CASE NOTE

IN RE GRAY AND ORS; EX PARTE MARSH AND ORS [1985] 59 A.L.J.R. 804: JURISDICTIONAL ERROR OF LAW IN AUSTRALIA

1. *Introduction*

When a court exercises its supervisory jurisdiction to review a decision of another court or an administrative tribunal, the scope of its review is limited. It cannot review an erroneous finding of fact, unless the objective existence of that fact is a matter on which the jurisdiction of the court or tribunal depends[1] or unless the finding of fact is made on the basis of no evidence, in which case the error made is an error of law.[2] An error of law is subject to judicial review, providing the error is a jurisdictional error of law[3] in which event the decision is a nullity.[4] Non-jurisdictional errors of law are errors of law which lie within the court's or tribunal's jurisdiction. Its jurisdiction is the area of inquiry over which it can make conclusive determinations on the merits of the case. Non-jurisdictional errors of law are immune from review,[5] unless the error is disclosed on the face of the record, for which certiorari will lie.[6] For the purpose of judicial review, the crucial distinction is thus between jurisdictional and non-jurisdictional errors of law. The decision of the House of Lords in *Anisminic Ltd* v. *Foreign Compensation Commission*[6a] threatened to abolish this distinction so as to render all errors of law, or almost all,[7] jurisdictional and thereby reviewable.[8] Subsequent English cases, while initially accepting the expanded scope for judicial review created by the near-abandonment of the distinction,[9] have since sought to restrict the application of *Anisminic*[10] and have attempted to restore and maintain the distinction, at least in the case of courts.[11] The

[1] *R.* v. *Blakeley; Ex parte Association of Architects of Australia* (1950) 82 C.L.R. 54.
[2] *Edwards* v. *Bairstow* [1956] A.C. 14, per Lord Radcliffe at 34.
See also *British Launderers' Research Assoc.* v. *Borough of Hendon Rating Authority* [1949] 1 K.B. 462 at 471.
[3] *Bunbury* v. *Fuller* (1853) 9 Ex. 111.
[4] R. D. McInnes "Jurisdictional Review after Anisminic" (1977) 9 V.U.W.L.R. 37, at 38. *Anisminic* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 at 195.
[5] *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56 at 69-70.
[6] *R.* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 K.B. 338; *Hockey* v. *Yelland* [1984] 56 ALR 215, at 219. *Glenville Homes Pty Ltd* v. *Builders Licensing Board* [1981] 2 N.S.W.L.R. 608.
[6a] [1969] 2 A.C. 147.
[7] The question posed after *Anisminic* was whether any scope was left for non-jurisdictional errors of law. Lord Wilberforce (at 210) insisted that such scope remained.
[8] *Anisminic* v. *FCC* [1969] 2 A.C. 147, per Lord Pearce at 195, and Lord Reid at 171.
[9] *Pearlman* v. *Keepers of Harrow School* [1979] Q.B. 56, per Lord Denning M.R. at 69.
[10] *South-East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products* [1981] A.C. 363.
[11] *In Re Racal Communications Ltd* [1981] A.C. 374.

Australian courts have persistently refused to abandon the distinction between jurisdictional and non-jurisdictional errors of law[12] and the recent High Court decision, *In Re Gray; Ex parte Marsh* is significant in that it gives substantial and express approval for the retention of the distinction.

2. *The Facts of the Case*

An election for a national organiser of the Amalgamated Metal Workers Union (hereafter the Union) was held by means of a secret postal ballot, early in 1984. The election was conducted under section 170 of the *Conciliation and Arbitration Act* 1904 (C'th) (hereafter the Act) by the Industrial Registrar at the request of the Union[13] with a view to ensuring that no irregularity occurred in or in connection with the election.[14] The unsuccessful candidate, Mr Adamson, lodged an application with the Industrial Registrar, pursuant to section 159(1) of the Act for an inquiry into conduct which he alleged had occurred in or in connection with the election and which he alleged amounted to "irregularities" within the meaning of the Act. The conduct complained of consisted in the distribution of pamphlets, and the placing of newspaper advertisements by the successful candidate, Mr Bali, containing photographs of Mr Bali and Mr Marsh (a supporter of Mr Bali's candidature) shaking hands with the Prime Minister, Mr Bob Hawke. The pamphlets and advertisements also contained statements urging members of the Union to vote for Mr Bali "for genuine Labor Leadership"[15] and specified details of his history with the Australian Labor Party. The unsuccessful candidate alleged in his application that the distributed election material was misleading and was likely to mislead members of the Union voting in the election, on the grounds that it suggested that Bali had the general endorsement of Mr Hawke and the A.L.P.,[16] which he did not, and that it suggested that his allegiance was to the A.L.P. and that his policies would be those of the A.L.P. when in fact he was supported by the National Civic Council, an organisation whose interests and objectives are contrary to the A.L.P. The Industrial Registrar referred the application to the Federal Court of Australia (Gray J.) pursuant to section 159(4)(a) of the Act.[17]

[12] *Houssein* v. *Under Secy, Dept. of Industrial Relations and Technology* [1981] 56 A.L.J.R. 21; *Hockey* v. *Yelland* [1984] 56 A.L.R. 215.

[13] It is not disclosed precisely whether the request was made by a sub-group or branch of the Union, or the Union itself.

[14] Section 170(1) reads: "An organisation or a branch of an organisation may, in writing, request the Industrial Registrar . . . that an election for an office in the organisation . . . be conducted under this section with a view to ensuring that no irregularity occurs."

[15] *In Re Gray; Ex parte Marsh* [1985] 59 A.L.J.R. 804, at 805.

[16] There was no suggestion that he had the *formal* endorsement of the A.L.P.

[17] Where an election is being conducted under s. 170, and an application is made under s. 159(1) for an inquiry into an alleged irregularity, s. 159(4)(a) holds that "the Industrial Registrar shall . . . refer the application to the Court and thereupon an inquiry shall be deemed to have been instituted." Section 159(4) applies in virtue of s. 159(3).

In accordance with the duty imposed on the court by section 165(1) of the Act,[18] Gray J. proceeded to inquire as to whether or not an irregularity had occurred. He set himself to decide that question on the basis of two assumptions: (1) the assumption that the conduct complained of had occurred, and (2) the assumption that the material distributed was capable of misleading and likely to mislead electors.[19] The critical question was whether or not the distribution of such misleading material amounted to an irregularity under the Act. An "irregularity" is defined in section 4(1) of the Act:

> "... in relation to an election or ballot, [to] include ... a breach of the rules of an organisation[20] ... and any act, omission or other means whereby the full and free recording of votes, ... or a correct ascertainment or declaration of the results of the voting[21] is, or is attempted to be, prevented or hindered."

It is unclear whether parliament intended the definition within section 4(1) to be exhaustive, or whether it intended the notion of an irregularity to comprehend such other behaviour as would ordinarily be understood by the term. Gray J. held that "to mislead electors in the way in which Mr Bali's propaganda arguably did could amount to an irregularity"[22] whether or not the definition within section 4(1) is exhaustive, for either the conduct is sufficient to fall within the definition as a hindering of full and free recording of votes, or the misleading of voters is the type of thing ordinarily understood to amount to an electoral irregularity. Having made the finding that the misleading conduct, if proved to have occurred, could amount to an irregularity within the meaning of the Act, Gray J. adjourned the inquiry to a date to be fixed for the return of subpoenas which had already been served upon Mr Bali and Mr Marsh seeking the production of various documents. On that date, any further necessary directions would also be given before the hearing of evidence would begin.

The proceedings before the High Court were instituted by Mr Bali and Mr Marsh who sought inter alia[23] certiorari to quash the finding of Gray

[18] Section 165(1) reads: "At an inquiry the Court shall inquire into and determine the question whether any irregularity has occurred in or in connection with the election."

[19] *In re Gray*, 808. Gray J. decided to make these assumptions for he believed that the court was not yet in a position to make a proper determination on the matter, as a full determination would depend on evidence not yet presented.

[20] It was agreed by all parties that no actual breach of the union rules had occurred; *In Re Gray* at 806 and 810.

[21] There was also no suggestion that any attempt had been made to prevent a correct ascertainment or declaration of the results of the voting. *In Re Gray* at 810.

[22] *In Re Gray* at 808. Gray J. was also of the opinion that the misleading conduct in question may have affected the result of the election in an illegitimate way. Such a finding by the court is the basis of its power to declare an election void, pursuant to s. 165(4).

[23] The prosecutors also applied for special leave to appeal from a judgment of the Full Court of the Federal Court dismissing an appeal from a decision made by Gray J. Mr Bali and Mr Marsh had filed notices of motion with the Federal Court (Gray J.) seeking to have the subpoenas with which they had been served set aside. Mr Bali also sought to have the inquiry terminated. Gray J. dismissed both applications. Bali and Marsh then sought special leave to appeal from Gray J.'s order refusing to set aside the subpoenas, from the Full Court of the Federal Court which dismissed the appeal as incompetent by reason of an "ouster clause", s. 118(1)(a) of the Act, which prevents appeals to the Full Court of the Federal Court from

J., and prohibition to restrain further Federal Court proceedings.[24] The prosecutors argued that the conduct which the unsuccessful candidate complained of was not sufficient to amount to an irregularity within section 4(1) of the Act, that definition being exhaustive, and as such the Federal Court had no jurisdiction to hold an inquiry.[25] All six members of the High Court held that Gray J., in his application of the statutory conditions for an irregularity to the alleged primary facts had committed an error of law[26] in wrongly determining that the facts, if correct, could amount to an irregularity within the meaning of the Act.[27] In a three-three split[28] the High Court

a judgment or order of that court, constituted by a single Judge, in proceedings under Part IX of the Act. Bali and Marsh sought special leave to appeal to the High Court from the judgment of the Full Court on the grounds that the setting aside of the subpoenas was a separate proceeding from the inquiry into the disputed election rules under Part IX, the subpoenas having been issued under the general Federal Court Rules. The High Court insisted that the issue and the motion to set aside the subpoenas were simply steps in the application for an inquiry, a proceeding under Part IX and as such the ouster clause did apply. Moreover, in proceedings under Part IX no appeal can lie to the High Court from a judgment of the Full Court of the Federal Court, pursuant to s. 118B(2) of the Act. The High Court thus rejected the application to it for special leave to appeal and affirmed the decision of the Full Court of the Federal Court. See *In Re Gray* at pp. 808, 813, 815, 817.

[24] Under s. 75(v) of the Constitution, the High Court has original jurisdiction in all matters in which a writ of prohibition is sought against an officer of the Commonwealth. Whether prohibition will lie notwithstanding that the officer is a judge of a superior court of record is discussed most fully in the judgment of Deane, J. (See below.) Gibbs C.J. assumes that prohibition can lie against the Federal Court on the basis of *R.* v. *Federal Court of Australia, Ex. p. W.A. National Football League* (1979) 143 C.L.R. 190. Section 75(v) of the Constitution does not expressly mention the writ of certiorari, and there is considerable doubt as to the power of the High Court to order certiorari directed to another superior court of record (see Deane J. at 819 and Dawson J. at 822–823).

[25] The High Court was also faced with a challenge to the constitutional validity of Part IX of the Act, the provisions which confer power on the Federal Court to inquire into disputed elections, and declare elections void. The prosecutors argued that such powers went beyond the judicial power of the Commonwealth and were neither incidental nor ancillary to the exercise by the Court of its judicial function. As such, the Commonwealth parliament could not validly vest the Federal Court with this power, so that the Court failed to have any jurisdiction to undertake the inquiry or make an order. This challenge was initially presented to the Federal Court and Gray J. gave judgment that the challenge had failed. In the proceedings before the High Court, the Court found it unnecessary to consider whether Part IX validly confers power on the Federal Court as it was prepared to order prohibition to restrain further proceedings. (See Gibbs C.J. at 813.)

[26] Gibbs C.J. at 812; Wilson J. at 185; Brennan J. at 817; Deane J. at 817; Dawson J. at 822; Mason J. agreed that the matters complained of did not constitute an irregularity within the meaning of the Act and that Gray J. had been mistaken in believing that they could, but saw Gray J.'s determination as only tentative and so considered that it "may well be going too far" to say that Gray J. had erred in law. (at 815) But on the substance of the point, he is in agreement with the other five.

[27] Despite the fact that the distinction between errors of fact and errors of law is notoriously unclear, it is generally accepted that an error made in the application of statutory criteria to a set of primary facts is an error of law, at least on the adoption of the analytic approach enunciated by Whitmore and Aronson in their *Review of Administrative Action* (Sydney, Law Book Co., 1978); See also *Edwards* v. *Bairstow* [1956] A.C. 14, per Lord Radcliffe at 35. Moreover, it is clear that the term "irregularity" is a technical legal term which requires legal training for its interpretation and application. Thus, even on the approach adopted by Denning L.J. in *British Launderers' Research Assoc.* v. *Borough of Hendon Rating Authority* [1949] 1 K.B. 462, at 471–472, the error committed here would be an error of law, not of fact.

[28] In cases of even division of opinion, the Chief Justice has a "casting vote". *Judiciary Act* (1903) (C'th) s. 23(2)(b).

held that the error of law was jurisdictional and that prohibition should be ordered to restrain further proceedings in the Federal Court.[29]

3. *Background to the Decision*

Before considering the six separate judgments delivered by the High Court, it would be useful to consider briefly the state of the law prior to *In Re Gray; Ex parte Marsh*. A fundamental dispute in Administrative Law has centred on the nature of jurisdiction; the traditional or narrow perception of jurisdiction is that it is determinable only at the commencement of a hearing,[30] that it consists entirely in the power to embark on the inquiry.[31] If such competence is established, no error of law committed during the course of the inquiry could threaten the jurisdiction of the court or render its decision a nullity.[32] By contrast, what can be described as the broad or extended conception of jurisdiction is the view that jurisdiction may also be exceeded during the course of an inquiry legitimately embarked upon,[33] such that errors of law made within an inquiry which the court is competent to hear may yet exceed the jurisdiction of the court and render its decisions void.

Associated with the narrow perception of jurisdiction is the notion of a traditional jurisdictional error of law, that is, an error made by a court or tribunal in determining the threshold, preliminary or "collateral" question[34] of whether the conditions precedent to the exercise of its jurisdiction are satisfied.[35] The jurisdiction of a tribunal or court may be defined by statute to depend upon the objective existence of a state of affairs, for instance, whether persons are engaged in the "coal-mining industry",[36] or whether an individual has been subjected to a "dismissal",[37] or received a reduction in his grade of employment by way of "punishment"[38] or whether a residence is a "self-contained dwelling unit".[39] To determine that the necessary state

[29] Certiorari was not ordered.

[30] R. D. McInnes "Jurisdictional Review after Anisminic" (1977) 9 V.U.W.L.R. 37, at 51. McInnes suggests that this narrow doctrine is in fact a nineteenth-century phenomenon.

[31] McInnes, op.cit. at 38. *R.* v. *Nat. Bell Liquors Ltd* [1922] 2 A.C. 128.

[32] Unless, of course, the error of law was disclosed on the face of the record.

[33] McInnes, op.cit. at p. 51.

[34] They are called "collateral" questions because they are collateral to the substantive question the tribunal is authorised to decide. *Bunbury* v. *Fuller* (1853) 9 Ex 111.

[35] *Bunbury* v. *Fuller* (1853) 9 Ex 111.

[36] *R.* v. *Hickman; Ex parte Fox and Clinton* (1945) 70 C.L.R. 598. That it was necessary that, objectively, the persons were engaged in the coal-mining industry is evident from the fact that the powers given to the Local Reference Board "do not include any authority to decide either the limits of the Local Board's own jurisdiction, or the extent of the application or operation of the conception involved in the expression 'coal-mining industry'."; per Dixon J. at 617.

[37] *Ex parte Worth; re Tully* (1954) 55 S.R.(N.S.W.) 47.

[38] *Potter* v. *Melbourne & Metropolitan Tramways Board* (1957) 98 C.L.R. 337; "The words (of the statute) do not relate to what the appeal board supposes to fall within that category (i.e. punishments) but in terms speaks of what *in fact* falls within the category."; per Dixon C.J., Webb, Kitto, and Taylor JJ. at 344. (My emphasis.)

[39] *Bell* v. *Ontario Human Rights Commission* (1971) 18 D.L.R. (3d) 1.

of affairs exists, when it fails to exist, is for the decison-making body to proceed lacking jurisdiction[40] though a court will be reluctant to treat the determination as erroneous if the tribunal enjoys special expertise.[41] Conversely, a failure to recognise that the necessary conditions for the exercise of jurisdiction are in fact satisfied, is wrongfully to decline to exercise jurisdiction[42] which is itself a jurisdictional error. Alternatively, the jurisdiction of a tribunal or court may depend upon its "subjective" satisfaction that a certain state of affairs exists; for instance, a chairman of a tribunal may only have to

> "... satisfy himself that all persons ... appearing to him to have an interest ... have been given reasonable notice of the time and place of the proceedings ...".[43]

But even if a statute does confer a subjective discretionary power to determine whether the jurisdictional conditions precedent are satisfied, the decision-making body may nevertheless commit a traditional jurisdictional error if it does not make the necessary enquiries to arrive at the state of satisfaction[44] or if it misconceives from the outset the nature of its duty or function.[45] In some cases, a superior court may enjoy the power to determine conclusively whether or not the conditions upon which its jurisdiction depends are satisfied[46] though this power is rare.[47] The enjoyment of such a power effectively causes the threshold question to fall within the court's jurisdiction, and therefore to be unreviewable.

Associated with the broad perception of jurisdiction, as enunciated in *Anisminic*, is the notion of extended jurisdictional error. This consists in a recognition that a decision-making body may exceed its jurisdiction in the course of a competent inquiry by, for instance, applying the wrong test[48] so

[40] *Potter* v. *Melb. & Met. Tramways Board* (1957) 98 C.L.R. 337; *R.* v. *Hickman; Ex parte Fox* (1945) 70 C.L.R. 598.

[41] *R.* v. *Marshall; Ex parte Baranor Nominees Pty Ltd* [1986] V.R. 19; Where the tribunal enjoys special expertise "the finding of 'jurisdictional fact' by the tribunal will only be overturned where there is clear proof leading unmistakably to the conclusion that the finding was erroneous."; per Brooking J. at 32–33.

[42] *Bell* v. *Ontario Human Rights Commission* (1971) 18 D.L.R. (3d) 1.

[43] *R.* v. *Thomas; Ex parte Sheldons Consolidated Pty Ltd* [1982] V.R. 617, per Kaye J. at 625.

[44] Ibid at 625, where there was no certification made or record in the minutes that the chairman had made enquiries before the commencement of the proceedings as to whether an interested party (Sheldons Pty Ltd) had been given appropriate notice. The Court held that as a result the statutory condition precedent (that the chairman satisfy himself that ...) was not fulfilled.

[45] "Where the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not arise in law and in fact"; per Dixon C.J., Williams, Webb and Fullagar JJ.; *Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Coy Pty Ltd* [1953] 88 C.L.R. 100, at 120. See also *Sinclair* v. *Mining Warden of Maryborough* (1975) 132 C.L.R. 473.

[46] *Parisienne Basket Shoes Pty Ltd* v. *Whyte* (1938) 59 C.L.R. 369. The High Court held that a Court of Petty Sessions could conclusively determine whether an information had been laid "too late" to be heard.

[47] This power was held not to be enjoyed by a tribunal in *Manning* v. *Thompson* (1979) 25 A.L.R. 129 (zoning limits).

[48] *Australian Stevedoring Industry Board* [1953] 88 C.L.R. 100 at 120.

that it "... fail[s] to deal with the question remitted to it and decide[s] some question which was not remitted to it",[49] or by taking into account irrelevant considerations so as to "... base ... [its] decision on some matter which was not prescribed for ... [its] adjudication",[50] ignoring or refusing to take into account relevant considerations,[51] imposing an unwarranted condition,[52] failing to comply with the requirements of natural justice,[53] or the giving of a decision in bad faith.[54] Any such error made in the course of an inquiry legitimately embarked upon renders the decision a nullity.[55]

The breadth of potential jurisdictional error opened up by *Anisminic* led some English judges[56] and many commentators[57] to argue that there was no scope left for non-jurisdictional error so that all errors of law were susceptible to direct intervention by another court exercising supervisory jurisdiction. That view could not be sustained in the face of a series of English cases which purported to accept that excesses of jurisdiction could occur in the course of an inquiry, but which nevertheless proceeded to identify specific errors of law falling within jurisdiction. Thus, for an English County Court judge to ask the right question (viz. did the installation of a heating system amount to "structural alteration"?) but arrive at the wrong answer was for him to make an unreviewable error of law within his jurisdiction.[58] For an Industrial Court to decide, perhaps erroneously,[59] that an employee on strike was not in breach of his contract of employment, was not for it to exceed its

[49] *Anisminic* v. *FCC* [1969] 2 A.C. 147, per Lord Reid at 171.

[50] Ibid; per Lord Reid at 174. This error was committed in *Anisminic* itself for the Foreign Compensation Commission took into account the nationality of the successor in title to the British Company whose property had been sequestrated by the Egyptian government. The "successor in title" was an Egyptian Organisation, T.E.D.O., not a British national and so the British Coy. had its claim for compensation rejected. The notion of a "successor in title" was also misconstrued. See also Lord Pearce at 195.

[51] *Anisminic* v. *FCC* [1969] 2 A.C. 147, per Lord Reid at 171. See also *Sinclair* v. *Mining Warden* (1975) 132 C.L.R. 473 (failed to take into account "public interest" in general).

[52] *Anisminic* v. *FCC* [1969] 2 A.C. 147 can be interpreted as having committed this error.

[53] Id. per Lord Reid at 171.

[54] Ibid.

[55] Ibid.

[56] *Pearlman* v. *Keepers of Harrow* [1979] Q.B. 56, per Lord Denning at 69–70.

[57] John Smillie, "Jurisdictional Review of Abuse of Discretionary Power" (1969) 47 *Can Bar Rev.* 623, at 639; Wade "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 L.Q.R. 198, at 212 "The jurisdictional barrier ... is likely to prove frail when circumstances put it under pressure. It may well be asked whether there is any merit in maintaining it in its present artificial position, or indeed at all." See also Gould "Anisminic and Jurisdictional Review" [1970] *Public Law* 358 at 361. John Smillie in his "Judicial Review of Administrative Action – a Pragmatic Approach" (1980) 4 *Otago Law Review* 417 argues in support of Lord Denning's position in *Pearlman* that the distinction between jurisdictional and non-jurisdictional errors of law ought to be abandoned and replaced by carefully formulated criteria as to when judicial intervention by way of review is warranted. It is submitted that this approach has substantial merit.

[58] *Pearlman* v. *Keepers of Harrow* [1979] Q.B. 56, per Geoffrey-Lane L.J. at 76. Although this was a dissenting judgment in the case, it has been expressly approved of in a joint judgment by the Privy Council in *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products* [1981] A.C. 363 at 370 (where Denning L.J.'s call for the abandonment of the distinction was expressly disapproved), and has received express approval by Lord Diplock in *In re Racal Communications Ltd* [1981] A.C. 374.

[59] *South East Asia Fire Bricks* v. *Non-Metallic Mineral Products* [1981] A.C. 363. Their Lordships assumed, without deciding, that the award contained one or more errors of law (at 374).

jurisdiction for it "applied its mind to the proper question".[60] English courts became keen to show that a distinction between jurisdictional and non-jurisdictional errors of law could be maintained consistently with an acceptance of the notion of extended jurisdictional error as articulated in *Anisminic.* But when a judge of an English High Court refused to make an order for the inspection of company documents because he had erroneously construed the type of offence there needed to be evidence of,[61] his error of law was held to be non-jurisdictional,[62] not on the grounds that his error was not of the type envisaged by *Anisminic* but on the grounds that although *Anisminic* had abolished the distinction between jurisdictional and non-jurisdictional errors the abolition only applied to administrative tribunals[63] and not to inferior courts[64] nor, even more so, to superior courts.[65] It follows that, in England, although the distinction between jurisdictional and non-jurisdictional errors of law has been preserved, in respect of courts, it is now unclear whether the notion of an extended jurisdictional error is properly applicable to courts.[66]

In Australia, the courts have been eager to maintain a distinction between jurisdictional and non-jurisdictional errors of law while yet offering some recognition that excesses of jurisdiction may occur within the context of a competent inquiry. To this effect, the Victorian Supreme Court was prepared to hold that a failure by a referee of a Small Claims Tribunal to identify the only legal basis[67] on which the claim before it could be based[68] did not

[60] Ibid. at 373–374. As the error was within the judge's jurisdiction, it was not suceptible to review, and the ouster clause effectively prevented an appeal.

[61] The High Court judge in question seemed to believe that an inspection of documents could only be ordered where there was reasonable cause to believe that an offence had been committed in the course of the internal management of the company, which the Court of Appeal in the appeal against the decision regarded as too narrow. *In re Racal Communications Ltd* [1981] A.C. 374, at 381.

[62] The (English) High Court judge also made an error of law in deciding that the employee did not fall within the class of an "officer of the company" within the meaning of the *Companies Act* 1948. This error was also held to be non-jurisdictional.

[63] Id. per Lord Diplock at 382 "In *Anisminic* . . . this house was concerned only with decisions of administrative tribunals." The New Zealand Court of Appeal in *Bulk Gas Users Group* v. *Attorney-General* [1983] N.Z.L.R. 129 has also abandoned the distinction between jurisdictional and non-jurisdictional errors of law for the purpose of judicial review of administrative tribunals. Instead, a rebuttable presumption is to be adopted that Parliament intends all errors of law made by an administrative tribunal to be reviewable.

[64] Id. p. 383; this raises the problem of distinguishing between administrative tribunals and inferior courts.

[65] Id. p. 384.

[66] It would seem to be an implication of *In re Racal,* given its refusal to recognise the application of *Anisminic* to courts, that it does not endorse the extended notion of jurisdictional error in regard to courts.

[67] *R.* v. *Small Claims Tribunal & Syme; Ex parte Barwinner Nominees Pty Ltd* [1975] VR 831. The facts concerned a consumer who purchased a T.V. set from Barwinner Nominees, which was badly defective. The Small Claims Tribunal ordered the trader to refund the entire purchase price while permitting the consumer complainant to retain the T.V. set. The Vic. Supreme Ct. held that the property having passed s. 161(3) of the *Goods Act* 1958 (Vic.) applied, and the only legal basis on which the claim could be determined would be as a claim for damages for breach of warranty.

[68] The Vic. Supreme Ct. (Gowans J.) also held that the referee had committed no error of law in failing to make the order conditional on return of the goods. Even had it been an error of law, however, the Court stated that it would not have involved an excess of jurisdiction.

in itself show an excess of jurisdiction.[69] To fall within the type of extended jurisdictional error contemplated by *Anisminic*, it is not sufficient to fail to take into account relevant considerations;[70] "it is only when, by doing so, the tribunal steps outside jurisdiction that nullity is the result".[71] Thus, if the failure to take into account relevant considerations takes the form of adopting the view that the law is not relevant at all[72] or that it does not authorise the order the tribunal is to make[73] then the tribunal would be seen to step outside the limits of its jurisdiction.[74] But errors of law which fall short of such disregard may fall within jurisdiction. And the early attempt by the English judges to interpret *Anisminic* as effectively abolishing the distinction between jurisdictional and non-jurisdictional errors of law for judicial bodies like courts has been firmly repudiated.[75] The Australian High Court, in two cases in which it discusses the effect of an "ouster clause" on the availability of certiorari for errors of law which appear on the face of the record, has explicitly maintained the distinction[76] while yet implicitly acknowledging in theory the possibility of extended jurisdictional error.[77]

Australian recognition of specific instances of extended jurisdictional error is rare. One such instance has been recognised in a case heard by the New South Wales Court of Appeal[78] in which a Royal Commissioner, undertaking an inquiry into the traffic of drugs, in response to a witness who in effect unjustifiably refused to answer questions put to him[79] considered many matters external to the inquiry, including evidence given at a conspiracy trial to which the witness was not a party.[80] In holding that the Commissioner took into account matters which he had no right to take into account, the Court held that he had travelled outside his jurisdiction in the course of an inquiry properly embarked upon.[81] What has been lacking in Australia, however, is express High Court recognition of a specific example of extended jursidictional error. The facts of *In Re Gray; Ex parte Marsh* prompt an expectation that the High Court may offer express judicial recognition of

[69] Id. p. 841.
[70] Id. p. 840.
[71] Id. p. 840.
[72] Id. p. 841.
[73] Id. p. 841.
[74] Id. p. 841.
[75] *Glenville Homes Pty Ltd* v. *Builders Licensing Board* [1981] 2 N.S.W.L.R. 608, at 609. The N.S.W. Court of Appeal expressly rejected the view proposed by Denning L.J. in *Pearlman*, and approved the repudiation of Lord Denning's view by the Privy Council in *South East Asia Fire Bricks* and by the House of Lords in *In re Racal*.
[76] *Houssein* v. *Dept. of Industrial Relations* [1981] 56 A.L.J.R. 217, at 219. *Hockey* v. *Yelland* (1984) 56 A.L.R. 215 at 219.
[77] Id. pp. 220, and 219 respectively.
[78] *Thelander* v. *Woodward & Attorney-General* [1981] 1 N.S.W.L.R. 644, per Reynolds J.A., Moffit P., and Glass J.A.
[79] Id. p. 654.
[80] Id. pp. 654–655. The court also showed recognition of the distinction between jurisdictional and non-jurisdictional errors of law by carefully considering whether the error "was done within the area of jurisdiction remitted to the tribunal or is properly to be regarded as done outside it." (at 655)
[81] Id. p. 655. The court explicitly perceives the error as a jurisdictional error in the wider sense expounded by Lord Reid in *Anisminic*.

an instance of an excess of jurisdiction or offer express substantial recognition of the doctrine itself, while yet showing the way in which such recognition is consistent with the distinction between jurisdictional and non-jurisdictional errors of law.

4. *Decision of In Re Gray; Ex parte Marsh*

In determining that Gray J. had committed an error of law in holding the distribution of misleading electoral material to constitute an irregularity within the meaning of the Act, it was held that the definition of "irregularity" in the Act was intended to be inclusive[82] so as to comprehend its ordinary meaning in addition to the specific words of the section. In considering the specific words of that section, "whereby the full and free recording of votes ... is ... hindered", Gibbs C.J. distinguished between the mental process of forming an opinion on whom to vote for, and the process of casting a vote by obtaining and marking a ballot paper and depositing it with an officer of the union. He construed the words, the "recording of votes" to refer to the second process[83] which could be hindered by the distribution of misleading statements if those statements carried the message that a candidate was formally endorsed by a particular party when in fact he or she belonged to a rival party.[84] As there was no suggestion in the case that the winning candidate was formally endorsed by the Australian Labor Party, he concluded that the misleading representations could only serve to affect the formation of a decision by a voter for whom to vote, and, as such, would be insufficient to constitute an irregularity within the terms of the definition. Ordinarily understood, an irregularity requires a departure from some rule, but Gibbs C.J. was unable to identify any rule or established practice relating to an election which might be violated by a failure to disclose every fact which may affect the opinion of voters, or by the publication of a genuine photograph which carries a false suggestion, or by a statement that a person was a genuine supporter of a Party where that support was arguably not wholehearted or orthodox.[85] Gibbs C.J. concludes, and the other five judges agree,[86] that the conduct of Mr Bali neither constitutes an irregularity within the common understanding of that term, nor within the strict terms of the definition.

On the question of the nature of the error of law identified, Gibbs C.J. Wilson and Brennan JJ. hold the error to be jurisdictional, while Mason,

[82] Gibbs C.J. came to this conclusion by contrasting it with other definitions in the Act which were prefaced by the word "means" or "means and includes" (used in contrasted senses).

[83] *In Re Gray; Ex parte Marsh* at 810.

[84] *Evans* v. *Chicton-Browne* (1981) 147 C.L.R. 169; or, for instance, if a "How to Vote" card misrepresented the policies of a candidate. *Consandine* v. *Strathfield Municipal Council* (1981) 44 L.G.R.A. 435.

[85] *In Re Gray; Ex parte Marsh* at 811.

[86] See fn. 25. Gibbs C.J. also made much of the fact that the result of many elections would be rendered uncertain if they could be invalidated on proof that statements had been made during the election which were likely to mislead voters in deciding for whom to vote.

Deane and Dawson JJ. treat the error as occurring within the limits of the court's jurisdiction. Much is made of the fact that the Federal Court, although a superior court, enjoys only limited jurisdiction[87] possessing highly special and restricted powers under Part IX of the Act to inquire into and invalidate disputed elections, powers which were originally conferred on the Australia Industrial Court,[88] a court whose jurisdiction was clearly restricted. Gibbs C.J. takes such considerations to indicate that Parliament cannot have intended that the Federal Court should have the power "to determine conclusively the question on which the jurisdiction under Part IX depends."[89] The three majority judgments appear to treat the error as a traditional jurisdictional error.[90]

5. *Analysis of In Re Gray; Ex parte Marsh*

As each of the six judges delivered separate judgments, and as there is no clear core of common reasoning amongst them, it seems best to approach an analysis of the reasoning behind the decision by way of considering each single judgment in turn.

Gibbs C.J.: Gibbs C.J. expressly approves the broader conception of jurisdiction, acknowledging that since *Anisminic*

> ". . . it has been more clearly understood that an error of law may amount to a jurisdictional error even though the tribunal which made the inquiry had jurisdiction to embark on its inquiry."[91]

At the same time, Gibbs C.J. clearly shows the importance he attaches to retaining the distinction between jurisdictional and non-jurisdictional error.[92] Having expressly approved of the notion of extended jurisdictional error, and recognising that the form it might take could be that of asking the wrong question or applying the wrong test,[93] he proceeds to describe the error made by Gray J. in giving a wrong meaning and effect to the word "iregularity" within Part IX of the Act, as that of applying "the wrong test in deciding what is an irregularity".[94] It would seem to follow that the error identified by Gibbs C.J. would be characterised by him as an excess of jurisdiction occurring within the course of an inquiry properly embarked upon.

[87] Id. pp. 812–813, and see below in my analysis of Deane J.'s judgment.

[88] In 1976, the powers were transferred to the Federal Court, pursuant to s. 118A of the Act.

[89] *In Re Gray; Ex parte Marsh* at 813; nor could Parliament have intended the inconvenience which could be caused were the Court to be "free to decide the limits of its own jurisdiction and erroneously to embark on an inquiry beyond the limits set by the Act."

[90] It is argued below that Gibbs C.J.'s judgment is ambiguous.

[91] *In Re Gray; Ex parte Marsh* at 812.

[92] Id. p. 812, where Gibbs C.J. cites the judgment of Lord Wilberforce in *Anisminic* which stresses the need to continue to make the distinction.

[93] These are the types of extended jurisdictional error explicitly mentioned as such in the extract from Lord Wilberforce's judgment in *Anisminic* which Gibbs C.J. cites.

[94] Id. p. 812.

It is at this point in Gibbs C.J.'s judgment that his remarks become ambiguous. It is submitted that there are two possible interpretations of what Gibbs C.J. intended by his remarks.

(i) Traditional Jurisdictional Error

One reading would suggest that it is Gibbs C.J.'s intention to characterise the error of law as a traditional jurisdictional error, consisting in an assumption of jurisdiction when the statutory conditions precedent for the exercise of that jurisdiction are not satisfied. As he sees it, the state of affairs on which the jurisdiction of the Federal Court inquiry depended, did not exist, and so the threshold or preliminary decision the court had to make was made incorrectly. And

> "... the correctness of its decision on ... whether the state of things, upon whose existence its jurisdiction depended, did or did not exist ... may be tested by prohibition."[95]

But such an interpretation by itself fails to account for the fact that Gibbs C.J. goes to some length in citing the judgment of Lord Wilberforce in *Anisminic*[96] on the distinction between traditional and extended jurisdictional error, a distinction which he also formulates for himself. If he intends to construe the error committed by Gray J. as simply a traditional jurisdictional error there would seem little point in making such express acknowledgement of the potential existence of excesses of jurisdiction which can occur in the course of a competent inquiry. Moreover, the error committed is clearly characterised as that of applying the wrong test. All of this is explicable, however, if one sees that what Gibbs C.J. is intending to do is to say something about the *form* which jurisdictional errors might take, that is, the *manner* in which mistakes in jurisdiction can be made. On this interpretation what Gibbs C.J. is saying is that the form which may be taken by an error committed during the course of an inquiry, viz. applying the wrong test, may be the very same form taken by an error committed at the threshold stage; what may go wrong at the preliminary stage is thus not just that the court answers the collateral question incorrectly, but that it asks itself the wrong question. On this view, Gibbs C.J. makes an important contribution to our understanding of traditional jurisdictional error, for he shows that there is considerable overlap in the manner or form which jurisdictional errors may take at the threshold stage and during the course of an inquiry. As he says,

> "... if that Court [the Federal Court] ... applies the wrong test in deciding what is an irregularity – and so holds that something is an irregularity which is not in law capable of being so described, it is assuming to exercise the powers conferred on it by statute although the condition of their exercise is not satisfied."[97]

[95] Id. p. 813.
[96] Id. p. 812. He also makes reference to Lord Reid at 171, and Lord Pearce at 195; that is, to those parts of the judgments in *Anisminic* which articulate the conception of what can be described as extended jurisdictional error.
[97] Id. p. 812.

Thus, the form of error identified here is that of applying the wrong test, a paradigm form of extended jurisdictional error. However, the test was being used by the Court to determine whether it had jurisdiction to embark on the inquiry, whether the conditions precedent for the exercise of its jurisdiction were satisfied, a determination, which, if made wrongly, is classically understood to amount to a traditional jurisdictional error. The mistake made by the Federal Court was thus to apply the wrong test in deciding the threshold question. Gibbs C.J.'s point must be to show that traditional jurisdictional errors may consist in precisely the same form of mistake as that typically associated with extended jurisdictional errors.

If this interpretation is correct, the path would be open to consider whether traditional jurisdictional errors might also take the form of ignoring relevant considerations, taking account of irrelevant considerations, imposing unwarranted conditions, acting in breach of natural justice, or acting in bad faith. The principal difference between the two types of error would simply lie in the stage of the inquiry at which the error is committed. The implication is that there would be no coherent distinction to be made between the forms which traditional and extended jurisdictional errors might take. However, the considerable overlap in the manner in which traditional and extended jurisdictional errors occur would fall short of complete uniformity. For the error which consists in answering the right question wrongly, while it is the prototype of a traditional jurisdictional error, can not serve as a form of extended jurisdictional error, for it is precisely this form of error when it occurs within the course of an enquiry which remains the coveted example of an unreviewable error of law falling within jurisdiction.[98] With this exception, however, the judgment of Gibbs C.J. might be read as indicating that both traditional and extended jurisdictional errors of law may be seen in the future to consist in the same form of mistakes, and to require the same form of analysis. Thus, it would be necessary to ask of an error of law occurring at the threshold stage, whether it amounts to an application of the wrong test, or the imposition of an unwarranted condition, and so on.

(ii) Extended Jurisdictional Error

A second interpretation would be to read Gibbs C.J.'s judgment as indicating that the error committed by Gray J. amounts to an extended jurisdictional error. This interpretation would be supported by the express recognition given to the notion of extended jurisdictional error and by the characterisation of the form of error as one paradigmatically associated with excesses of jurisdiction. Moreover, the primary danger identified as potentially resulting from Gray J.'s application of the wrong test is that the Federal Court might declare an election void[99] when in fact no irregularity had occurred.[100] This could suggest that Gibbs C.J. is not so much concerned that the Federal Court could embark on an inquiry erroneously, as that it

[98] *Pearlman* v. *Keepers of Harrow School* per Geoffrey-Lane L.J. at 76.
[99] Pursuant to s. 165(3)(a) of the Act.
[100] *In Re Gray; Ex parte Marsh* at 812.

might make an order during the inquiry which exceeds its jurisdiction. But what then would be the point of his remarks that the conditions on which the Court's jurisdiction depends were unsatisfied? It is possible to construe these remarks as implying that whenever a court lacks jurisdiction for its actions, whether it be at the preliminary stage in an inquiry or during its course, the court is in effect assuming that it is within its competence to exercise jurisdiction, when in fact the requirements of the power, as defined by the statute, are not met. The implication would be that we could explain both traditional and extended jurisdictional errors as in essence a failure to meet statutory requirements.

It is submitted that the first interpretation is more plausible as it accounts more successfully for the numerous remarks to the effect that the conditions for the assumption of jurisdiction by the court were not satisfied.[101] However, on either interpretation, Gibbs C.J. is intending to point to the considerable uniformity which exists between the two types of jurisdictional error.

Wilson J.: As a member of the majority, Wilson J. agrees with Gibbs C.J. that the error of law committed by the Federal Court was a jurisdictional error. In holding that the facts alleged by the claimant, even if true, would not constitute an irregularity within the meaning of the Act, Wilson J. concludes that the claim made would be insufficient to attract the jurisdiction of the Court. As such, the Court would be committing a traditional jurisdictional error were it to assume jurisdiction and embark on the inquiry "beyond the stage necessary to determine whether jurisdiction exists."[102] No clear recognition is given of the notion of extended jurisdictional error.

Brennan J.: The third member of the majority, Brennan J., also construes the error as jurisdictional. For him the crucial distinction lies between the jurisdiction of the Court to inquire into the running of the election[103] and the jurisdiction of the Court to make an order declaring the election void.[104] While the latter jurisdiction depends on a finding by the Court that an irregularity has occurred, together with a finding that, in its opinion "the result of the election may have been affected",[105] the former jurisdiction, to conduct the inquiry, simply depends on whether the jurisdiction has been properly invoked in accordance with the procedures laid down in the Act,[106] that is, whether an application for an inquiry has been duly lodged containing an allegation of conduct which amounts to an irregularity. What is an "essential preliminary" to the inquiry is the need for the facts specified in the application to constitute an irregularity. If the facts cannot do that, "a

[101] Id. pp. 812-183; Gibbs C.J. also speaks of the Court "embarking" on an inquiry.
[102] Id. p. 815. Wilson J. does not cite *Anisminic*, nor give any clear recognition of the notion of extended jurisdictional error.
[103] Pursuant to s. 165(1) of the Act.
[104] Pursuant to s. 165(3) of the Act.
[105] Section 165(4) of the Act.
[106] See s. 170; s. 159(1), s. 159(2), s. 159(4)(a) and (b).

defect in jurisdiction appears"[107] and the inquiry cannot proceed. To conclude mistakenly that the facts could amount to an irregularity is thus a traditional jurisdictional error for which prohibition will lie.[108]

What Brennan J. insists upon is that the jurisdiction to inquire, unlike the jurisdiction to make an order, does not depend upon, and cannot rely upon, simply a finding by the court that an irregularity has occurred;[109] nor does it depend upon the objective existence of an irregularity (which would require that facts amounting to an irregularity had in reality occurred).[110] All the jurisdiction to inquire depends upon is that the facts alleged in the application (whether true or not, and whether or not they are susceptible to proof) are conceptually capable of constituting an irregularity. If they fail that conceptual test, as Brennan J. believes they do here, the Court does not have jurisdiction to embark on the inquiry. Brennan J. offers no express or implied recognition of the notion of extended jurisdictional error.[111]

Mason J.: In his dissenting judgment, Mason J. concedes that the matters complained of are insufficient to constitute an irregularity within the meaning of the Act, but holds that as Gray J. "seems not to have made a final conclusion on what constitutes an 'irregularity' "[112] it may be saying too much to say that he committed an error of law. Even if the mistake made by Gray J. did amount to an error of law, however, Mason J. holds that it would be an error which fell within the Court's jurisdiction, as he considers that Parliament must have intended that the Court should determine conclusively for itself whether or not an irregularity has occurred.

Mason J.'s reasoning is primarily based on his claim that in general a superior court, *even one of limited jurisdiction*, such as the Federal Court, has the power to determine conclusively the questions upon which its jurisdiction depends. He supports this view by reference to Dixon J.'s comments in *Parisienne Basket Shoes* v. *Whyte*[113] to the effect that great inconvenience would result if the jurisdiction of a superior court was made to depend upon the actual or objective existence of a state of affairs, from which he infers

[107] *In Re Gray; Ex parte Marsh* at 817.

[108] Id. p. 817.

[109] Here Brennan J. is keen to distinguish his view from that held by Mason J. who holds that the jurisdiction of the court to proceed with the inquiry may simply depend on its own finding that an irregularity has occurred. The power to make an order, s. 165(3), does simply depend on a finding by the court of an irregularity.

[110] Id. p. 816; "The jurisdiction to inquire does not depend upon *the fact that an irregularity* has occurred." (my emphasis) See also Wilson J. at 815 "I agree with Mason J. that these provisions do not evidence any intention by the parliament that the jurisdiction of the Federal Court is to depend upon the *actual occurrence* of an irregularity."

[111] In fact, Brennan J. cites *The Colonial Bank of Australasia* v. *Willan* (1874) LR 5 P.C. 417, which appears to deny the existence of extended jurisdictional errors, for, it is suggested, if a court "miscarrie[s] in the course of [an inquiry it is competent to try] . . . the superior court cannot quash an adjudication without assuming the functions of a court of appeal." (at 442–3). This appears to deny that a court can exercise its supervisory jurisdiction to review any issues decided within the course of an inquiry. And Brennan J. makes no mention of *Anisminic*.

[112] Id. p. 813.

[113] (1938) 59 C.L.R. 369 (High Court).

that Parliament cannot have intended that the jurisdiction of the Federal Court could depend upon the objective existence of an irregularity.[114] And indeed both Brennan and Wilson JJ. explicitly accept that this could not be what Parliament intended.[115] The flaw in Mason J.'s reasoning, it is submitted, is that he identifies as the primary alternative to a court's having the power to determine the threshold question conclusively, that its jurisdiction rather depends upon "the actual occurrence of some fact."[116] But, as Brennan J. points out, there is a second and more plausible alternative, viz. that the jurisdiction of the court may have been intended to depend upon whether the facts alleged in the application are conceptually capable of amounting to an irregularity.[117]

Mason J. points out that when an election is conducted under section 170 Parliament has conferred on the Federal Court a subjective discretionary power to satisfy itself "that there is reasonable ground for the application."[118] If the Court cannot so satisfy itself it is not required to proceed with the inquiry.[119] What Mason J. is implicitly asserting is that as the election was conducted under section 170 jurisdiction to proceed with the inquiry depended at most only upon a finding by the Court that it was satisfied that there were reasonable grounds for the application. As the Court clearly was so satisfied[120] there could be no defect in jurisdiction. But, it is submitted, it is well established that even where a court enjoys a subjectively defined discretionary power, if the exercise of that power involves the misapplication of a statutory concept, that is, an application of the wrong test, the error of law made as a consequence can be jurisdictional.[121]

Deane J.: As a member of the minority, Deane J., while yet agreeing with the majority that the information revealed in the application does not amount to an irregularity within the meaning of the Act,[122] holds that the application for prohibition and certiorari should be refused on the grounds that the questions of fact and law involved in the inquiry were entirely within Gray J.'s jurisdiction, and "his jurisdiction to decide these questions includes jurisdiction to decide them wrongly."[123] Thus, on the substantive point, Deane J. treats the error as consisting in an unreviewable determination occurring within the limits of the jurisdiction of the Federal Court. There is also a suggestion in Deane J.'s judgment that he is not prepared to recognise the

[114] *In Re Gray; Ex parte Marsh* at 814; "It is nonsense to suppose that Parliament intended the Federal Court's jurisdiction to depend on the actual occurrence of an irregularity."
[115] See fn. 110.
[116] Id. p. 814.
[117] Id. Brennan J. p. 817.
[118] Pursuant to s. 159(4)(b) of the Act.
[119] Section 159(4)(b) of the Act.
[120] Gray J. must have been so satisfied to be prepared to make the assumptions he did until a proper determination could be made, when all the evidence had been presented.
[121] *Australian Stevedoring Industry Board* [1953] 88 C.L.R. 100.
[122] *In Re Gray; Ex parte Marsh*, at 817.
[123] Id. p. 820.

possibility of extended jurisdictional errors occurring in the course of an inquiry competently embarked upon by a superior court.[124]

However the more interesting comments in Deane J.'s judgment lie in the remarks he makes about the reviewability of the Federal Court and the general amenability of superior courts to the prerogative writs. He suggests that it is possible to read the power of review conferred on the High Court by section 75(v) of the Constitution as implicitly restricted by considerations of the appropriateness of the use of a prerogative writ at common law. It would follow that were, for instance, the writ of prohibition, by its nature or as a matter of established doctrine, to be a remedy which could not be appropriately granted against a superior court, then section 75(v) should be read as being similarly confined.[125] It is indisputable that, historically, prohibition was used to control inferior courts and tribunals,[126] and some have suggested that in the absence of any express statutory authorisation, prohibition will not lie at all to any superior court.[127] However, Deane J. insists that there is no such general rule to the effect that all superior courts are immune from prohibition. Rather, a distinction has to be drawn between superior courts of general jurisdiction and superior courts of limited jurisdiction.[128] Prohibition, it is suggested, will be available in respect of those superior courts, the jurisdiction of which is limited by statutory and constitutional restraints.[129] Accordingly, the power conferred on the High Court

[124] Id. p. 818. In regard to a superior court, he refers approvingly to a judgment of Latham C.J. in *R.* v. *Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 C.L.R. 208, in which one aspect of a superior court is defined to be that "... it is not, while actually exercising the jurisdiction entrusted to it, subject to the direct intervention or intermeddling of another court exercising supervisory original jurisdiction." The problem is that terms like "actually exercising the jurisdiction entrusted to it" are equivocal as between the court acting within the limits of its jurisdiction, and the court simply proceeding with an inquiry properly embarked upon. On the latter view, Deane J. is denying the existence of jurisdictional error in the broad sense.

[125] He dismisses the suggestion which occurs in *R.* v. *Watson; Ex parte Armstrong* (1976) 136 C.L.R. 248, that section 75(v) of the Constitution does permit prohibition to lie against judges of a superior court, regardless of any constraints which might be present at common law, on the grounds that the cases cited in support of the proposition related to a body, the old Arbitration Court, which had not been constituted as a superior court.

[126] See e.g. Wade, *Administrative Law* (5th ed., Clarendon Press, Oxford, 1982) p. 548.

[127] Whitmore and Aronson, *Review of Administrative Action* (Sydney Law Book Co., 1978) p. 421.

[128] See, e.g. J. Crawford, *Australian Courts of Law* (Melbourne, O.U.P., 1982) pp. 111-112.

[129] Deane J. cites in support of this view the remark of Willes J. in *James* v. *South Western Railway Co.* (1872) L.R. Ex. 287, at 290, in respect of the High Court of Admiralty, "I do not call it an inferior court, but, treating it as a superior court with a limited jurisdiction, it is subject to prohibition, though superior in name." Similar support is to be drawn from the remarks of Fullagar J. in *Attorney-General of Queensland* v. *Wilkinson* (1958) 100 C.L.R. 422, p. 431 "It was said ... that the Industrial Court is by section 6(7) of the Act made a 'superior Court of Record'. But this is obviously insufficient to render the Industrial Court immune from prohibition. Whatever may be its status, and whatever its dignity, it is a court of limited jurisdiction, and it follows prima facie that it may be restrained by prohibition from exercising its jurisdiction." See also *R.* v. *Chancellor of St. Edmundsbury and Ipswich Diocese: Ex parte White* (1948) 1 K.B. 195, at 208, in which Wrottesley L.J. held that the writ of prohibition "went to all courts of limited jurisdiction regardless of their position or of the law they administered." Dawson J. also agrees that prohibition does lie to a superior court of limited jurisdiction if "want of jurisdiction is apparent." (at 822).

by section 75(v) of the Constitution need not be read down so as to prevent the use of prohibition against the Federal Court, which, as Dawson J. puts it, "is necessarily a court of limited jurisdiction."[130]

However, the position in respect of the prerogative writ of certiorari is different. Here, the status of a court as a superior court is seen as inconsistent with a susceptibility to the writ of certiorari. The reason for this, in Deane J.'s view, lies in the nature of the writ itself, and, in particular, in the fact that certiorari effects a notional removal of the record of the court hearing the substantive matter in question, into the hands of the court from which the writ is issued. Such a procedure reflects the fact that the court from which the writ is issued may directly interfere with the exercise of the jurisdiction of the other court, for instance, by quashing an order of that court on the basis of an error of law which does not go to jurisdiction, or by making an order which should have been made by the other court. Either step reveals an intermeddling with, or an assumption of, the jurisdiction of the court to which the writ is directed. But such interference is thought to be incompatible with the status of a superior court. By contrast, the writ of prohibition, though it restrains the exercise of jurisdiction, does not effect an interference with the actual exercise of a court's jurisdiction. In this way, Deane J. indicates that the writ of certiorari cannot be applied to the Federal Court, though he resists stating a final conclusion on this aspect of the case, such a conclusion being for him unnecessary, due to his rejection of the application on a point of substance.[131]

Dawson J.: The dissenting judgment of Dawson J. is based on the view that the error of law, which he identifies as the belief that the facts alleged were capable of supporting a finding of an irregularity, fell within the limits of the jurisdiction of the Court. The Court has power to determine conclusively the questions "upon which its jurisdiction depends".[132] As such, those determinations, even if wrong, cannot be subject to a writ of prohibition for

> "prohibition is a remedy against a wrongful assumption of jurisdiction, and not a remedy against an erroneous decision made by a court in the exercise of a jurisdiction which it possesses."[133]

It is submitted that Dawson J.'s judgment is equivocal as to whether he takes the error of law to have occurred at the point at which the court was to embark on the inquiry or during its course. There is no clear distinction made between traditional and extended jurisdictional errors.

[130] *In Re Gray; Ex parte Marsh* p. 821. Dawson J. notes that in particular the jurisdiction of the Federal Court is limited by the scope of the power conferred on the Commonwealth parliament by sections 75 and 76 of the Constitution.

[131] Deane J. also expresses the view that the Family Court, being a superior court, is insusceptible to the writ of certiorari. Accordingly, he suggests that the issuing of a writ of certiorari against the Family Court in *Re Ross-Jones; Ex parte Green* (1984) 59 A.L.J.R. 132, may have been erroneous, though he recognises the existence of precedent against his view; e.g. *R.* v. *Cook; Ex parte Twigg* (1980) 147 C.LR. 15.

[132] Id. p. 822.

[133] Id. p. 822.

6. *Implications of In Re Gray; Ex parte Marsh*

It is unmistakably clear from all of the six separate judgments that the High Court of Australia continues to recognise the distinction between jurisdictional and non-jurisdictional errors of law, and continues to perceive scope for unreviewable errors of law which occur within a court's jurisdiction,[134] though it is acknowledged that it may be difficult to decide on which side of the line an error may fall.[135] There has been no acceptance of the argument that the effect of *Anisminic* was to abolish the distinction between jurisdictional and non-jurisdictional errors of law, at least in respect of courts.[136]

But the reasoning of the three majority judgments that the error of law was a traditional jurisdictional error, together with the view expressed in the three minority judgments that the error of law fell within the jurisdiction of the court, have left it unclear precisely to what degree the notion of extended jurisdictional error has been accepted by the Australian High Court. While Gibbs C.J. expressly approves of the notion of an error which exceeds jurisdiction occurring within the course of an inquiry properly embarked upon, his judgment suggests that there may be no coherent distinction between the form which traditional and extended jurisdictional errors might take.[137] Mason J. also expressly approves of the notion of excesses of jurisdiction as enunciated in *Anisminic*,[138] though he finds it inapplicable in this case. Dawson J. cites *Anisminic* approvingly but gives no clear indication of what proposition he takes it to be authority for.[139] Wilson J. provides no clear recognition of the doctrine, and the judgments of Brennan and Deane JJ. implicitly suggest that errors of law committed in the course of an inquiry may only be subject to appeal,[140] and are not susceptible to intervention by a court exercising supervisory jurisdiction[141] though their remarks are equivocal.

At best, one can view *In Re Gray; Ex parte Marsh* as providing lukewarm support for the notion of extended jurisdictional error, while illustrating a readiness on behalf of several members of the High Court to identify errors of law committed by a superior court as errors which will lie within the unreviewable limits of its jurisdiction. It is submitted that it is the predominant implication of *In Re Gray; Ex parte Marsh* that the Australian High Court will only regard judicial review as warranted in those circumstances in which the error of law identified can be characterised as a traditional jurisdictional error of law.

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[134] Id. Mason J. at 813, 814; Gibbs C.J. at 812; Brennan J. at 817; Wilson J. at 815; Deane J. at 820; Dawson J. at 822.

[135] Id. Gibbs C.J. p. 812.

[136] To this extent, there is agreement between the Australian High Court and Lord Diplock in *In re Racal*.

[137] Id. Gibbs C.J. p. 812.

[138] Id. Mason J. p. 814.

[139] Id. Dawson, J. p. 822.

[140] Id. Brennan J. p. 816.

[141] Id. Deane J. p. 818.

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