The relevance of procedural fairness and practical injustice to materiality as an element of jurisdictional error

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In 2018 the High Court articulated a new threshold of materiality to determine whether a mistake is grave enough to amount to a jurisdictional error.[1] However, its precise content and interaction with existing common law norms of administrative review and jurisdictional error are yet to be crystallised in the Australian legal context. The content and significance of 'materiality', and its role in the concept of jurisdictional error, are both contested. The doubts expressed by Nettle and Gordon JJ in the High Court materiality cases are but one example.[2]

This article pursues deepening insight into the concept of materiality and its interaction with procedural fairness. Specifically, it questions what the materiality threshold looks like for the fair hearing rule and considers whether materiality has a meaningful role to play in this context. The bias rule is not examined, as materiality is considered irrelevant to establishing a breach on the grounds of actual or apprehended bias a point I will expand on later.[3] First, I outline the development of both jurisdictional error and materiality, noting persistent criticisms of materiality as an emerging concept. I then reflect on procedural fairness and its interaction with materiality by analysing the content of the fair hearing rule in light of emerging materiality principles. Finally, I consider the narrow factual circumstances of prominent materiality cases to demonstrate that an inquiry under the fair hearing rule would produce identical results. Upon comparison of the 'materiality' threshold and the practical injustice test for the fair hearing rule, it is apparent that the content of these tests is substantially identical. Consequently, a breach of the fair hearing rule, if made out, will almost always result in a jurisdictional error.

Jurisdictional error: pathways to the modern approach

Jurisdictional error is at the heart of modern Australian judicial review.[4] It is a term that has been adopted to mark the difference between a breach of an administrative law norm that results in an invalid exercise of a decision-maker's power and a breach that is merely unlawful.[5] An invalid decision is void ab initio, whereas an unlawful one is invalidated only prospectively.[6] Jurisdictional error is both a conclusion and a starting point from which the

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1 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (*'Hossain'*).

2 See, eg, *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 ('*SZMTA*'), 455 [81], 460 [95] (Nettle and Gordon JJ).

3 *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590 (*'MZAPC'*), 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ) 637–8 [182] (Edelman J).

4 Lisa Burton Crawford and Janina Boughey, 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30 *Public Law Review* 18, 20–2.

5 Ibid 20.

6 Lisa Burton Crawford, 'Materiality and the Interpretation of Executive Power' (2021) 28 *Australian Journal of Administrative Law* 166, 167.

effects of a mistake are determined.[7] Accordingly, its precise meaning remains elusive; like many administrative law concepts jurisdictional error is necessarily flexible, and the courts have resisted boxing it into a rigid test.[8]

The recent significance of jurisdictional error can be tied to Australia's administrative law history, which originally centred on the availability of the prerogative writs.[9] Now, the constitutional significance of the concept of jurisdictional error in Australia is tied to the availability of the constitutional writs.[10] Jurisdictional error holds a firm place in judicial review, with the central question for courts engaging in s 75(v)/39B jurisdiction being: does the alleged breach go beyond the scope of the decision-maker's power, such that Parliament intends it to invalidate the decision?[11] To understand its place in judicial review, and indeed to set the scene for considering 'materiality', I will briefly turn to the development of the concept to place it firmly in its uniquely Australian context.

Craig v South Australia[12] ('*Craig*') was the first modern attempt to develop a set of grounds whose breach led presumptively to a finding of jurisdictional error.[13] Although its emphasis on distinguishing between 'inferior courts' and 'administrative tribunals' as a determinant of a narrower/broader test of jurisdictional error has since been superseded by a functional test, the decision was significant for two reasons.[14] First, it recognised, although in rudimentary form, that the test for jurisdictional error was receptive to the nature of the power purportedly being exercised and the character of the body exercising it;[15] that is, the threshold for jurisdictional error has never been set in stone and will sometimes be difficult to discern depending on 'the circumstances of the particular case'.[16] Second, *Craig* set out a list of errors it identified as being 'jurisdictional',[17] with the result that the purported exercise of administrative power was invalid.[18]

Kirk v Industrial Court (NSW)[19] ('*Kirk*') clarified elements of *Craig*. Importantly, it noted that jurisdictional error was not confined to the list of errors set out in that case.[20] *Kirk* confirmed that jurisdictional error would have continual significance in Australian administrative law by finding that the constitutional writs of prohibition and mandamus are available only where a jurisdictional error is made out. In doing so, the High Court tied the concept of jurisdictional

7 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2021) 789 [13.20]; *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43 [27].
8 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 ('*Kirk*'), 574 [73].
9 Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis, 2019) 128.
10 Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 96.
11 Crawford and Boughey (n 4) 20.
12 *Craig v South Australia* (1995) 184 CLR 163 ('*Craig*').
13 JJ Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 83.
14 *Craig* (n 12) 177, 179.
15 Ibid 176–8.
16 Ibid 177.
17 Ibid 176–80.
18 Ibid 179.
19 *Kirk* (n 8).
20 Ibid 574 [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

error to the jurisdiction to grant remedies under s 75(v).[21] Consequently, jurisdictional error is an essential precondition for mandamus and prohibition, as well as certiorari as an ancillary remedy,[22] to issue. The court further expanded its application by holding that the constitutional writs are entrenched in the supervisory jurisdiction of state Supreme Courts by virtue of s 73, and, importantly, that these writs are similarly responsive to jurisdictional error[23] — that is, the supervisory jurisdiction to correct jurisdictional error is a defining characteristic of state Supreme Courts.

Further cases have refined the reasons for which remedies can be granted for identifying whether an error is jurisdictional and thus invalidates a decision. The distinction is important in a modern administrative law context because it not only acts as a threshold or gateway to the granting of certain remedies, as noted above, but also has consequences for the status of the impugned decision.[24]

The modern approach to identifying jurisdictional error has shifted in emphasis from the classification-based test in *Craig*; however, the practical approach has remained similar. The courts focus on the context and purpose of a provision to determine whether an error is jurisdictional, through a process of statutory interpretation.[25] Justice Mortimer (in the Federal Court) in *Hossain v Minister for Immigration and Border Protection*[26] ('*Hossain*') set out the reasoning for this construction-based approach, which focuses on the specific provision within the context of administrative law norms such as procedural fairness and unreasonableness.[27] Her Honour reasoned that jurisdictional error is an exercise in statutory construction, as a finding of jurisdictional error depends on the 'terms, nature and extent of the power in issue'.[28] Boughey and Crawford reason that, under this statute-driven approach, the original 'functional considerations' (impact of the breach, public policy issues, and consequences stemming from labelling an error 'jurisdictional') are still considered but through the process of interpretation rather than as distinct considerations.[29]

Emerging principles of materiality as a threshold test of jurisdictional error

Materiality is a recent addition to the concept of jurisdictional error. Due to the centrality of jurisdictional error in judicial review,[30] it has drawn considerable attention in the academic community. Its development is outlined below, as is demonstrated through the three High

21 Ibid 580–1 [98]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Spigelman (n 13) 77.
22 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673 [62]–[63], quoting *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (*'Aala'*), 90–1 [14].
23 *Kirk* (n 8) 580 [98]; 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
24 Boughey, Rock and Weeks (n 9) 128.
25 *MZAPC* (n 3) 597 [30] (Kiefel CJ, Gageler, Keane and Gleeson JJ), citing *Plaintiff S10/2011 v Minister for Immigration and Citizenship* 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).
26 *Hossain* (n 1).
27 Leighton McDonald, 'Jurisdictional Error as Conceptual Totem' (2019) 42 *UNSW Law Journal* 1019, 1021
28 *Minister for Immigration and Border Protection v Hossain* [2017] 252 FCR 31, 46 [57].
29 Janina Boughey and Lisa Burton Crawford, 'Jurisdictional Error: Do We Really Need It?' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 395, 404.
30 Crawford and Boughey (n 4) 20–2.

Court cases of *Hossain, Minister for Immigration and Border Protection v SZMTA*[31] ('*SZMTA*') *and MZAPC v Minister for Immigration and Border Protection* ('*MZAPC*').[32]

Hossain v Minister for Immigration and Border Protection

Hossain was a unique case where an error that would otherwise have been deemed as jurisdictional was held to be non-jurisdictional because an alternative, legally sound means for denying the visa existed, such that the error made no difference to the outcome.[33] *Hossain* involved the appeal of an unsuccessful partner visa application.[34] The Minister for Immigration and Border Protection, and later the Administrative Appeals Tribunal ('AAT'), found that the applicant had failed to satisfy two criteria necessary to the granting of the visa.[35] First, Hossain allegedly failed to lodge his application within the requisite time frame;[36] and, second, he had outstanding debts to the Commonwealth.[37] The Full Court of the Federal Court on appeal found that the Tribunal had erred when considering whether there were 'compelling reasons for not applying' the first (timing) criterion, as the AAT determined this with regard to whether such reasons existed at the time of the application.[38] The regulation instead required the Tribunal to assess this criterion at the time the Tribunal made its decision.[39]

On appeal, the High Court found the error to be non-jurisdictional.[40] The majority clarified that a 'decision involving jurisdictional error and a decision wanting in authority' are the same.[41] In doing so, the court articulated a threshold of materiality that is ordinarily a necessary component for establishing jurisdictional error[42] — that is, whether an error of law is jurisdictional depends on the gravity of the error[43] as determined by a process of statutory construction.[44] In this case, the AAT had an alternative basis for refusing the partner visa (the public interest criterion) which was not infected by jurisdictional error.[45] Therefore, the error concerning the timing criteria was not sufficiently grave as to amount to a jurisdictional error — it was neither a fundamental error nor an error capable of affecting the final decision.[46] Although *Hossain* was not a procedural fairness case, it remains relevant as the first articulation of materiality as a threshold for establishing jurisdictional error.

31 *SZMTA* (n 2).
32 *MZAPC* (n 3).
33 *Hossain* (n 1) 136 [35] (Kiefel CJ, Gageler and Keane JJ), 137 [41] (Nettle J), 149 [79] (Edelman J).
34 Ibid 127 [4] (Kiefel CJ, Gageler and Keane JJ), 138 [44] (Edelman J).
35 Ibid 128 [5]–[6] (Kiefel CJ, Gageler and Keane JJ), 138 [44] (Edelman J).
36 Ibid 128 [7] (Kiefel CJ, Gageler and Keane JJ), 140 [53] (Edelman J).
37 Ibid 128 [8] (Kiefel CJ, Gageler and Keane JJ), 140 [54] (Edelman J).
38 Ibid 129 [10] (Kiefel CJ, Gageler and Keane JJ), 140 [56] (Edelman J).
39 Ibid 130 [15] (Kiefel CJ, Gageler and Keane JJ), 140 [56] (Edelman J).
40 Ibid 136 [37] (Kiefel CJ, Gageler and Keane JJ), 138 [43] (Nettle J), 150 [80] (Edelman J).
41 Ibid 133 [26] (Kiefel CJ, Gageler and Keane JJ).
42 Ibid 134 [29] (Kiefel CJ, Gageler and Keane JJ).
43 Ibid 133 [25] (Kiefel CJ, Gageler and Keane JJ).
44 Ibid 133 [27] (Kiefel CJ, Gageler and Keane JJ), 146 [67] (Edelman J).
45 Ibid 137 [41] (Nettle J), 149 [79] (Edelman J).
46 Ibid 136 [35] (Kiefel CJ, Gageler and Keane JJ), 137 [41] (Nettle J), 149 [79] (Edelman J).

Minister for Immigration and Border Protection v SZMTA

In *SZMTA*, the High Court attempted to clarify the content and practical implications of materiality. The case involved a protection visa application which was refused by the Minister's delegate.[47] The decision was appealed on the basis that a notification to the Tribunal concerning the fact that certain documents fell within the ambit of s 438 of the *Migration Act 1958* (Cth) was not disclosed to the applicant.[48] The documents that the notification concerned had previously been provided to the applicant following a freedom of information request.[49]

The majority held that, despite the Minister's concession that the breach amounted to a denial of procedural fairness,[50] the failure to disclose the notification was not a jurisdictional error. That is because the documents' contents 'were of such marginal significance' that the applicant's lost opportunity to make submissions with the knowledge of the notification 'could not realistically have made any difference to the result'.[51] Although the majority mentioned the 'practical injustice' test, the satisfaction of which ordinarily results in jurisdictional error,[52] they seemed to address it primarily through the lens of materiality rather than as a separate inquiry.[53] The majority view confirmed that materiality is an aspect of jurisdictional error[54] rather than a factor in remedial discretion.[55]

This reasoning confirmed that the central inquiry of materiality is whether 'compliance could realistically have resulted in a different decision'.[56] The majority further clarified that the onus of establishing materiality rests with the party asserting jurisdictional error.[57] Nettle and Gordon JJ issued a cautionary dissent, arguing that a materiality type of inquiry should occur as part of the court's discretion to award remedies to avoid an impermissible intrusion into judicial merits review rather than as a threshold to establishing jurisdictional error.[58] They further took issue with the circumstance-sensitivity of materiality, which supposedly subverts the entitlement of a plaintiff to 'know where they stand'.[59] However, as they formed the minority, the judgment in *SZMTA* confirmed that materiality will remain a central feature of jurisdictional error for the foreseeable future.

47 *SZMTA* (n 2) 450 [64] (Bell, Gageler and Keane JJ), 468 [124] (Nettle and Gordon JJ).
48 Ibid 450 [66] (Bell, Gageler and Keane JJ).
49 Ibid 450 [66] (Bell, Gageler and Keane JJ).
50 Ibid 440 [27] (Bell, Gageler and Keane JJ).
51 Ibid 452 [72] (Bell, Gageler and Keane JJ).
52 Ibid 443 [38] (Bell, Gageler and Keane JJ).
53 Ibid 443–6 [39]–[51] (Bell, Gageler and Keane JJ).
54 Ibid 445 [45] (Bell, Gageler and Keane JJ).
55 Ibid 458 [90] (Nettle and Gordon JJ).
56 Ibid 445 [45] (Bell, Gageler and Keane JJ).
57 Ibid 445 [46] (Bell, Gageler and Keane JJ).
58 Ibid 460 [95] (Nettle and Gordon JJ).
59 Ibid 458 [88] (Nettle and Gordon JJ).

MZAPC v Minister for Immigration and Border Protection

In the latest edition in the materiality saga, handed down in May 2021,[60] the court upheld *SZMTA's* conception of materiality, confirming that the central inquiry is whether 'compliance could realistically have resulted in a different decision'.[61] *MZAPC* involved yet another refused protection visa.[62] In denying the visa, the Tribunal did not disclose to the applicant that it had acquired the details of his criminal history, which included a dishonesty offence.[63] The decision was appealed to the Federal Court on the ground that the Tribunal had failed to accord the applicant procedural fairness, as the dishonesty offence went to the assessment of the applicant's credibility — the central issue being whether materiality could be made out.[64] On appeal to the High Court, the Minister had already conceded that there had been a denial of procedural fairness,[65] and thus the court focused its inquiry on who correctly bore the onus of establishing materiality; and what materiality required in the circumstances of the case.[66] However, as the Tribunal had accepted the applicant's story as the truth and denied the visa on the basis that he did not have a well-founded fear of persecution should he return to India,[67] the Court found the error to be immaterial and upheld the finding of the Federal Court.[68]

Beyond its immediate facts, *MZAPC* confirmed the interpretive technique which concludes that Parliament will not intend an administrative action to be invalidated by an immaterial error.[69] The Court expanded on materiality generally, noting situations where materiality would not form part of the jurisdictional error inquiry. Materiality is not relevant to determining a breach on grounds of 'unreasonableness, but also actual or apprehended bias, and situations where "lack of respect for the dignity of the individual results in a denial of procedural fairness"'.[70] The Court also confirmed, albeit by a slim majority, that the onus of proving materiality rests with the applicant.[71] When describing the materiality principle, the majority incorporated language from the fair hearing rule by 'recognising that the legislature is not likely to have intended that a breach that occasions no "practical injustice"' will be invalid.[72] By contrast, Edelman J set out a segregated three-step test which involved a 'procedural irregularity', the practical injustice threshold, and the further materiality threshold; however, he was in the minority.[73] Consequently, the High Court has attempted to crystallise the materiality threshold

60 *MZAPC* (n 3).
61 Ibid 598 [35] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
62 Ibid 593 [7] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 622 [124] (Gordon and Steward JJ).
63 Ibid 593 [10] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 623 [128] (Gordon and Steward JJ).
64 Ibid 594–5 [17] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 624 [133]–[134] (Gordon and Steward JJ).
65 Ibid 594–5 [17] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 624 [134] (Gordon and Steward JJ), 643 [201] (Edelman J).
66 Ibid 592 [1] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 624 [135] (Gordon and Steward JJ).
67 Ibid 609 [76] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 628 [151] (Gordon and Steward JJ).
68 Ibid 610 [82] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 628 [152]–[153] (Gordon and Steward JJ), 646 [209]–[210] (Edelman J).
69 Crawford (n 6) 168; Crawford and Boughey (n 4) 26.
70 Crawford (n 6) 168; MZAPC (n 3) 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 637–8 [181]–[182] (Edelman J), 614–15 [100] (Gordon and Steward JJ).
71 MZAPC (n 3) 605 [60] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
72 Ibid 601–2 [46] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
73 Ibid 630–2 [160]–[164] (Edelman J).

as an emerging pillar of jurisdictional error by balancing the need to hold decision-makers accountable with the need to avoid holding decision-makers to an impossible, impractical standard in cases where the result would not alter.[74]

The salient point from these cases is that the threshold of materiality further confirms an ambulatory approach to determining the limits of administrative action.[75] It follows the trend away from the original examples of breaches outlined in *Craig*[76] and makes the inquiry for jurisdictional error context-specific.[77] Consequently, while precedential decisions may be useful to determine the content of a decision-maker's obligations (for example, the content of the fair hearing rule in a specific statutory context), the circumstances of a case now hold greater significance.[78]

Materiality represents a step towards a more coherent test for jurisdictional error — one which further builds upon the traditional grounds of review and is focused primarily on statute and circumstance. While Crawford notes that some grounds of review represent errors that will always have an impact on the outcome of a decision,[79] both Edelman J and Nettle J contend that the threshold of materiality cannot be the same in every circumstance.[80] These observations tie back to the reasoning in *Craig*, further elaborated upon in *Kirk* — namely, that the threshold for establishing jurisdictional error is not fixed in place.[81] Ultimately, while jurisdiction is a binary label — it either is or is not present — establishing a jurisdictional error has been and remains dependent on the circumstances of the decision.

Criticisms of materiality

There remain persistent criticisms of materiality as an emerging concept. While this article is primarily concerned with the interplay between materiality and procedural fairness, it is important briefly to acknowledge these criticisms to place materiality in its proper context.

Critics such as Aniulis decry materiality as a 'tangled threshold' or a step too far[82] — a concern that is overstated in the context of ever-changing judicial principles. I will address these concerns briefly, noting that others have already dealt with these issues at length. Aronson documents significant judicial shifts, where the courts 'spring a surprise on the drafters', and argues that there is nothing 'new' or 'radical' about materiality: normative and practical-based statutory interpretation has and will continue to form a part of judges' roles.[83] *Kioa v West*,[84]

74 *Aala* (n 22) 90–1 [14] (Gleeson CJ).
75 Lisa Burton Crawford, 'Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power' (2019) 30 *Public Law Review* 281, 284.
76 *Craig* (n 12) 176–80.
77 Lisa Burton Crawford and Dan Meagher, 'Statutory Precedents under the "Modern Approach" to Statutory Interpretation' (2020) 42 *Sydney Law Review* 209, 210.
78 *Hossain* (n 1) 134–5 [30]–[31] (Kiefel CJ, Gageler and Keane JJ).
79 Crawford (n 75) 289.
80 *Hossain* (n 1) 137 [40] (Nettle J), 147 [72] (Edelman J).
81 *Craig* (n 12) 176–8; Kirk (n 8) 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
82 Harry Aniulis, 'Materiality: Marking the Metes and Bounds of Jurisdictional Error?' (2020) 27 *Australian Journal of Administrative Law* 88, 101.
83 Mark Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through' (2021) 28 *Australian Journal of Administrative Law* 6, 10.
84 (1985) 159 CLR 550 ('*Kioa*').

Plaintiff S157/2002 v Commonwealth[85] ('*Plaintiff S157*') and *Hossain* represent significant changes to the judicial canon, the development of which is expected of the judiciary.[86] Emerging common law principles or, rather, the explicit articulation of their centrality are 'no threat to the survival of the generic principles'.[87]

Second, the concern that materiality represents an impermissible intrusion by the courts into merits review is generally unsubstantiated.[88] First, similar practices in judicial review on the grounds of unreasonableness, procedural fairness and jurisdictional facts are widely accepted as constitutionally permissible. In the case of the latter, where the legislature has made the existence of an objective fact a jurisdictional threshold, the question of its existence is a legal question determined by statutory interpretation.[89] Second, Robert French, writing extra-curially, explained that:

> Ultimately both [judicial review and merits review] are concerned with the merits of the case. A decision which is bad in law is bad on its merits. A better distinction might be drawn by using the term 'factual merits review' and 'legal merits review'.[90]

Groves has interpreted this quote as a recognition that, although the separation of powers indicates the judiciary will not engage with any form of the substantive value or merits of a decision, the practical reality is that merits and legality cannot be artificially separated from one another.[91] Both courts and tribunals consider the quality of the decision, referable to different standards, but this will necessarily involve issues of both factual and legal merit in both cases.[92] Practically, the High Court is usually the first body to avoid anything that leads to improper merits review, as to do so raises questions of their continuing legitimacy within the Ch III court system. The central inquiry of materiality is not whether a circumstance is factually material but whether an *error of law is legally* material such that it could realistically affect the outcome of a decision.

In summary, although materiality has only recently become an element of jurisdictional error, as a concept it is neither radical nor ahistorical. The High Court majority's articulation of the principles of materiality in *Hossain* was within its purpose of determining the content of law.[93] Similarly, materiality as an element of determining jurisdictional error represents no threat to separation of powers or judicial integrity principles because it goes to the effect of the legal error under consideration. It applies as a mechanism to determine the legal consequence of existing grounds of judicial review by imposing a threshold below which legal errors cannot be considered jurisdictional.

85 211 CLR 476 ('*Plaintiff S157*').
86 Ibid 13; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 366 [13] (Brennan J).
87 Aronson (n 83) 6.
88 Aniulis (n 82) 104.
89 Boughey, Rock and Weeks (n 9) 113.
90 Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Australian Administrative Law — Concepts and Context* (Cambridge University Press, 2014) 34.
91 Matthew Groves, 'The Unfolding Purpose of Fairness' (2017) 45 *Federal Law Review* 653, 669.
92 Ibid.
93 Aronson (n 83) 10.

Procedural fairness and jurisdictional error

Following *MZAPC*, it is clear that materiality is not universal, neither is it intended to form part of the inquiry for jurisdictional error for every ground of review.[94] In that case, the majority comprised of Kiefel CJ and Gageler, Keane and Gleeson JJ, with Edelman J concurring separately in the result, recognised that several grounds, or 'common law principles', already encompass a materiality component, such that adding materiality as a further step would be meaningless in the circumstances. These grounds included the rule against actual or apprehended bias and the requirement that all decisions be legally reasonable.[95] Extending this reasoning, it is uncontroversial that a decision made in bad faith will, 'by definition, involve an error that is not trivial or harmless'.[96] Previously, in Hossain, Edelman J and Nettle J had identified other circumstances where materiality has no role to play.[97] These included where the error was so fundamental to the exercise of statutory power that its breach would automatically result in invalidity[98] and circumstances where a jurisdictional error should be found for dignitarian purposes.[99]

The rationale behind materiality is that Parliament would not intend an unlawful yet immaterial exercise of power to result in an invalid decision — a line of reasoning that can be traced back to *Stead v State Commissioner of Taxation*[100] ('*Stead*'). Accordingly, a materiality inquiry is an exercise based on close statutory interpretation and examination of the particular factual circumstances.[101] The grounds listed above will always be material, as it is unthinkable that Parliament would intend that a decision infected by bias, for example, be legally valid. For Parliament to authorise such bias (that is, to render it immaterial), they would have to legislate to abrogate the rule against bias with 'irresistible' clarity.[102]

Although *Craig's* classification-based test has been superseded as a threshold for jurisdictional error that is receptive to the functional circumstances of the impugned decision, it recognised that the test for jurisdictional error was not one-size-fits-all.[103] *Kirk* further expanded on this notion, adding that determining whether an error is jurisdictional is 'almost entirely functional'.[104] The emerging materiality doctrine draws upon these foundational principles, acting as a tangible manifestation of the threshold for jurisdictional error as a sliding scale; that is, in some cases the threshold of materiality — and thus the threshold for establishing jurisdictional error — will be higher, and in other cases it will be lower. In the *Craig* era, this threshold was determined by reference to the type of institution (inferior court or administrative

94 Crawford (n 75) 289.
95 *MZAPC* (n 3) 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 637–8 [181]–[182] (Edelman J).
96 Ibid 637 [181] (Edelman J); *WAVF v Refugee Review Tribunal* (2003) 125 FLR 351, 368 [41] (French J), quoting De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed, 1995) 553.
97 *Hossain* (n 1) 137 [40] (Nettle J), 147 [72] (Edelman J).
98 Ibid 147 [72] (Edelman J).
99 Ibid 137 [40] (Nettle J).
100 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 ('*Stead*'), 145–6.
101 *MZAPC* (n 3) 625 [136], 619 [113], 610 [84] (Gordon and Steward JJ), 597 [30]–[31], 598 [34] (Kiefel CJ, Gageler, Keane and Gleeson JJ), quoting *Hossain* (n 1) 134–5 [30] (Kiefel CJ, Gageler and Keane JJ).
102 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ('*Saeed*'), 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), citing *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
103 *Craig* (n 12) 176–8.
104 Aronson (n 83) 15, quoting *Kirk* (n 8) 570 [64], quoting L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963.

tribunal);[105] and in *Kirk* the court articulated the scale in terms of the functions and powers of the repository.[106] Now, the High Court is beginning to articulate a threshold of materiality that is both context-sensitive and referable to the grounds of review.

In a procedural fairness context, the rule against bias has already been deemed not to require a materiality analysis to establish jurisdictional error.[107] I seek to argue that the other arm of procedural fairness — the fair hearing rule — demands a similarly low threshold for materiality, albeit not one that results in no materiality inquiry at all. In doing so, I first examine the rationale for procedural fairness, recognising that it holds a privileged position in judicial review. I next review the content of the fair hearing rule, arguing that the 'practical injustice' standard is the functional equivalent of materiality, thus rendering the role of materiality much lower in a procedural fairness context.

Procedural fairness — rationales

The ground of procedural fairness developed through the natural justice cases from the 17th century,[108] and its modern history begins with *Cooper v Wandsworth Board of Works*.[109] It holds a special place in the context of administrative decision-making, and the obligation to accord procedural fairness always exists 'in the absence of clear, contrary legislative intention'.[110] More specifically, procedural fairness is determined through the two arms of the fair hearing rule and the rule against bias. The tests for establishing a breach of either arm are highly flexible,[111] and it is clear since *Re Refugee Review Tribunal; Ex parte Aala*[112] ('*Aala*') that procedural fairness is a ground that if made out will normally establish jurisdictional error.[113] However, up until 1963,[114] procedural fairness was associated primarily with proprietary rights, rather than lesser varieties of 'interest'.[115] It is only since the case of *Ridge v Baldwin* that procedural fairness has been considered necessary to the function of administrative decision-making.

The maxim of procedural fairness, first articulated in *John v Rees*, posited that, even where the result seems obvious, natural justice should be accorded.[116] In that case, Megarry J said, 'the path of the law is strewn with examples of open and shut cases which, somehow, were not'.[117] Following this decision, Australian courts have expanded the notion of procedural fairness to recognise its value in the judicial review context. The fair hearing rule and the rule

105 *Craig* (n 12) 177.
106 *Kirk* (n 8) 574–5 [74]–[75] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
107 *MZAPC* (n 3) 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
108 Groves (n 91) 654.
109 *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.
110 *Saeed* (n 102) 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 ('*WZARH*'), 335 [30] (Kiefel, Bell and Keane JJ).
111 Boughey, Rock and Weeks (n 9) 116–17.
112 *Aala* (n 22).
113 Ibid 101 [41] (Gaudron and Gummow JJ).
114 *Ridge v Baldwin* [1964] AC 40; Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 104.
115 See, eg, *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.
116 *John v Rees* [1969] 2 All ER 274.
117 Ibid 309; *Stead* (n 100) 145.

against bias are valuable for their utilitarian purpose in promoting good decision-making. Beyond this, they recognise the obvious relationship between the decision-maker and applicant in the context of administrative action.[118]

Procedural fairness holds a special place in judicial review of administrative action. This special place is founded on several rationales. First, affording procedural fairness to applicants of judicial review realises the rule of law. The main thrust of the rule of law is that nobody is above the law, regardless of their position in society.[119] This reasoning is particularly relevant in a judicial review context because the review of administrative actions of government decision-makers is concerned with judging a purported exercise of executive power against a set of standard principles. In Australia, s 75(v) of the *Constitution* is considered to '[secure] a basic element of the rule of law' by subjecting executive action to judicial review by the High Court.[120] As Robert French noted extra-curially, the incredible power wielded by the executive is not unlimited: its exercise is dependent on compliance with norms of decision-making.[121] These norms include that the use of power is fair, rational, lawful and exercised in good faith.[122]

Ensuring there is procedural fairness in executive action achieves the aims of the rule of law. Lord Reed recognised that procedural fairness obligations promote 'congruence between the actions of the decision-maker and the law which should govern their actions'.[123] In the absence of such accountability, the subjects of our constitutional system lose faith in its validity. Groves, commenting on the purpose of fairness in judicial review of administrative action, argues that this promotes an 'intangible benefit', which bolsters regime legitimacy.[124] Consistency in the regulation of executive action — particularly administrative decision-making, which involves determining issues that directly impact constituents — enhances the legitimacy of the decisions, and by extension, the government itself.[125] Maintaining fairness of procedure in accordance with processes that are understood by those subject to them therefore bolsters the rule of law.

Second, the dignitarian purpose realised by procedural fairness forms the basis for the presumption of legality — that is, procedural fairness can only be abrogated with clear legislative intent.[126] Upholding procedural fairness rules respects the dignity of the public, who are directly 'affected by the exercise of official power'.[127] Further, there is a moral value achieved by ensuring that procedures treat subjects of the law with dignity.[128] As

118 Kristen Rundle, 'The Stakes of Procedural Fairness: Reflections on the Australian Position' (2016) 23 *Australian Journal of Administrative Law* 164, 173.
119 Robert French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence' (2017) 44 *Brief* 19, 22.
120 *Plaintiff S157* (n 85) 482 [5] (Gleeson CJ); M Gleeson, *2000 Boyer Lectures: the Rule of Law and the Constitution* (ABC Books, 2000) 67, quoted in Robert French, 'Rights and Freedoms and the Rule of Law' (2017) 13 *Judicial Review* 261, 263.
121 French (n 119) 22.
122 Ibid.
123 *Osborn v Parole Board* [2014] 1 All ER 369 ('*Osborn*'), 395 [71] (Lord Reed).
124 Groves (n 91) 671.
125 Ibid.
126 *Saeed* (n 102) 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
127 Groves (n 91) 671.
128 Lon L Fuller, *The Morality of Law* (Yale University Press, 1969) 162.

contended by TRS Allan, even if procedural fairness does not lead to a higher incidence of correct or preferable decision-making, treating applicants with respect recognises a separate, intangible virtue[129] — that is, it acknowledges that we as humans value equality, respect and fairness.[130] The principle of legality is predicated on these values and serves to 'protect substantive or basic fundamental rights'.[131] It follows that these values are of legal importance, as they form the basis for this presumption of procedural fairness that forms part of the statutory construction process.[132]

In the UK case of *Osborn v Parole Board*,[133] Lord Reed provided a compelling overview of why dignitarian justifications underpin the importance of procedural fairness. His Lordship noted that the way we subconsciously perceive justice necessarily requires respect for the persons affected by executive or judicial decisions through the procedure in making the decision.[134] In that case, his Lordship argued that this respect requires that those who 'have something to say which is relevant to the decision' should be granted an audience; an opportunity to participate in this procedure.[135] Lord Reed emphasised the importance of fair process regardless of practical impact by referring to the obiter in *R v University of Cambridge (Dr Bentley's Case)*:[136]

> The point of the dictum … is that Adam was allowed a hearing notwithstanding that God, being omniscient, did not require to hear him in order to improve the quality of His decision-making.[137]

As Groves notes, Australian courts have picked up on this language and increasingly make explicit reference to dignitarian principles in their judgments.[138] Both the dignitarian and rule of law rationales discussed above demonstrate that ensuring procedural fairness in administrative decision-making is consistent with values that we collectively deem important. Upholding the dignity of applicants and maintaining the rule of law are cornerstone features of our Australian democracy — the former recognises that the subjects of law are human and deserve a minimum level of respect, and the latter ensures the integrity of the judiciary in the exercise of its Ch III powers. More than any other ground, procedural fairness holds a special place within judicial review because it supports these fundamental aspects of administrative accountability.

129 Trevor RS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 77–87, cited in Groves (n 91) 671.
130 Rundle (n 118) 166, quoting Jerry Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985) 171.
131 *R v Secretary of State for the Home Department, ex parte Pierson* [1997] All ER 577, 605 (Lord Lloyd), cited in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).
132 *Saeed* (n 102) 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
133 *Osborn* (n 123).
134 Ibid 394 [68] (Lord Reed).
135 Ibid
136 (1723) 92 ER 370.
137 *Osborn* (n 123) 394 [69] (Lord Reed).
138 Groves (n 91) 672.

The fair hearing rule — 'practical injustice' performs a similar function to a materiality inquiry

As noted above, the majority in *MZAPC* observed that a decision that contravened the rule against bias would of itself constitute a jurisdictional error.[139] The court had previously distinguished the bias test, which is determined by reference to the reasonable apprehension of an hypothetical observer, from materiality, which involves a counter-factual analysis about what might happen[140] — that is, in the context of actual or apprehended bias, materiality has no role to play in determining whether an error is jurisdictional.[141] Indeed, given that the test for bias is judged according to what an observer might think, it would undermine public faith in the law if a court could determine the existence of bias and later judge it to be immaterial.[142] It follows that materiality applies with various levels of strength in different circumstances.

For these reasons, the scope of my inquiry is limited to the fair hearing rule. Specifically, what does materiality demand in the context of the fair hearing rule?

The content of the fair hearing rule is already highly context specific. It asks, 'what is required in order to ensure that the decision is made fairly in the circumstances, having regard to the legal framework within which the decision is to be made?'.[143] In *Kioa v West*, the High Court framed their standing inquiry in terms of how a person is affected by administrative decision-making, rather than merely by the nature of their interest.[144] Relevantly, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [145] ('*Lam*') established that an applicant asserting a breach of the fair hearing rule must demonstrate that they have suffered some 'practical injustice' that results in a detriment to the applicant.[146] In that case, Gleeson CJ reasoned that this threshold recognises that fairness does not exist in the abstract it must have a practical element.[147] Later, in *Minister for Immigration and Border Protection v WZARH*[148] ('*WZARH*'), the Court confirmed that this inquiry is to be conducted in terms of fair process in the overall circumstances of the case, rather than confining it to fairness concerning a particular expectation or interest.[149]

Rundle highlights that the practical element of the fair hearing rule refers to a lack of fairness in the loss of opportunity to be heard.[150] The inquiry, she contends, should be directed to before a decision is made, rather than towards a decision's *outcome*.[151] Judicial review

139 *MZAPC* (n 3) 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
140 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 ('*CNY17*'), 94–5 [47] (Kiefel CJ and Gageler J).
141 Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44(2) *Melbourne University Law Review* 565, 598.
142 Ibid 598–9.
143 *WZARH* (n 110) 335 [30] (Kiefel, Bell and Keane JJ), quoted in Boughey, Rock and Weeks (n 9) 116–17.
144 *Kioa* (n 84) 619–22; Groves (n 91) 656.
145 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*'),
146 Ibid 13 [36] (Gleeson CJ).
147 Ibid [37].
148 *WZARH* (n 110).
149 Groves (n 91) 665–6.
150 Rundle (n 118) 170.
151 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 663 (Gibbs CJ).

indeed turns on actions taken in making a decision, not those that follow in consequence.[152] However, in *Stead*, a case that is repeatedly cited for its articulation of a minimum threshold to the natural justice test, the central inquiry was whether the breach deprived the applicant of the 'possibility of a successful outcome'.[153] It follows that the lost opportunity should be judged in the context of the final decision. The requirement that there be some 'practical injustice', then, balances the dignitarian values underpinning procedural fairness (discussed above) with utilitarian views that prioritise 'decision-making [as] a function of the real world'.[154]

The narrow factual circumstances of High Court materiality cases demonstrate the similarity between 'materiality' and 'practical injustice'

The three seminal materiality cases, as well as the pre-materiality procedural fairness case of *Lam*, were all decided on very narrow factual bases. In the three cases which involved procedural fairness, concessions made by either counsel meant that 'practical injustice' did not sit at the centre of the inquiry. Revisiting these cases demonstrates that they are exceptions to the general trend of cases decided in accordance with the fair hearing rule, in which even relatively minor departures from that rule are material for the reasons discussed above. *Lam* is a useful example for discussing the threshold for whether a mistake is grave enough to amount to a jurisdictional error, even though the lack of practical injustice was conceded.[155]

In the context of materiality, the narrow factual bases of these cases support a lower threshold of materiality when establishing jurisdictional error on the ground of procedural fairness. Simply put, due to the onerous and context-specific nature of the 'practical injustice' test, courts will observe a higher bar for establishing *immateriality* of the breach. Where procedural fairness is conceded at the outset, courts will go through a similar process as is required by the 'practical injustice' test but will now label their inquiry with reference to materiality.

Lam *demonstrates the narrow circumstances where a breach will not result in practical injustice*

Lam involved a visa cancellation on character grounds, following a series of offences committed by the appellant, which included heroin trafficking.[156] When the decision-maker was determining whether to cancel the visa, the applicant received a letter outlining the cancellation decision process and the matters they would consider, which relevantly included 'the best interests of any children with whom you have an involvement'.[157] Following a written submission in which the appellant enclosed a letter in his support from his children's carer, Ms Tran, along with her contact details,[158] the appellant received a further letter from the

152 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 388 ALR 257 [22].
153 *Stead* (n 98) 147.
154 *Hossain* (n 1) 134 [28] (Kiefel CJ, Gageler and Keane JJ).
155 *Transcript of Proceedings, Lam* (n 145) 23–4 [995]–[1000] (Mr Walker).
156 *Lam* (n 145) 4 [1]–[2] (Gleeson CJ).
157 Ibid 5 [6] (Gleeson CJ).
158 Ibid 5–6 [8] (Gleeson CJ).

Character Assessment Unit requesting these same details.[159] Despite these representations, the department did not decide to contact Ms Tran.[160] The appellant argued that the decision not to contact her amounted to procedural unfairness, arising from the fact that Lam had not been informed of the decision.[161]

In argument, Bret Walker SC, counsel for the appellant, conceded that the appellant would not have acted differently whether or not the Tribunal contacted Ms Tran,[162] thus confining the content of the complaint to the fact that there was no notice of the decision not to contact Ms Tran, rather than any specific opportunity denied to the appellant.[163] In doing so, counsel for the appellant destroyed any chance of success in this appeal. The as-yet unarticulated test for the fair hearing rule, which required some 'practical injustice' to be suffered by the party asserting breach, was completely conceded:

> Your Honours, may I once and for all concede it. He was not denied any opportunity. If I measure it by what he put in, no complaint. If I measure it about the amplitude of an invitation to put in material, no complaint. If I measure it by what he could have said had he been told before the decision, 'Look, we don't have time. We don't have enough officers' or, 'On reflection, we don't think it is going to help. We are not going to be in touch with the children's carers or their mother', then I do not say that he could have said more on his account from his perception than he already said.[164]

Had Mr Walker not been forced to concede this point, and instead was able to advance the case on the basis that procedural fairness was not afforded, it is likely the outcome of the case would have been different. This is because the appellant could have argued that he lost the opportunity to make further submissions about his relationship with his children, with the benefit of knowing that the Tribunal would not contact their carer, Ms Tran. *Lam's* case, although cited primarily for its departure from the 'legitimate expectation' language,[165] and its articulation of a 'practical injustice' requirement that is necessary to establish a breach of procedural fairness,[166] is also an example of the narrow circumstances where a court will find that a mistake involving procedural fairness will not amount to a jurisdictional error. Here, conceding that the mistake bore no implication for the appellant's behaviour was critical to establishing these narrow circumstances.[167]

Hossain's *unique facts reduce its analogical relevance going forward*

As noted above, *Hossain* involved highly specific factual circumstances. Upon interpretation of the statutory scheme under which the decision was made, the court determined that the Tribunal's error regarding the timing criterion did not impact the validity of the public interest criterion[168] — that is, because there were two bases upon which the visa was refused, an error involving one of those bases did not have any practical implications for the ultimate

159 Ibid 6 [9] (Gleeson CJ).
160 Ibid 6–7 [12] (Gleeson CJ).
161 Ibid 8 [18] (Gleeson CJ).
162 Transcript of Proceedings, *Lam* (n 145) 6 [230] (Mr Walker).
163 Ibid 26 [1120] (Hayne J).
164 Ibid 23–4 [995]–[1000] (Mr Walker).
165 *Lam* (n 145) 12 [34] (Gleeson CJ), 16 [47] (McHugh and Gummow JJ), 38 [121], 45 [140] (Callinan J).
166 Ibid 13–14 [37] (Gleeson CJ).
167 Transcript of Proceedings, *Lam* (n 145) 6 [230] (Mr Walker).
168 *Hossain* (n 1) 137 [41] (Nettle J), 149 [79] (Edelman J).

decision.[169] While the principles regarding materiality in *Hossain* hold precedential value, its factual circumstances are less useful in this regard because they are unique. Overall, the case represents low factual analogical usefulness for future decisions.

SZMTA *and* MZPAC *can be used to establish the similarity between materiality and practical injustice, through counterfactual analysis*

In both *SZMTA* and *MZAPC,* the Minister conceded that there had been a breach of procedural fairness.[170] Consequently, the central issue was whether the breach amounted to a jurisdictional error, a task completed through the lens of materiality. Had the fact of breach been contested, or had the cases been challenged under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'),[171] it is likely that the appellants would still be unsuccessful in obtaining the remedies they desired. This is because the inquiry conducted when establishing a breach of procedural fairness is substantially the same as the materiality inquiry. Since Aala, and before the articulation of materiality, a breach of procedural fairness automatically resulted in a finding of jurisdictional error,[172] and the implied materiality element of practical injustice went to establishing that breach.[173] While the language and emphasis has evolved, the practical test has not. Rather, the implied materiality element is now considered as a further, explicit, element of jurisdictional error. To demonstrate their similarity, it is useful to consider the facts of *MZAPC* in alternative court proceedings. Let us then assume that the Minister had not conceded a breach of procedural fairness and that this issue in dispute would therefore turn on whether the appellant in *MZAPC* has suffered some 'practical injustice'.

In *WZARH*, the majority reiterated the stringent test for 'practical injustice':

> Where, however, the procedure adopted by an administrator can be shown itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness is established by nothing more than that failure … unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome. The practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given. [174]

In *MZAPC*, the appellant argued that, because the Tribunal failed to disclose the notification under s 438, he lacked the opportunity to make submissions on the information disclosed in the notification.[175] These facts satisfy the first limb of the fair hearing rule, as the Tribunal failed to allow the appellant to be heard on the content of the notification. The appellant's case would likely fall short on the second limb. The appellant argued that the material that was the subject of the notification, which included a Victoria Police record, went to the Tribunal's assessment of his credibility.[176] However, in the absence of evidence that the Tribunal considered exercising its powers under s 483(3), and in the absence of reference

169 Ibid.
170 *SZMTA* (n 2) 440 [27] (Bell, Gageler and Keane JJ); *MZAPC* (n 3) 594–5 [17] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 624 [134] (Gordon and Steward JJ), 643 [201] (Edelman J).
171 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') s 5(1)(a).
172 *Aala* (n 22) 101 [41] (Gaudron and Gummow JJ).
173 *Stead* (n 100) 147.
174 *WZARH* (n 110) 342–3 [60] (Gageler and Gordon JJ).
175 *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 [30].
176 Ibid [28].

to the notification material in its reasons, the court may infer that the Tribunal did not consider the information when determining the appellant's case.[177] These circumstances are distinguishable from *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[178] ('*VEAL*'), where there was clear evidence that the Tribunal had intellectually engaged with the adverse material,[179] and the content of the information was so prejudicial that it could not realistically be set aside.[180] Further, the Tribunal accepted the credibility of the appellant's claims and instead denied the visa on the basis that the appellant's fears of persecution should he return to India were not well founded.[181] Because the appellant's credibility was not in issue, the content of the notification was not significant to the contentious issues being determined by the Tribunal.[182]

In these factual circumstances, allowing the appellant the opportunity to make submissions about the content of the notification would not increase the possibility of a successful outcome because the contents of the report were of minimal relevance to the ultimate decision.[183] Had the Minister conceded a breach of procedural fairness in a case run under s 5 of the ADJR Act, the court would still have had to determine whether the appellant suffered a practical injustice in order to obtain a remedy under s 16. Here, the materiality element is established as part of the practical injustice test for establishing procedural unfairness. And again, as with the common law, the appellant would have been denied remedies on this basis. On balance, as the denial of procedural fairness did not rise to the level where it deprived the appellant of the possibility of a successful outcome, it is unlikely that the appellant would have been granted the remedies he sought, even in this alternative factual scenario.

Some might argue that semantic differences between the test for a breach of procedural fairness (depriving the *possibility* of a successful outcome)[184] and the threshold for materiality (whether the outcome could have *realistically* been different)[185] mean that the bar to establish procedural fairness is less onerous. Respectfully, I disagree. In the High Court's various judgments on materiality, the use of the term 'realistic' has often been supplemented or replaced by other phrases, such as 'realistic possibility',[186] 'objective possibility',[187] and 'unnegated possibility'.[188] Further, in *MZAPC* the majority referred to the strength of *Stead's* 'analogical force of reasoning', on the basis that 'procedural unfairness can result in

177 *MZAPC* (n 3) 604 [56]–[57] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
178 (2005) 225 CLR 88 ('*VEAL*').
179 Ibid 99 [27].
180 Ibid.
181 *MZAPC* (n 3) 609 [76] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 628 [151] (Gordon and Steward JJ).
182 *VEAL* (n 178) 96 [17].
183 *SZMTA* (n 2) 452 [72] (Bell, Gageler and Keane JJ).
184 *Stead* (n 100) 147; *WZARH* (n 110) 342–3 [60] (Gageler and Gordon JJ).
185 *MZAPC* (n 3) 605 [60] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
186 *SZMTA* (n 2) 445 [48], [49] (Bell, Gageler and Keane JJ); *MZAPC* (n 3) 600 [39]–[40] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
187 *CNY17* (n 140) 95 [47] (Kiefel CJ and Gageler J).
188 *MZAPC* (n 3) 602 [47] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

jurisdictional error'.[189] In *Stead*, the central inquiry was whether 'the denial of natural justice deprived him of the *possibility* of a successful outcome'.[190] The threshold for deprivation is therefore the same in both the 'practical injustice' test and the inquiry under a 'materiality' analysis.

I have just distinguished key materiality and procedural fairness cases, where jurisdictional error was *not* found, from factually clearer breaches of procedural fairness that will amount to a jurisdictional error — that is, there is a very narrow factual area in which these cases sit. In the cases of *SZMTA* and *MZAPC*, materiality merely fulfilled the function of the practical injustice test, given that the breach of procedural fairness was conceded by the government. In cases where a breach of the fair hearing rule is contested, the practical injustice test does most of the legwork. Consequently, there is a higher bar for immateriality. In this context, the substantive inquiry of materiality is almost the same as that for procedural fairness set out in *Stead* — the emphasis has merely shifted from an implied threshold of materiality in establishing the ground of procedural fairness to an explicit materiality inquiry that sits outside the ground of review.

***Materiality post*-MZAPC**

Materiality remains important in the context of the fair hearing rule in circumstances where procedural fairness is conceded, and the courts need to establish whether the breach rises to a jurisdictional error. One might argue that a concession should automatically amount to a jurisdictional error, given the importance of procedural fairness in our administrative regime and the dignitarian and rule of law values that we associate with affording procedural fairness. But this argument is inconsistent with the principles set out in *Lam* and *WZARH*. Both cases acknowledge that a breach of procedural fairness, lacking a practical element, will amount to a merely non-jurisdictional error.[191] The logic behind arguing that a concession will automatically lead to jurisdictional error undermines the 'practical injustice' threshold and asserts that any breach, no matter how insignificant, should amount to a jurisdictional error. While some may see this as a desirable mode of governing administration, it is ahistorical and attempts to hold up procedural fairness as something more than it is.

Under the test for procedural fairness, the applicant must go further than asserting mere breach and demonstrate that they were deprived of the possibility of a successful outcome in consequence. Why, then, should the bar be lower in a s 75(v) context, merely because a Minister has conceded one part of a two-part inquiry? Materiality remains relevant to the fair hearing rule because otherwise the application of that rule would be vulnerable to a concession of even the most minor breach.

In the alternative, it is unclear why the High Court interprets a ministerial concession of a breach to amount to a denial of procedural fairness, generally, and glosses over the practical injustice test in favour of a materiality inquiry. Perhaps materiality represents a broadening of the practical injustice test that applies to all grounds of review, not just procedural fairness. An alternative approach could be to view a breach as satisfying part 1 of the two-part test

189 *MZAPC* (n 3) 601 [45] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
190 *Stead* (n 100) 147.
191 *Lam* (n 145) 13–14 [37] (Gleeson CJ); *WZARH* (n 110) 342–3 [60] (Gageler and Gordon JJ).

in *WZARH* and engage with the (substantially identical) practical injustice test. If, as I have argued, the relevance of materiality is limited to such concessions in the fair hearing rule context, then a stringent materiality analysis could be altogether avoided by deferring to a procedural fairness inquiry in the first instance. In this context, in the context of the fair hearing rule, materiality has no new role to play; its articulation is not a development of law but merely a shift in emphasis and language.

Concluding remarks

It remains uncertain how, exactly, the procedural fairness fair hearing rule and materiality interact, and indeed whether materiality should form a part of a procedural fairness inquiry at all. I have demonstrated that the 'practical justice' threshold and the materiality threshold are substantially identical, by examining what each test demands in the context of recent materiality cases. It appears that the line of reasoning for both thresholds is substantially the same and that, once practical injustice is made out, materiality has little more to add in terms of judicial analysis. This is evident from the counter-factual analysis of *MZAPC*, where the reasoning considered the similar factors and produced the same outcome. It follows that materiality has a lesser role when the central inquiry of judicial review is breach of the fair hearing rule — substantially, the test remains as articulated in *Stead*. However, because of the High Court's disregard for the practical injustice test in cases where a breach has been conceded by the decision-maker, materiality remains relevant to establishing the practical detriment necessary to amount to jurisdictional error. Consequently, materiality cannot be completely disregarded for the fair hearing rule as it has been for the rule against bias. Despite the special place of procedural fairness in judicial review in promoting values of dignity and the rule of law, materiality remains an important filter that functionally serves to realise the principles set out in *Lam*. In both the context of the fair hearing rule and administrative mistakes generally, materiality represents the practical, utilitarian balance between the aforementioned values and 'decision-making [as] a function of the real world'.[192]

192 *Hossain* (n 1) 134 [28] (Kiefel CJ, Gageler and Keane JJ).