JURISDICTIONAL ERROR SINCE CRAIG

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I have been asked to address the topic 'jurisdictional error since *Craig*'. That is a daunting task — it is a very large topic, *Craig v South Australia*[1] (*Craig*) having been decided in 1995. Much has happened in the field since then. It could be the subject of a PhD — or a single sentence. I think if I had to pick a sentence it would be 'It's all about the statute'.

What is the significance of *Craig*?

Craig is often the starting point in discussions of jurisdictional error. But it is not and cannot be the end point. If we are considering 'jurisdictional error since *Craig*' then, of course, we need to understand what happened in *Craig.* Why is *Craig* our starting point? What did *Craig* say about jurisdictional error and why is it so significant?

Craig concerned a decision of the District Court of South Australia (an inferior court) to stay criminal proceedings based on the principle in *Dietrich v The Queen*[2] (*Dietrich*). It thus seems an unlikely foundation or starting point for understanding jurisdictional error more generally in the context of administrative decisions.

The Crown sought certiorari in relation to the stay and the South Australian Supreme Court concluded that the judge had made a jurisdictional error. The matter went on appeal to the High Court, which concluded that the trial judge had made no jurisdictional error or error of law on the face of the record.

In reaching that conclusion, the Court unanimously made various observations about the nature of jurisdictional error in the context of administrative bodies in contrast to inferior courts. It is those remarks that have proved influential in the development of jurisdictional error.

Craig also marks the point at which Australian administrative law diverged so fundamentally from UK administrative law in deciding not to apply *Anisminic Ltd v Foreign Compensation Commission*[3] (*Anisminic*) to an inferior court or to accept that the distinction between jurisdictional error and non-jurisdictional error should be abolished.

The key remarks about jurisdictional error in *Craig* were as follows (and are worth quoting in full):

> In considering what constitutes 'jurisdictional error', it is necessary to distinguish between, on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ.
>
> At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. … [C]onstitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to

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> confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
>
> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.[4]

From these passages I argue that *Craig* has two particularly important aspects:

(1) It reminds us that the nature of jurisdictional error may be different as between inferior courts on the one hand, and tribunals on the other.
(2) It tells us something about the scope of what constitutes a jurisdictional error for each type of body.

In particular, the articulation in *Craig* of the kinds of errors that are jurisdictional in nature when committed by an administrative body, rather than a court, has come to be seen as the starting point for identifying those errors said to be jurisdictional in nature. But, as later decisions have made clear, the list in *Craig* is not exhaustive and the categories of jurisdictional error are not closed.

In this article I will discuss four developments since *Craig*:

(a) the constitutionalisation of review for jurisdictional error;
(b) the nature of jurisdictional error;
(c) the consequences of jurisdictional error; and
(d) the differences in this area of law between administrative bodies and courts.

Constitutionalisation of judicial review

Judicial review for jurisdictional error is now constitutionally entrenched in Australia. At the federal level this occurs as a consequence of s 75(v) of the *Constitution*. The constitutional entrenchment of review of federal administrative decisions on the basis of jurisdictional error was recognised in *Plaintiff S157/2002 v Commonwealth*,[5] where the High Court held that a privative clause was ineffective to prevent review by the High Court for jurisdictional error. This is now well established and I will not discuss this development in detail.

At state level it was long thought that state privative clauses were able to exclude juridical review more effectively than federal privative clauses given the lack of a strict separation of powers (although state privative clauses remained liable to be read down by the courts).[6] However, in 2010, the High Court decided *Kirk v Industrial Relations Commission of New South Wales*[7] (*Kirk*). *Kirk* is one of the most significant post-*Craig* developments in relation to jurisdictional error.

Kirk concerned the conduct and outcome of a trial in the Industrial Relations Commission of New South Wales (IRC). Mr Kirk was convicted of certain offences after a trial at which he was called by the Crown to give evidence. The relevant legislation designated the IRC a 'superior court of record' and contained a privative clause purporting to protect its decisions from review. The High Court held, nonetheless, that the IRC had committed a jurisdictional error and set aside its decision. Of particular relevance was the approach the Court adopted to the privative clause. In summary, it held as follows:[8]

(1) The Supreme Courts of the states are expressly referred to in ch III of the *Constitution*. It is beyond the legislative power of a state to alter the character of its Supreme Court such that it ceases to meet the constitutional description. As a consequence, certain defining characteristics of Supreme Courts cannot be removed by the states.
(2) A defining characteristic of state Supreme Courts (ascertained by reference to the powers of those courts prior to federation) is the power to confine inferior courts and tribunals within the limits of their authority by granting prohibition, mandamus and certiorari on grounds of jurisdictional error.
(3) A state privative clause that purports to remove the Supreme Court's authority to grant relief on the ground of jurisdictional error is beyond power because it purports to remove a defining characteristic of the Supreme Court of the state.
(4) If a court has limited powers and authority to decide issues of an identified kind, a privative clause does not negate those limits on that court's authority. This is so even in relation to review of a statutory court styled a 'superior court of record'. Thus *all* state courts are subject to Supreme Court supervision and the legislature cannot avoid that supervision by providing that a court is a superior court.
(5) Although *Kirk* concerned a court, its principles were expressed to apply also to Supreme Court supervision of executive decision-making.

In light of these conclusions, the joint judgment pointed to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context.[9] Thus jurisdictional error is now fundamental to the judicial review powers of the Supreme Courts in the same way that it has been fundamental to the High Court and other federal courts. Thus it becomes important to understand what a jurisdictional error is, how we can identify one in the wild, and what the consequences of finding a jurisdictional error are.

Development of grounds that constitute jurisdictional error

One can see in the quotation from *Craig* above that certain kinds of error have been identified as jurisdictional in nature for administrative bodies:

(a) identifying a wrong issue;
(b) asking the wrong question;
(c) ignoring relevant material;
(d) relying on irrelevant material;
(e) *in some cases*, making an erroneous finding or reaching a mistaken conclusion:
  (i) making an erroneous finding could encompass mistakes as to jurisdictional facts;
  (ii) and also perhaps a no-evidence ground of review, either generally or perhaps in relation to 'critical facts' — the authorities are mixed (and there is some suggestion in obiter remarks in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[10] that this would be so only in relation to jurisdictional facts);
  (iii) reaching a mistaken conclusion could encompass legal unreasonableness — a concept developed recently in *Minister for Immigration and Citizenship v Li*[11] (*Li*).

In *Craig* itself, although not in the quoted passages, the Court also identified two other forms of error that can form the basis for issuing a writ of certiorari and would now be understood to involve (or lead to) jurisdictional error:

(a) failure to observe some applicable requirement of procedural fairness;[12] and
(b) fraud.

To these categories one might now add, for administrative bodies:

(a) irrationality or illogicality, to the extent that they are regarded as different from unreasonableness and noting the debate on that question;
(b) mistaken denial of jurisdiction;
(c) failure to deal with an integer of a claim;
(d) bad faith;
(e) improper purpose; and
(f) acting under dictation / inflexible application of policy.

Some of these are perhaps refinements of 'asking the wrong question' or 'identifying a wrong issue' — but they are now often considered as standalone grounds of review.

It may also be noted that anterior decision or error, even by a person other than the decision-maker, can lead to a jurisdictional error on the part of the decision-maker. This was most recently seen in a decision of the High Court in *Wei v Minister for Immigration and Border Protection*.[13] In that case a university had failed to upload data about a student to a departmental computer system, in breach of a statutory obligation to do so. The Minister's delegate cancelled the plaintiff's student visa because he was not satisfied that the plaintiff was enrolled in a course. A majority of the High Court held that the university's breach of its statutory duty caused the delegate to make a jurisdictional error.

But there must remain, of course, some errors that are not jurisdictional in nature. Below are two examples of legal errors that may be non-jurisdictional:

(1) A real example is a failure to comply with a statutory provision requiring the decision-maker to give reasons. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*,[14] concerning a decision to cancel a visa and a statutory obligation to give reasons for such a decision, the High Court held that a breach of the requirement to give reasons was not a jurisdictional error in relation to the cancellation decision. Mandamus would lie to enforce the duty to give reasons — but certiorari did not lie in relation to the cancellation decision.
(2) A hypothetical example is one I have drawn from an article by Jeremy Kirk:[15] a statute provides that a body can make a decision if it advertises its proposed decision in a newspaper for at least 14 days prior to the decision being confirmed. The body misunderstands the meaning of '14 days' and includes the day the decision is made as opposed to 14 clear days. This is a legal error. But it may not be a jurisdictional error (depending upon the particular statute and context).

And, of course, there are errors of fact. Generally, errors of fact are not jurisdictional in nature and decision-makers are 'authorised to go wrong' — at least in relation to non-jurisdictional facts and subject to the no-evidence ground.

If an error is jurisdictional then it can be said that the body has failed to exercise the jurisdiction conferred on it — either by actually declining to make a decision or constructively, where in a factual sense a decision is made but an error means that the body failed to exercise the jurisdiction conferred on it. Many of the jurisdictional errors from *Craig*

and later cases reflect the concept of 'constructive failure to exercise jurisdiction' — 'when a tribunal misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form'.[16]

But the High Court has made it clear that any list — whether it be the list in *Craig* or a longer one developed incrementally through judicial decision-making — is not exhaustive.[17] As the joint judgment in *Kirk* observed, 'It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error. … The reasoning in *Craig* … is not to be seen as providing a rigid taxonomy of jurisdictional error'.[18]

It is apparent in the cases decided since *Craig* that all the 'grounds' of administrative review are directed to ascertaining whether the decision-maker has exercised the jurisdiction conferred by the statute. That is, the better way to understand jurisdictional error as it has developed since *Craig*, at least in the context of a decision authorised by statute, is as a label or conclusion in relation to an error that involves a breach of some statutory requirement, where Parliament intended that breach would give rise to invalidity. (I note, but put to one side, the conundrum of non-statutory decisions and what kinds of error might be jurisdictional error for such decisions — non-statutory decisions are rare and are not the focus of my article).

This concept is neatly encapsulated in the following statement by McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf*:

> What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.[19]

This understanding of jurisdictional error puts the statutory context front and centre — one can only determine whether a decision-maker has made an error, and whether any error is jurisdictional, by construing the statute that conferred the power so as to understand the limits of that power. Thus statutory construction is the key to most administrative law and to identifying jurisdictional error.

This was already recognised in relation to some of the traditional *Craig* grounds — for example, relevant and irrelevant considerations:

(1) What is relevant or irrelevant is determined by reference to the statute, not simply logic or the views of the judge.[20]
(2) Whether procedural fairness is required, and if so what it requires, is understood to be a matter of statutory construction, albeit with a starting point that decisions that affect rights and interests require procedural fairness and clear words are required to exclude procedural fairness for such decisions.
(3) The issues to be identified and the question to be asked and answered will be determined by the statutory provisions understood in context.
(4) Whether facts are jurisdictional will be determined by a process of statutory construction.
(5) Improper purpose will be determined by reference to the statute, including its objects and purposes.
(6) Parliament is presumed to intend powers to be exercised reasonably — so the ground of unreasonableness is tethered to the statute and what is unreasonable is determined by reference to the statute. As the joint judgment put it in *Li*:

> The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.[21]

And so on, for each of the traditional, *Craig* and post-*Craig* errors.

But that is not to say that the traditional grounds should be abandoned. I consider them to be useful analytical tools. In this regard, I agree with Perry J of the Federal Court,[22] who has said (extrajudicially) that the traditional grounds can also affect the process of statutory construction. That is, they provide guidance as to the kinds of issues to be addressed in construction. For example:

(1) If the statute is being construed to determine whether procedural fairness is required then clear words of necessary intendment would be required to exclude it.
(2) If the statute is being construed to determine what matters the statute requires the decision-maker to consider then attention will be focused on whether any such matters are express; and whether any such matters might be implied from the text, context and purpose of the legislation.

But the traditional grounds are not to be regarded as freestanding requirements that must always be complied with by all decision-makers.

Ultimately, a finding of jurisdictional error is a conclusion that the decision-maker has failed to comply with an essential precondition to or limit on the valid exercise of power.[23] It is an error that leads to invalidity. That is determined by reference to the statute. Of course, this leaves room — one might say considerable room — for the courts to determine which preconditions or limits are essential and lead to invalidity and which are not and do not.

I note in passing that discussions of this kind often refer to *Project Blue Sky Inc v Australian Broadcasting Authority*[24] (*Project Blue Sky*), decided in 1998 (not long after *Craig*). That case is certainly of assistance in the task of statutory construction with which we are concerned, but, interestingly, the judgments did not use the phrase 'jurisdictional error'.

The consequences of jurisdictional error

If a purported decision is affected by jurisdictional error, it is regarded as no decision at all. It is a nullity. The principal current authority for this statement is *Minister for Immigration and Multicultural Affairs v Bhardwaj* [25] (*Bhardwaj*), although there are other authorities to that effect. [26]

In *Bhardwaj* the IRC purported to make a decision in relation to Mr Bhardwaj in September, when he failed to attend a hearing. The IRC had been notified that he was unable to attend, but this notice had not reached the particular member constituting the IRC. After it realised what had occurred the IRC held a hearing and in October it made a different decision in relation to Mr Bhardwaj. The High Court held that the September decision was affected by jurisdictional error; thus the IRC was not *functus officio* when it made the October decision. As a consequence, in law the October decision was the IRC's *only* decision.

In *Bhardwaj*, Gaudron and Gummow JJ (McHugh J generally agreeing) said this:

> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. *A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.* …[27]

There is some debate as to whether this reflects a majority approach to the consequence of jurisdictional error — in my view it does, but it must be read in light of what preceded it and what followed it. In particular, attention must be given to the following passages from the reasons of Gaudron and Gummow JJ:

> [O]nly if the general law so requires or the Act impliedly so directs, are decisions involving jurisdictional error to be treated as effective unless and until set aside.
>
> …
>
> There being no provision of the Act which, in terms, purports to give any legal effect to decisions of the Tribunal which involve jurisdictional error, … it is necessary to consider whether, nevertheless, the Act should be construed as impliedly having that effect.[28]

Similar remarks were made by Gleeson CJ[29] and by Hayne J.[30]

That is, notwithstanding the general proposition that a decision affected by jurisdictional error is no decision at all, a majority of the judgments in *Bhardwaj* contemplated a situation in which a purported decision which is affected by jurisdictional error may be treated as having some legal effect until it is set aside.

This is because a statutory regime may impose legal consequences on the *fact* that a (purported) decision was made, as opposed to the making of a valid decision. As Perry J has put it, 'the bare fact that a decision has been made may provide the factum' upon which another decision may be made, or consequences may flow, which does have legal effect on rights and liabilities.[31]

This understanding of *Bhardwaj* was reflected in the Full Federal Court decision in *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*, where Gray and Downes JJ said this:

> *Bhardwaj* cannot be taken to be authority for a *universal proposition* that jurisdictional error on the part of a decision-maker will lead to the decision having no consequences whatsoever. All that it shows is that *the legal and factual consequences of the decision, if any, will depend upon the particular statute*.[32]

This approach avoids some of the problems associated with an absolute theory of invalidity, which would appear to leave people free to ignore a decision affected by jurisdictional error, even before such error has been determined by a court.

This approach — that is, a second exercise in statutory construction, after jurisdictional error has been found, to see if nonetheless the infected decision has some legal consequences — has, however, been said to undermine the conclusion that an error is jurisdictional in nature.[33] It has been suggested that a conclusion that a purported decision has some effect really means the error in question was not jurisdictional.

I do not think that this criticism is correct. That is, the existence of jurisdictional error permits a court to set aside a decision — but, at least until the decision is set aside, it is open to Parliament to give the fact of the making of the decision some legal consequences. Of course, however, a purported decision could only have some legal effect if the relevant Act provided for it to do so.

If a purported decision is affected by jurisdictional error, it will therefore be necessary to determine whether, despite the jurisdictional error, the Act under which it was made requires that it be given (some) legal effect until set aside.

This line of reasoning also raises questions about the application of the doctrine of *functus officio* in relation to decisions infected by jurisdictional error — and the power of a tribunal that would otherwise be *functus officio* to remake its decision in the absence of any court order quashing its first (infected) decision. That is, if an administrative body thinks it made a jurisdictional error, can it treat its own decision as a nullity and proceed to decide again?

In that regard, the statement of Gleeson CJ in *Bhardwaj* is of assistance, again directing us to consider whether or not the statute provides for a decision to be remade:

> The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration. And the statutory scheme, including the conferring and limitation of rights of review on appeal, may evince an intention inconsistent with a capacity for self-correction. … The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. That requires examination of two questions. Has the tribunal discharged the functions committed to it by statute? What does the statute provide, expressly or by implication, as to whether, and in what circumstances, a failure to discharge its functions means that the tribunal may revisit the exercise of its powers …?[34]

A useful illustration is the registration of a person as a medical practitioner under the law regulating health practitioners:[35]

(1) If a person is not registered, it is a criminal offence for them to hold themselves out as a medical practitioner.
(2) If a person was registered but the Medical Board had made a jurisdictional error in doing so, the decision is, on the *Bhardwaj* approach, legally a nullity and could arguably be ignored or remade or be quashed on judicial review.
(3) But I would argue that while the person was purportedly registered they committed no offence by holding themselves out as a medical practitioner (assuming no fraud on their part).
(4) And, I would suggest, if the registration decision was quashed for jurisdictional error, that would not mean that the person had previously committed a criminal offence — that is, the registration decision can have legal consequences even though it has been quashed.
(5) This conclusion is reached through a process of statutory construction and, of course, turns on particular features of the statutory scheme for registration of medical practitioners.

Differences between administrative bodies, inferior courts and superior courts

Differences in the tests

The second paragraph in the passage from *Craig* quoted above suggests that inferior courts, although they are subject to review for jurisdictional error, nonetheless have jurisdiction to go wrong — so that the kinds of errors that are jurisdictional for administrative bodies are not jurisdictional for inferior courts. For example, taking into account irrelevant considerations or failing to consider relevant considerations may not constitute a jurisdictional error.

However, some parts of the joint judgment in *Kirk* suggested that the distinction between courts and administrative bodies was unhelpful:[36]

(1) Such a distinction may be unhelpful at state level because it can be difficult, in some cases, to distinguish between an administrative tribunal and a court. In the absence of a strict separation of powers, administrative and judicial functions may be mixed

together in the one body at state level and a body may be called a tribunal and yet be a court.

(2) Because inferior courts are amenable to certiorari, it is difficult to say that they can 'authoritatively' decide questions of law — and questions of their own jurisdiction — in the way that a superior court can.

Nonetheless, *Craig* clearly articulated a difference in the notion of jurisdictional error as between inferior courts and tribunals, and other parts of the joint judgment in *Kirk* referred to and relied upon the distinction as articulated in *Craig* — and the differences in the kinds of error that are jurisdictional. That is, the High Court did not clearly depart from the distinction drawn in *Craig*; indeed, it appeared to apply it, although it may be that the differences are fewer than was previously thought.

The consequences of jurisdictional error for courts

The question of the *consequences* of a jurisdictional error is an area where there may be thought to be some difference in the outcome as between superior courts, inferior courts and administrative bodies.

In *Kirk* the joint judgment acknowledged the tension between two important principles — finality, on the one hand; and the need to compel inferior tribunals to observe the law, on the other. These pull in different directions. And, in the context of criminal trials, and judicial proceedings more generally, the doctrine of *functus officio* is well established — once a judgment is entered it cannot, generally, be recalled and revisited (although there are, of course, some statutory exceptions to this.)

In *DPP v Edwards*[37] (*Edwards*) the Victorian Court of Appeal split on the question of the consequences of a jurisdictional error committed by an inferior court. In *Edwards* the County Court made a sentencing order that, on any view, it had no power to make. It had misunderstood the scope of its power. But it had sentenced the offender and the sentence had passed into the record. The Court then purported to set aside the first sentence and impose a fresh sentence. Could it do so or was it *functus officio*?

Chief Justice Warren held that the County Court was not *functus officio* and could correct its error. Her Honour addressed three key questions:

(1) Was the County Court's error jurisdictional in nature? She held that it was. The Court had 'misconceived the extent of its powers', to use the language of *Craig*.

(2) If it was, at common law does an order of an inferior court affected by jurisdictional error nonetheless have sufficient legal effect to trigger the *functus* doctrine? Her Honour held that it did not, relying on the reasoning of Gaudron, Gummow, McHugh and Hayne JJ in *Bhardwaj* but with reference to the particular circumstances of inferior courts.

This was because inferior court orders made in excess of jurisdiction generally lack legal effect — in contrast to orders of a superior court, which have legal effect unless and until set aside. This distinction between the effect of the orders of inferior and superior courts is reflected in numerous High Court cases.

One example was *Pelechowski v The Registrar, Court of Appeal*,[38] where a majority of the High Court held that an injunction purportedly granted by the District Court of New South Wales was a nullity and it was not a contempt to breach it. The majority

quoted from *Attorney-General (NSW) v Mayas Pty Ltd*[39] — a decision of the New South Wales Court of Appeal:

> If an inferior tribunal exercising judicial power has no authority to make an order of the kind in question, the failure to obey it cannot be a contempt. *Such an order is a nullity. Any person may disregard it.* Different considerations arise, however, if the order is of a kind within the tribunal's power but which was improperly made. In that class of case, the order is good until it is set aside by a superior tribunal. While it exists it must be obeyed.[40]

I note, too, that this contrast between orders of an inferior court and orders of a superior court was reiterated by Gageler J in *New South Wales v Kable*,[41] decided after *Edwards*:

> There is, however, a critical distinction between a superior court and an inferior court concerning the authority belonging to a judicial order that is made without jurisdiction. A judicial order of an inferior court made without jurisdiction has no legal force as an order of that court. One consequence is that failure to obey the order cannot be a contempt of court. Another is that the order may be challenged collaterally … In contrast:
>
> 'It is settled by the highest authority that the decision of a superior court, even if in excess of jurisdiction, is at the worst voidable, and is valid unless and until it is set aside'.[42]

(3) If at common law the Court was not *functus officio*, had the Parliament altered the position so as to give the purported order sufficient legal effect to attract the operation of the *functus* doctrine? Her Honour concluded that there had been no statutory alteration of the common law position that would give some legal effect to a County Court order vitiated by jurisdictional error.

Thus Warren CJ held that the original sentence was a nullity and it was open to the County Court to re-sentence the offender.

In contrast, Weinberg and Williams JJ held that the County Court could not impose a fresh sentence — it was *functus officio* and the fact it had made a jurisdictional error in the first sentence did not affect the operation of the *functus* doctrine. In this regard they overruled the 1972 decision of the Court of Appeal in *R v Bratolli*.[43]

Somewhat curiously, Weinberg and Williams JJ relied upon the judgments of Gleeson CJ and Kirby J in *Bhardwaj* in preference to the joint judgment of Gaudron and Gummow JJ (and McHugh J agreeing). Chief Justice Gleeson and Justice Kirby do not constitute a majority; in fact, Kirby J was in dissent.

Although there are differences in the reasoning between the majority and the minority, and their approach to the doctrine articulated in *Bhardwaj*, to some extent the difference in outcome stems from the different views taken about the question of statutory construction. That is, a different view was taken about whether the applicable statutory regimes evinced a legislative intention that a sentence of the County Court should have legal effect until set aside, even if infected by jurisdictional error. This is, of course, a question on which reasonable minds might differ.

Further, there are persuasive policy arguments on both sides of this case. On the one hand, there is obvious force in the proposition that, once made, a judicial order, whether of a superior or an inferior court, should not be treated as a nullity, for that would allow a person subject to such an order simply to ignore it. Could a person sentenced to a term of imprisonment simply leave the prison and not be guilty of escaping custody?[44] This approach also leads to uncertainty for those subject to orders or charged with carrying them out.

On the other hand, to recognise a power of self-correction where a court realises it has made a jurisdictional error has practical benefits in removing the need for a formal appeal or judicial review. It is a power that would be exercised by judges, judicially, and there is some merit in permitting that course. This has been recognised in other states that have clear statutory provisions dealing with the correction of error by inferior courts. Indeed, the *Sentencing Act 1991* (Vic) has now been amended to give the courts of Victoria the same power.[45]

Conclusion

Although jurisdictional error is at the heart of Australian administrative law, there are some aspects of administrative law where jurisdictional error is not required, and it is worth bearing these in mind. The first is statutory review for non-jurisdictional error, such as review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The second is the availability of injunctive and declaratory relief in the absence of jurisdictional error.

In this regard there is, in my view, an under-explored and under-utilised proposition in *Project Blue Sky* that, although the programming standard at issue in that case was not invalid, nonetheless declaratory or injunctive relief may be available to preclude the decision-maker acting unlawfully in the future:

> Although an act done in contravention of s 160 is not invalid, it is a breach of the Act and therefore unlawful. … A person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.[46]

And in fact the Court made a declaration that the standard was unlawfully made.

Other examples are *Ainsworth v Criminal Justice Commission*[47] and *Plaintiff M61/2010E v Commonwealth*[48] — two cases where the High Court held that certiorari was not available but granted declaratory relief.

I want to finish with a passage from *Kirk*, quoting Professor Jaffe:

> denominating some questions as 'jurisdictional' is almost entirely functional: it is used to validate review when review is felt to be necessary ... If it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified.[49]

Returning to the idea of jurisdictional error summed up in one sentence, perhaps the one sentence is not 'It's all about the statute' but, rather, 'How bad was the error?'.

Endnotes

1 (1995) 184 CLR 163.
2 *Dietrich v The Queen* (1992) 177 *CLR* 292.
3 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
4 (1995) 184 CLR 163, 176, 179–80 (emphasis added).
5 (2003) 211 CLR 476.
6 See, for example, *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, where Gummow and Gaudron JJ stated that 'provided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle'.
7 (2010) 239 CLR 531.
8 Ibid [55].
9 Ibid [100].

10 (2004) 207 ALR 12.
11 (2013) 249 CLR 332.
12 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351, 374 (Mason J); see also the discussion in *Kirk* (2010) 239 CLR 531, [76], [106]–[107].
13 [2015] HCA 51.
14 (2003) 216 CLR 212.
15 Jeremy Kirk, 'The Concept of Jurisdictional Error' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 11, 13.
16 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [51].
17 Ibid [82].
18 (2010) 239 CLR 531, [71]–[73].
19 (2001) 206 CLR 323, [82].
20 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
21 (2013) 249 CLR 332, [66].
22 Melissa Perry, 'The Riddle of Jurisdictional Error: Comment on Article by O'Donnell' (2007) 28 *Australian Bar Review* 236.
23 Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139, 152.
24 (1998) 194 CLR 355.
25 (2002) 209 CLR 597.
26 See *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 242–3 (Rich, Dixon and McTiernan JJ); *Posner v Collector for Inter-State Destitute Persons (Vict)* (1946) 74 CLR 461, 483 (Dixon J); *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473, 483 (Gibbs J); *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338, 349–50 (Wilson, Deane and Gaudron JJ); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–15 [51] (Gaudron and Gummow JJ). See also *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420.
27 (2002) 209 CLR 597, 614–15 [51] (emphasis added; citations omitted).
28 Ibid 614–15 [50], [54].
29 Ibid 614–15 [51].
30 Ibid 604–5 [12]–[13] (Gleeson CJ); 647 [153] (Hayne J).
31 Perry, above n 22, 341.
32 (2003) 145 FCR 1, [42] (emphasis added).
33 See, for example, Stephen Forrest, 'The Physics of Jurisdictional Error' (2014) 25 *Public Law Review* 21, 29.
34 (2002) 209 CLR 597 at [8].
35 This kind of statutory context (though not this particular fact scenario) was dealt with by Nettle JA in *Kabourakis v Medical Practitioners Board* [2006] VSCA 301 — although in that case there was no jurisdictional error. His Honour's reasoning is, as would be expected, instructive.
36 (2010) 239 CLR 531, [69]–[70]; see also discussion in Leeming, above n 23, 141–2.
37 [2012] VSCA 293.
38 (1999) 198 CLR 435.
39 (1988) 14 NSWLR 342.
40 Ibid 357 (McHugh JA).
41 (2013) 298 ALR 144, [56].
42 Ibid, quoting *Cameron v Cole* (1944) 68 CLR 571, [59].
43 [1971] VR 446.
44 An example given in *Edwards* [2012] VSCA 293, [225].
45 See s 104B.
46 (1998) 194 CLR 355, [100].
47 (1992) 175 CLR 564.
48 (2010) 243 CLR 319.
49 At [64].