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Materiality and a non-binary approach to invalidity

An analysis of the threshold of materiality and the evolution of jurisdictional error

29 October 2024

I PRELIMINARY

For better or worse, jurisdictional error is a concept that strikes at the heart of Australia's constitutional system. Its meaning shapes the breadth of the courts' jurisdiction to engage in judicial review. Though the High Court has recognised the difficulties inherent in distinguishing between jurisdictional and non-jurisdictional errors, the distinction has long been preserved.[1]

Whether an error is 'jurisdictional' is contingent upon whether there can be discerned a legislative intention to invalidate acts infected by the relevant error. This being the case, Courts must make 'qualitative judgments' about what the legislature should be taken to intend in conferring powers on the executive. But what should inform these qualitative judgments? In absence of any affirmative indication of parliamentary intention, how should courts determine questions of validity where there has been non-compliance with a condition to the exercise of power?

The focus of this article is materiality and the rise of a non-binary approach to discerning jurisdictional error. The threshold of materiality was introduced as a general common law principle of statutory interpretation relevant to the definition of jurisdictional error by the High Court in *Hossain v Minister for Immigration and Border Protection*.[2] The principle has been underpinned by a qualitative judgment by the High Court to the effect that, ordinarily, immaterial errors will not operate to invalidate statutory decisions.

Since *Hossain*, the application and scope of this concept of materiality has been controversial.[3] It split the High Court in *Minister for Immigration and Border Protection v SZMTA*[4] and later in *MZAPC v Minister for Immigration and Border Protection* ('*MZAPC*').[5] While recently in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[6] the High Court more clearly explained the components of materiality and its application, the concept remains a controversial one. There continues a

[1] see the discussion in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 571 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[2] (2018) 264 CLR 123.
[3] *OKS v Western Australia* (2019) 265 CLR 268 at 281 per Edelman J.
[4] (2019) 264 CLR 421.
[5] (2021) 95 ALJR 441.
[6] [2024] HCA 12.

longstanding debate as to how judicial review courts should balance the demands of legality with the practical realities of administrative decision-making.

This article will analyse the threshold of materiality and outline controversies associated with the concept. Also explored will be the relationship between materiality the and the test for invalidity adopted by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* ('*Project Blue Sky*').[7] As will be seen, the High Court's adoption of a 'non-binary' approach to discerning jurisdictional error remains controversial.

II BACKGROUND

To understand materiality and the non-binary approach to determining invalidity, it is first necessary to understand judicial review and the nature of jurisdictional error.

Judicial review

Judicial review can generally be described as a supervisory jurisdiction of superior courts to control the exercise of powers by inferior courts, tribunals and administrators. It is borne of a 'characteristic duty' of the judicature to declare and enforce the law that determines the limits and governs the exercise of a repository's power.[8]

Jurisdiction of a court to engage in judicial review of an exercise, or purported exercise, of power is jurisdiction to ensure that administrative decision-makers remain within the limits of their authority by way of declaration and enforcement of the laws that prescribe those limits.[9] In *Attorney-General (NSW) v Quin*,[10] Brennan J observed that 'the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.'[11]

Jurisdictional error

Jurisdictional error is a descriptor for the scope of the constitutionally entrenched original jurisdiction of the High Court to engage in judicial review of the actions of Commonwealth judicial and executive officers.[12] State Supreme Courts have a similar jurisdiction to engage in judicial review of the actions of State judicial and executive officers.[13]

To describe a decision as being infected by jurisdictional error is to describe it as having been made outside jurisdiction.[14] The plurality in *Hossain* described jurisdictional error as 'a failure to comply with a statutory precondition or condition to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it.'[15] In *Kirk v Industrial Court (NSW)*,[16] the High Court said that jurisdictional error is an expression not simply of the existence of an error but of the gravity of that error.[17]

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[7] (1998) 194 CLR 355.
[8] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35 per Brennan J.
[9] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24. See earlier *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35.
[10] (1990) 170 CLR 1.
[11] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J.
[12] see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
[13] see *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
[14] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 606 per Gaudron and Gummow JJ.
[15] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 per Kiefel CJ, Gageler and Keane JJ.
[16] (2010) 239 CLR 531.
[17] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 571 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

It has been said that jurisdictional error accounts for a cornerstone of our constitutional framework that is the 'incapacity of the executive government to dispense its servants from obedience to laws made by Parliament'.[18] Subject only to statute, and prerogative powers, any effect by an act of the Executive Government on legal rights or liabilities is borne from 'the application to the act of the same substantive law as would be applicable in respect of the act had it been done by any other actor.'[19]

A determination by an officer of the executive branch of government does not itself have any legal force or effect. The exercise of non-prerogative executive capacity involves 'nothing more than the utilisation of a bare capacity or permission.'[20] It is statute that stamps an arbitrator's decision with legal authority, so that when it is declared, the legal rights and obligations are those as stated in the decision.[21] In this context, jurisdiction refers to 'the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences.'[22]

When viewed through this prism, it becomes clear that jurisdictional error is simply a descriptor for errors sufficiently serious to denude an executive or judicial officer's decisions of the statutory "stamp" necessary for those decisions have legal force.[23] Such errors deprive a decision of the qualities required for it to operate as a factum for a statute's operation, to provide that rights and obligations are as specified in that decision.[24]

Against this backdrop, it can be understood why in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,[25] Gaudron and Gumnow JJ observed that a decision that involves jurisdictional error is a decision is 'properly regarded, *in law*, as no decision at all' [emphasis added].[26] In one sense, when a review court finds that an error is jurisdictional, it merely recognises the inherent incapacity of the executive government to exercise non-prerogative coercive powers.

The High Court has long recognised the difficulty of distinguishing between jurisdictional and non-jurisdictional errors.[27]. The distinction is ultimately one between acts unauthorised by law and acts that are authorised."[28] No rigid taxonomy of jurisdictional error is said to exist.[29] The discernment of an error's gravity is contingent upon the statute and its construction, considered against the common law and its values.[30] Indeed, the High Court has expressed the legal constraints on power to be a product of parliamentary intention arrived at through a process of statutory interpretation with reference to common law principles of statutory interpretation.

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[18] *A v Hayden (No 2)* (1984) 156 CLR 532 at 580 per Brennan J.
[19] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 98 per Gageler J.
[20] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 98 per Gageler J.
[21] *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 594 per Crennan and Kiefel JJ).
[22] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 132 per Kiefel CJ, Gageler and Keane JJ.
[23] *Attorney-General (Cth) v Alinta Limited* (2008) 233 CLR 542 at 594 per Crennan and Kiefel JJ.
[24] See also Hammond, Emily, "*The Duality of Jurisdictional Error: Central (to justifying entrenched judicial review of executive action) and pivotal (to review doctrine)*" [2021] UNSW Law Journal Forum No 6, at 9.
[25] (2002) 209 CLR 597.
[26] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614 to 615 per Gaudron and Gummow JJ.
[27] *Craig v South Australia* (1995) 184 CLR 163 at 177 to 180.
[28] Selway, Bradley, "*The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues*" (2002) 30 Federal Law Review 217 at 234, quoted in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 25.
[29] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574.
[30] Chief Justice James Allsop, "*The foundations of administrative law*", 12th Annual Whitmore Lecture, 4 April, 2019.

The broad test for determining whether an implied legislative condition is jurisdictional was set out by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky*. Their Honours said 'an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate *any* act that fails to comply with the condition'.[31] The test in *Project Blue Sky* and its relationship with the principle of materiality is discussed further below.

Why is jurisdictional error important?

In Australia, the distinction between jurisdictional and non-jurisdictional errors remains important at a number of levels. For one, jurisdictional error must be asserted and demonstrated to enliven the jurisdiction and to ground the issuing of the prerogative writs of mandamus or prohibition.[32] Further, the distinction is important for the purposes of determining the reviewability of decisions the subject of privative clauses (i.e. statutory provisions that deprive, or purport to deprive, courts of jurisdiction to review the acts of public officials or tribunals in order to enforce compliance with the law). An error that is jurisdictional in nature cannot be protected by privative clauses for the reasons articulated by the High Court in *Plaintiff S157/2002 v Commonwealth.*[33]

The jurisdiction conferred on courts by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and equivalent State legislation has made the distinction between jurisdictional error and non-jurisdictional error less relevant in the context of many statutory judicial review regimes.

III MATERIALITY

Materiality is a common law principle of statutory interpretation. The principle enunciated is that a statute conferring decision-making authority is not ordinarily to be interpreted as denying legal force to every decision made in breach of a condition which the statute expressly or impliedly requires to be observed in the course of a decision-making process. The statute is instead "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance".[34]

Hossain

The threshold of materiality was introduced as a general principle relevant to the definition of jurisdictional error by a majority of the High Court in *Hossain*.[35] The applicant in *Hossain* was a Bangladeshi citizen who had applied for a Partner (Temporary) (Class UK) visa on the basis of his relationship with his partner. To be granted the visa, the applicant was required to satisfy, amongst other criteria, criterion 3001 in Schedule 3 to the *Migration Regulations 1994* (Cth) ('*the Migration Regulations*').[36] Relevantly, criterion 3001 provided that a valid application must have been made within 28 days after the last day when the applicant held a substantive visa, unless the Minister was satisfied there were compelling reasons for not applying the criterion. The applicant was also required to satisfy

[31] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 per McHugh, Gummow, Kirby and Hayne.
[32] *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117 at 139 per French CJ, Crennan and Kiefel JJ.
[33] (2003) 211 CLR 476
[34] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134 per Kiefel CJ, Gageler and Keane JJ.
[35] (2018) 264 CLR 123.
[36] By virtue of cl 820.211(2)(d) of Sch 2 to the *Migration Regulations 1994* (Cth).

public interest criterion 4004,[37] which required that the applicant did not have outstanding debts to the Commonwealth unless the Minister was satisfied appropriate arrangements had been made for payment. The Administrative Appeals Tribunal ('AAT') had affirmed a delegate of the Minister's decision refused to grant the visa. The AAT concluded the applicant failed to satisfy public interest criterion 4004, as he had made no appropriate arrangements to repay an outstanding debt to the Commonwealth. The AAT also found the application had not been made within 28 days of the last day the applicant had held a substantive visa, and that there were no compelling reasons at the time of the visa application to waive the criterion. However, the AAT erred in construing and applying cl 820.211(2)(d), by assessing the existence of compelling reasons at the time of the visa application rather than at the time of its decision.

The decision in *Hossain* comprised a joint judgment of Kiefel CJ, Gageler and Keane JJ, and separate judgments by Nettle and Edelman JJ respectively. The Court held the AAT's error in construing and applying the criterion relating to the timing of the making of the application was not a jurisdictional error. This was on the basis that the error could not have affected the decision which the AAT in fact made, in circumstances where the AAT was not, and could not reasonably have been, satisfied the public interest criterion was met.

Ultimately, this recent line of cases started by *Hossain* has transferred an error's "immateriality" from a factor usually relevant only to the exercise of a judicial review court's remedial discretion, to a factor that strikes at the heart of the very definition of jurisdictional error.[38] It has been said that a jurisdictional error may now be understood as 'a material departure from the express and implied limits of power.'[39] The introduction of the materiality principle was based in the practical concerns of the administrative state, and the notion that '[d]ecision-making is a function of the real world'.[40] It has since been said by the High Court that the legislature is not likely to have intended that a breach that occasions no "practical injustice" will deprive a decision of statutory force.[41]

Subsequent cases

The principle of materiality has since been applied in a number of subsequent cases including *SZMTA*, *MZAPC* and most recently *LPDT*. *SZMTA* concerned applications by non-citizens to the AAT (and its predecessor, the Refugee Review Tribunal) for review of decisions by a delegate of the Minister refusing their applications for their protection visas. Pursuant to s 438(2)(a) of the *Migration Act 1958* (Cth) ('*the Migration Act*'), the Department of Immigration and Border Protection had notified the Registrar of the AAT that a form of public interest immunity applied to particular information that had come before the tribunals. The tribunals breached the rules of procedural fairness by failing to disclose the fact of the notification to the applicants.

A majority of the High Court comprising Bell, Gageler and Keane JJ applied the materiality principle and held an invalid notification under s 438(2), without more, amounted to a mere unauthorised act in breach of a limitation within the statutory procedures which condition the performance of the overarching duty of

[37] By virtue of cl cl 820.223 of Sch 2 to the *Migration Regulations 1994* (Cth).
[38] see Aronson, Mark, "*Judicial Review of Administrative Action: Between Grand Theory and Muddling Through"*(2021) 28 AJ Admin L 6.
[39] Crawford, Lisa Burton, "*Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power*" (2019) 30 PLR 281 at 282.
[40] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134 per Kiefel CJ, Gageler and Keane JJ, quoting *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458 at 469.
[41] *Minister for Immigration and Border Protection v SZMTA* (2021) 95 ALJR 441 at 453 per Kiefel CJ, Gageler, Keane and Gleeson JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37].

the Tribunal to conduct a review. Relevantly, the majority in *SZMTA* said that a breach is material to a decision 'only if compliance could realistically have resulted in a different decision.'[42]

Relevantly, the majority also confirmed that the question of the materiality of a breach is an ordinary question of fact in respect of which the applicant for judicial review bears the onus of proof.[43] This assessment 'is to be determined by inferences,' drawn from expectations as to 'the course of the regular administration of the Act.'[44] Importantly, Nettle and Gordon JJ penned judgments in dissent. Their Honours concluded a court may, in its discretion, withhold a remedy for an immaterial error, but that materiality should not be an element of jurisdictional error.

The kind of unfairness that arose in *SZMTA* was subsequently the subject of the decision in *MZAPC* that involved a further failure to be notified under s 438 of the Migration Act of an event that altered the procedural context of the Tribunal's review. Relevantly, though all members of the Court recognised and applied the threshold of materiality in *MZAPC*, Gordon, Steward and Edelman JJ asserted that the onus lies on the respondent in a judicial review action to establish that an error was immaterial (as opposed to the majority whom confirmed the view expressed by the majority in SZMTA that the onus lies with an applicant to prove that an error was material).

In *CNY17 v Minister for Immigration and Border Protection*,[45] Kiefel CJ and Gageler J referred to the determination of materiality by a court as involving 'a question of counter-factual analysis to be determined by the court as a matter of objective possibility as an aspect of determining whether an identified failure to comply with a statutory condition has resulted in a decision that has in fact been made being a decision that is wanting in statutory authorisation'.[46]

The most recent High Court decision directed at materiality is *LPDT*.[47] In that decision, Gaegler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ gave a joint judgment Unlike in previous cases, the Court was united on the application of the principle and on other matters (including the issue of onus). The Court said:

> *[7] In most cases, however, an error will only be jurisdictional if the error was material to the decision that was made in fact, in the sense that there is a realistic possibility that the decision that was made in fact could have been different if the error had not occurred. That is because it is now accepted that a statute which contains an express or implied condition to be observed in a decision-making process is ordinarily to be interpreted as incorporating such a "threshold of materiality" in the event of non-compliance.*
> *...*
> *[16] In sum, unless there is identified a basis on which it can be affirmatively concluded that the outcome would inevitably have been the same had the error not been made, once an applicant establishes that there has been an error and demonstrates that there exists a realistic possibility that the outcome of the decision could have been different had that error not been made, the threshold of materiality will have been met (and curial relief will be justified subject to any issue of utility or discretion).*

Ultimately, what is clear from these cases that a failure to adhere to an essential condition to the exercise of a power is no longer determinative of whether there has been a jurisdictional error. Whether an error is

[42] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 per Bell, Gageler and Keane JJ.
[43] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 per Bell, Gageler and Keane JJ.
[44] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 per Bell, Gageler and Keane JJ.
[45] (2019) 268 CLR 76.
[46] *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 95 to 96 per Kiefel CJ and Gageler J.
[47] [2024] HCA 12.

jurisdictional or non-jurisdictional is also contingent upon whether the error can be said to have 'affected' the exercise of the repository's power.

Qualifications to the materiality threshold

The application of the materiality threshold does not apply in every circumstance. Materiality has been described as a "usual implication".[48] It has no more status than an interpretive presumption and accordingly is subject to contrary legislative provision. The application of the threshold is wholly contingent upon the terms and context of the statute.

Members of the High Court have recognised exceptions to the requirement that an error must be material to be characterised as a jurisdictional error. [49] In *Hossain*, Nettle and Edelman JJ observed that there are circumstances in which an error is jurisdictional 'despite not depriving a party of the possibility of a successful outcome.'[50] These circumstances were said to include:

- where respect for the dignity of the individual may mean that a denial of procedural fairness should be regarded as a jurisdictional error regardless of the effect it may have had on the result reached by the decision-maker; and

- where a decision-maker is required to make a decision by reference to a single specified criterion and, in error, addresses himself or herself to the wrong criterion.

Members of the High Court have also recognised circumstances where a standalone threshold of materiality is not required to be met because a condition already incorporates a threshold of materiality. Indeed, the majority in *MZPAC* observed '[t]here are conditions routinely by common law principles of interpretation which, of their nature, incorporate an element of materiality, noncompliance with which will result in a decision exceeding the limits of decision-making authority without any additional threshold needing to be met.'[51] Such conditions were said to include the "standard condition" that a decision-maker be free from actual or apprehended bias, [52] and the condition that a final decision lie within the bounds of reasonableness.[53]

IV THE BINARY/NON-BINARY QUESTION

The relationship between the threshold of materiality and the principles explained by the High Court in *Project Blue Sky* is, in the author's view, an important one. It was explained in *Project Blue Sky* that 'an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition'.[54]

From the reasoning in *Project Blue Sky* and subsequent decisions, it is clear there are two elements that must be satisfied before an error can be found to go to jurisdiction. Firstly, it must be established that

[48] *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 480 to 481 per Edelman J.
[49] for further discussion, see Young, Simon, "*The Blue Sky Effect: A Repatriation of Judicial Review or a Search for Flexibility?*" (2020) 27 AJ Admin L 165 at 177.
[50] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 135 per Kiefel CJ, Gageler and Keane JJ.
[51] *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 453 per Kiefel CJ, Gageler, Keane and Gleeson JJ.
[52] See *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 95, 96, 102, 117.
[53] *Tsvetnenko v United States* (2019) 269 FCR 225 at 245, 246.
[54] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 per McHugh, Gummow, Kirby and Hayne JJ.

there has been non-compliance with a statutory condition that regulates the exercise of a power. Secondly, it must be established that non-compliance with such a condition deprives a decision-maker of authority. As explained by Edelman J in *MZAPC*, 'just as the conditions upon statutory power are to be discerned as a matter of legislative intention, so too is legislative intention the basis for discerning whether non-compliance with a condition upon statutory power will deprive a decision-maker of authority.'[55] Whilst these are both matters of statutory construction, they remain separate considerations. The materiality doctrine is only relevant to the jurisdictional question - that is, whether non-compliance with a condition should deprive a decision of the qualities required for it to operate as a factum for a statute's operation.

Arguably, within the jurisdictional question, there exists a further important distinction between:

- a court asking whether there exists a legislative purpose to invalidate *any* act that fails to comply with a condition ("the binary approach"); and

- a court asking whether there exists a legislative purpose to invalidate the specific act in question that failed to comply with such conditions ("the non-binary approach").

A distinction of this kind was identified by Aniulis in his article '*Materiality: Marking the Metes and Bounds of Jurisdictional Error?*'[56] The question of whether the non-binary or binary approaches should be favoured by the courts strikes at the heart of the materiality controversy. To accept the doctrine of materiality is to accept the non-binary approach because, for a threshold of materiality to exist in determining jurisdictional error, it must first be possible for a breach of the same statutory condition to be jurisdictional in some circumstances and non-jurisdictional in others.

Historically, there has been a lack of clarity as to whether the binary or non-binary approach should apply where there is an absence of any affirmative indication of a legislative intention on the issue. Many statutes contain little or no guidance as to whether the binary or non-binary approaches should be applied.

The Court in *Project Blue Sky* appeared to prefer a binary approach - that is, that non-compliance with a legislative condition must be construed as either always depriving a decision-maker of power, or never doing so (no matter how the condition is breached). In a joint judgment, McHugh, Gummow, Kirby and Hayne JJ said that whether an act done in breach of a statutory condition is invalid depends upon whether 'there can be discerned a legislative purpose to invalidate ***any*** act that fails to comply with the condition' (emphasis added).[57]

Before *Hossain*, there were judicial statements made by the High Court that appeared to pull in a different direction to the binary approach taken in cases like *Project Blue Sky*. In *Craig v South Australia,*[58] the High Court said:

> *'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.' (emphasis added)*

[55] *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 480 per Edelman J.
[56] Aniulis, Harry, "*Materiality: Marking the Metes and Bounds of Jurisdictional Error?*" (2020) 27 AJ Admin L 88.
[57] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 per McHugh, Gummow, Kirby and Hayne.
[58] (1995) 184 CLR 163 at 179.

Additionally, in *Minister for Immigration and Multicultural Affairs v Yusuf*,[59] McHugh, Gummow and Hayne JJ said, in explaining the nature of jurisdictional error, that '[w]hat is important…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' (emphasis added). Statements such as these appear to add weight to a view there may be things extraneous to the statute itself that can be determinative of whether non-compliance with the condition results in invalidity.

In any event, the decision in *Hossain* signalled an explicit departure from the binary approach. In his judgment, Edelman J observed: [60]

> *'[a] close examination of legislation will usually have the effect that not every express or implied condition must be construed in a binary way. A legislative condition need not be construed as (i) always depriving a decision maker of power, or (ii) never doing so, no matter how it is breached.'*

Whilst the introduction of materiality provides clarity with respect to the binary/non-binary issue, there remain controversies in the adoption of a non-binary approach - particularly the notion that an error's materiality can be determinative of whether non-compliance with the condition results in invalidity. In the Full Federal Court decision the subject of *Hossain*, Mortimer J was critical of a non-binary approach. Her Honour did not accept the premise that the very same error can be jurisdictional in one case and non-jurisdictional in another, observing: "the nature of the error is not ambulatory, where the very same statutory criterion and statutory power are involved in both circumstances."[61]

V DISCUSSION AND COMMON CRITICISMS OF MATERIALITY

So long as the answer to the question of whether non-compliance with a statutory condition constitutes jurisdictional error is contingent upon whether there can be discerned a legislative intention to invalidate acts that fail to comply with the condition, the courts must make what the plurality in *Hossain* referred to as "qualitative judgments" about what the legislature should be taken to intend in circumstances where statutes are silent on the issue.[62]

The High Court has itself acknowledged that to attribute an intention to the legislature is to 'apply something of a fiction.'[63] Judicial findings as to legislative intention are not the attribution of some collective mental state to legislators. Rather, they are 'an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws.'[64] Indeed, in *Hossain*, the plurality said:[65]

> *'The common law principles which inform the construction of statutes conferring decision-making authority (31) reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere.... Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied.'*

[59] (2001) 206 CLR 323.
[60] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 146 per Edelman J.
[61] *Minister for Immigration and Border Protection v Hossain and Another* [2017] FCAFC 82 at [67] per Mortimer J.
[62] There is a debate as to whether the rules underpinning grounds of review are better understood as statutory implications or as arising from the common law. That controversy falls outside the scope of this paper.
[63] *Mills v Meeking* (1990) 169 CLR 214 at 234; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 339, 340; *Zheng v Cai* 2009) 239 CLR 446 at 455-456.
[64] *Zheng v Cai* (2009) 239 CLR 446 at 455-456.
[65] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 per Kiefel CJ, Gageler and Keane JJ.

Whatever the merits of the High Court's approach to statutory construction, it is clear from this statement by the plurality that more is at play than any textually focused reading of the statute. It is also clear that the judiciary deals with statutory conferrals of power with an array of strong preconceptions about how the executive should and should not act.[66]

A lack of justification?

A common criticism of the materiality principle is that the basis upon which it can be said that parliament ordinarily intends that only material errors should invalidate decisions has not been properly explained. Crawford describes an 'explanation of why it is that immaterial errors may be presumed not to invalidate the exercise of power'[67] as 'a crucial missing link' to the reasoning of the High Court. In view of Aronson, it is unclear whether statutory interpretation 'is in truth being offered as explanation or justification' for the materiality doctrine.[68]

To say that an administrative decision has only the force and effect given to it by statute, gets you no closer to determining the kinds of errors that should deprive decisions of such force and effect in circumstances where there is an absence of any affirmative indication of any legislative intention to assist in that inquiry. In discerning what force and effect is given to acts by a statute, one must still confront the question of what parliament should be taken to intend regarding the binary/non-binary question.

It seems clear that if a non-binary approach is adopted, and if a legislative condition need not be construed as either always depriving a decision-maker of power, or never doing so,[69] there must be things extraneous to the nature of the condition itself that can be determinative of whether non-compliance with the condition results in invalidity. The High Court has said that such a thing is materiality. It is this step in reasoning that has been contentious. It is one thing to accept that that not every express or implied condition must be construed in a binary way. It is another to say statutes are ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.

Relationship with public law values

Public law is concerned with power and its control. The breadth of executive authority to wield power is not defined by clear lines, but by 'spaces in the sense of conclusions drawn from evaluation'.[70] It is clear that administrative law rules and processes function within a framework of values.[71] The principles of executive power rest upon 'lawful authority, upon jurisdiction, which in turn depend (in respect of power sourced in statute) upon statutory authority delimited by common law rules of statutory interpretation and upon the whole of the common law and its values.'[72]

In a lecture, Allsop CJ (as His Honour then was) identified three primary values that inhere public law. These were (a) a rejection of unfairness; (b) insistence on essential equality; and (c) respect for the

[66] Aronson, Mark, "*Judicial Review of Administrative Action: Between Grand Theory and Muddling Through"*(2021) 28 AJ Admin L 6.
[67] Crawford, Lisa Burton, "*Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power*" (2019) 30 PLR 281 at 282.
[68] Aronson, Mark, "*Judicial Review of Administrative Action: Between Grand Theory and Muddling Through"*(2021) 28 AJ Admin L 6 at 10.
[69] No matter how the condition is breached.
[70] Chief Justice James Allsop, "*The foundations of administrative law*", 12th Annual Whitmore Lecture, 4 April, 2019 at 5.
[71] Allan, T.R.S, "*Procedural Fairness and the Duty of Respect*", Oxford Journal of Legal Studies, Volume 18, Issue 3, Autumn 1998, 497 at 497.
[72] Chief Justice James Allsop, "*The foundations of administrative law*", 12th Annual Whitmore Lecture, 4 April, 2019 at 9.

integrity and dignity of the individual. It was said that these are values borne from human society that inform the common law, judicial power, and the judicial method.[73]

The infusing of power and its exercise with these public law values is evident in countless aspects of administrative law. Clear examples of this are the implied conditions of procedural fairness, and reasonableness. These are working assumptions of parliamentary intention for which clear contrary language is required to displace. In the case of reasonableness, the legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.[74] In a similar vein, the common law ordinarily implies, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power.[75]

Arguably, the implied conditions of procedural fairness and reasonableness are not products of the attribution of some collective mental state to legislators, nor do they owe their origin to any textually focused reading of statutes. Rather, they are borne of human conceptions of fairness and dignity that inform qualitative judgments by the courts about the appropriate limits to an exercise of administrative power. In *Hossain*, Edelman J sought to draw an equivalence between the presumption of reasonableness and the invoking of a general threshold of materiality. His Honour said:[76]

> *'Just as it is unlikely to be concluded that Parliament intended to authorise an unreasonable exercise of power (78), so too it is unlikely to be an intention that the legislature is taken to have that a decision be rendered invalid by an immaterial error.'*

Whether these presumptions are alike is a matter of controversy. The principle of reasonableness and procedural fairness can clearly be traced back to recognised values that inhere public law. As observed by Gaegler J in *SZVFW*,[77] "[r]easonableness is itself a traditional conception of the common law – a translation of "the human into the legal." While it is clear that the principles of reasonableness and procedural fairness are traceable to the values identified by Allsop CJ, the grounding of the materiality threshold in these values may be less clear.

Arguably, dealing with individuals in accordance with procedures required by law has intrinsic value regardless of whether compliance with those procedures could affect the outcome of any decision (i.e. whether non-compliance was material). There exists independent value in providing persons affected by the exercise of executive power with fairness, respect and dignity, and ensuring that justice is seen to be done. In this respect, appearances matter in public administration.[78] In *R v Thames Magistrates' Court, ex parte Polemis*,[79] Lord Widgery observed:[80]

> *'It is . . . absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: 'Well, even if the case had been properly conducted, the result would have been the same.' This is mixing up the doing of justice with seeing that justice is done.'*

[73] Chief Justice James Allsop, "*The foundations of administrative law*", 12th Annual Whitmore Lecture, 4 April, 2019 at 14.
[74] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
[75] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100, 101; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666.
[76] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 146 per Edelman J.
[77] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 567 per Gaegler J.
[78] Bingham LJ, "*Should Public Law Remedies be Discretionary*" [1991] PL 64 at 72.
[79] [1974] 1 WLR 1371.
[80] *R v Thames Magistrates' Court, ex parte Polemis* [1974] 1 WLR 1371 at 1375, 1376 per Lord Widgery CJ.

Administrative decision-making is often conducted in conditions of uncertainty, complexity, and incommensurability.[81] In those conditions, it could be said that the values of fairness, respect and dignity require full consideration be paid to an affected individual's case so that the individual will more readily accept the outcome "as a reasonable accommodation between private and public interests", and so that the interests of justice are properly served.[82]

On the other hand, there is a competing concern that common law courts should be able balance the demands of legality with the practical realities of administrative decision-making. In *R (Cart) v Upper Tribunal*,[83] Baroness Hale stated that "a certain level of error is acceptable in a legal system which has so many demands upon its limited resources". After all, decision-making is 'a function of the real world'.[84]

The High Court has a history of considering the practical realities of the administrative state in an attempt to more clearly define the distinction between jurisdictional and non-jurisdictional error. For example, in *Project Blue Sky*, the Court recognised it to be unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act.[85] Whether the practical concerns of the administrative state, and the interests of efficient public administration should inform the breadth of jurisdictional error at the expense of the values identified above is a contentious issue.

The rule of law criticism

The rule of law is a foundation of administrative law. It speaks of a need for the control of power and for society to be ruled by law and not by the will of the powerful. Indeed, it has been said that s 75(v) of the Constitution 'secures a basic element of the rule of law'[86] and that '[t]he essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power.'[87] The rule of law reflects the value described by Allsop CJ as 'insistence on essential equality'.[88]

A common argument made is that, to adopt the principle of materiality, and to impose an onus on the Applicant in a judicial review proceeding to demonstrate an error is material is inconsistent with the rule of law principle and the fundamental conception of administrative law that a statutory power must be exercised under, and according to, the terms of the statute.

In their dissenting judgments in *SZMTA*, Nettle and Gordon JJ argued that the principle of materiality offends the principle that 'everyone (including a decision-maker) is bound by the law'.[89] Their Honours said:[90]

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[81] Allan, T.R.S, "*Procedural Fairness and the Duty of Respect*", Oxford Journal of Legal Studies, Volume 18, Issue 3, Autumn 1998, 497 at 500, citing Galligan, D.J., "*Due Process and Fair Procedures: A Study of Administrative Procedures*", 1996, Oxford: Clarendon Press.
[82] Allan, T.R.S, "*Procedural Fairness and the Duty of Respect*", Oxford Journal of Legal Studies, Volume 18, Issue 3, Autumn 1998, 497 at 500, citing Galligan, D.J., "*Due Process and Fair Procedures: A Study of Administrative Procedures*", 1996, Oxford: Clarendon Press.
[83] [2011] 3 WLR 107 at [42].
[84] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134 per Kiefel CJ, Gageler and Keane JJ, quoting *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458 at 469.
[85] in support of this proposition, the Plurality cited *Montreal Street Railway Co v Normandin* [1917] AC 170 at 175; *Clayton v Heffron* (1960) 105 CLR 214 at 247; *TVW Enterprises Ltd v Duffy* [No 3J] (1985) 8 FCR 93 at 104-105.
[86] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482.
[87] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
[88] Chief Justice James Allsop, "*The foundations of administrative law*", 12th Annual Whitmore Lecture, 4 April, 2019 at 14.
[89] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 458, 459 per Nettle and Gordon JJ.
[90] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 458, 459 per Nettle and Gordon JJ.

> *'Parliament cannot be taken to intend that a decision-maker need only comply with laws to the extent that failure to comply would not bring about a different result. Any such conception would be contrary to the notion, central to the conceptual foundations of judicial review, that everyone (including a decision-maker) is bound by the law.'*

Commentators have said that the effect of the High Court's view of jurisdictional error is to create a legal framework 'that is weighted against applicants.'[91] The adopting of a threshold of materiality is inconsistent with the fundamental objectives of judicial review – that is, to ensure compliance with the laws that determine the limits and govern the exercise of a repository's power in order to preserve certainty and equality before the law.[92]

It has been argued that materiality offends the rule of law principle because it operates to permit (or at least leave unremedied) executive decision-makers' non-compliance with essential pre-conditions to the exercise of power. To properly discharge a review court's constitutional duty to declare and enforce the law constraining executive power, it is said that the courts' jurisdiction cannot be limited to only reviewing errors that are material to an ultimate conclusion reached by an administrative decision-maker. The rule of law principle requires that if conditions of the validity of any decision enunciated by the legislature are violated in respect of any decision, it should be immaterial whether the same decision would have been arrived at in the absence of the departure from those conditions. [93] As explained by Nettle and Gordon JJ, 'the playing field is set by the statute, not the decision-maker or the court on review.'[94] As can be seen, the extent to which rule of law arguments (such as those made by Nettle and Gordon JJ in *SZMTA*) should inform the qualitive judgements made by the Court in discerning legislative intention has bene contentious.

A lack of certainty?

Another criticism often levelled against the imposition of a threshold of materiality is that it deprives individuals affected by administrative decisions of any real certainty, consistency and reliability. The principle of legal certainty requires the effect of a legal provision to be clear and predictable to those persons who are subject to it. These individuals are said to be entitled to 'know where they stand.'[95] In *SZMTA*, Nettle and Gordon JJ observed: [96]

> *'in relation to jurisdictional error, decision-makers and those affected by the decisions of decision-makers are entitled to expect that decisions will be valid and enforceable under and according to the statute and not under a statute subject to some margin of error or principle of construction described as 'materiality'.'*

In applying a threshold of materiality, the nature of an error can be converted from jurisdictional to non-jurisdictional if, for example, the decision-maker's reasons disclose a separate and independent basis to affirm a decision under review, and that separate basis is not impugned.[97]

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[91] see May, Serena, "*The Limits of Fairness and Fact-Finding in Judicial Review: MZAPC v Minister for Immigration and Border Protection*" (2021) Sydney Law Review, Volume 43(1).
[92] see May, Serena, "*The Limits of Fairness and Fact-Finding in Judicial Review: MZAPC v Minister for Immigration and Border Protection*" (2021) Sydney Law Review, Volume 43(1).
[93] See *General Medical Council v Spackman* [1943] AC 627 at 644 per Lord Wright.
[94] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 459, 460 per Nettle and Gordon JJ.
[95] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 458 per Nettle and Gordon JJ.
[96] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 458 per Nettle and Gordon JJ.
[97] As was observed by Mortimer J in *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 at [64].

Of course, there are situations where the immateriality of errors will be more obvious. In *Hossain*, the statute in question provided two independent bases for the relevant decision.[98] However, under many other statutory frameworks, the dividing line between material and immaterial errors of law will sometimes be less clear. In the context of statutory regimes that vest broad (non-binary) discretions in decision-makers, it will be more difficult for a court determine whether non-compliance with a condition could realistically have resulted in a different decision.[99]

It seems uncontentious that the presumption of a materiality threshold further complicates an already complex inquiry. In applying the threshold, the courts are required to identify the impact of certain errors on decisions that are often 'composed of many strands' of reasoning.[100] In this regard, it has been argued that adoption of the non-binary approach generally serves to 'undermine the certainty attached to the precedent effect of interpreted statutes, particularly so in cases that relate to established jurisdictional facts.'[101]

REMEDIES

It has been contended that the materiality of an error should only be relevant to the exercise of a court's discretion to grant relief (after jurisdictional error is established). This was the thrust of an argument made in dissent by Nettle and Gordon JJ in *SZMTA*. In the past, courts have typically dealt with immaterial or "trivial" errors by finding jurisdictional error, but refusing relief on discretionary grounds because granting it would make no difference.[102] In *Hossain*, Nettle J observed 'that the exercise of residual discretion to refuse relief in a case of jurisdictional error may, in an appropriate case, depend on a backward-looking test of whether there could possibly have been a different outcome'.[103]

In *Minister for Immigration and Border Protection v WZARH*,[104] Gageler and Gordon JJ said that where a breach of an implied condition to comply with the rules of procedural fairness was 'material', it justified 'the grant of declaratory relief by a court of competent jurisdiction, if it operates to deprive the offshore entry person of the possibility of a successful outcome.'[105] In this regard, it remains true that where jurisdictional error has been established, courts remain vested with a discretion to withhold relief. Relief may be denied because the error relied upon is immaterial to the reasoning of the decision-maker.[106]

On this issue, it must be borne in mind that a finding of jurisdictional error itself has legal consequences. For example, a decision that involves jurisdictional error is a decision is 'properly regarded, in law, as no decision at all'.[107] As recognised by Nettle and Gordon JJ in *SZMTA*, '[i]f the power is exercised in

[98] Welmans, Larissa et al, "*Jurisdictional Error and Materiality: Hossain v Minister For Immigration And Border Protection (2018) 359 ALR 1; [2018] HCA 34*" (2019) 26 AJ Admin L 52.
[99] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 Bell, Gageler and Keane JJ.
[100] *Minister for Immigration and Border Protection v Hossain and Another* [2017] FCAFC 82 at 54 per Mortimer J; as also observed in Aniulis, Harry, "*Materiality: Marking the Metes and Bounds of Jurisdictional Error?*" (2020) 27 AJ Admin L 88 at 90.
[101] Raad, Courtney, "*Hossain v Minister for Immigration and Border Protection: A Material Change to the Fabric of Jurisdictional Error?*" (2019) Sydney Law Review, VOL 41(2):265.
[102] *Stead v State Government Insurance Commission* (1986) 161 CLR 141.
[103] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137, 138 per Nettle J.
[104] (2015) 256 CLR 326
[105] *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 341 per Gageler and Gordon JJ.
[106] *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at [76], [77] per Kirby J citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [58].
[107] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614 to 615 per Gaudron and Gummow JJ.

excess of jurisdiction, the invalidity cannot be unwound or cured by a court exercising its discretion to refuse to grant relief.'[108]

VI SUMMARY

Historically, there has been divergence of opinion amongst the High Court as to what legislature should, and should not, be taken to intend in conferring powers on the executive.[109] While the Court has since come to a unified view on many elements of materiality, difficult questions remain. Whether the High Court's adoption of a threshold of materiality, and the acceptance of a 'non-binary' approach to discerning jurisdictional error, represents a positive development for Australian public law jurisprudence remains an open question.

[108] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421.
[109] Crawford, Lisa Burton, "*Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power*" (2019) 30 PLR 281 at 283.