Jurisdictional error: history and some recent cases

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The impact of the decision in *Hossain v Minister for Immigration and Border Protection* ('*Hossain*')[1] and subsequent decisions on jurisdictional error indicates that statutes are ordinarily to be interpreted as incorporating a threshold of 'materiality' before a decision is denied legal effect. That condition will not be regarded as being met where the decision could not have been different if the error had not been made. Only bias and unreasonableness grounds do not have to meet this materiality requirement.

This article considers some cases relating to jurisdictional error and materiality which have occurred since. Regrettably, in my view (and the view of some High Court judges[2]), neither concept has become more coherent or easy to apply.

Jurisdictional error

'Jurisdiction' is the authority to decide. The source of a court or tribunal's power must be found within the grant provided to it by the empowering statute. Jurisdictional error or acting outside jurisdiction means that a court or tribunal decision lacked authority and is invalid.[3] Since the 13th century, the common law courts have confined inferior courts within the limits of their jurisdiction by the writ of prohibition.

The conventional view is that by confining inferior bodies within the limits of their jurisdiction, courts are *implementing* the will of Parliament. Parliament has imposed a jurisdictional limit and the courts are enforcing it.[4]

That objective is comparatively easy to achieve if jurisdictional error is confined to exceeding those matters expressly identified in the statute and those matters ancillary to them. A power to review certain kinds of planning decision, for example, may still give rise to questions of statutory construction but the answers to these questions are pursued by recognisable principles with a view to determining the true meaning of the words of grant of authority in the statute. Parliamentary intention is fulfilled by orthodox rules of construction.

Privative clauses and avoidance of invalidity

It is equally an exercise of parliamentary sovereignty to determine whether a factual or legal error results in a decision being invalid.[5] Parliament can permit errors to be made while still acting within jurisdiction so that, despite the errors, the decision will still have legal effect.

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1 (2018) 264 CLR 123 ('*Hossain*').

2 See, eg, the comments of Edelman J in *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737, 765 [23] ('*Nathanson*').

3 *Hossain* (n 1) 132–3 [23]–[24]; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, 520 [29] ('*MZAPC*').

4 See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 195 (Lord Pearce) ('*Anisminic*').

5 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

A sentence to a term of imprisonment, for example, may contain errors but it is normally the case that it remains valid until altered on appeal. If that were not the case and it was void, those detaining the applicant would be liable for false imprisonment.

Tension arises when parliaments attempt to exclude review by the courts for legal error by wide privative clauses. Is a legal error one within jurisdiction which might be made without invalidating the ultimate decision or does it constitute a decision made outside the jurisdiction granted to the decision-maker? If it is the latter, does the resulting decision lack authority and is it invalid?

A privative clause will typically not protect a decision made in excess of jurisdiction because, absent power, there was no 'decision' to protect at all. The UK Parliament, being sovereign, can protect a decision even from jurisdictional error if it uses very clear words. For constitutional reasons, Australian parliaments cannot. Thus, privative clauses can only be of limited operation.

In the face of a privative clause, *Anisminic Ltd v Foreign Compensation Commission* ('*Anisminic*')[6] moved the line between jurisdictional error and non-jurisdictional error of law by substantially enlarging the scope of the former. A similar move occurred in *Craig v South Australia* ('*Craig*'),[7] which held that a tribunal acts outside its jurisdiction if it:

(a) identifies a wrong issue;

(b) asks itself a wrong question;

(c) ignores relevant material;

(d) relies on irrelevant material; or

(e) at least in some circumstances, makes an erroneous finding or reaches a mistaken conclusion, affecting the tribunal's exercise or purported exercise of power.

Australian courts must maintain a distinction between jurisdictional and non-jurisdictional error for constitutional reasons. Despite this, the occasions on which jurisdictional error will be found are many. The distinction between jurisdictional error and error of law within jurisdiction is and always has been extremely difficult to draw. In *Anisminic*, Lord Reid said that the absence of power means that any purported decision is a 'nullity'[8] so the consequences of jurisdictional error are potentially profound.

Regrettably, the wide grounds of jurisdictional error set out in *Anisminic* and *Craig* frequently rely on implications drawn from statute. Those implications range from those which are tolerably clear to those which seem to owe their existence more to divination if not indeed predisposition.[9] In all events this comes at great cost to the certainty of the law even if it does, to some, confer a sense of intellectual rectitude.

6 *Anisminic* (n 4).

7 (1995) 184 CLR 163, 176 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

8 *Anisminic* (n 4) 171B–C. See also *Hossain* (n 1) 133 [24].

9 For a recent decision where the NSW Court of Appeal held 4:1 that a decision not to impose an 'intensive correction order' was not jurisdictional and the High Court held 4:3 that it was, see *Stanley v DPP (NSW)* (2023) 97 ALJR 107. In the view of many judges, this decision had the potential, if jurisdictional, to invalidate the entire sentence under which the defendant had been imprisoned.

Nonetheless, for the most part, the determination of whether a decision was made within authority has been an exercise in statutory construction. That remained so even with the extended forms of jurisdictional error which arose after *Anisminic* and *Craig.* Some cases might depend upon factual findings to determine whether jurisdictional limits have been exceeded. Was a procedure followed, for example?

One area where facts were critical to jurisdiction was a statutory requirement to find a 'jurisdictional fact'. In these cases, jurisdiction depended upon the existence of a particular fact. Here, it was open for a court to determine whether the required fact actually existed so as to enliven the jurisdiction of a lower court or tribunal.[10]

While jurisdictional fact cases turn on factual findings, the findings which are required are identified in the statute and are comparatively confined. What is more, the content of the factual finding which must be made is very similar in each case. Did the event occur in a geographic area? Is the value of the subject matter under a certain sum? Was there a breach of a rule warranting regulatory intervention? Questions such as these have their origins in the statute and direct attention to the same issues in each case.

If jurisdictional error is established, relief normally follows. Relief might be denied in exercise of a discretion in the case of futility but whether a decision would be set aside for want of jurisdiction is not dependent on the finding of facts relating to the consequence of the error itself.

Materiality

The facts which have to be found by the imposition of a requirement of 'materiality', and how they are to be found, are quite different. They are not set out specifically in the statute. The facts are individual to each case with no guidance beyond what may be gleaned from the general concept of materiality. The materiality conclusion is not even determined by existing facts but on speculation about hypothetical, counterfactual outcomes.

The High Court said in *MZAPC v Minister for Immigration and Border Protection* ('*MZAPC*')[11] that materiality turns on 'reasonable conjecture' that the decision, which was in fact made in an individual case, could have been different.[12] Thus, the facts required to be found to determine whether a jurisdictional error renders a decision invalid, could be widely different. The High Court has also placed the onus clearly on an applicant to prove that the decision made could have been different, absent the error.

It is first appropriate to consider the doctrinal basis for this outcome. 'Materiality' requires facts to be found before relief is granted for jurisdictional error. This requirement was not so

10 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 391; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
11 *MZAPC* (n 3).
12 Ibid 524 [38].

much of the outcome of the *construction of a particular statute* as it was of a *construction imposed by the Court on all statutes*. In *Hossain* Kiefel CJ, Gageler and Keane JJ stated that materiality was a common-law principle of statutory construction:

> Ordinarily, a statute which impliedly requires that a condition or another condition to be observed in the course of a decision-making process is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.[13]

In *MZAPC* Kiefel CJ, Gageler, Keane and Gleeson JJ stated that the limits of decision-making authority were 'informed by evolving common-law principles of statutory interpretation'.[14] Their Honours went on to say that in *Hossain*, Kiefel CJ, Gageler and Keane JJ enunciated a 'common law' principle of statutory interpretation that a statute conferring decision-making authority is not ordinarily to be interpreted as denying legal force to every decision made in breach of a condition. 'The statute is instead "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance".'[15]

A party claiming authority to decide normally must show the existence of that authority. It would only be in the rare case where a citizen is relying on an exception to a general grant of jurisdiction that a citizen would have to show that jurisdiction did not exist.

Despite this, the High Court has said that the applicant bears the onus of proof to establish materiality.[16] Some judges have said that the materiality requirement is contrary to principle and have shown that it is difficult to apply in practice.[17]

In *Minister for Immigration and Border Protection v SZMTA* ('*SZMTA*'),[18] Nettle and Gordon JJ in dissent said that a person was entitled to expect a decision to be made in accordance with the statute and not be subject to an additional requirement to show materiality.

In *Nathanson v Minister for Home Affairs*,[19] Gordon J again in dissent said that there were some cases where the error is so egregious that the '"quality or severity of the error", as a matter of logic and common sense, necessarily gives rise to the conclusion that it does not matter whether the "decision could realistically have been different had [the] error not occurred".'[20]

It is difficult to pass over these views as merely those of dissentients. The origin of review for jurisdictional error was that it was implementing the will of Parliament. It was, in effect, 'thus far and no further'.[21] It is against this background that it should be remembered that Parliament did not legislate to require 'materiality' in statutes as a ground of jurisdictional

13 *Hossain* (n 1) 134 [29].
14 *MZAPC* (n 3) 521 [30].
15 Ibid 521 [31], quoting *Hossain* (n 1) 134 [29].
16 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 445 [46]–[47] ('*SZMTA*').
17 Ibid 458–60 [90]–[95] (Nettle and Gordon JJ); *Nathanson* (n 2) 757 [84]–[85] (Gordon J), 759–60 [93]–[98] and 76–5 [121]–[127] (Edelman J).
18 *SZMTA* (n 16) 458–60 [90]–[95].
19 *Nathanson* (n 2).
20 Ibid 755 [76]–[78], 758 [86].
21 *SZMTA* (n 16) 445 [46]–[47].

error. The majorities in *Hossain* and *MZAPC* imposed it as an additional requirement upon the limits already set in all statutes. By doing so, the High Court altered those limits, in practical outcome if not in express form.

The expressed will of Parliament has become: 'thus far but an indeterminate amount further if the applicant is unable to prove materiality'. Thus, jurisdiction is determined by factual findings relating to consequence. It really does require a very special lens to see a clear parliamentary intent lying behind such a result.

Onus of proof, evidence and materiality

There has been considerable uncertainty about what, if any, evidence is required to demonstrate whether a decision could have been different. In *SZMTA* the High Court said that the issue was 'an ordinary question of fact' which can be determined 'from inferences drawn from evidence adduced on the application' and that this could be assisted by 'by reference to what can be expected to occur in the course of the regular administration of the Act'.[22] The object of this exercise is to determine whether on a counterfactual analysis the decision 'could' have been different as a matter of reasonable conjecture.[23] Materiality was to be proved by inferences from admissible evidence.[24]

Does this contemplate parties leading evidence to establish and rebut a counterfactual? If the resolution of the question is 'an ordinary question of fact', it does.

It certainly permits debate about whether evidence, which was obtained in breach of natural justice, was *considered* by a decision-maker. In *MZAPC* the High Court upheld a decision on the basis that the impugned evidence was not taken into account.

However, in *Nathanson*, the Court held that in a breach of procedural fairness case, 'reasonable conjecture' does not require an applicant to demonstrate how they would have taken advantage of the ability to present their case. It was not necessary to demonstrate the nature of the additional evidence or submissions which would be put to the tribunal. It was to be assumed that a party would do so and achieve a favourable outcome. Considering these statements it was unsurprising that Gageler J said that establishing the threshold of materiality is not onerous.[25]

Justice Edelman has been a critic of materiality. In *Nathanson* he said that the presentation of evidence to demonstrate materiality was exactly what *MZAPC* had required to be done. He stated that the evidence required in a natural justice case to prove the counterfactual was 'almost nothing',[26] and that it was sufficient to make a 'quadruple might' submission by speculating that

> but for the denial of procedural fairness there *might* have been things that he or his wife *might* have said at the hearing that *might* have assisted his case in a manner that *might* have led to a different result.[27]

22 *SZMTA* (n 16) 445 [46]–[47].
23 *MZAPC* (n 3) 524 [38].
24 Ibid 529 [52].
25 *Nathanson* (n 2) 750 [46]–[47], 752 [55].
26 Ibid 759 [93].
27 Ibid (emphasis in original); see also 761 [105].

Criticism of materiality test

A criticism of materiality is that it brings the court very close to making merits judgments. *Nahi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*Nahi*')[28] is an example of that. In that case, the applicant filed affidavits about the effect that the cancellation of his visa would have on the welfare of his children. The Full Court of the Federal Court determined the case on other grounds. It nevertheless entertained this evidence and made quite extensive factual findings about the effects of the cancellation of the applicant's visa and his deportation on the welfare of the applicant's children to answer the materiality question.[29]

If the court is not to engage in the merits of a decision it must limit itself to forecasting what decision the decision-maker might have made. In a case about the natural justice hearing rule, either materiality has meaning or it does not. That would seem to necessitate some indication of what the evidence was to be led to assess whether it would have made a difference. If not, Edelman J's view that what has to be proved is 'almost nothing' must surely be right. If that is not so, how is an applicant to be denied the right to show that further evidence or submissions might have made a difference?

If it is open for an applicant to call evidence (even if it is not necessary) about what evidence the applicant would have led or about what submission the applicant would have made, it must surely be that the respondent is able to lead evidence to say that neither would have made any difference. This would be so if materiality was 'an ordinary question of fact'.

This is what happened in *Star Training Academy Pty Ltd v Commissioner of Police (NSW)*.[30] The applicant led evidence of what it would have done had the respondent accorded it procedural fairness. The decision-maker was called. Under cross-examination she admitted that she might have changed her decision if there had been other evidence but that she could not say because she did not see it.

The case was a very strong case for the applicant. The procedural unfairness was obvious. Justice N Adams found for the applicant. In doing so, her Honour expressed her reservations about evidence being led in the manner that it had but acknowledged that the decisions of the High Court suggested that it could be done. Her Honour particularly expressed her reservations about the outcome of a case about jurisdictional error possibly turning on questions of credit.[31]

These matters emphasise the significant disadvantage applicants will face carrying the onus of proof. Typically, respondent departments have exclusive knowledge of why a decision was made. They also have the best knowledge of what happens 'in the course of the regular administration of the Act'.[32] Applicants are at a significant disadvantage proving that the decision could have changed.

28 [2022] FCAFC 29.
29 See also *Healey v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 188.
30 [2023] NSWSC 153.
31 See ibid [186]–[201].
32 *SZMTA* (n 16) 445 [47].

It should also be noted that there are cases where private bodies are authorised to make decisions with legal consequences. Adjudicators who act under the *Building Industry (Security of Payments) Acts* are also subject to review for jurisdictional error.[33]

Justification for materiality test

The imposition of a 'materiality' test to determine jurisdictional error may have occurred in an attempt to rein in the width of jurisdictional error as a result of decisions like *Craig*. It can be said that in a case like *Hossain*, the doctrine has its attractions. In that case, the applicant was refused a visa because he applied outside a time limit and because he failed a public interest test as he owed a debt to the Commonwealth and had made no arrangements to pay it. The time limit question was conceded to be wrongly decided. This error did not materially affect the result because the applicant was clearly indebted to the Commonwealth and failed on the public interest ground.

In *Hossain* it was always open to refuse the visa on the public interest ground. One wonders whether in that case it was necessary to impose a materiality test for all cases when it could have been decided by holding that the decision could have been properly refused on the public interest ground. In all events, not all factual scenarios are as clear as *Hossain*.

It is perhaps the frequency with which jurisdictional error can be found and decisions invalidated that lies behind the statement of Kiefel CJ, Gageler and Keane JJ in *Hossain* when rationalising materiality that decision-making 'is a function of the real world'.[34] Later in *SZMTA* Bell, Gageler and Keane JJ spoke of breaches of the rules of procedural fairness needing to give rise to 'practical injustice' to constitute jurisdictional error.[35]

Conclusion on materiality test

If practicality and reality are the aim of 'materiality', it is questionable whether it is achieving its goal, particularly for the parties who must run jurisdictional error cases. It seems to have made predicting an outcome and running a case more difficult. It solves none of the complexities which existed before it was introduced and only adds another layer of complexity to them.

33 *Ceerose Pty Ltd v A-Civil Aust Pty Ltd (No 2)* [2023] NSWSC 345.
34 *Hossain* (n 1) 134 [28].
35 *SZMTA* (n 16) 443 [38].