THE IMPLICATIONS OF JURISDICTIONAL FACT REVIEW FOR PLANNING AND ENVIRONMENTAL DECISION-MAKING

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Introduction

The New South Wales Court of Appeal in *Woolworths Ltd v Pallas Newco Pty Ltd*[1] (*Pallas Newco*) confirmed an emerging trend that jurisdictional facts form an integral part of judicial review of planning and environmental decision-making. A specially convened five-member Court held that the characterisation of a proposed development in a development application under the applicable environmental planning instrument is a jurisdictional fact, which the Land and Environment Court must determine for itself.

Woolworths Ltd applied to Ashfield Council to use an existing building as a drive-through liquor outlet. The issue was whether or not the proposed use was classified as a 'drive-in takeaway establishment' within the terms of the Ashfield Local Environmental Plan 1985 and permissible with consent in the zone. The Council thought it was and granted consent. The uncertainty with respect to the development's classification related to the minor part played by the drive-in component of the development and the predominance and concentration of in-store selling that would occur. Pallas Newco Pty Ltd sought a declaration that the development consent was void and of no effect as well as an injunction. The Land and Environment Court at first instance[2] declared the consent was void and of no effect, a finding that was not disturbed on appeal.

The decision has significant implications for administrative decision-making in the planning and environment context. Evaluating the significance of jurisdictional facts in environmental and planning law 'depends on one's view as to the proper scope of judicial review, and the appropriate relationship between decision-makers and reviewing courts.'[3] Accordingly, this paper commences with an examination of the scope of judicial review and the law's traditional approach to issues of fact and law. It then sets out the approach of Australian courts to jurisdictional fact review in environmental and planning law and concludes with a discussion of the implications of jurisdictional fact review for administrative decision-making in the planning and environment context.

The scope of judicial review

The purpose of judicial review is to ensure that powers are exercised for the purpose for which they were conferred and in the manner in which they were intended to be exercised.[4] Judicial review is generally confined to review of questions of law and does not permit review of the merits of an administrative decision or a decision-maker's errors of fact. In *Attorney-General (NSW) v Quin*[5] Brennan J stated that the 'merits of administrative action, to the

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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.'[6] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[7] Kirby J said that judicial review does not ordinarily enter into a consideration of the factual merits of a decision and cannot be used as a basis for a re-evaluation of the findings of fact.[8]

There are some exceptions to the law's reluctance to engage in review for errors of fact. Those exceptions are where there was no evidence to sustain the factual finding, or where the fact-finding process was seriously irrational or illogical (as opposed to the finding of fact itself), or where the existence of particular facts was a pre-condition for a decision-maker's having power to enter into an inquiry or make a particular decision (that is, where there was a jurisdictional fact).[9]

The distinction between questions of fact and law is vital in many areas of the law.[10] However, the distinction 'certainly admits a degree of manipulability'.[11] The traditional judicial approach to articulating the differences between errors of fact and errors of law in the judicial review context is to divide the decision-making process into three stages: determining the facts by way of primary findings and inferences, determining the law and applying the law to the facts as found.[12]

Determining the facts

When finding the primary facts, there is a preliminary question of law. That is whether there is more than one conclusion available to the decision-maker on the evidence or material before it. If that is the case, then it is for the decision-maker to make findings of fact by choosing between the available conclusions.[13] The decision-maker will commit an error of law if it makes inferences from intermediate facts, or finds ultimate facts, for which there was no evidence.[14] However, there is no error of law simply in making a wrong finding of fact.[15] In *Australian Broadcasting Tribunal v Bond*[16] Mason J stated:

> 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.[17]

Determining the law

In *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[18] the Full Court of the Federal Court stated five general propositions in attempting to distinguish legal from factual questions:

1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.
2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact.
3. The meaning of a legal term is a question of law.
4. The effect or construction of a term whose meaning or interpretation is established is a question of law.
5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is a question of law.[19]

The Court qualified the fifth proposition, stating that when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts falls within those words, whether they do or not is a question of fact.[20]

It is possible for an error of law to arise in the process of attributing a meaning to a term used in its ordinary English sense. In *Hope v Bathurst City Council*[21] the High Court held that

the term 'carrying on… businesses or industries of grazing' was used in its ordinary sense, but the Land and Valuation Court at first instance had misconstrued its meaning. The term was held to mean 'grazing activities undertaken as a commercial enterprise in the nature of a going concern', and not, as the Land and Valuation Court held, an activity with a significant commercial purpose or character. Mason J held that the Court's error was 'associated with an omission to relate the word to the expression with which it was associated, this being an error in construction and accordingly of law.'[22]

Applying the law to the facts as found

The third stage is where the decision-maker applies the law to the facts as fully found. Glass JA in *Azzopardi v Tasman UEB Industries Ltd*[23] stated that error may also intrude into this process.

> An erroneous conclusion that facts properly determined fail to satisfy a statutory test … will ordinarily be an erroneous conclusion of fact. It is only in marginal cases that the statutory test is satisfied or not satisfied as a matter of law, because no other application is reasonably open … Accordingly this Court will not entertain unexplained perversity of result as a ground for intervention although it will correct perverse or unreasonable applications of the law to the facts found.[24]

In other words, a decision-maker will commit an error of law if only one conclusion is open as to whether the facts fall within or outside the description in the rule, and it concludes otherwise. A decision-maker will not commit an error of law if different conclusions are open. In such a case, it is for the decision-maker to decide what is the correct conclusion (subject to review on the basis of judicial review grounds such as *Wednesbury* unreasonableness).[25]

That is no longer the approach to the characterisation of a use under an environmental planning instrument made under the *Environmental Planning and Assessment Act* 1979 (EP&A Act). While land use categories in environmental planning instruments are terms that carry ordinary meanings, and while the characterisation of a proposed development within the meaning of an ordinary English expression is a question of fact, it is also a jurisdictional fact.[26]

Jurisdictional fact review

Identifying jurisdictional facts

The authoritative statement of the concept of 'jurisdictional fact' in Australia is set out in the majority judgment of the High Court in *Corporation of the City of Enfield v Development Assessment Commission*[27] *(Enfield)*, as follows:

> The term 'jurisdictional fact' (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion. Used here, it identifies a criterion, satisfaction of which mandates a particular outcome.[28]

Ultimately, whether or not a particular finding of fact is jurisdictional is a question of statutory construction.[29] Consideration must be given to the total context of the legislative scheme in which the power in question is conferred, including the scope and nature of the jurisdiction and the fact said to be jurisdictional.[30]

The fact is likely to be jurisdictional if satisfaction of it is extrinsic or preliminary or ancillary to the exercise of a statutory power.[31] The word 'preliminary' in this context refers to a matter that is legally antecedent to the decision-making process, rather than to a matter that must be determined at the outset. In *Pallas Newco* it was established that classification of a use is extrinsic or ancillary to the determination of a development application.[32] Handley JA in that case distinguished between a finding that a development consent *can* be granted, and a

finding that it *should* be. His Honour said, 'This threshold or preliminary enquiry (can I?) is legally and logically antecedent to and distinct from the merits enquiry (should I?).'[33]

That conclusion is supported by the legislative context. Section 79C(1) of the EP&A Act provides a list of matters that a consent authority must take into consideration in the determination of a development application. It does not require consideration of whether a proposed development is permissible or prohibited. Accordingly, the classification process is extrinsic to the process of determining whether consent should be given.[34] Moreover, s 77(a) provides that Division 2 of Part 4 of the EP&A Act (which includes s 79C(1)) only applies to development that is permissible with development consent. In other words, a consent authority must consider the matters under s 79C(1) *only if* the development is permissible.

The extrinsic or preliminary or ancillary fact must, to be jurisdictional, exist in fact in an objective sense. Further, it must be a purpose of the legislation that an action done in breach of the provision will invalidate that action under the statute.[35]

Where the factual reference contains words involving the mental state of the primary decision-maker, such as 'opinion', 'belief', or 'satisfaction', the construction is often against a conclusion of jurisdictional fact.[36] However a provision expressed in terms of the satisfaction of the decision-maker may be a jurisdictional fact 'of a special kind, one more readily established.'[37] For example, cl 145(1)(a) of the *Environmental Planning and Assessment Regulation* 2000 (the EP&A Regulation) prohibited a certifying authority from issuing a construction certificate unless it was 'satisfied' that the design and construction of the building as depicted in plans and specifications were not inconsistent with the development consent. In *Lesnewski v Mosman Municipal Council*[38] the NSW Court of Appeal found that whether the design and construction of the building were not inconsistent with the development consent was not a jurisdictional fact; rather, the certifying authority's *satisfaction* of the matters referred to in cl 145(1)(a) was a jurisdictional fact. Amendments to the EP&A Regulation in 2006 removed the reference in cl 145(1)(a) to the 'satisfaction' of the certifying authority,[39] which means this provision will need to be reconsidered as to whether consistency with a development consent is a jurisdictional fact.

Where there is an element of fact and degree involved in determining the absence or presence of a fact, the fact is less likely to be jurisdictional. In such cases, it is more likely that Parliament intended that any error made by the decision-maker is an error within jurisdiction rather than an error going to jurisdiction.[40] However, that is not necessarily determinative. In *Pallas Newco*, whether the proposal answered the statutory description of 'drive-in take-away establishment' did involve an element of fact and degree, but 'not of such a character as to suggest that Parliament intended such a characterisation should turn on the opinion of the consent authority.'[41] On the other hand, where the administrative decision-maker is required to assess a wide range of matters involving the formation of value judgments, the decision-making process is unlikely to involve a jurisdictional fact.[42]

In *Pallas Newco*, Spigelman CJ said that the most significant indicator against jurisdictional fact is the degree of inconvenience that can arise if a consent which is valid on its face cannot be relied upon either by the consent authority or the proponent of the development. However, it was said that such inconvenience is substantially reduced by s 101 of the EP&A Act, which imposes a strict 3-month time limit for challenge to a decision to grant consent. Section 101 provides:

> If public notice of the granting of a consent or a complying development certificate is given in accordance with the regulations by a consent authority or an accredited certifier, the validity of the consent or certificate cannot be questioned in any legal proceedings except those commenced in the Court by any person at any time before the expiration of 3 months from the date on which public notice was so given.

Spigelman CJ's interpretation of s 101 was significant in concluding that a jurisdictional fact was involved. Section 101 is further examined later in this paper.

Rejection of the doctrine of 'deference'

The emergence of jurisdictional facts in planning and environmental law has settled interesting questions about the weight, if any, a reviewing court should give to the conclusions reached by an administrative decision-maker on factual matters. In *Enfield*, the High Court considered what weight, if any, had to be given by Debelle J at first instance to the conclusion reached by the Development Assessment Commission in deciding whether the proposed development was classified as 'special industry'.[43] In this regard, the Court considered the doctrine of 'deference' which has developed in the United States.[44] The 'deference' doctrine applies where the statute administered by a government agency is susceptible of several constructions, each of which is seen to be a reasonable representation of congressional intent.[45] Since the doctrine is concerned with competing interpretations of ambiguous legislation and not with jurisdictional fact-finding, the High Court did not need to decide on its applicability. It was nevertheless rejected. The majority stated:

> An undesirable consequence of the *Chevron* doctrine may be its encouragement to decision-makers to adopt one of several competing reasonable interpretations of the statute in question, so as to fit the facts to the desired result. In a situation such as the present, the undesirable consequence would be that the decision-maker might be tempted to mould the facts and to express findings about them so as to establish jurisdiction and thus to insulate that finding of jurisdiction from judicial examination.[46]

In Australia, the recognition that judicial review does not allow a review of the merits, is not the product of any doctrine of 'deference', 'but of basic principles of administrative law respecting the exercise of discretionary powers.'[47] The majority in *Enfield* also acknowledged the rule expressed by Brennan J in *Waterford v The Commonwealth*[48] that there is no error of law simply in making a wrong finding of fact.[49] However, no such limitations apply when the factual reference is jurisdictional.[50]

The decision in *Pallas Newco* is also significant because it firmly rejected a line of authority in NSW that supported deference to administrative decision-makers. The leading case was *Londish v Knox Grammar School*[51] (*Londish*). The issue in *Londish* was whether the proposal for which development consent had been granted was classified as an 'educational establishment' (and permissible with consent) or 'boarding houses' (and prohibited).

Stein JA, with whom Mason P and Meagher JA agreed, said that 'educational establishment' was an ordinary expression of common understanding.[52] Whether facts fell within the meaning of such an expression was a question of fact, and an incorrect finding would not involve an error of law. In such cases, the court could not substitute its own opinion for that of the primary decision-maker.[53] Stein JA said, 'if the opinion formed by the decision-maker was not vitiated by irrelevant considerations and one which was reasonably open to make, the court will not review the substance of the decision.'[54] The evidence and material before the council may have reasonably admitted to more than one conclusion and the council's decision to categorise the proposed development as an 'educational establishment' was reasonably open to it to make and within its discretion. Accordingly, the council's decision was not reviewable by the court.

Spigelman CJ in *Pallas Newco* rejected *Londish*, for a number of reasons. Firstly, while it was agreed that the question of whether a proposal answers a statutory description is one of fact, there was no recognition in *Londish* that that is not determinative of whether a fact is jurisdictional. According to Spigelman CJ, the court incorrectly identified the issue as whether or not a proposal answers a statutory description. However, the issue was really whether a finding of fact by a primary decision-maker could be called into question.

Furthermore, the court was influenced by the notion of 'deference', which the High Court in *Enfield* rejected. Finally – and importantly – Stein JA did not consider the legislative scheme in *Londish*, which was crucial to the conclusion in *Pallas Newco* that classification is a jurisdictional fact.

The Court in *Pallas Newco* also considered *Chambers v Maclean Shire Council*[55] (*Chambers*). In *Chambers*, the Council granted consent to a development application for a prawn and research station on a farm property. The applicant challenged the validity of the consent, contending that the development was prohibited because the subject site did not meet the minimum performance criterion for pond-based aquaculture, that elevation of the site be 'within an area the mean elevation of which is above 1 metre Australian Height Datum (AHD)', as prescribed by State Environmental Planning Policy 62 (SEPP 62). The elevation of 40% of the site was lower than 1 metre AHD.

At first instance, Sheahan J construed 'area' to mean a 'district' or 'region'. His Honour followed *Londish* and held that it was reasonably open to the Council to find that the general area in which the farm is located has a prevailing elevation of approximately 1 metre AHD or more. On appeal, Ipp JA (Sheller and Giles JJA agreeing) held that the question of whether the minimum criterion set out in SEPP 62 were met was a question of construction and law, thus the Council's decision was reviewable.[56] Sheahan J had erred in construing 'area' so broadly, and having regard to the purpose of the provision (to protect the environment from pollution from acid sulphate soils), it was more likely that the provision was intended to apply to specific development sites and not to undefined, general areas.

Ipp JA stated that 'it is not for a council itself to determine, as a matter of its opinion, whether it has power to grant consent to a development application.'[57] In the present case, whether the minimum performance criterion under SEPP 62 was met determined whether the Council had the power to consent to the application. This question was a jurisdictional fact, and must be answered objectively – 'not by reference to the subjective opinion of the Council.'[58] Accordingly, the court held that Sheahan J at first instance erred in adopting the approach in *Londish*.

While the outcome of the decision in *Chambers* was desirable, it needn't have resulted from a conclusion that a jurisdictional fact was involved. That is because there really was only one conclusion open on the facts. Either the site did, or did not, satisfy the minimum performance criterion prescribed by SEPP 62, having regard to the proper construction of the word 'area' in the legislative context. In this case, applying the law properly construed to the facts as fully found, the site did not satisfy the criterion. Accordingly, it is submitted that the Court could have invalidated the Council's decision on error of law grounds without recourse to jurisdictional facts.

The implications of jurisdictional fact review for planning and environment decision-making

The consequence of classifying a statutory provision as one of jurisdictional fact is that the reviewing court can decide the factual issue for itself, and, having regard to the evidence before it, substitute its own opinion for that of the original decision-maker.

The rationale for the law's traditional reluctance to engage in a review of the facts relates to the proper scope of judicial review and the relationship between the executive and judicial arms of government. As Mason CJ said in *Australian Broadcasting Tribunal v Bond*[59], to expose all findings of fact to judicial review would radically alter that relationship.[60] While jurisdictional fact review does not necessarily involve a review of all findings of fact (only the jurisdictional ones), it nevertheless raises separation of powers issues. If an Act commits the final decisions on factual issues to the administrative decision-maker rather than the court,

there are no separation of powers issues.[61] Furthermore, '[t]here is nothing about fact-finding or evaluation in themselves which is either uniquely judicial, or more clearly done better by a judge.'[62]

Interestingly, in *Pallas Newco* Sheller JA, while ultimately agreeing with the Chief Justice, expressed similar opinions. His Honour expressed discomfort with the idea that a court can 'correctly' determine whether a proposed use answers a statutory description in a case (such as that one) where reasonable minds may differ. His Honour said:

> There is much to be said, in my opinion, for the approach expressed by Stein JA in *Londish*. I accept… that in part Stein JA's conclusion may have flowed from an acceptance of the doctrine of deference which has now been rejected in the High Court. But the point Stein JA made is particularly true of the description of the development here in question. The decision by a council may not only be reasonably open but one regarded by many as correct. A contrary decision by a Court on review may also be no more than one reasonably open and thought by others to be correct.[63]

In other words, the fact that minds might differ and conclude otherwise than did the Council is no reason to vitiate its decision.[64] In *Bentham*, Stein JA, citing Lord Diplock in *Bromley London Borough v Greater London Council* [65], posed the question in this way: 'is the decision 'looked at objectively,… so devoid of any plausible justification that no reasonable body of persons could have reached [it]'?' [66] Ultimately, however, Sheller JA agreed with Spigelman CJ's orders because he was bound by the High Court's decision in *Enfield*.

The preferable approach to review of administrative decision-making involving the determination of factual issues in the environment and planning context is to intervene only if the decision-maker has made an error of law, in circumstances when only one interpretation of the primary facts was reasonably open to it, and it chose another, which was not. For example, if the proposed development in *Pallas Newco* comprised no drive-in component at all, then obviously the council would be in error by classifying the development as a 'drive-in take-away establishment', and the court should intervene. However, the judicial intervention in such a case should be on the basis of *Wednesbury*[67] unreasonableness, not jurisdictional fact.

When more than one conclusion is reasonably open to the primary decision-maker, that decision-maker should have the ultimate say as to which is the appropriate classification of the development, particularly when there are zone objectives guiding the decision-maker in the exercise of its discretion. In *Enfield*, the majority expressed concern with the 'deference' doctrine on the basis that the decision-maker might 'mould the facts' so as to enliven its jurisdiction. It is (somewhat bravely) submitted that this may not be so undesirable. For example, a site zoned 'General Industrial', might permit development that is classified as 'light industry', but prohibit development that is 'industry'. In a borderline case where the development could be either 'light industry' or 'industry', the consent authority should refer to the objectives of the zone, the environmental planning instrument and the EP&A Act in the exercise of its discretion. If the proposal satisfies all of those objectives, and if the decision-maker has otherwise exercised its power in accordance with all of the statutory requirements, why should the court have the final say as to how the development is 'properly' characterised?

This approach respects the exercise of a decision-maker's discretionary powers[68] and involves application of the fundamental principle of judicial review enunciated by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*[69]:

> The limited role of a court in reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set the limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

Jurisdictional fact review is an 'unnecessarily heavy-handed intrusion into executive decision-making'[70] in the context of environment and planning matters, having regard to the unrestricted rights of access to judicial review conferred by s 123 of the EP&A Act and the wide range of judicial review grounds available under the common law.

In planning and environment matters, a conclusion that a legislative provision does not involve a jurisdictional fact does not preclude judicial review of the decision according to the ordinary grounds of judicial review. Pearson notes that decisions made under statutory provisions that turn upon the 'satisfaction' of the decision-maker are reviewable under the principles set out by Gibbs J in *Buck v Bavone*[71]. Clearly, judicial intervention on factual matters 'undermines the legitimacy of the impugned decision-maker.'[72] This is particularly true of the criteria that a jurisdictional fact is one which can be 'objectively' determined, rather than according to the 'opinion' or 'satisfaction' of the decision-maker. The assumption of this theory is that 'a court's fact-finding is bound to be better than an administrator's'.[73] In *Timbarra*, Spigelman CJ said that 'facts, even where they are described as "objective", do not have an existence independent of their identification by some process of human agency.'[74] The consequence is neatly summarised by Aronson *et al*:

> Although his Honour did not state it explicitly, it follows that when courts make findings about jurisdictional facts, they cannot pretend to a factual infallibility, to an ability to connect with the "real" facts out there in a way denied everyone else. Their findings are their opinion, and because most decision-makers have also made their own findings (albeit provisionally), the net effect of jurisdictional fact review is to substitute the court's opinion for the decision-maker's.[75]

In *Australian Heritage Commission v Mt Isa Mines*[76], the High Court, it is respectfully submitted, correctly emphasised the importance of the decision-making function conferred on the relevant decision-maker. The High Court held that there was no jurisdictional fact involved in a decision by the Australian Heritage Commission to enter a place on the Register of the National Estate. Section 4(1) of the Act defined the national estate as follows:

> 4(1) For the purposes of this Act, the national estate consists of those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community.

The question to be answered in this case was whether, on the true construction of the Act, the Commission could make an entry in the Register of any place which the Commission considered should be so recorded, or whether only a particular place which, objectively, answers the description in s 4 of that Act, could be so recorded.

At first instance and on appeal, the Federal Court[77] and then the Full Court[78] held that whether or not a place answered the description in s 4 was a fact upon which the jurisdiction of the Commission depended. On appeal, Black CJ dissented, and said that the task of determining whether a place was part of the National Estate was 'a difficult and complicated one, involving the careful assessment of complex facts and the formation of opinions and value judgments on a potentially wide range of matters.'[79] His Honour stated that the very nature of identification of places on the National Estate suggested a legislative intention that the body established by Parliament with the function of identification is to have the power to make a conclusive determination of that matter. His Honour continued:

> If the conclusion that a place is part of the national estate were to be seen as a jurisdictional fact, one of the commission's most important functions, and a key function in the overall scheme of the Act, would be performed only provisionally… Despite the possible application of the principle that weight is given to the findings of a specialist tribunal concerning a jurisdictional fact, there would be something approaching merits review of the commission's decision since the matter for factual review would be, essentially, the performance of the whole function of identification. The inconvenience of such a result

> … is a powerful indication that it was not the intention of the Parliament that the finding should, in effect, be only provisional.[80]

The High Court allowed an appeal.[81] In a joint judgment, the Court said that a construction of the Act that would find the Commission's determination a question of jurisdictional fact would produce the result that a decision of the Commission to register will at all relevant times remain liable to challenge for absence of the requisite 'jurisdictional fact'.[82] Furthermore, the Court commented that while their conclusion restricted the possibility of judicial review, it did not foreclose it, because review of the Commission's decision would be available on the various grounds under s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).[83]

Aronson *et al* submit that where the nature of the facts involves a significant evaluative component, particularly where that evaluative component includes political considerations, there are even stronger arguments against a court being allowed to review the substance of a primary decision on jurisdictional fact grounds.[84] For example parliament, through the *Local Government Act* 1993 (NSW) together with the EP&A Act, has entrusted local councils to make all sorts of factual determinations in the assessment of development applications. To use the language of Black CJ in *Australian Heritage Commission*, if the conclusion that the categorisation of development is permissible or prohibited is seen as a jurisdictional fact, one of the consent authority's 'most important functions, and a key function in the overall scheme of the Act, would be performed only provisionally.'[85]

(Un)certainty and (in)convenience?

The courts[86] and other commentators[87] have recognised the importance of certainty in decision-making on planning matters. Certainty can be achieved by ensuring the finality of decision-making, and by imposing strict time limits on the availability of judicial review. That is the purpose of a time limiting privative clause like s 101 of the EP&A Act. In *Hornsby Shire Council v Vitone Developments Pty Limited*[88], McClellan CJ said:

> There can be no doubt that in relation to decisions as to whether or not to grant consent in a planning context there are compelling reasons to exclude the opportunity for judicial review, at least after a limited period. … The mere prospect of a challenge will be enough to imperil many proposed developments. The principal, or the almost inevitable financier, may not invest where there is a prospect of litigation which, even if a challenge fails, will inevitably bring uncertainty and delay. The purpose of s 101 is not so much to protect the decision maker from challenge but to provide assurance to those who seek to act upon a consent.[89]

In *Plaintiff S157/2002 v Commonwealth*[90], the High Court affirmed a long line of Australian authority that privative clauses should be strictly construed, so that a clause which seeks to protect a 'decision' or 'determination' does not have the effect of protecting a decision or determination affected by jurisdictional error.[91] Spigelman CJ in *Pallas Newco* distinguished *Plaintiff S157* on the basis that the privative clauses under consideration in the two cases were not analogous. Firstly, the precondition in s 101 requiring public notice of the consent reinforces the operation of the privative clause.[92] Secondly, unlike the privative clause in *Plaintiff S157*, s 101 permits any form of challenge within the 3 month period. Finally, s 101 refers to 'the *validity* of the consent', not, as in *Plaintiff S157*, 'the consent cannot be questioned'. The use of the word 'validity' indicated a Parliamentary intention to protect decisions from jurisdictional error. His Honour stated:

> The Parliament was well aware of the adverse consequences of uncertainty in this sphere of discourse. It balanced the conflicting elements by providing certainty, after a short period. The reference to "validity of consent", identifying the kind of challenge protected by s101, does, in my opinion, extend to a protection from jurisdictional error. In this regard it is analogous to an extension of a privative provision to a "purported consent" '[93]

Spigelman CJ also said that after the expiration of the 3 month period the threefold principle in *R v Hickman; Ex parte Fox & Clinton*[94] continues to apply; that is, where it is manifest that the decision is not a bona fide attempt to exercise the power; where it does not relate to the subject matter of the legislation; or where it is not reasonably capable of reference to the power given to the decision-maker. Accordingly, any remaining uncertainty and inconvenience 'would be in a very narrow compass because of the restricted basis on which the *Hickman* principle applies.'[95]

Notwithstanding the Court of Appeal's findings to the contrary, it may appear that the validity of a consent can still be challenged on the ground of jurisdictional error (in the broader sense) even after the expiration of the 3-month period. Firstly, s 101 does not protect against breach of a requirement 'which is construed as being of such significance in the legislative scheme that it constitutes a limitation or requirement that is variously expressed in the authorities as "essential", "indispensable", "imperative" or "inviolable."'[96] In *Pallas Newco*, Spigelman CJ placed so much emphasis on the task of classification of development under Division 1 of Part 4 of the EP&A Act so as to label it a jurisdictional fact. Wouldn't it follow, then, that because the correct classification of development is 'essential' to the jurisdiction of a consent authority, any error made in classification would be reviewable after the 3-month period?

Secondly, s 101 refers to 'the granting of a consent'. 'Consent' refers to 'development consent'.[97] A consent to a development application which has no legal force or effect (that is, one affected by jurisdictional error) is not a 'consent under Part 4' within the meaning of s 101. Accordingly, applying the reasoning in *Plaintiff S157*, s 101 does not apply to a consent that is marred by jurisdictional error because it is not a consent under Part 4 of the EP&A Act. On this construction, the certainty which s 101 was intended to give to development consents would be significantly undermined.

Fortunately, the Court of Appeal has confirmed that any ability to challenge the validity of a consent after the expiration of the three month period is limited to the *Hickman* provisos and where there is breach of an 'imperative duty' or 'inviolable restraint'.[98] In *Lesnewski v Mosman Council*[99], one issue which arose on appeal was whether s 101 of the EP&A Act acts as a bar to a challenge to the validity of a development consent on the ground of denial of procedural fairness. Tobias JA, with whom Hodgson and Ipp JJA agreed, held that it does not. Their Honours' reasoning was that the provision does not, after the expiration of the 3-month period, extend to protect decisions that do not conform to the *Hickman* principle and does not protect against breach of a requirement which is 'essential', 'indispensable', 'imperative' or 'inviolable'.[100] Following Spigelman CJ's statement in *Vanmeld Pty Limited v Fairfield City Council*[101] that procedural fairness can be described as an 'inviolable limitation or restraint', s 101 does not protect against a breach of procedural fairness.

In *Maitland City Council v Anambah Homes Pty Ltd*[102] Anambah Homes Pty Ltd challenged the validity of a condition of development consent. The Court of Appeal declared it to be invalid because it did not comply with s 94(11) (now s 94B(1)) of the EP&A Act, which allowed consent authorities to impose conditions only if they were of a kind allowed by, or were determined in accordance with, a contributions plan. The proceedings challenging the validity of the condition were brought outside the period specified in s 101. The Court of Appeal held that compliance with s 94(11) was 'essential' to the validity of the condition, since the only source of power authorising the imposition of a condition requiring the dedication of land free of cost or a monetary contribution was (at that time) to be found in s 94 of the EP&A Act.[103] Since the condition did not comply with s 94(11), s 101 did not protect it.

The claim that s 101 did not protect a particular development consent was rejected by the Land and Environment Court in *Currey v Hargraves and Others*[104]. Wyong Shire Council

granted development consent in relation to a property in Noraville. The applicant challenged the validity of that consent, on the bases that, first, the consent was issued by the Council's Director of Health and Development, who did not have delegated authority to do so and secondly, there was no power to grant consent because the preconditions to the power to do so, namely the requirements of cl 36 of the local environmental plan were not met. Clause 36 allowed the council to grant consent to the use of a heritage item even if the use would be prohibited under the LEP if it was satisfied of certain matters.

The applicant conceded the facts did not infringe the *Hickman* principle, but claimed the lack of delegated authority was an inviolable restraint which amounted to an essential, indispensable, imperative duty that s 101 did not protect. Lloyd J rejected this submission; his Honour said the lack of delegated authority was not inviolable because the delegate had apparent or ostensible authority and the consent was one which the council itself could have issued.[105] In regard to cl 36 of the LEP, his Honour said, 'since that clause leaves to the council the question of whether it is satisfied that its provisions have been met, I am again inclined to the view that this discretionary consideration is not one which is inviolable in the relevant sense.'[106]

As Ellis-Jones observes, a more consistent and predictable approach is now being taken by NSW superior courts to the application of s 101 of the EP&A Act.[107] It is now clear that a challenge to the validity of a development consent that is commenced after the expiration of the three-month period is statute-barred, subject to compliance with the threefold *Hickman* principle and any other 'inviolable limitations or restraints'. The highly desirable certainty that this creates lessens concerns with respect to the potential inconvenience of jurisdictional fact review.

Conclusion

The consequence of jurisdictional fact review is that a reviewing court can decide the factual issue for itself, and, having regard to the evidence before it, substitute its own opinion for that of the original decision-maker. In situations where only one conclusion was reasonably open to the decision-maker, a reviewing court should intervene only if the decision-maker has made an error of law. Where a number of conclusions are reasonably open on the facts, the courts should not interfere in the consent authority's determination.

This is for a number of reasons: firstly, it is difficult to reconcile the scope of judicial review, which does not permit review of the factual merits of a decision, with jurisdictional fact review, which often does. Secondly, a conclusion that a factual reference does not involve a jurisdictional fact will often not preclude review of the primary decision on the judicial review principles enunciated in *Buck v Bavone*. Thirdly, jurisdictional fact review diminishes respect for and the integrity of primary decision-makers, because the fact-finding process is inherently a function of the executive, not the judiciary. Finally, jurisdictional fact review results in a degree of uncertainty and inconvenience for the primary decision-maker and for developers seeking to rely on a development consent. However, it is conceded that the last issue is mitigated to an extent by the Court of Appeal's construction of s 101 of the EP&A Act.

These conclusions do not arise from a view as to the correctness of the decision in *Pallas Newco*. It is respectfully submitted that the Court of Appeal arrived at the correct conclusion as a matter of law; that is, having regard to the legislative scheme governing the assessment and determination of development applications under the EP&A Act. Rather, these conclusions relate to matters of policy. In the author's view, the implications of jurisdictional fact review in respect of classification of proposed developments (as outlined above) could be avoided if classification was not preliminary or ancillary to the exercise of a decision-

making power. The legislative scheme should be amended so that the decision in *Londish* is regarded as good law in NSW.

Endnotes

1 2004) 61 NSWLR 707.
2 *Pallas Newco Pty Ltd v Votraint No 1066 Pty Ltd* (2003) 129 LGERA 234.
3 Pearson, L, 'Jurisdictional Fact: a Dilemma for the Courts' (2000) 17(5) *Environmental and Planning Law Journal* 453-467 at 466.
4 Spigelman, J, 'The integrity branch of government' (2004) 78 ALJ 724 at 730.
5 (1990) 170 CLR 1.
6 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at [17].
7 (2003) 198 ALR 59.
8 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20* (2003) 198 ALR 59 at [114].
9 Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action*, Third Edition, Lawbook Co., 2004 at 179.
10 *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 at 394.
11 Aronson, Dyer and Groves, above n 9, at 184.
12 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156..
13 Pearson, above n 3, at 455.
14 Aronson, Dyer and Groves, above n 9, at 193.
15 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77.
16 (1990) 170 CLR 321.
17 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355-6.
18 (1993) 43 FCR 280.
19 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287.
20 *Pozzolanic Enterprises,* above n 19, at 288, citing *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8.
21 (1980) 144 CLR 1.
22 *Hope v Bathurst City Council*, above n 20, at 10.
23 (1985) 4 NSWLR 139.
24 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 157.
25 *Australian Gas Light Co Ltd v Valuer-General* (1940) 40 SR(NSW) 126 at 138; *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509 at 512.
26 *Woolworths Ltd v Pallas Newco Pty Ltd & Anor* (2004) 61 NSWLR 707. See also *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, [28].
27 (2000) 199 CLR 135.
28 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [28].
29 *Timbarra*, above n 26, at [28]; *Pallas Newco*, above n 26, at [6].
30 *Timbarra*, above n 26, at [37], *Pallas Newco,* above n 26, at [6].
31 *Timbarra*, above n 26, at [44], *Pallas Newco,* above n 26, at [48].
32 *Pallas Newco*, above n 26, at [52].
33 *Pallas Newco*, above n 26, at [141] to [142].
34 *Pallas Newco*, above n 26, at [50].
35 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 195 CLR 355 at 93; *Timbarra*, above n 26, at [37]; *Pallas Newco*, above n 26, at [49];
36 *Timbarra*, above n 26, at [42].
37 *Pallas Newco,* above n 26, at [25].
38 (2005) 138 LGERA 207.
39 *Environmental Planning Legislation Amendment Act* 2006.
40 *Pallas Newco*, above n 26, at [53] to [56].
41 *Pallas Newco*, above n 26, at [62].
42 *Pallas Newco*, above n 26, at [58]. See also *Australian Heritage Commission v Mt Isa Mines* (1997) 187 CLR 297 (examined later in this paper).
43 *Enfield*, above n 28, at [39].
44 See *Chevron USA Inc v Natural Resources Defence Council Inc* (1984) 467 US 837.
45 *Enfield*, above n 28, at [41].
46 *Enfield*, above n 28, at [42].
47 *Enfield*, above n 28, at [44].
48 *Waterford v The Commonwealth* (1987) 163 CLR 54.
49 *Waterford v The Commonwealth*, above n 48, at 77.
50 *Enfield*, above n 28, at [44].
51 (1997) 97 LGERA 1.
52 *Londish v Knox Grammar School* (1997) 97 LGERA 1 at 8.
53 *Minister for Aboriginal Affairs v Peko Wallsend* (1986) 162 CLR 24.
54 *Londish*, above n 52, at 8.

55 2003) 57 NSWLR 152.
56 *Hope v Bathurst City Council*, above n 20, at 10; *Agfa-Gevaert Limited*, above n 10, at 397.
57 *Chambers v Maclean Shire Council* (2003) 57 NSWLR 152 at [46].
58 *Chambers*, above n 57, at [48].
59 (1990) 170 CLR 321.
60 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341.
61 Aronson, M, 'The Resurgence of Jurisdictional Facts', *Public Law Review*, Volume 12(1), March 2001, pp. 17-39 at 30.
62 Aronson, Dyer and Groves, above n 9, at 180.
63 *Pallas Newco*, above n 26, at [180].
64 *Bentham v Kiama Municipal Council* (1986) 59 LGRA 94 at 98.
65 [1983] 1 AC 768 at 821.
66 *Bentham v Kiama Municipal Council*, above n 64, at 98. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.
67 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, above n 67.
68 *Attorney-General (NSW) v Quin*, above n 6, at 36.
69 (1986) 162 CLR 24 at 40-41.
70 Pearson, above n 3, at 467.
71 (1976) 135 CLR 110 at 118-119.
72 Aronson, Dyer and Groves, above n 9, at 180.
73 Aronson, Dyer, and Groves, above n 9, at 228.
74 *Timbarra* above n 26, at [85].
75 Aronson, Dyer and Groves, above n 9, at 228.
76 (1997) 187 CLR 297.
77 *Mount Isa Mines Limited v Australian Heritage Commission* (1995) 56 FCR 219.
78 *Australian Heritage Commission v Mt Isa Mines Limited* (1995) 60 FCR 456.
79 *Australian Heritage Commission v Mt Isa Mines Limited*, above n 77, at 466.
80 *Australian Heritage Commission v Mt Isa Mines Limited*, above n 77, at 466.
81 *Australian Heritage Commission v Mt Isa Mines Limited* (1997) 187 CLR 297.
82 *Australian Heritage Commission v Mt Isa Mines Limited*, above n 81, at 306.
83 *Australian Heritage Commission v Mt Isa Mines Limited*, above n 81, at 308.
84 Aronson, Dyer and Groves, above n 9, at 233.
85 *Australian Heritage Commission v Mt Isa Mines Limited*, above n 78, at 466.
86 For example, *Timbarra*, above n 26, at [91], *Hornsby Shire Council v Vitone Developments Pty Limited* (2003) 132 LGERA 122 at [58], *Pallas Newco*, above n 26, at [80].
87 Campbell, E and Groves, M, 'Time Limitations on Applications for Judicial Review' (2004) 32 *Federal Law Review* 29, at 29-30.
88 (2003) 132 LGERA 122.
89 *Hornsby Shire Council v Vitone Developments Pty Limited* (2003) 132 LGERA 122 at [58].
90 (2003) 211 CLR 476.
91 *Pallas Newco*, above n 26, at [69].
92 *Pallas Newco*, above n 26, at [74].
93 *Pallas Newco*, above n 26, at [80].
94 (1945) 70 CLR 598.
95 *Pallas Newco*, above n 26, at [84].
96 *Lesnewski v Mosman Council* (2005) 138 LGERA 207 at [76]. See also *Pallas Newco*, above n 26, at [81].
97 Section 4(1) defines 'development consent' as 'consent under Part 4 to carry out development'.
98 See *Lesnewski*, above n 96; *Maitland City Council v Anambah Homes Pty Ltd* (2005) 64 NSWLR 695; *Corowa v Geographe Point Pty Ltd* (2007) 154 LGERA 117; *Currey v Hargraves and Others* (2007) 155 LGERA 91.
99 (2005) 138 LGERA 207.
100 *Lesnewski*, above n 96, at [76].
101 (1999) 46 NSWLR 78.
102 (2005) 64 NSWLR 695.
103 *Anambah Homes*, above n 98, at [132].
104 (2007) 155 LGERA 91.
105 *Currey v Hargraves and Others*, above n 98, at [34], citing see *Brickworks Ltd v Warringah Shire Council* (1963) 108 CLR 568; *Pearson v Leichhardt Municipal Council* (1997) 93 LGERA 206 and *J R Hunt Real Estate Pty Ltd v Hornsby Shire Council* (1997) 130 LGERA 45.
106 *Currey v Hargraves and Others*, above n 98, at [34].
107 Ellis-Jones, I, 'The approach of the courts to the construction and application of time limit privative clauses' (2006) 11 *LGLJ* 153, at 159.

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