ERROR OF LAW OR ERROR OF FACT?

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Introduction

One distinction which has long bedevilled administrative law is the distinction between an error of law and an error of fact.[1] This distinction is not one without theoretical significance. Thus, by way of example, prerogative

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1 See H Whitmore, *Principles of Australian Administrative Law* 5th ed. (1980) at 157-60; H. Whitmore and M Aronson, *Review of Administrative Action,* (1978) Ch. 7; E. Sykes, D Lanham and R. Tracey, *General Principles of Administrative Law* (1979) at 200-03; S.A. de Smith, *Judicial Review of Administrative Action* 4th ed. (1980) at 126-41 ; H W R. Wade, *Administrative Law,* 4th ed. (1977) Ch. 9; J. Garner, *Administrative Law* 4th ed. (1974) at 142-47.

relief by way of certiorari or prohibition will only be granted where the error which appears on the face of the record of an administrative decision is an error of law and not an error of fact;[2] and many statutes now provide that an appeal may be taken on a point of law[3] or provide that a question of law may be referred to a court for determination.[4] An analogous jurisdiction to the review of decisions of administrative tribunals by way of certiorari or prohibition is review by means of those writs for an error of law appearing on the face of an arbitrator's award.[5]

The way is thus laid open for a court, if it so wishes, to review the findings made by an administrative tribunal and the decision in fact reached by that Tribunal. An error which may appear can simply be classified by such a court as an error of law; a court which does not want to intervene can classify the same error as one of fact. Although this proposition may suggest that courts frequently make an arbitrary decision depending upon the result they wish to achieve, there are a number of reasons behind the distinction which explain why it has to be made and provide an indication as to how a particular question of classification may be resolved. One reason is the constitutional separation between the legislative, executive and judicial arms of government at the federal level in Australia. This separation precludes a body such as the Administrative Appeals Tribunal, which exercises non-judicial functions, from ultimately determining questions of law and section 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth.) accordingly provides that an appeal "on a question of law" lies from a decision of that Tribunal to the Federal Court of Australia.[6] A second reason is that the courts have traditionally been the ultimate arbiter of questions of law.

It will be suggested that the experience to-date of the Administrative Appeals Tribunal may now throw doubt on the continued validity of a constitutional argument and that the rationale suggested may also now be in need of re-examination. The rationale in particular may be regarded

2 Gould v. Wily, [1960] N.Z.L.R. 960, at 962-63; Ex parte Godkin; Re Fitzmaurice, (1969) 90 W.N. (Pt. 1) (N.S.W.) 159.

3. E.g., Administrative Appeals Tribunal Act 1975, s.44 (Cth.); Conciliation and Arbitration Act 1904, s.113 (Cth.); Repatriation Act 1920, s.107VZZH (Cth.).

4 E.g. Administrative Appeals Tribunal Act 1975, s.45 (Cth.); Repatriation Act 1920, s.107VZZG (Cth.); Copyright Act 1968, s.161 (Cth.); Conciliation and Arbitration Act 1904, s.112 (Cth.).

5. E.g., Max Cooper & Sons Pty Ltd v. University of New South Wales, [1979] 2 N.S.W.L.R. 257.

6. E.g., Sullivan v. Department of Transport, (1978) 20 A.L.R. 323, at 350; Blackwood Hodge (Australia) Pty Ltd v Collector of Custom, (1980) 3 A.L.D. 38, at 49; Deputy Commissioner of Patents v. Board of Control of Michigan Technological University, (1979) 2 A.L.D. 711, at 714; Drake v Minister for Immigration and Ethnic Affairs, (1979) 2 A.L.D. 60, at 61-62, 85; Defence Forces Retirement and Death Benefits Authority and Commonwealth of Australia v. Heffernan, (1978) 1 A.L.D. 429; May v. The Secretary, Department of Transport, (1981) 4 A.L.D. 169; Kuswardana v. Minister for Immigration and Ethnic Affairs, (1981) 3 A.L.N. No. 42.

as an historical attempt to apportion the appropriate responsibilities of courts and tribunals and can thus be linked with the distinction between an error of law within jurisdiction[7] and an error of law which goes to jurisdiction.[8] A writ of mandamus will only lie for the latter error. It is suggested that the purpose of a writ of mandamus is to compel the performance of a duty, not simply to enforce a right, and that if the administrative tribunal is performing a duty which has been entrusted to it, the appropriate balance has been struck between the role of the tribunal and the role of the court.

A similar balancing of responsibilities underlies the only jurisdiction of a court of review to review a finding of fact — that is, its jurisdiction to review a fact which goes to the jurisdiction of an administrative tribunal.

Given the substantial development in administrative law over the last decade, particularly at the federal level in Australia,[9] it would appear appropriate to review the distinction which has been drawn between questions of law and questions of fact and the further distinction which has been made between jurisdictional and non-jurisdictional findings of fact.

What Constitutes an Error of Law as Opposed to an Error of Fact?

At the outset it should be stated that the present exposition is not an attempt to define exhaustively what constitutes an error of law or an error of fact. Indeed, it has been said that the man who could succeed in such a definition would be a public enemy.[10] The purpose sought to be achieved is more modest — it is an attempt to illustrate some of those situations in which a court may intervene and review the findings of an administrative tribunal.

As will be seen, the scope of judicial intervention is wider than many texts indicate and the grounds of intervention are such that a court may

7. E.g., R. v. Commonwealth Court of Conciliation and Arbitrationl Ex parte Ellis, (1954) 90 C.L.R. 55; Cuming Campbell Investments Pty Ltd v. The Collector of Imposts, (1938) 60 C.L.R. 741.
8. E g., R. v. The Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd., (1949) 78 C.L.R 389.
9. See generally: Taylor, The New Administrative Law, (1977) 51 *A L J* 804, Brennan, Future of Public Law in the Administrative Appeals Tribunal, (1979) 4 *Otago L Rev.* 286; Davies, Administrative Law within the Australian Federal System (Unpublished address given to the International Association of Law Libraries, May 1981); Curtis, Judicial Review of Administrative Act, (1979) 53 A.L.J. 530; Griffiths, Legislative Reform of Judicial Review of Commonwealth Administrative Action, (1978) 9 *Fed L.Rev* 42; Pearce, The Australian Government Administrative Appeals Tribunal, (1976) 1 *U N S.W Law Journal* 193; Kirby, Administrative Law Reform in Action, (1978) 2 *U.N S.W Law Journal* 203; Kirby, Towards the New Administrative Law, (1981) 40 *Aust.J. Public Admin.* 103; Hall, 'Aspects of Federal Administration Law — The Adminstration Appeals Tribunal' (1983) 57 *A.L.J.* 389.
10. Green, *Judge and Jury* (1930) at 270.

in reality question a finding of fact which a tribunal has made. Although a court will not normally evaluate the evidence presented to the tribunal and reach a different conclusion upon weighing the evidence for itself, it is possible for a court to upset a finding of fact by deciding that in reaching that finding the tribunal has committed an error of law. When writing in 1927 Professor Dickinson maintained that :

> Matters of law grow downward into roots of fact and matters of fact reach upward without break into matters of law. The knife of policy alone effects an artificial cleavage where the court chooses to draw the line.[11]

In order to understand where this knife of policy separates those situations in which the courts are prepared to intervene from those in which intervention is not undertaken, it is suggested that one should examine: (i) The distinction which can be drawn between findings of primary fact and findings of ultimate fact: (ii) those situations in which a court is reviewing primary facts; and (iii) those situations in which findings of ultimate fact are being reviewed. It will become apparent that many texts restrict their attention to the last of these three issues.

Findings of Primary and Ultimate Fact

The distinction between findings of primary or basic fact from findings of ultimate fact has been best explained by the prestigious Court of Appeal for the District of Columbia in the United States. That Court separated the administrative decision making process into the following four stages: First, the evidence is taken and weighed both as to its accuracy and credibility; Second, basic and underlying facts are reached; Third, ultimate facts, usually in the language of the statute, are inferred from the basic facts; Fourth, the application of the statutory criteria leads to the decision.[12] By way of illustrating these stages, the Court explained that before the agency involved in that case could grant a construction permit for a radio station it was required by statute to be convinced that the public interest, convenience or necessity would be served. A finding on these topics would be ultimate facts. The ultimate facts, however, would be reached from a consideration of such basic facts as the probable existence or non-existence of electrical interference in view of the number of other radio stations operating in the area; their power, wavelength, and the like. These basic facts would emerge from the evidence presented.[13]

11. Dickinson, *Administrative Justice and the Supremacy of the Law* (1927) at 55.
12 Saginaw Broadcasting Co v. F.C.C., 96 F. 2d 554 (1938). Flick, *Natural Justice* (1979) at 89-94.
13. 96 F. 2d 554, at 559-60.

The great majority of the cases that come before the courts concern an administrator who has been confronted with a host of primary facts that have either been admitted or proved and the question to be answered concerns the extent to which the courts may review the inferences and conclusions which the administrator has drawn from those facts.

Whilst it is recognised that the distinction between "primary facts" and "inferences" from those facts is largely one of degree and should not be pushed too far,[14] it is useful for a number of reasons. First, it has been held that a court possesses a greater power of review when considering inferences drawn from primary facts which may be based on conflicting evidence and which must take into account issues of credibility, veracity and reliability.[15] Second, the process of drawing inferences from primary facts involves a process of reasoning which permits of greater opportunity for the application of wrong legal principles; making findings of fact involves more a task of searching for truthfulness and objective fact. And, finally, most of the case law in this area involves inferences drawn by an administrator and when the courts speak of "evidence" in this context they frequently mean "primary facts".

The failure by an administrative tribunal to clearly specify those facts upon which a decision is based can obviously impede judicial review and may even prevent parties from effectively deciding whether a case is appropriate for review.[16] Consequently, the value of a series of cases before the High Court of Australia which call upon an administrator to state the grounds for his decision cannot be underestimated.[17] Similarly, those statutory provisions which call for findings of fact in addition to a statement of reasons expand the concept of accountability by the administrative process.[18]

Reviewing Findings of Primary Fact

Although the process of receiving and weighing conflicting evidence

14. Secretary of State for Employment and Productivity v. C. Maurice & Co Ltd, [1969] 2 A.C. 346, at 360-61 per Lord Wilberforce.
15. Benmax v. Austin Motor Co Ltd, [1955] A.C. 370; Wheat v. R. Lacon & Co Ltd [1966] 2 W.L.R. 581; Whiting v. Archer, [1964] N.Z.L.R. 742, at 746.
16. E.g., Eaton v. Nuttal, [1977] 1 W.L.R. 549, at 551, 554.
17. Giris Pty. Ltd v. Federal Commissioner of Taxation, (1969) 119 C.L.R. 365; Federal Commissioner of Taxation v. Brian Hatch Timber Co. (Sales) Pty Ltd., (1972) 128 C.L.R. 28; Kolotex Hosiery (Australia) Pty Ltd v. Commissioner of Taxation (1975) 49 A.L.J.R. 35. See Taggart, 'Should Administrative Tribunals be Required to State Findings of fact?' (1980) 9 *N Z. Univ L.Rev.* 162; Timberg, 'Administrative Findings of Fact', (1941) 27 *Wash.U.L.Q.* 62; Jacob, Requirement of Findings of Fact in Administrative Determinations — Judicial Experience in India and the United States (1966) 8 *J Indian L.Inst.* 54.
18. E.g., Administrative Appeal Tribunal Act 1975, ss.28, 38, 43(2) (Cth.). On the distinction between findings of fact and reasons, see Flick, supra n. 12, at 89-94.

is the task of the administrative tribunal, a court may challenge a finding of primary fact which has been made either on the basis (a) that the tribunal has wrongfully excluded relevant evidence or wrongfully admitted irrelevant evidence, or (b) that the tribunal has reached a finding which is just not supported by any evidence at all. In the former case the court is in effect saying that on the evidence before the tribunal the findings of fact actually made may be perfectly justified, but that had the tribunal considered further relevant evidence different findings may have been reached or that additional facts may have been found to exist. Had the irrelevant evidence before the tribunal been excluded similar consequences could follow. In the latter case the court is not to be seen as weighing for itself the conflicting evidence, but merely deciding that there is no evidence (whether it conflicts with other evidence or not) which supports the findings of primary fact. A reviewing court should, however, consider the accumulated expertise which an administrative tribunal could possess before it too readily intervenes on either ground.

Each of the above propositions is well supported by authority.

(a) Exclusion of relevant evidence or admission of irrelevant evidence.

As a general rule, the wrongful rejection of evidence on the ground that it is irrelevant or inadmissible does not provide a sufficient cause for judicial intervention by way of mandamus or certiorari. But a review is possible if an applicant can establish an error of law, a jurisdictional error, or a denial of natural justice.[19] Review is not possible where the failure to consider evidence is simply due to the fact that the evidence has only been discovered since the time of the hearing.[20] Where it is alleged that a tribunal has admitted improper evidence the test to be applied is whether such evidence has affected the decision reached.[21]

An error of law may lead to the wrongful rejection of evidence if the administrative tribunal misconstrues the scope of its discretion[22] or if it misconstrues a statutory provision and thereby considers irrelevant rather than relevant considerations.[23] An instance of an administrator holding evidence inadmissible by reason of his misconstruction of a statute is provided by *R* v. *Industrial Injuries Commissioner, Ex parte Ward.*[24] That case concerned the *National Insurance (Industrial Injuries) Act,* 1946 (U.K.) which provided in section 12 for the making of a final assessment of disability

19. For a discussion in greater detail, see Flick, supra n. 12, at 45-49.
20. Wade, supra n. 1, at 281-82
21. Re Dallinga and City of Calgary, (1975) 62 D.L.R. (3d) 433.
22. Cf. Ward v. Williams, (1955) 92 C.L.R. 496, at 514
23. Maradana Mosque Trustees v Mahmud, [1967] 1 A.C. 13.
24. [1965] 2 Q.B. 112.

benefits. Section 14 provided that an applicant for disability benefits could apply for an increased payment of up to 46 shillings per week; this payment being renewable each year. Pursuant to section 12 the applicant in the present case had had a disability assessment made of five per cent for life and when he later applied for a renewal of his section 14 payment the local appeal tribunal admitted into evidence and relied upon statements made by medical consultants to the effect that the applicant's present condition was no longer related to his original industrial accident which entitled him to the disability payment under section 12. Before a special tribunal reviewing this decision the applicant persuaded a majority of the decision-makers that no evidence was admissible on a claim under section 14 which contradicted the original findings of the medical board under section 12 as these findings were stated by the Act to be final and conclusive. But when this decision of the special tribunal was in turn reviewed by the courts it was held that it had committed an error of law for which certiorari would lie. Findings under section 12 were final and precluded any later variation of disability benefits; but they did not preclude fresh medical testimony being adduced when an applicant sought increased payment under section 14.

Jurisdictional error will in most cases involve a determination of whether or not primary facts fit within some statutory formula,[25] but it is possible for an administrator to decline to exercise his jurisdiction by ruling inadmissible evidence from which primary facts can be deduced. By way of example, in *R* v. *Marsham*[26] owners of property challenged an assessment of their share of the liability to pay for paving work carried out by a local Board of Works under the *Metropolis Management Act,* 1862 (U.K.). The owners sought to question whether the expenditure by the Board was in respect of paving and also to question whether the alleged expenditure had actually been incurred. The magistrate, however, refused to allow cross-examination on either issue. Before the Court of Appeal it was argued that this only constituted a wrongful rejection of evidence and was not a failure to exercise a jurisdiction for which mandamus would lie. The argument was unanimously rejected, Lord Esher M.R. explaining his decision as follows:

> Now, the form in which he is said to have declined jurisdiction is, that he refused to hear certain evidence which was tendered before him, and it is suggested on behalf of the board that such refusal, at the most, only amounted to a wrongful refusal to receive evidence, and not to a declining of jurisdiction. The distinction between the

25. Discussed at 42-48.

26 [1892] 1 Q.B. 371.

> two is sometimes rather nice; but it is plain that a judge may wrongly refuse to hear evidence upon either of two grounds: one, that even if received the evidence would not prove the subject-matter which the judge was bound to inquire into; the other, that whether the evidence would prove the subject matter or not, the subject-matter itself was one into which he had no jurisdiction to inquire. In the former case the judge would be wrongly refusing to receive evidence, but would not be refusing jurisdiction, as he would in the latter. Here the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear evidence, even though it would prove the fact; he has, therefore, declined jurisdiction.[27]

(b) Primary facts unsupported by any evidence

This ground of review is not the allegation that an administrator has failed to reach findings of relevant fact, but rather the allegation that the facts which have been found are not supported by sufficient probative evidence in the record.

Unlike the position that exists in the United States under their substantial evidence rule,[28] the position under English and Commonwealth law is that if a tribunal has properly directed itself in law its findings of fact cannot be reversed by a reviewing court if there is any probative evidence which can support those findings.[29] Thus, if a tribunal which has exclusive jurisdiction to determine facts decides that it does not accept the evidence tendered as establishing a particular fact, its decision is normally to be regarded as conclusive.[30]

Indeed, it has only been in recent years that the courts have asserted a power to review findings that have no evidential support. The initial restriction to review was attributable to *R* v. *Nat Bell Liquors Ltd.*[31] In that case the Judicial Committee of the Privy Council had to review a decision by the Appeal Division of the Supreme Court of Alberta to quash a conviction of the liquor company for unlawfully keeping for sale at its warehouse a quantity of liquor. This conviction had originally been obtained largely on the basis of the affidavit evidence of an agent provocateur named Bolsing who had sworn that an employee of the company had,

27. [1892] 1 Q.B. at 378.
28. B. Schwartz, *Administrative Law* (1976) at 591-95
29. The Australian Gas Light Co v Valuer General, (1940) 40 S.R. (N.S.W.) 126, at 138 per Jordan C.J.; Armah v. Government of Ghana, [1968] A.C. 192; Osgood v. Nelson, (1872) L.R. 5 H.L. 636, at 650-51 per Lord Chelmsford; Ex parte Parker, Re Brotherson, (1957) 57 S.R. (N.S.W.) 326; Moore v. Aluminium Platters, [1976] I.C.R. 83.
30. McPhee v. S. Bennett Ltd., (1935) 52 W.N. (N.S.W.) 8, at 9 per Jordan C.J.
31. [1922] 2 A.C. 128

contrary to section 23 of the *Liquor Act,* 1916, sold him twelve bottles of whiskey from the company's warehouse. Bolsing's evidence, however, was subject to a number of criticisms including the fact that it was largely uncorroborated; that Bolsing himself had previously been convicted of stealing beer and that he had falsely denied this during cross-examination; and that Bolsing was in the position of an accessory before the fact of the sale and was a witness interested in proving the facts alleged. Whilst the Alberta Supreme Court realised that its task in reviewing this evidence was of a supervisory and not of an appellate nature, it proceeded to uphold the order of certiorari because of the unreliability of the evidence. But this approach was strongly condemned by the Privy Council — whether the evidence was such as to justify a verdict was entirely irrelevant to the function of the Court in certiorari proceedings. As Lord Dunne observed:

> On certiorari, so far as the presence or absence of evidence becomes material, the question can at most be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court.[32]

The task of the Court, therefore, was not to weigh the reliability of evidence or to resolve inconsistencies in conflicting evidence — its only task was to ensure that there was some evidence before the tribunal upon which its findings of fact could be based.

Having established this initial proposition, the Privy Council proceeded to adopt an even more restrictive approach and to reject the argument that a lack of evidence amounted to a jurisdictional error. And it is upon this point that the *Nat Bell Case* is most often cited.[33] The following extract is almost an obligatory citation:

> It has been said that the matter may be regarded as a question of jurisdiction, that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of substantial evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all . . . This clearly is erroneous . . . To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong . . .[34]

Since 1922 these words have continued to hold sway and more recent

32. Id. at 144.
33. E.g., Whitmore, supra n.1, at 156.
34. [1922] 2 A.C. at 151-52 per Lord Sumner.

cases have reaffirmed the proposition that absence of evidence does not go to jurisdiction.[35]

But, as has been noted by Professor Wade,[36] there have been at least two inroads upon the *Nat Bell* principle. First, there is the possibility of error of law upon the face of the record for which the remedy of certiorari is available;[37] and, second, there is some suggestion that the rules of natural justice may be invoked.

Certiorari is a remedy which lies not only to check excesses of jurisdiction by inferior courts and tribunals, but is also a remedy which extends to quash errors of law within jurisdiction provided that the error appears on the face of the record and does not necessitate proof by way of affidavit evidence.[38] An absence of evidence upon which a magistrate, properly directed in point of law, could reach the findings of primary fact he does in fact reach is regarded by the leading texts as such an error of law within jurisdiction.[39] The case most frequently relied upon to support this proposition is the decision of the House of Lords in *Armah* v. *Government of Ghana.*[40] Indeed, that case seems to go somewhat further than holding that a court only has power to interfere with a finding of fact where that finding is supported by no evidence (as distinct from merely being against the weight of the evidence) because the House of Lords did indulge in a task of weighing conflicting evidence. Basically the facts of the case were quite simple. Armah had been the Minister of Trade in the Ghana Government but had lost his position following a coup d'etat in February 1966. A warrant for his arrest on corruption and extortion charges was then issued in Ghana in March 1966 and in the following May he was brought before a Bow Street magistrate who committed Armah to Brixton Prison until he was delivered pursuant to the provisions of the *Fugitive Offenders Act,* 1881. Section 5 of that Act provided that the magistrate could commit an accused person if the evidence presented raised a strong and probable presumption that the fugitive committed the offence mentioned in the warrant. The evidence before the magistrate to support the charges consisted of sworn statements from the Principal Secretary of the Ministry of Trade, a superintendent of police, and a state-

35. Davies v. Price, [1958] 1 W.L.R. 434, at 441-42, R. v. Agricultural Land Tribunal, Ex parte Bracey, [1960] 1 W.L.R. 911, at 914-15. See Towner, "No Evidence" and Excess of Jurisdiction in Administrative Law, [1978] *N Z L J* 48; Elliott, "No Evidence": A Ground of Judicial Review in Canadian Administrative Law, (1972) 37 *Sask L Rev* 48.

36 Wade, supra n.1, at 99-101.

37. R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw, [1952] 1 K.B. 338.

38. R. v. Agricultural Land Tribunal, Ex parte Bracey, [1960] 1 W.L.R. 911; Davies v. Price, [1958] 1 W.L.R. 434.

39. de Smith, supra n.1, at 133; Wade, supra n.1, at 99-100.

40. [1968] A.C. 192. Compare: Moose v. Klooger, [1918] V.L.R. 204, at 207.

ment from the person (one Fattal) who allegedly had made a payment of $40,000 to Armah. As Lord Pearce pointed out, the strength of this evidence lay in the fact that it was a direct assertion by Fattal that Armah asked and received from him a bribe.[41] But the evidence also had its weaknesses — there were discrepancies in Fattal's evidence; Fattal was an accomplice and the allegations he made were easy to make; and there was an absence of adequate corroboration. Such evidence, concluded Lords Reid, Pearce and Upjohn (Lords Morris and Pearson dissented), was not sufficient to satisfy the test prescribed by section 5 and they consequently allowed an appeal from a decision of the Divisional Court. The discrepancy between the House of Lords and the Divisional Court centred on the fact that the Divisional Court and the Magistrate had applied to the evidence a test less stringent than that of "strong and probable presumption". Whilst the evidence may have been sufficient to satisfy a less stringent test, it was not enough to satisfy a higher standard of proof. The crux of the approach of the majority is contained in the following words of Lord Reid:

> I am satisfied that the weight of the authorities which I have cited supports the view that the court can and must interfere if there is insufficient evidence to satisfy the relevant test.[42]

Whether these words will be applied with their full force outside the area of applications for habeas corpus (the remedy sought by Armah) still remains to be seen.

The second of the inroads upon the *Nat Bell* principle noted above, that is natural justice, is less well established. The case, however, which is continually cited to support the proposition is *R* v. *Deputy Industrial Injuries Commissioner; Ex parte Moore.*[43] There Diplock L.J. observed:

> These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions, must base his decision on evidence means no more than it must stand upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined and to show the likelihood or nonlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material, which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable

41. [1968] A.C. at 248-50.
42. Id. at 235
43. [1965] 1 Q.B. 456

> of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.[44]

But this head of review is really no different from that available for error of law — the task of weighing conflicting evidence is always left to the decisionmaker. Both heads of review call for the decision to be based upon some evidence of probative value. And it matters little whether a court interferes for error of law or violation of the rules of natural justice. Instances where a reviewing court has relied exclusively on the principles of natural justice are extremely rare but some examples are found in a series of very early decisions of the Supreme Court of New South Wales.[45] Suggestions that the dictum of Diplock L.J. encourages a court to perform a more searching scope of review than they already perform under the rubric of error of law seem both overly-optimistic and misconceived.

(c) Expertise

Even if it can be suggested that a reviewing court can insist upon a finding of primary fact being supported by sufficient probative evidence, an exception must be created so as to allow an administrative tribunal the freedom to reach a finding of primary fact which is solely supported by its own accumulated expertise. Thus, in *Boyle* v. *Wilson*[46] the House of Lords held that a licensing court could rely upon its own knowledge of local affairs to support a finding that there were too many licensed premises in the neighbourhood.[47] Again, the early workers compensation cases established that a judge could rely upon his own knowledge to reach findings involving the average cost of living among miners' families[48] and findings as to the wage a workman could receive.[49]

The proposition here being advanced is simply that a court reviewing the findings of fact of an expert tribunal cannot review those findings in quite the same light as findings of fact by a non-expert tribunal.[50] An expert tribunal must be given some latitude to reach findings of fact which

44. Id. at 488
45. Ex parte Healey, (1893) 9 W.N (N.S.W.) 180, Purcell v. The Perpetual Trustee Co , Limited, (1894) 15 N.S W.R L., 385; Ex parte Jordan, (1898) 19 *N S W R L.*, 25
46 [1907] A C 45.
47. See also: R. v Howard [1902] 2 K.B. 363, at 367-77, 381.
48. Peart v. Bolckow, Vaughan & Co. Ltd., [1925] 1 K.B. 399.
49. Roberts and Ruthven Limited v. Hall (1912) 106 L T. 769; Viney v. New Tredegar, Treharris and Troedyrhico Co-operative Society, (1939) 32 B W.C.C 264.
50. Spurling v. Development Underwriting (Vic.) Pty Ltd (1972) 30 L.G R.A. 19, at 32.

either fall within the area of its own expertise, even though there may be no evidence before it supporting such findings; or findings of fact which the tribunal has made in reliance upon its expertise in the evaluation of the conflicting evidence presented. Two limitations which may be suggested to the proposition being advanced are: (i) care should be taken to ensure that expertise is not used as a substitute for evidence such that the burden of proof is unfairly shifted;[51] and (ii) a tribunal should provide notice to the parties of its intention to reach specified findings of fact. As has been suggested elsewhere, the requirement is not that all facts relied upon must be found within the record, but that the parties must be given an opportunity to meet in an appropriate fashion any material which influences the decisionmaking process.[52]

Reviewing Findings of Ultimate Fact

As has been mentioned above, the great majority of cases that come before the courts concern an administrator who is confronted with a host of primary facts and is then faced with the difficult task of drawing a conclusion from these facts and reaching findings of ultimate fact. Ultimate facts, it will be recalled, are usually those facts mentioned in the statutory language.

Even given that a distinction can be drawn between primary facts and the inferences from those facts, however, the consequences are by no means clear. One line of cases establishes that where all the material facts have been fully found and the only question is whether those facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law.[53] This approach has a simplicity of application but would lead to virtually every decision of an administrative tribunal being reviewable for error of law.[54] A second line of cases, however, epitomised by the judgment of Denning L.J. in *Bracegirdle* v. *Oxley,*[55] establishes that inferences from primary facts are "sometimes conclusions of fact and sometimes conclusions of law." This

51. As would clearly be the case if the tribunal purported to reach a finding of ultimate fact unsupported by evidence, see Baltimore & Ohio Railroad Co v. Aberdeen and Rockfish Railroad Co., 393 U.S. 87 (1968). Discussed: Flick, supra n.12 at 77-81
52. Flick, supra n.12, at 85.
53. Farmer v. Cotton's Trustees, [1915] A.C. 922, at 932 per Lord Parker; Ritz Cleaners Limited v. West Middlesex Assessment Committee, [1937] 2 K.B. 642, at 665, 672; Hayes v. Federal Commissioner of Taxation, (1965) 96 C.L.R. 47, at 51. See also: Australian Iron & Steel Pty Limited v. Luna, (1968) 123 C.L.R. 305, at 320 per Windeyer J.; McPhee v. S. Bennett Ltd., (1934) 52 W N. (N.S.W.) 8, at 9 per Jordan C J.; Commissioner of Inland Revenue v. Walker, [1963] N.Z.L.R. 339, at 353-54 per Gresson P
54. Whitmore, supra n.1, at 158-59
55. [1947] K.B. 349, at 358

latter approach has an attractive quality of flexibility and is the approach most supported by the weight of authority.[56]

Bearing in mind these inconsistencies amongst the authorities, the following headings seem to give greater content to the views of Lord Denning M.R.

(a) Misdirection in point of law

It is obvious that even though the findings of primary fact by an administrator may be unimpeachable, his final decision will be reversed if he misdirects himself in point of law by, for example, failing to take into account relevant considerations;[57] or by acting upon a view of the primary facts which cannot reasonably be justified;[58] or by failing to give sufficient weight to a prima facie legal inference;[59] or by failing to give effect to a prescribed onus of proof;[60] or by imposing on an applicant an impermissible onus of proof;[61] or by misconstruing a statutory phrase;[62] or by otherwise misconstruing a statute. Such errors of law may be revealed by the tribunal in its statement of reasons for the decision reached.[63]

As an illustration of an administrator misdirecting himself in point of law, in *Sinclair* v. *Mining Warden at Maryborough*[64] a company had applied to a mining warden for a mining lease covering in all some 1,100 acres of land. Despite the presentation of extensive expert evidence of environmental damage which had been prescribed by objectors, and despite the fact that the evidence tendered by the company revealed that there were no minerals in any part of the areas for which mining leases were

56. British Launderers' Research Association v. Borough of Hendon Rating Association, [1949] 1 K.B. 462, at 471-72; Mattinson v. Multiplo Incubators Pty Ltd [1977] 1 N.S.W.L.R. 368, at 372-73 per Glass J.A.; Aafjes v. Kearney, (1976) 50 A.L.J.R. 454, at 456 per Barwick C.J.; Edwards v. Bairstow, [1956] A.C. 14, at 33-34 per Lord Radcliffe.
57. This is an error of law (Wootton v. Central Land Board, [1957] 1 W.L.R. 424) for which certiorari will lie if the error appears on the face of the record: Baldwin & Francis Ltd v. Patents Appeal Tribunal, [1959] A.C. 663; R. v. Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd., [1966] 1 Q.B. 380. See also Capper Pass Ltd v. Lawton, [1977] 1 Q.B. 852.
58. Edwards v. Bairstow, [1956] A.C. 14, at 29 per Viscount Simonds. Cited with approval, inter alia, by Gibbs J. in Aafjes v. Kearney, (1976) 50 A.L.J.R. 454, at 457.
59. Solihull Corporation v. Gas Council, [1961] 1 W.L.R. 619.
60. Rowing v. Minister of Pensions, [1946] 1 All E.R. 664.
61. Cf. Vine v. Smith, [1980] 1 N.S.W.L.R. 261, at 269-70.
62. Farmer v. Cotton's Trustees, [1915] A.C. 922; Barty-King v. Ministry of Defence, [1979] 2 All E.R. 80; Warringah Shire Council v. Rippledeen Pty Ltd, (1973) 28 L.G.R.A. 214; Warden v. Gosford Shire Council, (1973) 28 L.G.R.A. 317.
63. Capper Pass Ltd v. Lawton, [1977] 1 Q.B. 852, at 858; Clark v. Wellington Rent Appeal Board, [1975] 2 N.Z.L.R. 24. See generally Flick, supra n.12, at 87.
64. (1975) 132 C.L.R. 473. See also A.C.T. Construction Ltd v. Customs and Excise Commissioners, [1979] 2 All E.R. 691, at 694.

sought except a limited area of 60 acres, the mining warden proceeded to issue the licences sought. This decision was based in part upon the belief that the views presented by the objectors represented only a segment of those held by the public generally and that therefore it was not possible to deduce from their evidence that the interests of the public as a whole would be prejudicially affected. In addition, the mining warden thought that an applicant was entitled to a recommendation that a lease be granted unless it could be shown that it was against the public interest. When this decision was challenged in an action for mandamus before the Full Supreme Court of Queensland relief was denied on the ground that "the absence of evidence . . . did not place the warden in a position in which he was unable to make a recommendation."[65] But before the High Court of Australia the objectors met with success and relief was granted. All of the members of that Court held that the mining warden had been wrong in deciding that he could not accept the evidence of the objectors as evidence of the public interest; and Barwick C.J., Stephen, Gibbs and Murphy JJ. held that before the mining warden could recommend the grant of a lease there must be evidence as to the presence of minerals in the land concerned. After referring to the facts detailed earlier, Stephen J. observed:

> Without in any way trespassing upon the warden's function of determining for himself the weight to be attached to this unchallenged and largely unanswered evidence it is proper to note at least that it was relevant to the issue to which it was directed and that it did not depend upon issues of credibility in the ordinary sense of that word. What is more . . . the warden himself described it, or some of it, as unanswered and as presenting in at least one respect a strong case. Even had there been evidence of worthwhile mineralization within each of the lease areas it is perhaps difficult in these circumstances to see how any proper approach to the question of public interest could lead to a recommendation favourable to the respondent. When viewed in the light of the evidence of the respondent's own witness that two of the leases sought contained within them no areas of worthwhile mineralization it is apparent that in some way the warden's task has miscarried; for if the evidence be that to mine these two leases is not economic there can at least in their case be little, if anything, to weigh in the scales against the evidence of detriment furnished by the applicant.[66]

65. R. v. Mining Warden at Maryborough; Ex parte Sinclair, [1975] Qd.R. 235, at 241 per Lucas J.
66. (1975) 132 C.L.R. at 485

A further illustration of an error of law appears in *Pook* v. *Owen*[67] in which a majority of the Court of Appeal (Lord Denning M.R. dissenting) held that a decision of the General Commissioners under the *Income Tax Act,* 1853 (U.K.) could be reversed if they permitted a doctor who held a part-time appointment at a hospital fifteen miles from his home the travelling expenses incurred when he was called to the hospital on an emergency. The Act only allowed for expenses which were inherent in the nature of the appointment itself and did not allow for such personal considerations as the doctor's voluntary decision to live fifteen miles away to be taken into account.

That there was a dissent in each of the preceding cases only reveals the difficulties that may be incurred in the interpretation of a statute and only serves to emphasise the need for questions of law to be determined by an appropriate body.

Specific reference should also be made to the decision of the Federal Court of Australia in *Drake* v. *Minister for Immigration and Ethnic Affairs.*[68] That case involved a decision of the Administrative Appeals Tribunal affirming the making by the Minister of a deportation order against the appellant. As was mentioned at the outset,[69] appeals from the Tribunal to the Federal Court are restricted to questions of law and one of the errors of law which it was argued that the Tribunal had here committed was that it had attached such importance to a policy statement of the Minister as to result in a failure to independently consider the facts of the case. All members of the Court agreed that it is the duty of the Administrative Appeals Tribunal to satisfy itself whether the decision being reviewed is a decision which in its view is objectively the right one to be made; its duty is not simply to ensure that the Minister's decision is arrived at by a reasonable or justifiable application by him of policy.[70] And on the facts of the case, the matter was remitted to the Tribunal as it was not clear that that independent assessment of all the relevant considerations had been made.[71] Smithers J. reasoned that an error of law had been committed as the task performed by the Tribunal was not the one it was actually required to perform.[72] The further relevance of this case will be raised elsewhere,[73] but it should now be noted that en-

67. [1968] 1 All E.R 261
68. (1979) 2 A.L.D. 60
69. Supra n.6 and cases there cited.
70. Per Smithers J. (2 A.L.D. at 77); per Bowen C.J. and Deane J at 69-70.
71. Upon remittal the case was affirmed: Re Drake and Minister for Immigration and Ethnic Affairs (No. 2), (1979) 2 A.L.D. 634
72. (1979) 2 A.L.D. at 85
73. Discussed at n 159

trusted to the Administrative Appeals Tribunal have been the responsibility of reviewing Government policy and the reaching of the correct or preferable decision on the merits.[74] Leaving constitutional considerations aside, is it appropriate for such a tribunal to also determine questions of law?

(b) Inferences requiring the skills of a lawyer

Whenever the correct conclusion to be drawn from primary facts requires for its correctness a determination by a trained lawyer, the conclusion is one of law.[75] In the last cited case, for example, a finding had been made that the British Launderers' Research Association was not an institution established "for the purpose of science, literature or the fine arts exclusively" and hence was not entitled to an exemption from rating under the *Scientific Societies Act,* 1843. This finding was reversed by the Divisional Court and before the Court of Appeal it was argued that this was a fining fact with which the Divisional Court should not have interfered. Of this argument, Denning L.J. commented:

> If, and in so far, however, as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer — as, for instance, because it involves the interpretation of documents or because the law and facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer — the conclusion is a conclusion of law in which an appellate tribunal is as competent to form an opinion as the tribunal of first instance.[76]

Applying those principles to the facts of the case before him, Denning L.J. concluded that the finding was one of law because it involved an examination of the memorandum and articles of association of the Research Association and involved questions of interpretation to those documents and the Act.[77]

Subsequent cases where this need for the skills of a lawyer has served as sufficient reason to label a finding as one of law include the proper status of an employee where that status depended entirely on the construction of a written agreement[78] and again where the finding depend-

74. Re Becker and Minister for Immigration and Ethnic Affairs, (1977) 1 A.L.D. 158. See: Kirby, Beyond the Frontier Marked "Policy — Lawyers Keep Out" (July 1981); Pearce: Courts, Tribunals and Government Policy, (1980) 11 F.L.R. 203

75. British Launderers' Research Association v. Borough of Hendon Rating Authority, [1949] 1 K.B. 462, at 471-72 per Denning L.J.

76. Id. at 472.

77. Contrast: School of Oriental and African Studies v. Westminster City Rating Authority, [1940] 4 All E.R. 537

78. Gould v. Minister of National Insurances, [1951] 1 All E.R. 368.

ed upon what was said to be "the reasonable inferences based on the legal interpretation of the contract".[79] A question of law is also involved in determining an issue of causation of injury for the purposes of compensation.[80]

Implicit in the recognition that findings of ultimate fact, frequently in the form of a statutory phrase, may sometimes involve questions of law and sometimes questions of fact is the proposition that the interpretation of a statute does not always involve the skills of a lawyer or legal expertise. Where a statutory phrase involves a technical legal term[81] or involves a term which has acquired a precise definition in law,[82] a question of law is involved. Where, by way of contrast, the statutory language employs an ordinary English word or phrase, a question of fact is involved.[83] There is, however, an inherent difficulty in attempting a classification of terminology according to this dichotomy and in the great majority of cases the application of statutory language to the facts of an individual case can only be settled by the application of a sense of language in the context of the Act and a certain amount of common sense in using and understanding the English language in a particular context.[84]

Examples of phrases which it has been said should bear their ordinary and natural meaning include: "mining operations upon a mining property";[85] "working classes";[86] "living together as members of the same family";[87] "insulting behaviour";[88] "businesses" and "industries";[89] the "source" of income;[90] and "public school".[91] That the meaning of such phrases must be a question of fact is a consequence of the flexibility of

79. Morren v. Swinton and Pendlebury Borough Council, [1965] 1 W.L.R. 576, at 583 per Lord Parker C.J.
80. Hoveringham Gravels Ltd v. Secretary of State for the Environment, [1975] Q.B. 754.
81. Australian Gas Light Co. v. The Valuer-General, (1940) 40 S.R. (N.S.W.) 126, at 137.
82. Edwards v. Bairstow, [1956] A.C. 14 per Lord Radcliffe
83 Australian Gas Light Co. v. The Valuer-General, (1940) 40 S.R. (N.S.W.) 126, at 137.
84. In re Butler, [1939] 1 K.B. 570, at 579 per Sir Wilfred Greene M.R.
85. N.S.W. Associated Blue-Metal Quarries Limited v. Federal Commissioner of Taxation, (1955) 94 C.L.R. 509. See also Federal Commissioner of Taxation v. Broken Hill South Limited, (1941) 65 C.L.R. 150, at 155, 160-61.
86. White v. St. Marylebone Borough Council, [1915] 3 K.B. 249
87. R. v. Criminal Injuries Compensation Board, Ex parte Staton, [1972] 1 All E.R. 1034.
88. Brutus v. Cozens, [1972] A.C. 854, at 861 per Lord Reid. Cited with approval by Samuels J.A. in Hope v Bathurst City Council, [1979] 2 N.S.W.L.R. 471, at 477. See also Mattinson v. Multiplo Incubators Pty Ltd, [1977] 1 N.S.W.L.R. 368, at 372-73. In the context of a criminal case, see R v. Robinson, [1978] 1 N.Z.L.R. 709, at 716-17.
89. Fennell v. Wyong Shire Council, (1975) 31 L.G.R.A. 164, at 169 per Waddell J.; Hope v. Bathurst City Council, [1979] 2 N.S.W.L.R. 471; Coleman v. Grafton Greyhound Racing Club, (1955) 55 S.R. (N.S.W.) 214.
90. Commissioner of Taxation v. Mitchum, (1965) 113 C.L.R. 401
91. Girls' Public Day School Trust Limited v. Ereaunt, [1931] A.C. 12

much of the English vocabulary.[92] In those circumstances where an attempt has been made to use the vocabulary of those people in the field being regulated, it follows that the meaning to be given to the words will depend upon their special usage.[93] Moreover, this meaning will be that in vogue at the time of the passage of the statute.[94] But where the interpretation of ordinary English words has led half the judges to one meaning and the other half to another meaning, it has been said a question of law is involved and that it is the duty of a Court of Appeal to give a definite ruling one way or the other.[95] If such were not the case the situation would be intolerable as no lawyer could advise his client what to do.[96] Similarly, where the reasons of a tribunal reveal that it has attempted to define an ordinary English word, but has done so in an incomplete and otherwise unsatisfactory way, a question of law has again been held to be involved.[97] Great reservation, however, should be exercise by courts in the application of the last two propositions lest a question of fact is too readily transformed into a question of law.

Examples of phrases the interpretation of which it has been held involve a question of law include: whether tenement houses were "houses" within the terms of the *Housing Act,* 1957 (U.K.);[98] whether there had been a transfer of a business for the purpose of the *Contract of Employment Act* 1963 (U.K.);[99] and whether an expenditure is a capital or revenue expenditure.[100] Great reservation should also be exercised by the courts in concluding that no reasonable application of the primary facts could bring a case within the words of a statute as such a judgment on some occasions can require an extremely fine judgment.[101]

An illustration of what Denning L.J. meant in the *British Launderers' Case*[102] by facts and law being inseparable is provided by *Solihull Corporation* v. *Gas Council.*[103] The issue in that case centred on whether a local

92. Id.
93. Cf. Secretary of State for Employment and Productivity v. C. Maurice & Co. Ltd, [1969] 2 A.C. 346; R. v. Hichman, Ex parte Fox and Clinton, (1945) 70 C.L.R. 598.
94. Attorney-General for the Isle of Man v Moore, [1938] 3 All E.R. 263; Federal Commissioner of Taxation v. Broken Hill South Limited, (1941) 65 C.L.R. 150, at 160 per Williams J.
95. Pearlman v. Keepers and Governors of Harrow School, [1979] 1 Q.B. 56, at 66-67 per Lord Denning M.R.
96. Id.
97. A.C.T. Construction Ltd v. Customs and Excise Commissioners, [1979] 2 All E.R. 691, at 694.
98. Quiltotex Co Ltd v. Minister of Housing and Local Government, [1966] 1 Q.B. 704. Compare: In re Butler, [1939] 1 K.B. 570; Lake v. Bennett, [1970] 1 Q.B. 663.
99. Woodhouse v. Peter Brotherhood Ltd., [1972] 3 W.L.R. 215.
100. J.H.Bean v. Doncaster Amalgamated Collieries Ltd., [1944] 2 All E.R. 279.
101. Griffiths v. J.P. Harrison (Watford) Ltd., [1963] A.C. 1 (House of Lords divided 3:2).
102. Supra nn 75-76.
103. [1961] 1 W.L.R. 619.

gas board or the Gas Council was in occupation of a site purchased by the board for the purposes of operating a research station. Ever since the nationalisation of the gas industry by the *Gas Act,* 1948 (U.K.) the local boards and the Gas Council had been separate entities but they had never really been at arms length from each other. In the present case a separation had to be effected as only the gas boards were exempt from rates. The Lands Tribunal had held that the occupier of the research station was the Gas Council, but this finding was reversed by the Court of Appeal. It was said by that Court that the Lands Tribunal had failed to give sufficient weight to the legal inference to be derived from the fact that the owner of the site — the local gas board — was in possession. As the finding therefore involved a mixed question of fact and law — the proper inference to be drawn from the arrangement between the parties taking into account any prima facie legal inferences — the Court was able to review the Tribunal's finding and allow the appeal.

(c) Questions of degree

Where the question to be resolved depends not upon the applicability of some definite rule of law, but upon the view taken by a tribunal of whether the primary facts are such as to bring a case within a category which is but loosely defined, the question is ordinarily one of degree and therefore one of fact.[104] And, provided there is material before the tribunal which is capable of supporting its conclusion, a reviewing court is not entitled to interfere with the manner in which the tribunal has resolved such questions.[105] Intervention by the courts is only justified when the tribunal has reached a conclusion which cannot reasonably be drawn from the primary facts.[106] Each of these three propositions is amply supported by authority.

A common question of degree that has arisen is whether a person is a resident of a specified country for the purposes of income tax legislation.[107] Thus, for example, in *Commissioner of Taxation* v. *Miller*[108] the In-

104. Commissioner of Taxation v. Miller, (1943) 73 C.L.R. 93, at 101 per Rich J.; Brutus v. Cozens, [1972] A.C. 854; Ex parte Godkin, Re Fitzmaurice, (1969) 90 W.N. (Pt.1) (N.S.W.) 159; Commissioner of Inland Revenue v. Frethey, [1961] N.Z.L.R. 245; Atkinson v. Bettison, [1955] 1 W.L.R. 1127.

105. Commissioner of Taxation v. Miller, (1947) 73 C.L.R. 93, at 104 per Dixon J., In re Bowman, [1932] 2 K.B. 621. See also School of Oriental and African Studies v. Westminster City Rating Authority, [1940] 2 All E.R. 537.

106. E.g., Bracegirdle v. Oxley, [1947] 1 K.B. 349. Compare: Instrumatic Ltd. v. Supabrase Ltd., [1969] 1 W.L.R. 519.

107. Commissioner of Inland Revenue v. Lysaght, [1928] A.C. 234; Levene v. Commissioners of Inland Revenue, [1928] A.C. 217.

108. (1946) 73 C.L.R. 93

come Tax Board of Review had decided on the facts before it that Miller was a resident of the Territories of New Guinea and Papua and that by section 7(1) of the *Income Tax Assessment Act* 1936 (Cth.) it followed that the Act did not apply to any income Miller derived from sources within those territories. Basically the facts before the Board revealed that in August 1940 Miller and his wife gave up their habitation in Queensland and proceeded to live on a fourteen-ton deep sea fishing vessel (the "Sunshine") that Miller had just had built. In July 1942 the Millers put into the Queensland port of Mackay and at that stage their vessel was requisitioned on behalf of the American army. Miller was retained as master and was paid a monthly salary. For the period of time being investigated by the Board of Review, the "Sunshine" was based at Milne Bay in Papua and for most of this time the vessel was engaged in carrying supplies and plying between ships at anchor and the shore. Although Dixon J. expressed the view that had the decision been his he would not have concluded that Miller was resident in Papua,[109] neither he nor the other two members of the High Court of Australia were prepared to say that the Board's decision involved any question of law.

With typical precision, Scrutton L.J. had stated the law as follows: —

> If the questions arising in the case are questions of fact, the determination of the Commissioners is final, provided that there was evidence on which they could come to the conclusion they did; and that the Court itself, or any member of the Court, might, on the facts, have come to a different conclusion is perfectly irrelevant, provided that there was evidence from which the Commissioners' conclusion could be reasonably drawn."[110]

It is therefore a question of law whether there are sufficient primary facts to support an inference or whether there are some facts present which preclude an inference being drawn.[111] The actual quantity of factual support an inference must have in order to be immune from review has been phrased differently in different cases but it would appear that so long as the facts can reasonably give rise to the inference reached the courts will not intervene and substitute their decision for that of the ad-

109. Id. at 103.

110. Currie v. Commissioners of Inland Revenue, [1921] 2 K.B. 332 at 338. See also Commissioner of Inland Revenue v. Frethey, [1961] N.Z.L.R. 245, at 249-50 per McCarthey J.

111. White v. St. Marylebone Borough Council, [1915] 3 K.B. 249.

ministrator.[112] Cases have occurred, however, in which the courts have found an error of law because this minimum requirements of factual support has not been made out.[113]

The corollary of stating that where the question is one of degree it is a question of fact is that where the finding trespasses beyond the permitted limits of degree the administrators have misdirected themselves in law. Perhaps the best illustration is *Bracegirdle* v. *Oxley*.[114] In that case magistrates had failed to convict two lorry drivers for driving in a manner dangerous to the public when, for example, the facts with regard to one of the drivers revealed that he had driven his six-ton lorry at a speed between 40 to 44 miles per hour on a stretch of road that had a speed limit of 20 miles per hour and which had along it a number of bends, five farm entrances, one converging road and one narrow bridge. On these and other facts the court concluded that had the magistrates properly directed themselves in law they could have only come to one conclusion — that the driving was dangerous to the public. Consequently, an appeal from the magistrates' decision was upheld.

(d) Expertise

Although a court should be reluctant to disagree with the findings of fact of a tribunal whose decision is under review, an additional degree of reluctance should appear when the tribunal concerned is an expert body. Expertise affects both the ability of the tribunal to draw inferences from primary facts and its ability to construe the relevant language that it has to apply to those facts. Unfortunately, however, it would appear that "no special regard" is had to this quality of expertise by either the English or the Australian courts[115] and it is true to say that in the great majority of cases the courts place less weight than they should upon the accumulated experience of the administrative tribunals.

But a number of cases do point the way for the future. Thus, in a decision of the Supreme Court of Victoria it was stated by Stephen J.:

112. Smith v. General Motor Cab Company Limited, [1911] A.C. 188; Jones v. Minister of Health, (1950) 84 Ll.L.R. 417; Denver Chemical Manufacturing Company v. Commissioner of Taxation, (149) 79 C.L.R. 296; Felix v. General Dental Council, [1960] A.C. 704; Ducker v. Rees Rotubo Development Syndicate, Limited, [1928] A.C. 132; Global Plant Ltd v. Secretary of State for Social Services, [1972] 1 Q.B. 139; Re London County Council Order 1938, [1945] 2 All E.R. 484.

113. Edwards v. Bairstow [1956] A.C. 14; Doggett v. Waterloo Taxi-Cab Company Limited [1910] 2 K.B. 336; Taylor v. Armour & Co. Pty Ltd (1961) 19 L.G.R.A. 232.

114. [1947] 1 K.B. 349. Contrast Dennis v. Watt, (1943) S.R. (N.S.W.) 32 (negligent driving).

115. Benjafield and Whitmore, *Principles of Administrative Law* 4th ed. (1971) at 184 citing, inter alia, Ex parte Tooth and Co. Ltd., Re Council of the City of Sydney (1963) 80 W.N. (N.S.W.) 572. See also the comments of Lord Radcliffe in Edwards v. Bairstow [1956] A.C. 14, at 38.

> In approaching the decision of an expert tribunal I must, I think, not only refrain from making up my own mind on the evidence before it, must not only confine myself to inquiring whether on any reasonable view of the evidence the Tribunal's decision on a question of fact can be supported, but must also bear in mind that I am concerned with areas in which members of the Tribunal have special expertise and experience which the legislation plainly intends them to employ. I must, therefore, be slow to conclude that on no reasonable view could this Tribunal decide a particular matter of fact as it has.[116]

Even in a much earlier case this need to yield to the greater qualifications of the administrator had been recognised.[117] Courts should in fact encourage expert administrative tribunals to use their expertise, provided of course that the parties to a proceeding are given an adequate opportunity to meet in an appropriate fashion any material which influences the decision-making process.[118]

In yet other cases it has been recognised that where the language to be interpreted and applied to the facts of the individual case is admittedly imprecise or employs the vernacular of the field to be regulated, the rules of construction and the analytical reasoning upon which the decision of a court must rest may be inappropriate.[119] In the *Maurice Case* the point to be decided was whether the activities of the Maurice Company fell within a particular head of the 'Standard Industrial Classification'. If it did the Company was entitled to a refund of selective employment tax. On its way to the House of Lords this issue gave way to a variety of opinions: the industrial tribunal held that the company was entitled to a refund; the Divisional Court then upheld the argument of the Minister that no refund was to be paid; and then the Court of Appeal restored the decision of the industrial tribunal. Before the House of Lords it was the decision of the Court of Appeal that prevailed and Lord Wilberforce attributed the divergence between that Court and the Divisional Court to the fact that the former Court was prepared to place more weight upon the "tribunal's knowledge and experience in the factual field".[120] His

116. Spurling v. Development Underwriting (Vic.) Pty Ltd. (1972) 30 L.G.R.A. 19, at 32. See also Hoveringham Gravels Ltd v. Secretary of State for the Environment, [1975] Q.B. 754, 769.
117. Currie v. Commissioners of Inland Revenue, [1921] 2 K.B. 332, at 337 per Lord Sterndale.
118. Dugdale v. Kraft Foods Ltd. [1976] 1 W.L R 1288, at 1294-95. See generally: Flick, supra n. 12, at ch. 4.
119. R v. Hickman, Ex parte Fox and Clinton (1945) 70 C.L.R. 598, at 614 per Dixon J.; Secretary of State for Employment and Productivity v. E. Maurice & Co. Ltd., [1961] 2 A.C. 346, at 360-361 per Lord Wilberforce.
120. [1969] 2 A.C. at 360.

Lordship recognised the distinction between primary facts and inferences drawn from those facts but went on to say that where the inferences depended upon the application of language intended for use by statisticians and businessmen the courts should attach to such inferences a strength only slightly less than that attracted by decisions of fact properly so called.[121]

But these words assume that the expertise of a tribunal is an indivisible commodity. What if the tribunal members themselves only reach a majority conclusion? — is the court then more able to intervene? *Fisher Bendix Ltd* v. *Secretary of State for Employment and Productivity*[122] would suggest that the answer is in the affirmative because in that case, the facts being basically the same as in the *Maurice* case, the court preferred the dissenting views of the lawyer-chairman of an industrial tribunal to those views expressed by the two lay members.

Jurisdictional Facts

Although jurisdictional facts may be regarded as but a species of ultimate fact, the approach of a court when reviewing the findings upon which the jurisdiction of a tribunal depends is more searching and it is suggested that a court is more willing to substitute its own opinion on such matters for the inferences drawn by the administrator from the primary facts as presented to him. It can, therefore, be understood why texts on administrative law discuss error of law and jurisdictional error as different concepts and draw a distinction between jurisdictional facts and facts which go to the merits of a decision.[123]

The basic reason for insisting upon such distinctions, and for attempting to identify what constitutes a jurisdictional fact, is simply a desire to ensure that an administrative tribunal performs the tasks entrusted to it by the legislature and does not perform unauthorised tasks. As Latham C.J. explained:

> An authority with a limited jurisdiction cannot give itself jurisdiction by a wrong determination as to the existence of a fact upon which its jurisdiction depends, or by placing a wrong construction upon a statute upon which its jurisdiction depends, unless by a valid provision the authority is given power to act upon its own opinion in

121. Id. at 361.
122. [1970] 1 W.L.R. 856.
123. Whitmore, supra n.1, at 152-57; Sykes, Lanham and Tracey, supra n. 1, at 144-75; J.A.G. Griffith and H. Street, *Principles of Administrative Law* 5th ed. (1973) at 212-15.

relation to the existence of the fact or in relation to the construction of the statute.[124]

With typical clarity, Professor Wade maintains that a distinction between jurisdictional fact and facts which go to the merits is necessary because an administrative tribunal has the power, within the jurisdiction entrusted to it, to decide facts correctly or incorrectly.[125] Although such errors may be reviewable if an error of law is apparent, review is not permissible on jurisdictional grounds as the jurisdiction entrusted to the tribunal includes a power to err. It could not be suggested that a tribunal only has jurisdiction if it reaches the correct or preferable conclusion in each and every case it decides. Phrasing this justification in different terms, it is said that the reason for maintaining the distinction between want of jurisdiction and the manner of its exercise is that if the distinction were to be rejected review for excess of jurisdiction would be tantamount to a review on the merits.[126]

Despite these substantial reasons as to why the courts are so concerned about jurisdictional facts, Latham C.J. in the extract of his judgment quoted above and other authorities[127] can be cited for the proposition that a legislature may entrust to an administrative tribunal the power to conclusively determine not only facts which go to the merits but also to conclusively determine jurisdictional facts.

The great bulk of authority, however, supports the view that in most situations a court will review for itself the question whether primary facts satisfy a finding of ultimate fact upon which the jurisdiction of a tribunal depends. Thus, by way of example, courts have considered whether: (a) premises were "furnished" premises under the *Furnished Houses (Rent Control) Act* 1946 (U.K.);[128] (b) an employee has been "dismissed" under the *Crown Employees Appeal Board Act, 1944 (N.S.W.);*[129] (c) employees were engaged in the "coal mining industry";[130] and (d) employees had been transferred from one position to another by way of "punishment".[131]

124. R v. Hickman, Ex parte Fox and Clinton (1945) 70 C.L.R. 598, at 606. See also Ex parte Wurth, (1954) 55 S.R. (N.S.W.) 47, at 53 per Street C.J.
125. Wade, supra n.1, at 237-38.
126. Parisienne Basket Shoes Pty Ltd v. Whyte (1938) 59 C.L.R. 369, at 389 per Dixon J.
127. R. v. Commissioners for Special Purposes of the Income Tax, (1888) 21 Q.B.D. 313, at 319 per Lord Esher M.R. As examples see R. v. Ludlow, Ex parte Barnsley Corporation, [1947] 1 K.B. 634; Ex parte Moss, Re Board of Fire Commissioners of N.S.W., (1961) 61 S.R. (N.S.W.) 597, per Kinsella J.
128. R. v. Blackpool Rent Tribunal, Ex parte Ashton, [1948] 2 K.B. 277. See also, R. v. Bradford, [1908] 1 K.B. 365.
129. Ex parte Wurth, (1954) 55 S.R. (N.S.W.) 47.
130. R. v. Hickman, Ex parte Fox and Clinton, (1945) 70 C.L.R. 598. See the comments of Dixon J. at 614.
131. Potter v. Melbourne Metropolitan Tramways Board, (1957) 98 C.L.R. 337.

By insisting upon a distinction between jurisdictional facts and other findings of ultimate fact, the courts have inevitably invited a great deal of debate as to when an error of law is within jurisdiction and as to when it goes to jurisdiction.[132] Of particular relevance to this debate is the significance a court will give to a so-called "ouster" or "privative" clause which purports to preclude a court from, for example, reviewing a decision of a tribunal by means of certiorari, prohibition, etc.

Perhaps one of the best examples of the subtlety of the distinction and the effect it may have on judicial review is provided by the decision of the House of Lords in *Anisminic Ltd* v. *Foreign Compensation Commission.*[133] In that decision an English company had been denied compensation under the *Foreign Compensation (Egypt) (Determination and Registration of Claims) Order,* 1962 in respect of property which had been sequestrated by the Egyptian authorities during the Suez Incident of 1956. The denial of compensation by the Commission was upon the basis that the successor in title to the property was not a British national. One of the difficulties to be confronted by the House of Lords was a provision to the following effect:

> The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.[134]

It was ultimately concluded that such a provision did not extend to protecting "purported" decisions of the Commission and on the facts of the case the decision was a nullity because an irrelevant consideration had been taken into account — i.e., the nationality of the successor in title. Lord Reid referred to the long history that attached to statutory provisions which purported to exclude the ordinary jurisdiction of the courts and noted that no case could be cited to support the view that statutory language could support a nullity — as his Lordship observed, "there are no degrees of nullity".[135] Similarly, Lord Wilberforce relied upon the statutory origin of tribunals and stated that such tribunals only had a limited area of operation and that privative clauses could not extend this area. His Lordship stated:

> The courts, when they decide that a 'decision' is a 'nullity', are not disregarding the preclusive clause. For, just as it is their duty to attribute autonomy of decision of action to the tribunal within the

132. Supra nn. 7-8.
133. [1969] 2 A.C. 147
134. Foreign Compensation Act, 1950, (U.K.) s.4(4).
135. [1969] 2 A.C. at 170.

> designated area, so, as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed . . . In each task they are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive. What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed.[136]

Other decisions support the proposition that privative clauses receive their most restrictive interpretation when what is in issue is the jurisdiction of an administrative tribunal.[137]

Although the courts have, therefore, drawn this distinction between jurisdictional and non-jurisdictional findings of fact, in recent years there has been a decline in the significance of jurisdictional error as a ground of review. A number of reasons may be suggested for this decline. First, there is an almost universal practice nowadays for an enabling statute to provide for an appeal on a question of law from a tribunal's decision.[138] Indeed, section 14 of the *Tribunals and Inquiries Act* 1971 (U.K.) and section 4 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth.)[139] go a great deal of the way toward rendering nugatory the effect of any private clause. Second, since 1952 there has been a revival and an expansion of the principle of review by certiorari for error of law on the face of the record.[140] It is possible, however, for a tribunal to commit an error of law within jurisdiction and for that error to be protected by a privative clause.[141] A third reason relates to the revitalisa-

136 [1969] 2 A.C. at 208.

137 Consider: Ex parte Wurth, (1954) 55 S.R. (N.S.W.) 47; Ex parte Moss, (1961) 61 S.R. (N.S W.) 597; Ex parte Blackwell, Re Hateley, (1965) 83 W.N. (Pt.1) (N.S.W. 109.

138. See the comments of de Smith, *Judicial Review of Administrative Action* 3rd ed. (1973) at 99

139. Consideration should also be given to the effect of a privative clause when what is in issue is the original jurisdiction of the High Court of Australia pursuant to s.75(v) of the Australian Constitution. In such a context, Dixon J has been prepared to give to such a clause the following effect: ". . where the tribunal has made a bona fide attempt to exercise its authority in a matter relating to the subject matter with which the legislation deals and capable reasonably of being referred to the power possessed by the tribunal, the acts of the tribunal shall not be invalidated and accordingly shall not be the subject of prohibition." R. v. Murray, Ex parte Proctor, (1949) 77 C.L.R. 387, at 398. See also R. v. Hickman, Ex parte Fox and Clinton, (1945) 70 C.L.R. 598, at 615 per Dixon J., R. v Commonwealth Rent Controller, (1947) 75 C.L.R. 361, at 368-69 per Latham C.J. and Dixon J.; Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Colleries of Western Australia Ltd., (1960) 104 C.L.R. 437. But see Anderson, 'The Application of Privative Clauses to Proceedings of Commonwealth Tribunals' (1956) 3 *Uni Qld J L* 35.

140. Whitemore, 'O! That Way Madness Lies: Judicial Review for Error of Law' (1967) 2 *Fed. L Rev* 159. R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw [1952] 1 K.B. 338.

141. South East Asia Fire Bricks Bhd v Non-Metallic Mineral Products Manufacturing Employees Union [1980] 2 All E.R. 689.

tion in 1964 of natural justice as a ground of review[142] and attempts as from 1967[143] to insist upon procedural "fairness".[144]

Conclusions

Any discussion of what constitutes an error of law as opposed to an error of fact immediately poses a host of distinctions. In addition to the very distinction between fact and law, this paper draws attention to the distinction which can be made between findings of primary fact and findings of ultimate fact and jurisdictional facts. Discussed elsewhere is the distinction between the findings of fact upon which a decision may be based and the reasons for that decision.[145]

This multiplicity of distinctions inevitably invites comment and raises the question whether all such distinctions serve a useful purpose. There has been judicial criticism. Thus, by way of example, Gibbs J. in *Aafjes* v. *Kearney*[146] has stated in the context of a case stated to the High Court of Australia by the Workers' Compensation Commission of New South Wales:

> [T]he Court is called upon to consider whether the alleged error is one of law or of fact — an enquiry of a sterile and technical kind but frequently productive of disagreement.

The following passage has been equally critical of such a distinction being drawn: —

> But the distinction between an error which entails absence of jurisdiction — and an error made within the jurisdiction — is very fine. So fine indeed that it is rapidly being eroded . . . So fine is the distinction that in truth the High Court has a choice before it whether to interfere with an inferior court on a point of law. If it chooses to interfere, it can formulate its decision in the words: "The court below had no jurisdiction to decide this point wrongly as it did." If it does not choose to interfere, it can say: "The court had jurisdiction to decide it wrongly, and did so." Softly be it stated, but that is the reason

142 Ridge v Baldwin [1964] 2 A.C 40

143. Re H.K. (An Infant) [1967] 2 Q.B 617. See also: Schmidt v. Secretary of State, [1969] 2 Ch 149.

144 Attempts to distinguish natural justice and fairness should be resisted as a confusion of the question as to the application of the rules with the question of the content of those rules· Flick, 'Natural Justice in New Zealand: A Comment' [1976] *N Z.L.J* 296. See also Mullan, 'Fairness: The New Natural Justice — The Modern Synthesis' (1975) 1 *Monash L R.* 258; Seepersad, 'Fairness and Audi Alteram Partem', (1975) *Public Law* 242, Clark, 'Natural Justice. Substance and Shadow' (1975) *Public Law* 27.

145. See n.18 supra.

146. (1976) 50 A.L.J R. 454, at 457

> for the difference between the decision of the Court of Appeal in *Anisminic Ltd* v. *Foreign Compensation Commission* [1968] 2 Q.B. 862 and the House of Lords [1969] 2 A.C. 147.
>
> I would suggest that this distinction should now be discarded. The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. Not only in the instant case to do justice to the complainant. But also so as to secure that all courts and tribunals, when faced with the same point of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in which court it is heard.[147]

It should be noted, however, that this very statement of what the law should be has been disapproved by the House of Lords.[148]

In an area of law which is already plagued by other distinctions,[149] questions must inevitably be raised as to whether the principles upon which administrative law has developed are soundly based. And to understand what the principles are or should be it is necessary to examine what objectives a reviewing court has sought to achieve by applying the distinctions in issue. A selection of the objectives outlined in this paper would reveal that a reviewing court has sought to ensure that an administrative tribunal has:

- reached a decision based upon relevant evidence;[150]
- not acted in an arbitrary manner and reached a finding of fact not supported by any evidence;[151]
- not misdirected itself and directed its attention to the wrong issue by misconstruing a statute;[152]

147. Pearlman v. Keepers and Governors of Harrow School, [1979] 1 Q B. 56, at 69-70.

148. Re Racal Communications Ltd., [1980] 2 All E R. 634.

149. E.g , Consider the distinction which is drawn between judicial and quasi-judicial functions on the one hand and functions which are labelled as legislative or administrative on the other for the purposes of the applicability of the rules of natural justice (Ridge v. Baldwin, [1964] A.C. 40; Maradana Mosque Trustees v. Mahmud, [1967] 1 A C. 13; Durayappah v. Fernando, [1967] 2 A.C. 337; Nakkuda Ali v. Jayaratne, [1951] A.C 66) or the availability of such remedies as certiorari or prohibition (R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Company Ltd , [1924] 1 K.B 171; and see· R. v. London Borough of Hillington, [1974] 1 Q.B. 720). Why should, for example, a writ of certiorari be unavailable to quash a decision of a legislative character and yet a writ of mandamus be available to compel the performance of such a function (R. v. Manchester Corporation, [1911] 1 K.B. 560)? Further distinctions include an error of law within jurisdiction and an error which goes to jurisdiction (supra nn. 7-8); and the possible distinction between natural justice and fairness (supra nn 43-47)

150 See text supra at 198

151. See text supra at 200

152. See text supra at 206

- not stepped beyond the limits of its own expertise in an area where an expertise such as legal expertise would be of assistance;[153]
- not acted in an arbitrary manner by reaching an unreasonable conclusion on the material before it;[154]
- not stepped beyond the area entrusted to it by the legislature.[155]

When this list is considered, one relevant question is whether it is more appropriate for a court or a tribunal to seek to achieve such objectives.

It may be suggested that an administrative tribunal should be no more entitled to conclusively determine what evidence is relevant than it should conclusively determine what degree of procedural fairness should be accorded to a party. But the question remains: why should a court conclusively determine either of these issues or any of the other issues raised. Merely to label an issue as "legislative" or as an "error or law" in such a context is really only a statement of a conclusion rather than a reason for the result reached.

Whilst it is easy to make such criticisms of existing distinctions, it is far more difficult to suggest an alternative approach. All that can be suggested is that a reviewing court should exercise great restraint before it too readily interferes with the findings of an administrative tribunal — whether or not that finding is regarded by some as an error of law or one of fact.[156] Some of the factors a reviewing court should consider when exercising its judgment as to whether or not to intervene are:

- the powers of an administrative tribunal to obtain information (e.g. a power to order discovery, compel attendance of witnesses, order additional reports to be filed, etc.);
- the constitution of a tribunal (e.g. whether it is comprised of people with expertise in the field being regulated — legal members, or members qualified in medicine, engineering, social welfare, etc.);[157]
- the procedure adopted by an administrative tribunal and whether a party has had an adequate opportunity to present his case.

This suggestion places the role of a reviewing court very much in the

153. See text supra at 214
154. See text supra at 212
155. See text supra at 216
156. Pearce, 'Judicial Review of Federal Decisions — The Need for Restraint' (Unpublished paper to Administrative Law Seminar at Australian National University on 17-19 July, 1981).
157. See text supra at 214. Query whether too much emphasis can be placed on the element of legal expertise as a "specialist" tribunal may be comprised of members (e.g. barristers) who are merely appointed for a short period of time and who have had no prior experience in the field.

position of a "safety valve" — a device only to be exercised if matters go wrong to a point where an alternative release is essential.

Particularly is this need for judicial caution called for when the tribunal being considered is the Administrative Appeals Tribunal. Acting as it does as a focal point for the amalgamation of existing tribunals and as a restraint upon the further proliferation of tribunals,[158] the Administrative Appeals Tribunal is in the position of being able to accumulate amongst its members an expertise in matters of adminstrative law unparalleled by any other Commonwealth tribunal. It is also a body well suited to its task. Despite such issues as whether section 7(1) of the *Administrative Appeals Tribunal Act* 1975 is constitutionally valid,[159] the fact is that the President of the Tribunal, Mr. Justice J.D. Davies, is a Judge of the Federal Court of Australia and a number of other Judges of that Court have been appointed as Deputy Presidents.[160] Apart from these members, the Tribunal has also had appointed to it members with such qualifications as medicine, insurance and science. In addition to being able to draw on the expertise of such members, the Tribunal is in the position of being able to receive a detailed explanation of why a decision has been made.

This paper thus suggests no real alternative to the existing difficulties and distinctions apart from raising the need for judicial restraint. The emergence, at least at the federal level in Australia, of a comprehensive means of administrative review, however, promises well for the future. One must now look to the Administrative Appeals Tribunal and the Federal Court under the *Administrative Decisions (Judicial Review) Act* 1977 to evolve new principles. When the old principles are productive of so many distinctions and uncertainty of application, the need is great for their continued validity to be questioned.

158 See Commonwealth Administrative Review Committee, Parliamentary Paper No 144 of 1971; Committee on Administrative Discretions, Parliamentary Paper No 316 of 1973.

159 See comments by Flick on paper by Campbell, 'The Choice between Judicial and Administrative Tribunals — Constitution and other Legal Implications' (Unpublished paper to Administrative Law Seminar at the Australian National University on 17-19 July 1981). See also Drake v Minister for Immigration and Ethnic Affairs, (1979) 2 A.L.D. 60, at 63-65 per Bowen C.J. and Deane J.

160. E g., Mr. Justices F.R Fisher, J.F. Gallop, D G.P.McGregor, T R. Morling, and J.C. Toohey. The Tribunal does determine questions of law To suggest that such determinations are constitutionally permissible by reason of the fact that they are not conclusive but subject to review by the Federal Court (see sections 44 and 45) ignores the reality that some Judges of that Court may also sit as members of the Tribunal. Why should what one such judge says on matters of law in his capacity as a member of the Tribunal be entitled to less respect than what he says when sitting as a member of the Federal Court?