

JURISDICTIONAL ERROR & MATERIALITY

16TH WHITMORE LECTURE 2024

THE HON. JUSTICE JULIE WARD¹

Acknowledgment of Country

- 1 I commence by acknowledging the traditional owners of the land on which we meet today, the Gadigal of the Eora, and pay my respects to their Elders past, present and emerging. I extend that respect to all First Nations people who are here today.

Introduction

- 2 I am honoured to be speaking at what marks the 16th Whitmore Lecture. This series commenced in 2007 to honour the late Professor Harry Whitmore, whose contributions to Australian administrative law have left a profound impact on the manner by which merits and judicial review occurs at the federal level today.
- 3 My paper tonight is on the topic “jurisdictional error and the requirement of materiality”. The catalyst for this choice of topic arises out of the recent High Court decision, *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 (*LPDT*), which contains a firm and concise exposition of how the threshold is to be applied.

¹ President of the Court of Appeal, New South Wales. I am indebted to the invaluable assistance of the Court of Appeal Researcher, Mr Oscar Clark, and President’s Researcher, Ms Juliette van Ratingen in the research and preparation of this lecture.

- 4 By way of introduction, Professor Whitmore's legacy in the realm of administrative law cannot be understated. Professor Whitmore is well-recognised as the "founding father" of Australian administrative law.²
- 5 At the time Professor Whitmore's career in the law started to gain steam, legal scholars were still suspect of administrative law; the 1959 edition of A.V. Dicey's *The Law of the Constitution* suggested that, as late as the mid 1900s, it was a discipline belonging to civil, not common, law countries.³ Unperturbed by these views it seems, Professor Whitmore was a natural addition to the 1968 Kerr Committee, whose role in ushering in a new suite of reforms colloquially known as the "New Administrative Law" package precipitated a new era of administrative accountability.
- 6 Just prior to his involvement in these reforms, Professor Whitmore undertook a Master of Laws degree at Yale University in 1961. The impact that US jurisprudence had on Whitmore quickly became evident; his 1963 article titled "Australian Administrative Law – A Study in Inertia",⁴ which drew attention to the procedures adopted in the United States and other nations in administrative law and judicial review, questioned the "apathy and apparent self-satisfaction" which existed in Australia at that time.⁵ As the title of the article implied, Professor Whitmore believed that Australia's approach to the

² John McMillan and Dennis Pearce, 'Vale Emeritus Professor Harold Whitmore' (ANU College of Law, 2008), cited by S Gageler, 'Whitmore and the Americans: Some American Influences on the Development of Australian Administrative Law' (2015) 38(4) *UNSW Law Journal* 1316.

³ A. V. Dicey, *The Law of the Constitution* (1959) 328.

⁴ Harry Whitmore, 'Australian Administrative Law – A Study in Inertia' (1963) 36(9) *Australian Law Journal* 255.

⁵ See, for example, Don Harding, 'Professor Harry Whitmore' (1982) 5(2) *University of New South Wales Law Journal* 189; S Gageler, 'Whitmore and the Americans: Some American Influences on the Development of Australian Administrative Law' (2015) 38(4) *UNSW Law Journal* 1316 at 1321.

development of administrative law, whether from the perspective of the judiciary or the executive, was inert, or at least “inordinately slow”,⁶ and in need of advancement in step with that which had occurred overseas.

- 7 Of the 60 years since Professor Whitmore’s article, two things may be observed. First, it was perhaps overly optimistic to think that the proliferation of the public sector could be curbed.⁷ Second, I would like to think Professor Whitmore would be content to recant his characterisation of administrative law’s development as inert if he could see the significant development in our balance between deference to administrative decision-makers and curial intervention in the threshold of materiality.
- 8 To demonstrate my second point, I propose to expose first the pedigree of the modern statement of materiality in earlier English, Irish and local authorities, and then to look at *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (*Hossain*). The effect of this, I hope, will be to illustrate the distance the High Court travelled in *Hossain* in picking up what was previously only relevant to the question of relief and placing it at the forefront of judicial review. In so doing, I hope to do justice to Professor Whitmore’s observation that there is certainly no need for Australia blindly to follow where others have led in the domain of administrative law.⁸

⁶ David Benjafield and Harry Whitmore, *Principles of Australian Administrative Law* (1971) 361.

⁷ Harry Whitmore, ‘Australian Administrative Law – A Study in Inertia’ (1963) 36(9) *Australian Law Journal* 255 at 260.

⁸ *Ibid* 259.

A brief exposition on jurisdictional error

- 9 In the modern articulation of Australian administrative law, an enquiry into the materiality of an error arises in the context of determining whether an error is, indeed, jurisdictional, such that the decision is “void”; not (as was previously the case) with respect to relief.⁹
- 10 The characterisation of an error as “jurisdictional” is historically fraught; so too is the distinction between “jurisdictional” and “non-jurisdictional” errors.¹⁰ I do not propose to weigh into the latter debate to any meaningful extent. Instead I will focus on the modern engine room of jurisdictional error: materiality.
- 11 The employment of the term “material” in describing a jurisdictional error may appear superfluous, to the extent that the “materiality” of an error is a prerequisite as to whether it can be ascribed the descriptor “jurisdictional error”. Professor Louis L Jaffe, in his celebrated article “Judicial Review: Constitutional and Jurisdictional Fact” (cited extensively by the High Court in both *Hossain* and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (*Kirk*)),¹¹ criticised as “barely semantic” the US Supreme Court Justice Frankfurter’s reproach of the term “jurisdiction” as a “verbal coat of too many colours” (in his Honour’s dissenting opinion in the 1952 decision *United States v L A Tucker Truck Lines Inc*).¹²

⁹ *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 at [2] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), citing *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 [24], 143 [62].

¹⁰ *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 459 citing *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 144 [64] (Edelman J).

¹¹ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 130-131; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 570, 581, 590.

¹² *United States v L A Tucker Truck Lines Inc* (1952) 344 US 33 at 39.

- 12 Professor Jaffe argued that the language of jurisdiction is a traditional expression of the function of a court, acting within the limits of its own jurisdiction, of ensuring that a repository of statutory power did not strain the limits of that power: “[i]n short... the concept is almost entirely functional: it is used to validate review when review is felt to be necessary”.¹³ Professor Jaffe continued:

There will be situations in which the apparent or stated intention of the legislature is to limit review to certain gross errors, and in which the notion of jurisdiction, familiar as it is to judges and lawyers, will be as good as any to express the scope of review. There are other situations, too – organizational or procedural mistakes – in which the lapse is so serious that judges will want a concept which enables them to declare the order ‘void.’... 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.¹⁴

- 13 My now colleague, Justice Kirk, then at the Bar, observed that the effect of Professor Jaffe’s statement of “jurisdictional error” as a conclusion “... leaves the door open for the evolution of administrative law. That evolution may occur at the particular level, relating to the various types of grounds of review or species of legal error recognised as jurisdictional. But it may also occur at an intermediate level, where principles have room to develop which may inform and animate what types of error will be recognised as jurisdictional.”¹⁵

¹³ Louis Jaffe, ‘Judicial Review: Constitutional and Jurisdictional Fact’ (1957) 70 *Harvard Law Review* 953 at 963.

¹⁴ *Ibid.*

¹⁵ Jeremy Kirk, ‘The Concept of Jurisdictional Error’ in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 11 at 32.

- 14 Unlike in the United Kingdom, to which I will later turn, Australian public law has followed through on Kirk's comments in developing the doctrine of materiality at an intermediate level, deploying it to determine whether an error of a decision maker should be recognised as jurisdictional (jurisdictional, in the functional sense described by Professor Jaffe, used to denote errors so grave so as to be unauthorised by statute), or whether the decision may stand notwithstanding its infliction. However, pre-*Hossain*, as well in the United Kingdom, the measure of the gravity of the error was considered only at the stage where a court is determining whether it should exercise its discretion to grant relief. In other words, an error might be found irrespective of its gravity, but its gravity was then used to dictate an award of discretionary relief.

The Doctrine of Materiality

- 15 In Australia, the threshold, doctrine or delimitation of materiality is one among many "presumptions upon presumptions, implications upon implications" of statutory construction that control, and temper the control of, the exercise of power by statutory tribunals by courts pursuant.¹⁶ It fits within a suite of presumptions of statutory construction in the context of administrative law, about which Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 stated reflect "an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power".¹⁷ It is designed to capture the

¹⁶ Lisa Crawford, 'Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power' (2019) 30(4) *Public Law Review* 281 at 294.

¹⁷ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 (Brennan J).

fact that decision-making ought not be understood strictly in the abstract, and to focus attention on the fact that it is a “function of the real world”.¹⁸

16 Crystallised in *Hossain*, and applied in subsequent cases, this threshold demarcates the line in the sand at which a court will interfere with a decision of a tribunal purportedly infected by a jurisdictional error. The decision must be affected by the error in a material way, in the sense that there is a “realistic possibility that the decision in fact made could have been different had the breach of the condition not occurred”.¹⁹ Its application does not occur after a jurisdictional error is located, but instead operates at the point at which a court is asked to consider whether *any* jurisdictional error has occurred. In other words, an error cannot be characterised as a jurisdictional error *unless* it can be characterised as material. It is not an independent test.²⁰ That said however, the threshold is often misunderstood or misapplied; so much was made clear in the recent decision of *LPDT*, where, across sixteen paragraphs, the High Court offered authoritative instruction of how courts are to apply the doctrine.²¹

17 At this stage, it is apt to examine the doctrine’s international and local pedigree in order to frame the High Court’s reasoning in *Hossain*.

¹⁸ *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458 at 469 (Hill J).

¹⁹ *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 514 (Kiefel CJ, Gageler, Keane and Gleeson JJ), citing *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421.

²⁰ *Wei v Minister for Immigration and Border Protection* (2019) 257 CLR 22 at 32.

²¹ *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12, [2]-[16].

Manifestations of Materiality Pre-Hossain in Australia and Abroad

The United Kingdom and Ireland

- 18 Although *Hossain* was novel in its reasoning, insofar as there was no earlier authority for the existence of a materiality threshold as a principle of statutory construction to be applied in the location of jurisdictional error, the concept of a threshold in administrative law to demarcate the point at which curial intervention becomes justified is a long-standing presumption with varying manifestations across multiple jurisdictions. These authorities are important to understand in order later to illustrate Australia's departure from its previously accepted applications.
- 19 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, Mason J (as the his Honour then was) called in aid several English authorities to advance the proposition that:

Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision.²²

- 20 The cases to which Mason J referred all reflect the view that an error of a tribunal must be of a particular level of consequence as to position a court to

²² *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J).

interfere, albeit largely with respect to the question of relief.²³ In *Baldwin & Francis v Patents Appeal Tribunal*, Lord Justice Denning emphasised the significant impact of the Tribunal premising its decision on extraneous considerations, and failing to take into account “very relevant and indeed vital” considerations in justifying an award of discretionary relief.²⁴ In *Hanks v Minister of Housing and Local Government*, Lord Justice Megaw conceived that there “may be cases where the factor wrongly taken into account, or omitted, is insignificant, or where the wrong taking into account, or omission, actually operated in favour of the person who later claims to be aggrieved by the decision”.²⁵ In *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society*, Lord Justice Griffiths took the view that a court must not intervene in the decision of a tribunal “unless it is convinced that this would have resulted in the decision going the other way”.²⁶

- 21 As far back as 1889, English courts have applied a principle characteristically similar to our understanding of materiality.²⁷ Outside the scope of administrative law, there was a longstanding rule (dating back to roughly 1807) in Court of the King’s Bench,²⁸ at Common Pleas,²⁹ and in Chancery,³⁰ that an incorrect ruling in regard to evidence would not entitle the defendant to a new trial where the error “could have made no difference, at least it ought

²³ Nicholas Carey, ‘Presumptions upon Presumptions: Problems with the Threshold of Materiality’ (2021) 44(2) *UNSW Law Journal* 548 at 557.

²⁴ *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663 at 693 (Denning LJ).

²⁵ *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 at 1020 (Megaw LJ).

²⁶ *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227 at 260 (Griffiths LJ).

²⁷ *R v Bishop of London* (1889) 24 QBD 213 at 226-227.

²⁸ See, for example, *R v Ball* (1807) Russ & Ry 132.

²⁹ See, for example, *Horford v Wilson* (1807) 1 Taunt 12.

³⁰ See, for example, *Pemberton v Pemberton* (1805) 11 Ves 50.

not to have made any difference in the verdict”.³¹ This position was abolished by the introduction of the “Exchequer rule” in *Crease v Barrett* (1835) 1 Cr M & R 919, where the Court curbed its discretion to enquire into the effect of an error before determining whether to order a new trial.³² Whether this rule was absolute or not is a matter for debate,³³ but in any event, it was subsequently displaced by the passing of the *Judicature Act* in 1873 in relation to civil matters,³⁴ and by the introduction of what is now considered as the “proviso” in the *Criminal Appeal Act* in 1907.³⁵

- 22 In the context of administrative law, however, the modern statement of a test characteristically similar to our understanding of materiality can be found in the 1989 case of *Simplex v GE (Holdings) v Secretary of State for the Environment* (1989) 57 P & CR 306, recently summarised by Justice Holgate in *Castelite Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 1479, [24]:

... the test to be applied is whether the [decision-maker] can satisfy the court that [they] would necessarily, or inevitably, have reached the same decision if [they] had not committed the legal error which has been acknowledged.³⁶

³¹ *R v Teal* (1809) 11 East 307 at 312.

³² *Crease v Barrett* (1835) 1 Cr M & R 919 at 933.

³³ See *Weiss v The Queen* (2005) 224 CLR 300 at 306-312 for an exposition of the history of the Exchequer Rule.

³⁴ *Supreme Court of Judicature Act 1873* (UK) 36 & 37 Vict c 66 r 48.

³⁵ *Criminal Appeal Act 1907* (UK) 7 Edw VII c 23 s 4(1).

³⁶ *Castelite Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 1479, [24] (Holgate J).

- 23 It was previously the case that the threshold of materiality was far higher in circumstances where EU obligations were intertwined within the impugned decision.³⁷ However, in the decision in *Walton v Scottish Ministers* [2012] UKSC 44, there was strong caution against the general proposition at common law that the threshold of materiality must operate with a significantly higher level simply by virtue of the presence of an EU law obligation.³⁸ In any event, the test was rendered uniform by virtue of the insertion of s 31 to the *Superior Courts Act 1981* (UK) (by s 84 *Criminal Justice and Courts Act 2015* (UK)), which now provides that the High Court of England and Wales *must* refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant *would not have been substantially different* if the conduct complained of had not occurred.³⁹
- 24 As is explicit in the case law and legislative drafting, a threshold of materiality in the United Kingdom is confined to the question of relief, and is irrelevant to the task of locating the error in the impugned decision.
- 25 On the other hand, the Irish approach to materiality and its placement regarding the nature of the error, is less clear.⁴⁰ In the case of *Cork County Council v Shackleton*, Clarke J observed that “[i]t seems to me to follow that, where there has been a significant error in the interpretation of a material statutory provision leading to a decision of the property arbitrator being wrong

³⁷ *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603; see also James Maurici and Admas Habteslasie, ‘When Does the No Substantial Difference Test Make a Difference in Judicial Review Applications: Does the Outcome Differ, Depending on Whether the case Is Based on EU or UK Law’ (2019) 24(2) *Judicial Review* 127 at 131.

³⁸ *Walton v Scottish Ministers* [2012] UKSC 44.

³⁹ *Criminal Justice and Courts Act 2015* (UK) s 84(2A).

⁴⁰ See Paul Daly, ‘A Typology of Materiality’ (2019) 26 *Australian Journal of Administrative Law* 134 at 135-136

in law, any such decision should, prima facie, be quashed”.⁴¹ On one view, this may suggest that, subject to any extraneous reasons to refuse relief, where the error is material, or “significant”, an Irish court is bound to grant relief.

- 26 A similar line of reasoning was expressed in *State (Elm Developments Ltd) v An Board Pleanala* [1981] ILRM 108, where the Irish Supreme Court said the following in relation to the distinction between “mandatory” and “directory” statutory provisions (a controversial principle of statutory construction in Australia):⁴²

[i]f the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused.⁴³

The Australian approach: materiality prior to Hossain

- 27 I turn now to the Australian position prior to the 2018 High Court decision of *Hossain*. At this stage, the Australian authorities mirrored the position in the United Kingdom in confining an enquiry into the gravity of an error to the question whether to grant relief.

⁴¹ *Cork County Council v Shackleton* [2007] UEGC 241, [9.7] (Clarke J).

⁴² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

⁴³ *State (Elm Developments Ltd) v An Board Pleanala* [1981] ILRM 108 at 110 (Henchy J).

- 28 Justices Gaudron and Gummow, in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (*Aala*), warned that “denying jurisdictional error for “trivial” breaches” would require “the limitation ordinarily implied on the statutory power... to be rewritten”.⁴⁴ Although it was not until *Hossain* that the High Court took up the opening left in *Aala*, it is certainly not the case that there was no indication that jurisdictional error did not incorporate some form of a threshold pre-*Hossain* with regard to the permissibility of judicial intrusion.
- 29 An important authority which founds part of the High Court’s decision in *Hossain* to incorporate a “materiality” threshold as to the enquiry of the existence of a “jurisdictional error”, is *Stead v State Government Insurance Commission* (1986) 161 CLR 141 (*Stead*). In *Stead*, Mr Stead sued the State Government Insurance Commission in the Supreme Court of South Australia for damages for personal injury arising out of a motor vehicle accident, alleging that the accident had caused a neurotic condition which rendered him totally unable to work. Evidence was given by a doctor called on behalf of the Insurance Commission that there was no connection between the accident and the neurotic condition. In closing, the primary judge interjected in response to Mr Stead’s call for the rejection of the doctor’s evidence, stating that “I don’t accept [the doctor] on that. You needn’t go on as to that”. Subsequently however, the judge accepted the doctor’s evidence on that point, and found in favour of the Insurance Commission. Mr Stead appealed to the Full Court on the basis that, in actively stopping his counsel from addressing the topic of the doctor’s evidence in closing, the primary judge had

⁴⁴ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 109 (Gummow and Gaudron JJ).

deprived him of an opportunity to present argument on a central issue in dispute, and thereby occasioned a denial of natural justice. His argument was rejected.

- 30 On his appeal, the High Court noted that “not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial... All that the appellant needed to show that the denial of natural justice deprived him of the possibility of a successful outcome”.⁴⁵ In support of this proposition, the Court cited the principle as established by the English Court of Appeal in *Jones v National Coal Board* [1957] 2 QB 55 that:

There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. ... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.

...

That general principle is, however, subject to an important qualification which Bollen J plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.⁴⁶

⁴⁵ *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145.

⁴⁶ *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 citing *Jones v National Coal Board* [1957] 2 QB 55, 67.

- 31 The Court then drew contrast between instances where parties are denied the ability to make submission on a point of law, and submissions on a point in fact, stating that:

[i]f all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.

Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference.⁴⁷

- 32 I pause here to note that the utilisation of *Stead* by the High Court in *Hossain* as to the operation of materiality in the inquiry of determining whether an error is, indeed, jurisdictional, has been criticised. Nicholas Carey, in his article titled 'Presumptions upon Presumptions: Problems with the Threshold of Materiality', noted that *Stead* was a decision about a departure from the rules of natural justice, and had been applied in the past in the context of judicial review cases relating to the ground of a breach of the obligation to accord procedural fairness. Carey argued that, unlike its use in *Hossain*, it had been applied in those subsequent cases in support of a fundamental proposition, namely, that a breach of procedural fairness must have some

⁴⁷ *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 (Mason, Wilson, Brennan, Deane, Dawson JJ).

effect on the impugned decision in order to justify a court exercising its discretion to grant relief.⁴⁸ Rather, the issue in *Stead* turned on whether a court should exercise its residual discretion to order a new trial in circumstances where the primary judge refused to allow the appellant to make submissions on a particular point, which the primary judge subsequently relied upon to find against him. The Full Court had refused to exercise this discretion on the ground that there was no possibility of a successful outcome in spite of the breach of procedural fairness. Whilst overturned on appeal, the High Court was concerned strictly with the materiality of the error in the context of the question of relief. However, as averted to, the reliance on *Stead* in *Hossain* by the plurality of Chief Justice Kiefel, Justices Gageler (as the Chief Justice then was) and Keane, and Justice Edelman writing separately, was in regard to its position on the futility of curial intervention in circumstances where non-occurrence of the error would not have nonetheless allowed for a different outcome.⁴⁹

33 I briefly turn now to *Craig v South Australia* (1995) 184 CLR 163 (*Craig*), which was relied upon by Justice Edelman in *Hossain* in support of the notion that a decision must be *affected* before being classed as jurisdictional error.⁵⁰ Whilst the intended import of the term *affected* was not entirely clear from the reasoning in *Craig*, it seemed to demand that the error must have had some causal relationship with the impugned decision – *id est*, the decision-maker

⁴⁸ Nicholas Carey, 'Presumptions upon Presumptions: Problems with the Threshold of Materiality' (2021) 44(2) *UNSW Law Journal* 548 at 552.

⁴⁹ *Hossain v Minister for Immigration* (2018) 264 CLR 123 at 135, 147.

⁵⁰ *Hossain v Minister for Immigration* (2018) 264 CLR 123 at 145 (Edelman J), citing *Craig v South Australia* (1995) 184 CLR 163, 172.

may have taken a different path but-for the error.⁵¹ *Craig* concerned a person charged and tried in the District Court of South Australia with larceny, receiving stolen goods and arson. The accused sought a stay pending the provision of legal representation. The judge, after receiving evidence and hearing submissions in relation to the stay, concluded that the accused, through no fault of his own, “could not receive a fair trial unless he [was] properly represented by counsel”, and that in the circumstances the majority judgments in *Dietrich v The Queen* (1992) 177 CLR 292 (*Dietrich v The Queen*) required that the trial be stayed, adjourned or postponed until legal representation was available. The question before the High Court was whether the primary judge misconstrued *Dietrich v The Queen* in such a way so as to have committed jurisdictional error. The Court’s decision in *Craig* is known for its exposition of the various types of jurisdictional error (not, however, to be classed as a rigid taxonomy of jurisdictional error following the comments of the majority in *Kirk*).⁵² What was important in the holding in *Craig* for Justice Edelman’s purposes was that:

[i]n cases of decision makers acting under statute, it will usually be implied from the statute that any error of law on the face of the record does not render a decision liable to be set aside unless, as a pre-condition, the error was material in the sense that it ‘affected’ the decision.⁵³

⁵¹ See, generally, Ellen Rock, ‘Causation in Public Law’ (2023) 30 *Australian Journal of Administrative Law* 56.

⁵² *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 575; see also Justice Basten, ‘Jurisdictional Error after *Kirk*: Has It a Future?’ (2012) 23(2) *Public Law Review* 94.

⁵³ *Hossain v Minister for Immigration* (2018) 264 CLR 123 at 145 (Edelman J), citing *Craig v South Australia* (1995) 184 CLR 163, 176.

34 *Craig* stands out in its application of a causal descriptor at the point at which the error is classified, prior to the question of relief.

35 Another authority worth noting here is *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 (*Wei*). Both Justice Edelman and the plurality cited with approval the following statement of Justices Gageler and Keane:

Jurisdictional error, in the sense relevant to the availability of relief under s 75(v) of the *Constitution* in the light of s 474 of the *Migration Act* [1958 (Cth)], consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act.⁵⁴

36 As Carey has noted, *Wei* was an interesting decision on account of its maintenance of the distinction between “imperative” and “directory” statutory duties in the context of errors on the part of the decision maker.⁵⁵ Their Honours, while noting the abovementioned message of caution expressed in *Project Blue Sky v Australian Broadcasting Authority*, cited the following passage from the decision of Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 (*Plaintiff S157/2002*):

To describe a duty as imperative, or a restraint as inviolable, is to express the result of a process of construction, rather than a reason for

⁵⁴ *Hossain v Minister for Immigration* (2018) 264 CLR 123 at 135, 147 citing *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 32.

⁵⁵ Nicholas Carey, ‘Presumptions upon Presumptions: Problems with the Threshold of Materiality’ (2021) 44(2) *UNSW Law Journal* 548 at 560.

adopting a particular construction; but it explains the nature of the judgment to be made.⁵⁶

- 37 The central concern of statutory construction, in line with the position advanced in *Project Blue Sky*, their Honours said:

... is an inquiry as to whether the statutory purpose of the duty, when considered within the particular statutory scheme of which it forms part, would or would not be advanced by holding an exercise of decision-making power affected by breach of the duty to be invalid. Considerations bearing on an inquiry of that nature have long been recognised to include the justice and convenience of holding that a breach of the duty invalidates an exercise of the decision-making power.⁵⁷

- 38 In support of this, their Honours also cited the Privy Council decision in *Montreal Street Railway Co v Normandin* [1917] AC 170, where it was suggested that a Court should not conclude as invalid a neglectful performance of a particular statutory power (and in fact deem such duty as directory) if such intervention would work serious general inconvenience or injustice to persons who have no control over those responsible for the exercise of that power, and would not promote the main object of the legislature.⁵⁸ On that premise, Justices Gageler and Keane then held that “[t]he same considerations of justice and convenience tell in favour of the conclusion that a duty is imperative where a *material breach* would work to the peculiar disadvantage of an individual”.⁵⁹

⁵⁶ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 489 (Gleeson CJ).

⁵⁷ *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 33 (Gageler and Keane JJ).

⁵⁸ *Montreal Street Railway Co v Normandin* [1917] AC 170 at 175.

⁵⁹ *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 34.

39 Evidently, *Wei* stands for a conception of materiality not dissimilar to that introduced in *Hossain*. While the Court in *Hossain* was not concerned with the division between statutory duties characterised as either imperative or merely directory, the language of “material” in *Wei* self-evidently denotes some type of consideration being given with respect to the gravity, or effect, of the alleged error at the point of characterisation.

Relationship between materiality and practical injustice

40 The abovementioned authorities illustrate that, prior to the introduction of materiality, there was at least some threshold an error must reach before a Court would be inclined to intervene. However, those earlier authorities lacked any exposition of the exact import of that threshold. It seemed to be the case that the threshold in question pertained to the question of relief, not the classification of the error (akin the state of play in the United Kingdom), or simply did not have much work to do. As is clear, *Stead* went to relief, *Craig*, while using the term material, proffered little indication of the weight afforded to that descriptor, and the materiality element in *Wei* appeared not to require much consideration given the classification of the relevant duty as imperative.

41 However, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (*Lam*), Gleeson CJ introduced the doctrine of “practical injustice” into Australian administrative law. Like materiality, this doctrine demanded an enquiry into the gravity and effect of the error alleged before it was classified; an element of “practical injustice” being required before a court brands an error as a breach of procedural fairness. In that case, the applicant sought orders of certiorari and prohibition

to quash the decision of the relevant Minister to cancel his visa and to prevent the respondent from taking steps to deport him. In brief, the applicant complained that the Minister failed to accord procedural fairness in that, after notifying the applicant that contact was being pursued with the carers of the applicant's children to assess the possible effects upon them of the cancellation of the applicant's visa, the Minister failed to contact the carers. The applicant argued that the rules of procedural fairness required that the Minister must follow through on that stated intention or have advised, in advance, the applicant otherwise. In rejecting this argument on the basis that the applicant failed to show that he held any subjective expectation in reliance upon which he did, or did not, do anything, Gleeson CJ stated:

Fairness is not an abstract concept. It is essentially practical.

Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice. No practical injustice has been shown. The applicant lost no opportunity to advance his case. He did not rely to his disadvantage on the statement of intention. It has not been shown that there was procedural unfairness.⁶⁰

- 42 Not dissimilar to the functionality Professor Jaffe ascribed to the term “jurisdictional”, Gleeson CJ’s observations introduced a threshold of its own kind: an ostensible denial of procedural fairness will not be a denial of procedural fairness upon which a court will act (*id est*, it will not be a

⁶⁰ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14.

jurisdictional error) unless it can be shown that it affected a practical injustice upon the party. This might be seen to qualify Justices Gaudron and Gummow's statement in *Aala* that there is no such thing as "trivial breaches" of procedural unfairness, and that "[t]he issue always is whether or not there has been a breach of the obligation to accord procedural fairness, and, if so, there will have been jurisdictional error....".⁶¹ However, it is likely that the "practical injustice" inquiry simply added an step to the overall process. So much was recognised by the majority of Bell, Gageler and Keane JJ in *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (*SZMTA*), where their Honours said:

because procedural fairness requires disclosure of the fact of notification, non-disclosure of the fact of notification constitutes, without more, a breach of the Tribunal's implied obligation of procedural fairness. For such a breach to constitute jurisdictional error on the part of the Tribunal, however, the breach must give rise to a "practical injustice": the breach must result in a denial of an opportunity to make submissions and that denial must be material to the Tribunal's decision.⁶²

- 43 The relationship between materiality and the test of practical injustice is curious. While characteristically similar, in that both are directed toward an enquiry into the functional effect of the error beyond simply its nature, the "practical injustice" test as applied to the question whether a breach of

⁶¹ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 109.

⁶² *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 443.

procedural fairness constitutes a jurisdictional error is distinct from the operation of the materiality threshold. The comments of the majority in *SZMTA* indicate that first, it must be seen whether there has been a *prima facie* breach of procedural fairness then, to reach the level of jurisdictional error, it must then be seen whether the breach of procedural unfairness affected a “practical injustice” upon the party, and whether that practical injustice was material to the decision-maker’s subsequent decision.⁶³

44 Insofar as Gleeson CJ in *Lam* suggested that a finding of practical injustice is a pre-condition to a finding of a breach of procedural unfairness,⁶⁴ the aforesaid comments of the plurality in *SZMTA* might suggest that the test has since been turned on its head; first, a finding is made that there has been a breach of procedural unfairness, second, the “practical injustice” test and the threshold of materiality then operate to determine whether the breach constitutes a jurisdictional error.

45 However, the Court in *SZMTA* was confronted with a relatively black-and-white breach of procedural fairness in circumstances where the Minister had failed properly to notify applicants as required by the relevant statutory scheme.⁶⁵ Where the breach of procedural fairness is not a matter for *prima facie* conclusions, the “practical injustice” enquiry appears to operate in a fashion more akin to that which was envisioned by Gleeson CJ.

⁶³ *Ibid.*

⁶⁴ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14.

⁶⁵ *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 443.

46 As stated by Justice Gageler and Gordon in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 (*WZARH*), there are cases in which an administrator may misled a person into refraining from taking up an opportunity to be heard in accordance with a procedure that was otherwise fair.⁶⁶ In such instances, it is necessary for that person first to demonstrate that he or she would have taken up that opportunity had such conduct not occurred – this is a manifestation of the “practical injustice” enquiry occurring at first instance in seeking to establish whether a breach of procedural fairness in fact occurred. Only after that, does a court query whether the breach was material to the decision so as to constitute jurisdictional error. Yet, in other instances a breach of procedural fairness will *prima facie* be established, and then the question of practical injustice and materiality operate to determine whether the error is jurisdictional (except in *WZARH*, which pre-dated *Hossain* and therefore applied materiality to the question of relief).⁶⁷

47 In any event, it appears from the comments of the plurality in *SZMTA* that the enquiry into practical injustice is concerned with procedure, insofar one is required to ask what would have occurred in the process but for the procedural unfairness. On the other hand, the question of materiality is evidently targeted at outcomes. So long as this distinction remains, so too will these tests continue to be applied separately. The importance of this distinction was central to Justice Edelman’s judgment in *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 (*Nathanson*). It is also trite to note here

⁶⁶ *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 342.

⁶⁷ *Ibid* 343.

that Justice Edelman was at pains to emphasise that the weight of the onus of proving materiality, there understood in the context of a breach of procedural fairness, is essentially *de minimis*, and in that case (without setting out the facts), would have been satisfied by the “quadruple might” submission that:

...but for the denial of procedural fairness, there might have been things that [the applicant] might have said at the hearing that might have assisted [the applicant’s] case in a manner that might have led to a different result.⁶⁸

- 48 Together, it is clear that breaches of procedural fairness are an unique (for use of a better term) class of jurisdictional error for the purposes of materiality analysis.⁶⁹ It was said by Justice Nettle (writing separately) that “there may be a number of circumstances in which an error is jurisdictional despite not depriving a part of the possibility of a successful outcome”,⁷⁰ and later by Justice Edelman (also writing separately) that “there may be unusual circumstances where an error is so fundamental that it will be material whether or not a person is deprived of the possibility of a successful outcome. One circumstance, for reasons that could include respect for the dignity of the individual, may be an extreme case of denial of procedural fairness”.⁷¹ This is a reflection of the view of Lord Reed in *Osborn v Parole Board*, who opined that procedural fairness is underpinned by dignitarian considerations.⁷²

⁶⁸ *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 123.

⁶⁹ Paul Daly, ‘A Typology of Materiality’ (2019) 26 *Australian Journal of Administrative Law* 134 at 139.

⁷⁰ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137.

⁷¹ *Ibid* 148 citing *R (Osborn) v Parole Board* [2014] AC 1115, 1149; *DWN042 v Republic of Nauru* (2017) 92 ALJR 146 at 151.

⁷² *R (Osborn) v Parole Board* [2014] AC 1115 at 1149.

***Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123**

49 So now to *Hossain*. Until now, with few exceptions, Australian courts refrained from, rather than adopted, Professor Whitmore's suggestion that Australia need not follow other nations and instead should go out on its own.⁷³ Though it might be a unduly harsh to characterise this area of our public law as entirely inert up until this point in the lecture (particularly in light of the introduction of the "practical injustice" enquiry introduced by Gleeson CJ in *Plaintiff S157/2002*), it is perhaps presumptuous to suggest that we had been revolutionary in our application of a materiality-like threshold in judicial review. It is at this point in the lecture that we truly counter the suggestion of indolence in Australian administrative law.

50 Mr Sorwar Hossain, the applicant in *Hossain*, was a Bangladeshi citizen who first travelled to Australia on a student visa in May 2003, but ceased holding a substantive visa from November 2005. Then, on 27 May 2015, Mr Hossain applied for a partner visa on the basis of his relationship with his then-partner, an Australian citizen. In accordance with Sch 2 to the *Migration Regulations 1994* (Cth) (Regulations), Mr Hossain was required to meet criteria 3001, 3003, 3004 and 4004 in Schedule 3 to those Regulations. Of particular importance were criteria 3001 and 4004. The former required that a valid application must have been made within 28 days after the last day when Mr Hossain held a substantive visa, unless the Minister was satisfied that there were compelling reasons for not applying that criterion. The latter required

⁷³ Harry Whitmore, 'Australian Administrative Law – A Study in Inertia' (1963) 36(9) *Australian Law Journal* 255 at 259.

that the applicant did not have outstanding debts to the Commonwealth unless the Minister was satisfied that appropriate arrangements had been made for payment. Mr Hossain's application for a partner visa was refused by a delegate of the Minister on the basis that Mr Hossain failed to satisfy criterion 3001, as he had last held a substantive visa in 2005, and there were no compelling reasons at the time to waive the application of that criterion.

- 51 On a merits review by the Administrative Appeals Tribunal (Tribunal), the decision of the delegate was affirmed, and the Tribunal concluded also that Hossain failed to satisfy the "public interest" criterion 4004, as he had made no appropriate arrangements to repay an outstanding debt to the Commonwealth.
- 52 Mr Hossain then sought judicial review of the Tribunal's decision in the Federal Circuit Court of Australia. By the time the application was heard by the Federal Circuit Court, Mr Hossain had fully paid his debt to the Commonwealth. During the hearing, the Minister conceded that the Tribunal had erred in law in attempting to apply the criterion which related to the timing of the application, in that the Tribunal had assessed whether there were compelling reasons for not applying the criterion that otherwise would have operated to refuse Mr Hossain's visa at the time of the application for the visa, rather than at the time of its own decision. To this, the Minister argued that the conceded error was not jurisdictional, in the sense that the Tribunal's failure to be satisfied that the public interest criterion was met at the time of its decision provided an independent basis on which the Tribunal was bound to

affirm the delegate's decision; in other words, the error had no effect on the Tribunal's decision.

- 53 The Federal Circuit Court rejected this argument, refusing to entertain what it characterised as an “unbundling” of the Tribunal's decision into bifurcated “impeachable” and “unimpeachable” parts.⁷⁴ The Court concluded that, given the presence of jurisdictional error, there was no discretionary reason not to grant the relief sought by Hossain under s 476 of the *Migration Act 1958* (Cth).⁷⁵
- 54 On appeal to the Full Court of the Federal Court, much the same argument was put forward by the Minister. The Court, however, was split. In the majority were Justices Flick and Farrell, who, while rejecting the Minister's argument in form, nevertheless accepted the substance of the Minister's argument: that while the error was described aptly as “jurisdictional”, it did not deprive the Tribunal of the authority to affirm the delegate's decision.⁷⁶ In dissent, Justice Mortimer (as the Chief Justice then was) also considered that the Tribunal's error, being an error in the construction and application of the relevant legislation, justified the label of “jurisdictional”. Her Honour noted that “it is difficult to discern a consistent approach throughout the authorities as to the appropriate outcome where there is more than one basis for a Tribunal's decision on review under the *Migration Act*...”, and that the correct approach was “to accept an error of this kind is jurisdictional, and then ask whether

⁷⁴ *Hossain v Minister for Immigration and Border Protection* [2016] FCCA 1729 at [20].

⁷⁵ *Ibid* [27]-[30].

⁷⁶ *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31 at 39-40 (Flick and Farrell JJ).

there is utility in the grant of relief to an applicant, because of a second basis for the decision on review".⁷⁷ Accordingly, her Honour approached the matter as one involving discretion: it was concluded that the orders made by the Federal Circuit Court were not pointless because the fact that Mr Hossain's debt to the Commonwealth had been paid in full meant that, on reconsideration by the Tribunal, his meeting of the public interest criterion would no longer be in contest.⁷⁸ In the alternative, Justice Mortimer posited that, if the two visa criteria issues were not entirely independent, the Tribunal, satisfied that there were compelling reasons for not applying the criterion relating to the timing of the making of the application, might delay making its decision until such time as Mr Hossain could demonstrate that he had either paid his debt to the Commonwealth or entered into an arrangement for payment to occur.⁷⁹

- 55 The High Court unanimously held that the legal error was not jurisdictional because the Tribunal was required to affirm the decision of the Minister on a basis independent of the impugned public interest criterion. However, the decision was constituted by three separate judgments. It is worth dealing with these in turn.

Kiefel CJ, Gageler and Keane JJ

- 56 The plurality judgment confirmed, in line with Professor Jaffe's position that I referred to at the outset of this paper, that the classification of an error as

⁷⁷ Ibid 49 (Mortimer J).

⁷⁸ Ibid 56-57.

⁷⁹ Ibid 51.

“jurisdictional” is used to denote the gravity of the error, and in so doing, maintained the distinction between jurisdictional and non-jurisdictional error as those errors which a tribunal is not authorised to make, and those that a tribunal is authorised to make.⁸⁰

- 57 To illustrate this point, their Honours provided functional definitions of the terms “jurisdiction”, and “jurisdictional error”:

Jurisdiction, in the most generic sense in which it has come to be used in this field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it 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. It encompasses in that application all of the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions to have ‘such force and effect as is given to it by the law pursuant to which it was made’.⁸¹

- 58 On that premise, the plurality then held that “jurisdictional error”:

⁸⁰ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 quoting Bradley Selway, ‘The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues’ (2002) 30 *Federal Law Review* 217 at 234.

⁸¹ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 132 (Kiefel CJ, Gageler and Keane JJ).

...correspondingly refers to a failure to comply with one or more statutory preconditions or conditions 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. To describe a decision as 'involving jurisdictional error' is to describe that decision as having been made outside jurisdiction. A decision made outside jurisdiction is not necessarily to be regarded as a 'nullity', in that it remains a decision in fact which may yet have some status in law. But a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as 'no decision at all'. To that extent, in traditional parlance, the decision is 'invalid' or 'void'.⁸²

- 59 Contrary to the position of Lord Woolf and Sir John Laws, both writing extrajudicially, that any suggestion the legislature could have formed an intention to limit judicial review to gross errors pertaining to jurisdiction (there, criticising jurisdictional error's nomenclatorial pre-cursor, the *ultra vires* doctrine) is a "fairy tale"⁸³ or a "fig leaf",⁸⁴ the plurality stated that, in the same way that the preconditions, conditions and scope of decision-making power turns on an analysis of the conferring-statute, so too does the judgment of the extent of error which will result in an otherwise legal decision lacking the characteristics to be a valid decision in law turn on construction of the relevant statute.⁸⁵ The common law principles which inform the construction of these statutes, their Honours said, "reflect longstanding qualitative judgments about

⁸² Ibid 133 citing *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; *Jadwan Pty Ltd v Department of Health and Aged Care* (2003) 145 FCR 1; *Baxter v NSW Clickers' Association* (1909) 10 CLR 114; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1.

⁸³ Lord Woolf of Barnes, 'Droit Public – English Style' (1995) 57 *Public Law* 66.

⁸⁴ Sir John Laws, 'Illegality: the problem of jurisdiction' in Supperstone and Goudie (eds), *Judicial Review* (1992) 67.

⁸⁵ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133-134.

the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of legislative intention to the contrary”.⁸⁶ On that premise, it was concluded that “[a] statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance [with a condition required to be observed in the course of a decision-making process]”; a threshold which will not ordinarily be met where such non-compliance could have made no difference to the impugned decision.⁸⁷

- 60 On that basis, the plurality held that, while the Tribunal breached the implied condition required to be observed in the decision-making process in misapprehending and misapplying the criterion which related to the timing of the making of Mr Hossain’s visa application, that breach could have made no difference to the outcome given that the Tribunal was not satisfied that the public interest criterion was met.⁸⁸

Nettle and Edelman JJ

- 61 While agreeing with the plurality’s orders, Justice Edelman, and Justice Nettle, each wrote separately. I have already briefly touched on both these judgments above momentarily in the context of breaches of procedural fairness, but it is worth looking at them again in regard to what their Honours said about materiality.

⁸⁶ Ibid 134 citing Alan Robertson, ‘Is Judicial Review Qualitative?’ in Bell et al (eds), *Public law Adjudication in Common Law Systems: Process and Substance* (2016) 243.

⁸⁷ Ibid 134-135.

⁸⁸ Ibid 136.

- 62 Justice Nettle, agreeing substantially with the reasons Justice Edelman gave, stated two things of significant import for the purposes of this paper. First, his Honour, adding to Justice Edelman’s example of a circumstance in which an error is jurisdictional irrespective of its materiality, stated that “another such circumstance is where a decision maker is required to make a decision by reference to a single specified criterion. In such a case, the decision maker’s error will be a jurisdictional error [irrespective of whether it is material]”.⁸⁹ Second, although not quite as explicit as Justice Edelman, his Honour appeared to draw an important distinction between the residual discretion to grant relief and a finding of jurisdictional error; but suggested that both may, in certain circumstances, “depend on a backward-looking test of whether there could have been a different outcome”.⁹⁰
- 63 Justice Edelman went further. His judgment, facts aside, opened with the distinction the two categories of error: errors that have the consequence that the decision maker had no authority to make the decision (jurisdictional errors); and errors that appear on the face of the record, irrespective of whether the decision maker had authority to make the decision (non-jurisdictional errors).⁹¹ His Honour briefly stepped through the point of demarcation between them, but not without noting the difficulty that has been

⁸⁹ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137 citing *Kabir v Minister for Immigration and Citizenship* (2010) 118 ALD 513.

⁹⁰ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 138.

⁹¹ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 142.

created in attaching the consequential labels of “nullity” and “void” to the first kind of error.⁹²

- 64 On materiality, his Honour turned to the test propounded by the majority in *Project Blue Sky* to “ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid”.⁹³ As opposed to a binary approach to construction, his Honour stated that:

... the question is always one of construction of the legislation: which breaches of a provision does the legislation, either expressly or, more commonly, impliedly, treat as depriving the decision maker of power? Just as it is unlikely to be concluded that Parliament intended to authorise an unreasonable exercise of power, 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.⁹⁴

- 65 To illustrate the operation of materiality in this regard, Justice Edelman relied on the decision of the High Court in *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627. In that case, the Refugee Review Tribunal, though sending notice to the first applicant and instructing him to inform the other applicants of the hearing (which he did), failed to comply with ss 441A and 441G of the *Migration Act 1958* (Cth) in failing formally to send notice to those other applicants. In refusing to invalidate the decision of the Tribunal on

⁹² *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 143 citing Justice Leeming, ‘The Riddle of Jurisdictional Error’ (2014) 38 *Australian Bar Review* 139 at 148-149.

⁹³ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 145 citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390.

⁹⁴ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 146.

that basis, the Court said that the “admitted absurdity of the outcome is against acceptance of the conclusion the legislature intended that invalidity be the consequence of departure from any of the procedural steps leading up to the hearing”.⁹⁵ His Honour then turned to similar decisions of the High Court in *Craig, Kirk and Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, summarising his position to the effect that:

although the issue will always be one of construction of the express or implied terms of the statute, an error will not usually be material, in this sense of affecting the exercise of power, unless there is a possibility that it could have changed the result of the exercise of power. In other words, materiality will generally require the error to deprive a person of the possibility of a successful outcome.⁹⁶

66 To conclude, it is worth noting that his Honour drew an important distinction (important, in the sense that it marks a departure from earlier authority) between materiality at the point of location of jurisdictional error, and the residual discretion to refuse relief. To this, his Honour said:

The concept of materiality, whether it is express or implied, is necessary for a conclusion that (i) a decision is beyond power or (ii) whether or not the decision is beyond power, there is an actionable error of law on the face of the record. In contrast, the residual discretion arises if certiorari would otherwise be available for one of those reasons.... Although the residual discretion is not confined to being ‘forward looking’, it contrasts with the usual consideration of

⁹⁵ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 citing *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 at 640.

⁹⁶ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 147.

materiality... which looks backwards to whether the error would have made any difference to the result.⁹⁷

- 67 The errors of the Tribunal in *Hossain* were found to be not material to the decision, and therefore not jurisdictional. The appeal was dismissed with costs.

Concluding remarks

- 68 The correctness of the approach posited by *Hossain* has not been revisited despite any criticism it has since received. It seems unlikely to be reviewed any time soon, particularly in light of recent decisions such as *Nathanson*, *LPDT* and *SZMTA*, all of which illustrate a strong application of the materiality threshold in the manner conceived in *Hossain*.
- 69 To return to Professor Whitmore's characterisation of our law as inert: in the 60 years since his article was published, he may be disappointed to see that the operation of Parkinson's Law has in fact meant that the public service still seems to fill any void left in front of it, but justifiably he could feel vindicated in the role that the materiality threshold plays in striking an effective balance between the promotion of efficiency in administrative decisions and curial oversight.

⁹⁷ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 148.