (2nd ed. Boston: Little, Brown, 1984) at 599.

166 Blackwell, J. 'A Discussion of the Duty and Jurisdiction of the Courts to Review Administrative Decisions', (2003) Vol 3 No. 1 *QUTLJJ* 182 at 187.

167 Joseph P.A. *Constitutional and Administrative Law in New Zealand* 2nd Ed. (Wellington: Brookers, 2002) at 822; Schwartz, B. *Administrative Law* (2nd ed. Boston: Little, Brown, 1984) at 598.

168 [1955] 3 All ER 48 at 57-58.

169 Sackville J 'The limits of Judicial Review: Australia and the United States' (2000) 28 *FLR* 315 at 315.

170 Flick, G.A., 'Error of Law or Error of Fact?' *University of Western Australia Law Review* 15 (3 and 4) December (1983) 193; Endicott, T. 'Questions of Law' (1998) 114 *The Law Quarterly Review* 292; Emery & Smythe 'Error of Law in Administrative Law', (1984) 100 *The Law Quarterly Review* 612; Beatson, J. 'The Scope of Judicial Review for Error of Law', Vol. 4 No.1. *Oxford Journal of Legal Studies* 22; Taylor, G.D.S. *Judicial Review: A New Zealand Perspective* (Wellington: Butterworths, 1991) at 316-7. Indeed Basten QC argues that the distinction is already implicit in s5(3) of the AD(JR) where 'particular matter' in s5(3)(a) refers to both primary and secondary findings, but where 'particular fact' in s5(3)(b) only refers to primary findings of fact. While this distinction as applied to the content of s5(3)(b) may be contentious, it is significant that the distinction is considered operable. Basten QC, J. 'Judicial Review: Recent trends.' *Federal Law Review* 29 (3) 2001: 365 at 384.

171 per Mason CJ (1990) 170 CLR 321 at 355-6; (1990) 94 ALR 11 at 37-8; per Deane J (1990) 170 CLR 321 at 367; (1990) 94 ALR 11 at 46.

172 *Re Pasqua Hospital and Harmatiuk* (1983), 149 D.L.R. (3d) 237 (Sask. Q.B.). The Court here following Denning LJ's distinction between inferences and findings of primary facts cited (n 182).

173 *Metropolitan Borough of Battersea v British Iron and Steel Research Association; British Launderers' Research Association v Borough of Hendon Rating Authority* [1949] 1 KB 434; [1949] 1 All ER 21 at 25 per Denning MR.

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