JUDICIAL REVIEW OF TRIBUNAL DECISIONS—THE NEED FOR RESTRAINT

By Dennis Pearce*

The legal profession has for so long been accustomed to the idea of decisions being able to be reviewed through a hierarchy of courts that it has come to regard this practice as ordained. It is true that some limitations on appeals are included in legislation but these are in the main based on monetary limits and are less concerned with the nature of the subject-matter under appeal. There is a pervading notion that ultimately a "right" decision will be given by an appellate court. If all cases could only reach the final appeal court, correct decisions would always be obtained. This pursuit of the grail of the right decision will, in fairness, be affected by the view of a litigant's legal adviser as to whether or not an appeal is likely to succeed. But the bringing of an appeal is as likely to be affected by the depth of the client's pocket and the effect that the delays encountered in the appeal process will have on him. The wealthy litigant whose affairs are not disadvantaged by the need to resolve speedily the issue between him and his opponent has available the luxury of multiple opportunities to attempt the resolution of a dispute.

The possibility of litigation advancing through a series of courts with the consequent burden of costs is often a deterrent to action being brought. The courts may be open to all but they are really only available to those who can afford to pay or who can so arrange their affairs as to be able to afford to lose. Whether it is right that multiple avenues of appeal should be provided litigants in the courts is a question not relevant to this article. The issue here is whether it is appropriate that tribunals should become an adjunct to this system. Should a person who seeks review of a governmental decision by a tribunal find himself caught in a series of appeals from that tribunal decision? It will be submitted that he should not be subject to this risk because the tribunal is there to provide a function different from that which has resulted in the perceived need for there to be a hierarchy of courts.

The role of the courts is not only to resolve the dispute before it but also to state the relevant law correctly. In many areas the courts will be themselves making the law—a law that has been developed and moulded by them over many years without legislative intervention. But more likely nowadays is that the courts will be involved in the interpretation of a statute and, in fulfilling this duty, the courts will be indicating to members of the community how they should go about organizing their affairs to comply with the directives of the legislature. Our society thus has a system whereby experts in the law specify what the law is and apply that law so expounded to the facts that have brought the dispute before the court. The function of tribunals is very different. At the federal level a tribunal cannot

* LL.B. (Adel.), LL.M., Ph.D. (A.N.U.); Professor of Law, Australian National University.

finally determine a question of law.[1] This does not mean that it cannot pronounce upon the law,[2] but any such pronouncement has no binding effect. It does not pass into the "law of the land" as an authoritative statement that can only be ignored at peril. While State tribunals are not affected by this constitutional constraint, tribunal expositions of the law do not carry the authority of judicial pronouncements. The primary task of tribunals is to resolve disputes between the parties involved. Where the dispute is between citizen and government, the resolution of the dispute will usually be achieved by the tribunal determining what is the "best" decision in the circumstances. The judicial element in the dispute resolution process may thus well be subservient to the administrative element. This may not, however, necessarily represent the balance of the functions being performed in the case of a consumer appeals tribunal where the tribunal will be carrying out a task more akin to that of a court. In between these extremes are bodies such as industrial tribunals and town planning review bodies whose task partakes of a mixture of functions—judicial, administrative, and even legislative in some cases, for example, the making of pay awards. Many of the disputes that are resolved by these sorts of tribunals could have come before the courts. But it has been thought necessary to provide an alternative means of resolution because of the view that the disputes can be more satisfactorily resolved by means other than the judicial processes. There may be many reasons for this—cost, speed of resolution, the need for informality, the necessity for specialist knowledge, and often most importantly, the fact that courts are inhibited from conducting a merits review.

It is suggested that judicial review of tribunal decision-making should take these factors into account. Except in cases where it is necessary to expound the law, a court is no more likely to provide the "right" solution to a problem than is a tribunal. An analogy may be drawn between review of tribunal decisions and the resolution of factual questions by courts. Often—perhaps too often—the courts are concerned to resolve only factual disputes. When so acting, they are doing no more than carrying out a necessary function for society that there be an independent arbiter qualified to preside over disputes between members of the society. There is no reason why a judge should be any better at fulfilling this role than any other impartial member of the community who is capable of listening to both sides of a dispute and weighing the likelihood of competing assertions. That the courts recognise this fact is shown by the reluctance to interfere with findings of juries or for appeal courts to substitute their view of the facts for that of the lower court. This reluctance to interfere on the part of the appellate courts illustrates a recognition that in certain areas other bodies can do a job as well as the appellate court. It is only if the lower court has gone totally astray that the appellate court believes that it must intervene. The theme of this article is to argue that the courts should show at least an equal reluctance to interfere with decisions arrived at by tribunals.

---

[1] See Campbell, "The Choice Between Judicial and Administrative Tribunals—Constitutional and Other Legal Limitations" (1981) 12 F.L.Rev. 24.

[2] *Ibid.*

Perhaps the two most significant features of tribunals are the expertise of their membership and the comparative informality of their procedure. Tribunals do not necessarily comprise persons who have legal qualifications. Even where such qualifications are held, they are usually combined with close knowledge of the particular field of the tribunal's jurisdiction. To add to this expertise, it is common to find the tribunal comprising more than one member. Frequently a chairman will be supported by one or more other members who are drawn from persons having direct vocational experience in the field of activity with which the tribunal is concerned. It is essential that any process for the review of tribunal decision-making must bear in mind that the tribunal members are likely to know a great deal about the topic that comes before them. Judicial appointees are expected to be generalists—highly competent ones but generalists just the same. It is one of the most remarkable features of our court system that, in an age of increasing specialisation, judges are still expected to be able to understand and pronounce upon widely differing topics. But even allowing for the undoubted competence of the persons appointed to the bench and the apparent confidence with which they essay alien territory, it is surely wise to acknowledge expertise in others where it is seen to exist.

Informal procedures are adopted to enable decisions to be arrived at without regard necessarily to the rules of evidence and without the constraints that may be imposed by the traditional adversarial procedures followed in the courts. This is of particular significance when one takes into account the fact that tribunals are likely to be dealing with applicants who are not well-educated, may well not have a good command of the English language and who, most significantly, are likely to be unrepresented. The problem brought to the tribunal is likely also to be an immediate one for the applicant, for example, the payment of a pension, the right to a licence. Speedy and final resolution of such an issue is important. Avoidance of cost is essential. To lock an applicant into a prospective appeal structure will defeat many of the reasons for establishment of tribunals.

Finally, in relation to these general issues, the decision a tribunal is trying to arrive at is the right decision for the resolution of the particular dispute before it. While consistency in administration is important, it does not have the significance of the judicial doctrine of *stare decisis*—that courts should follow previous decisions. A tribunal decision does not have to fit within a series of precedents that bind, as distinct from providing guidance to, an administrator.

If these factors are not recognised it is difficult to see the role to be given to tribunals in our overall system of government. If tribunals are treated as if they are some part of the hierarchy of judicial bodies they will probably be found to perform a most inadequate role in relation to the development of the law. It may possibly be that courts, given a difference in approach, could perform a function similar to tribunals. Tribunals structured in their present form cannot do what courts do. If on the other hand tribunals are seen as bodies established to resolve speedily, informally and expertly disputes between citizens and government, they will be able to perform an essential function in our society which courts as presently structured cannot perform. Such a function, however, will not be able to

be properly carried out if the tribunals are subject to continuous judicial interference. It is desirable, therefore, to consider the main grounds for judicial intervention and to suggest the manner in which these might best be applied in the supervision of tribunals by courts. It is recognised that there must be supervision because tribunals, like most bodies exercising power over a given subject matter, are wont to expand their activities beyond the bounds laid down for them in the empowering legislation. But courts need to recognise that they are as likely to give way to this temptation as other bodies. Dixon J., talking of judicial review of inferior courts by the prerogative writs, noted that:

> there has ever been a tendency to draw within the scope of the remedy provided by the writ complaints that the inferior court has proceeded with some gross disregard of the forms of law or the principles of justice. But this tendency has been checked again and again . . .[3]

It is in fact in the area of control of tribunals that the courts have often demonstrated a willingness and a capacity to broaden their power base. The revival of error of law on the face of the record in *R.* v. *Northumberland Compensation Appeal Tribunal; ex parte Shaw*[4] and the broadening of the notion of jurisdictional error in *Anisminic Ltd* v. *Foreign Compensation Commission*[5] are famous examples.

The courts on occasions seem to recognise that they may be overstepping the mark in interfering with an expert tribunal but they equally show a reluctance to leave tribunals to carry out their task without close supervision. A good example of this somewhat schizophrenic approach is again provided by Dixon J.—this time in *R.* v. *Hickman; ex parte Fox.*[6] There his Honour commented that the determination of the matters that fell within the jurisdiction of a coal industry tribunal were not entirely appropriate for resolution by the courts. Nonetheless he indicated that it was the duty of the courts to resolve the issue and the only method available to them was to have regard to legal rules of construction and analytical reasoning. This reluctance to allow tribunals to determine jurisdictional facts will often involve a court in overriding a decision reached by a body that may be more expert in seeing the totality of an industry than the court. In the result, narrow principles of interpretation may be substituted for the pragmatic conclusions that are likely to be adopted by the expert body.[7] This issue is returned to below.

The grounds employed by the courts to review the decisions of tribunals are the familiar heads of jurisdictional error, error of law, *ultra vires* and natural justice. It is common also to find a statutory right of appeal being given to seek review of a decision of a tribunal on a "question of law". References to an error of law should be read as encompassing this ground also. For the purposes of this article these grounds can be briefly defined in the following terms. Jurisdictional error arises when a tribunal with a

[3] *Parisienne Basket Shoes Pty Ltd* v. *Whyte* (1937) 59 C.L.R. 369, 389.
[4] [1952] 1 K.B. 338.
[5] [1969] 2 A.C. 147.
[6] (1945) 70 C.L.R. 598, 614.
[7] *E.g.* in addition to *Hickman's* case, *R.* v. *Connell; ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 C.L.R. 407.

circumscribed power endeavours to deal with a matter outside that power. The issue may arise at the outset of a hearing because the body claims the right to deal with a matter not entrusted to it. An error going to jurisdiction may also arise in the course of proceedings or at the end if the tribunal attempts to make an order that it has no power to make. Error of law arises most simply where a tribunal misinterprets legislation that is relevant to its inquiry. However, the courts have also characterised as issues of law the drawing of conclusions from facts as found by a tribunal.[8] Indeed the ground has been seen as encompassing the fact finding process itself with the courts on occasions indicating that an error of law arises if the finding of fact cannot be supported in any way by the evidence.[9]

The ground of *ultra vires* covers much the same field as jurisdictional error in that it contemplates that the tribunal has acted in excess of its power. It also embraces such notions as the tribunal reaching its decision without regard to relevant factors or by having regard to irrelevant factors; the tribunal acting for an improper purpose; or acting so unreasonably that its decision can find no support in the eyes of reasonable persons. It may extend to the tribunal determining an issue without having sufficient evidence to justify its conclusion[10]—although this ground has also been categorised as an error of law or as an error going to jurisdiction.

Natural justice contemplates that the parties to an application before a tribunal must be allowed to put their case fully and are entitled to have their claim determined by an unbiased adjudicator.

Since the *Anisminic*[11] decision, some doubt has been raised as to whether these should be regarded as separate grounds of review or whether they are encompassed within the broad notion that all errors go to the jurisdiction of a tribunal. *Anisminic* seemed to leave errors of law out of the general jurisdictional sweep up, thereby imposing some limitation on the review powers of the courts. Clauses purporting to oust the jurisdiction of the courts might be effective if the error was one of law not going to jurisdiction; *certiorari* would lie only if the error appeared on the face of the record; prohibition might not be available. But the English courts with Lord Denning in the forefront, have shown some desire to hold that an error of law also deprives a tribunal of its jurisdiction, thereby allowing judicial review in all cases.[12] Australian courts have always demonstrated a reluctance to see all errors as going to jurisdiction[13] and, as will be shown, have reaffirmed this attitude since *Anisminic*.

---

[8] *Edwards (Inspector of Taxes)* v. *Bairstow* [1956] A.C. 14; *The Australian Gas Light Company* v. *The Valuer-General* (1940) 40 S.R. (N.S.W.) 126.

[9] *Ibid.*

[10] *E.g. Coleen Properties Ltd* v. *Minister of Housing and Local Government* [1971] 1 W.L.R. 433; *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014.

[11] [1969] 2 A.C. 147.

[12] *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56; *In re A Company* [1980] 3 W.L.R. 181, 187 *per* Lord Diplock; but *cf. South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 3 W.L.R. 318.

[13] *E.g. Posner* v. *Collector for Inter-State Destitute Persons (Victoria)* (1946) 74 C.L.R. 461; *R.* v. *Evatt; ex parte The Master Builders' Association of New South Wales (No. 2)* (1974) 132 C.L.R. 150.

Before commenting upon the appropriateness of the application of these grounds of review to tribunals, some raw statistics may be of interest just simply to show the dimension of the issue under discussion. Of the 1750 decisions digested in *Australian Current Law Digest* for 1979 and 1980, about 70 involved appeals from decisions of tribunals.

The decision of a tribunal was overruled by a court in a little more than 40 per cent of the cases. The basis for overturning the decision of the tribunal was divided surprisingly evenly between the grounds of review set out above, although want of jurisdiction was the most frequently cited basis of challenge.

Turning now to the application of the grounds of review to tribunals, their most noteworthy feature is often said to be their "flexibility". This splendidly polyhedral word—other dictionary meanings include "pliable", "manageable", "versatile", "adaptable"—is really a euphemism for "discretionary". The grounds are so vague and have been used so indiscriminately by the courts that it is difficult to identify any clear principles which enable the grounds to be accurately defined. If one takes error of law as an example—and the same issue arises where a statutory right of review on a question of law is provided—some courts have gone so far as to say that a question of law arises immediately following the initial fact finding and at the stage in the decision-making process when inferences are being drawn from those facts.[14] If this approach is adopted, every decision can be said to raise a question of law after the initial fact finding process has been completed. This simply allows a court to interfere with the decision if it disagrees with the conclusions drawn from particular facts. The issue is exacerbated if the courts take their inquiry back into the fact finding area by adopting as a ground of review the requirement that substantial evidence has to exist to justify a decision.[15] These interpretations of "errors of law" are devices, and need to be recognised as such, for allowing a court, at its discretion to interfere with a decision with which it does not agree. *Ultra vires*, with its emphasis on the need to have regard only to relevant considerations, also allows a court to characterise a decision reached by a tribunal as void according to the desire to interfere. No objective criteria of relevance exist until the court has determined what are those criteria and the matter is therefore left open for judicial review at will.

---

[14] *E.g. Farmer* v. *Cotton's Trustees* [1915] A.C. 922, 932; *Federal Commissioner of Taxation* v. *Broken Hill South Limited* (1941) 65 C.L.R. 150, 154. See the discussion of this view by Mason J. in *Hope* v. *The Council of the City of Bathurst* (1980) 54 A.L.J.R. 345, 347.

[15] It is suggested that this ground of review can be justified—and even then somewhat dubiously—only if the circumstances referred to in the Administrative Decisions (Judicial Review) Act 1977 (Cth) s. 5(3) are established. That sub-section provides that the "no evidence" ground is only to be made out where:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

It is in regard to these grounds that the courts need to be most aware of the matters mentioned above that should constrain their desire to overturn tribunal decisions. An over-ready classification of a conclusion reached by a tribunal as an error of law where the issue is in truth that the court would not itself have drawn that conclusion is a self-defeating practice. It undermines the confidence of the tribunal in its own decision-making capabilities. It also destroys the confidence of members of the public in the tribunal and indeed in the tribunal system itself. The independent tribunal system will collapse if applicants find themselves caught up in the snakes and ladders of court appeals. This will result in either the abandonment of the tribunal review system as a fruitless exercise or to the by-passing of the tribunals in favour of direct court action. Neither prospect ought to be contemplated with equanimity by any members of our society—and particularly not the judiciary. The restraint on judicial review for error of law urged by Lord Radcliffe in *Edwards (Inspector of Taxes)* v. *Bairstow*[16] needs to be borne in mind. His Lordship, having observed that the words of the Act were to be taken as specifying the limits within which the issue in question had to be decided, continued:

> But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the Commissioners . . . is not "erroneous in point of law".[17]

His Lordship considered that this approach should be adopted not because of the expertise of the tribunal (*sed quaere*) but because "in the interests of the efficient administration of justice" the decision of the tribunal ought only to be upset if it had been "positively wrong in law".[18]

Much the same remarks apply in the case of the relevancy of circumstances that a court considers are pertinent to the resolution of an issue. Clearly there will be matters to which no tribunal properly understanding its task can pay heed. But the tribunals are expert in their fields and may well be aware that matters that do not seem relevant at first sight, should be taken into account in reaching a decision. This may particularly be so in the case of industrial or price fixing tribunals.

The application of what Lord Reid in *Anisminic* called "the narrow original sense" of jurisdictional error[19] can also raise questions as to the appropriateness of a court as a review body. As mentioned previously, the pragmatic resolution of the scope of jurisdiction may be a sounder basis for dispute resolution than a narrow, statutory construction approach. This will be especially so if there is no other suitable body for the resolution of the dispute. It is not satisfactory for a court to hold that particular decisions fall outside the scope of a tribunal's power when this leaves a person affected without a review body to which to turn. There is no question but that the courts will need to resolve problems of competing

[16] [1956] A.C. 14.
[17] *Id.* 33.
[18] *Id.* 38.
[19] [1969] 2 A.C. 147, 171.

jurisdictions and restrain attempts by tribunals arbitrarily to widen their jurisdiction. But if the choice is between jurisdiction being vested in a review body or no review being available at all, it would seem wiser to lean towards the interpretation of the issue adopted by the tribunal broadening the scope of its jurisdiction rather than confining it. An example of this is the subtle distinction drawn by the High Court in *Potter* v. *Melbourne and Metropolitan Tramways Board*[20] between, on the one hand, an order of the Board demoting an employee as a punishment and on the other, such an order demoting the employee because he was said to be incompetent. In the former case an appeal lay to an appeals tribunal while in the latter there was no avenue of review available to the employee. The task of explaining the validity of the distinction to an employee affected by a demotion because he was said not to be doing his job properly would not be easy.

It would seem appropriate in cases concerned with the scope of jurisdiction of a tribunal for courts also to take into account the length of time that a tribunal has exercised a particular power. The longer it has acted without legislative intervention, the more reluctant should the courts be to take a narrow view of jurisdiction.

It cannot be questioned but that the courts must have the final responsibility for placing meaning on legislation. Tribunals must frequently essay an interpretation but that interpretation has no binding force until endorsed by a court. Nevertheless it is suggested that in regard to this issue also the courts should bear in mind the fact that tribunals will be expert in the field to which the legislation relates. In many cases, terms used in legislation giving a tribunal jurisdiction or having to be applied by a tribunal in the exercise of its jurisdiction will have an underlay of technical understanding. The courts invariably turn to dictionaries for the meaning of words and are reluctant to hold that words may have a specialized meaning. But courts should recognise the purpose underlying legislation and not be too ready to confine words by resort to older dictionary definitions. Words are to be given their current meaning and there may be nuances in relation to a particular industry that the courts should be prepared to acknowledge may well be within the knowledge of the relevant tribunal. Here again the courts should be slow to reverse a long standing interpretation of a provision, particularly one that it was open to the legislature to alter.[21] The Commonwealth's new legislation requiring courts to adopt a purposive approach to interpretation is pertinent in this context.[22] The reason for vesting a particular jurisdiction in a tribunal may indicate that the vesting formula should not be interpreted with undue literalism.

The last of the traditional grounds of review is that of natural justice. It is essential that the courts ensure that an applicant before a tribunal be given a fair hearing. The courts have always been prepared to tailor the procedure required to be followed by a tribunal to suit that tribunal: this is recognised in the notion of variable content in the application of the

[20] (1957) 98 C.L.R. 337.

[21] But *cf. May* v. *Secretary, Department of Transport* (Federal Court of Australia, 12 May 1981, unreported decision of Ellicott J.).

[22] Acts Interpretation Act 1901 (Cth), s. 15AA.

audi alteram partem rule. There seems to have been a willingness to accept that tribunals should have a discretion to adopt that procedure which best suits their jurisdiction. Intervention usually occurs where an applicant has been clearly disadvantaged by the procedure adopted. The recent House of Lords decision in *Bushell* v. *Secretary of State for the Environment*[23] would seem to acknowledge, at least tacitly, that due process merely for the sake of due process has to be weighed against the cost to the community of reopening issues that have been investigated and apparently finished. The decision lends support to the arguments put previously that the role of tribunals in our present society should not be undermined by over-zealous courts. If a tribunal has adopted a procedure that is fair in all the circumstances, the courts should not impose procedural obligations that might have been applicable if a court were dealing with the matter but which are not those usually followed by the tribunal. It is significant that the House of Lords in *Bushell's* case overruled an order of the Court of Appeal that would have set aside the decision in issue—one which had been arrived at four years previously after an inquiry lasting 100 days.

The foregoing comments are not intended to denigrate the importance of judicial review. They merely invite a consideration of the respective roles of courts and tribunals and suggest that courts should show restraint in the exercise of their supervisory powers. There is much to indicate that Australian courts are so acting, but before turning to some recent statements indicative of this attitude, it is instructive to look to North American approaches.

It seems that in Canada the courts have pursued their traditional supervisory role[24] but in the United States of America a doctrine of what is known as "deference to reasonable administrative interpretations" has long been recognised.[25] This doctrine has two implications for present purposes. While the courts affirm that ultimate responsibility for the interpretation of laws is theirs, nonetheless:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law".[26]

This will particularly be the case if the interpretation is one of long standing.[27] In *National Labor Relations Board* v. *Hearst Publications, Inc.*[28] it was said in relation to the review of decisions where questions of fact and law arise:

---

[23] [1980] 3 W.L.R. 22.

[24] *Cf.* Hogg, "Judicial Review: How Much Do We Need?" (1974) 20 McGill Law Journal 157.

[25] *Cf.* Woodward and Levin, "In Defense of Deference: Judicial Review of Agency Action" (1979) 31 Administrative Law Review 329. It is of interest to note that the bill which is criticised in that article, S. 111, (introduced by Senator Dale Bumpers), was passed by the United States Senate but has encountered difficulties in the House of Representatives: see (1979) 65 American Bar Association Journal 1465.

[26] *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission* (1968) 390 U.S. 261, 272.

[27] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Daniel* (1979) 439 U.S. 551, 566, note 20.

[28] (1944) 322 U.S. 111.

> where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.[29]

And also:

> Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record.[30]

This notion of deference to administrative decisions is not intended to amount to an abdication of responsibility by the courts. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia".[31] Rather, as put by Powell J. recently in the *International Teamsters* case:

> This deference is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time.[32]

While in Australia there has been no direct acknowledgement of this notion of deference, there are a number of indications that in regard to some aspects of tribunal decision-making, something akin to the approach of the United States courts is appearing.

The High Court in *Uranerz (Aust) Pty Ltd* v. *Hale*[33] equated tribunal fact finding with that of lower courts. Where an issue of credibility arises, a reviewing court should only exceptionally interfere with the findings of the tribunal. This ruling is of particular significance because the matter had gone from the Northern Territory Workmen's Compensation Tribunal to the Supreme Court pursuant to a power allowing the Court to deal with the appeal "by way of rehearing". The rehearing in this case was conducted on the transcript of the evidence and the documentary material before the Tribunal. The Supreme Court had reversed the Tribunal's decision. The High Court, in restoring the Tribunal's finding, said (*per* Gibbs J., with whom the other members of the Court agreed):

> If a rehearing is conducted solely on written material . . . the appellate court should generally defer to the conclusion on a question of credibility formed by the tribunal from whom the appeal is brought and whose members saw and heard the witnesses.[34]

This decision affords significant recognition to the fact finding capabilities of tribunals. The conclusion was essential to their status. If courts could readily overturn findings based on the acceptance or otherwise of the veracity of witnesses, the function of tribunals in the dispute settling process would be largely destroyed.

The Federal Court, when considering appeals from the Administrative Appeals Tribunal (which can only be brought on a "question of law") has

---

[29] *Id.* 131.
[30] *Id.* 130.
[31] *American Ship Building Company* v. *National Labor Relations Board* (1965) 380 U.S. 300, 318.
[32] *Supra* n. 27.
[33] (1980) 30 A.L.R. 193.
[34] *Id.* 198.

indicated that an appeal cannot succeed unless it can be demonstrated that there is no basis on which the Tribunal could have reached the conclusion to which it came.[35] Fisher J. in the *Blackwood Hodge* case put it as follows:

> It is my firm view that this court when hearing appeals from a Tribunal constituted for the purpose of reviewing decisions of this nature [the classification for duty of goods under the Customs Tariff Act 1966 (Cth)] should adopt a restrained approach. Parliament contemplated that only in exceptional circumstances should the decision of the Tribunal not be the final decision.[36]

Contrast, however, Ellicott J. in *May* v. *Secretary, Department of Transport*[37] who reversed a decision of the Tribunal on what he said "may seem a fine point".[38] Somewhat similar was the overturning of the decision of Davies J. in *Re Drake and Minister for Immigration and Ethnic Affairs*[39] for what was in effect the omission of the statement that he had reached his own conclusion having regard to, but not being bound by, the minister's policy.[40] The approach posited by Fisher J. properly takes account of the fact that the Administrative Appeals Tribunal is the only body that is dealing with Customs Tariff matters regularly and concedes that the Tribunal may know a good deal about its operation. It would seem that the same could be said about the exercise by the Administrative Appeals Tribunal of its jurisdiction on other topics; and the like view is apposite to many other expert tribunals.

Another example of an indication of a desire to leave tribunals to carry out their task free from intensive judicial oversight is provided by the Federal Court ruling in *Director-General of Social Services* v. *Chaney*.[41] There it was held that a conclusion reached by the Administrative Appeals Tribunal in the course of proceedings leading ultimately to a decision was not a "decision" for the purposes of founding an appeal to the Federal Court. This line of reasoning was endorsed by Lockhart J. in *Riordan* v. *Parole Board of the Australian Capital Territory*[42] when rejecting an application under the Administrative Decisions (Judicial Review) Act 1977 (Cth) to review actions of a parole board. A like approach was evidenced in a different context by the decision of Gobbo J. in *R.* v. *Small Claims Tribunal and Dean; ex parte R.A.C.V. General Insurance Pty Ltd.*[43] There his Honour dismissed an application for prohibition to restrain the Small Claims Tribunal entering upon an inquiry that was claimed to be outside its jurisdiction. He said that it was for the Tribunal first to determine the jurisdictional issue and this step had to be taken before any assertion of an improper assumption could be brought before the Court.

---

[35] *Blackwood Hodge (Australia) Pty Ltd* v. *Collector of Customs, New South Wales (No. 2)* (1980) 3 A.L.D. 38; *Board of Control of Michigan Technological University* v. *Deputy Commissioner of Patents* (1981) 34 A.L.R. 529.
[36] *Supra* p. 49.
[37] Federal Court of Australia, 12 May 1981, unreported decision.
[38] *Id.* p. 16.
[39] (1979) 2 A.L.D. 162.
[40] *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577.
[41] (1980) 31 A.L.R. 571.
[42] (1981) 34 A.L.R. 322.
[43] (1981) 3 A.L.N. No. 25.

All three decisions recognise that if the courts are to be called upon to pronounce on the validity of every step in a tribunal's handling of a case, the reason for vesting jurisdiction in the tribunal will be defeated. The same kind of thinking is evidenced by the attitude of courts in Australia to the maintenance of the distinction between error of law and jurisdictional error. The English approach towards broadening jurisdiction to encompass most errors of law has been resisted here. There have been a number of recent decisions in which an error has been held to be within jurisdiction and accordingly not reviewable either because prohibition was being sought[44] or because an ouster clause applied.[45] While these decisions might be regarded as applications of technical rules of law, such is the discretionary nature of the grounds of review that an error of law can be held as going to jurisdiction with only a little manipulation on the part of the courts. That the courts have chosen not so to act may be indicative of a desire not to be involved in too great a supervisory role as regards the tribunals' decisions. United States courts have adopted such an approach. Marshall J., delivering the opinion of the Supreme Court in *McKart* v. *United States*[46] said:

> The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.

A number of reasons were advanced in support of this view. The principal of these were that it was normally desirable for the agency to develop the necessary factual background; that agency decisions are frequently of a discretionary nature or frequently require expertise; and that it is more efficient for the administrative process to go forward without interruption than it is for the parties to seek aid from the courts at various intermediate stages. These reasons seem to apply equally to judicial review of administrative tribunals in the Australian context.

Associated with the preceding topic is the question of the exercise of jurisdiction by a court that overlaps or duplicates the jurisdiction of a tribunal. For example, under section 10 of the Administrative Decisions (Judicial Review) Act the Federal Court may refuse to grant an application where relief by way of appeal or review may be provided by another court or a tribunal. In the United States it is usual for courts to refuse to deal with matters until all administrative remedies have been exhausted. Marshall J., again in *McKart's* case, put the reasons for this approach thus:

> judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers

[44] *E.g. R.* v. *Evatt; ex parte The Master Builders' Association of New South Wales (No. 2)* (1974) 132 C.L.R. 150; *R.* v. *Stanley; ex parte Redapple Restaurants Pty Ltd* (1976) 13 S.A.S.R. 290.

[45] *E.g. R.* v. *Ward; ex parte Bowering* (1978) 20 S.A.S.R. 424; *R.* v. *Di Fazio; ex parte General Motors-Holdens Limited* (1979) 20 S.A.S.R. 559; and see further *infra*.

[46] (1969) 395 U.S. 185, 194.

> of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.[47]

Again these arguments seem apt in relation to review of tribunal action. However, there is no indication at present that Australian courts are attracted by this approach. For example, in *Salmar Holdings Pty Ltd* v. *Hornsby Shire Council*[48] the New South Wales Court of Appeal was prepared to entertain an application for a declaration notwithstanding the fact that the Local Government Act 1919 (N.S.W.) established a Board of Appeal to deal with the dispute in question. Mason J.A. did, however, note that the existence of a jurisdiction in a tribunal "becomes an important matter for consideration in deciding whether the discretion to grant relief should be exercised".[49] In the first case[50] that arose under the Judicial Review Act, Toohey J. ruled that a challenge to a decision of the Repatriation Commission should proceed notwithstanding the fact that proceedings had also been commenced before the Repatriation Tribunal. His Honour considered that, as it was claimed that an error of law existed in the Commission's decision, proceedings under the Judicial Review Act were likely to be as expeditious as those before the Tribunal. If indeed the alleged error of law was the *sole* basis on which the decision was to be challenged, the ruling of Toohey J. is supportable. However, if it were only an attempt to attract what was really a discretionary review by the court, it would seem preferable for the matter to have been left with the Tribunal. In cases of this kind, it might be wise for the court to conduct something of a preliminary inquiry in an endeavour to ascertain the strength of the claim that the decision is reviewable on a point of law. It is also suggested that the discretion alluded to by Mason J.A. in *Salmar's* case should be exercised bearing in mind the factors mentioned by Marshall J. in *McKart's* case.

While it is probable that, at least for the present, courts will be slow to forego (or postpone) the exercise of their jurisdiction, they have at least not acted to deprive tribunals of the right to exercise jurisdiction concurrently with the courts. In *Collector of Customs (NSW)* v. *Brian Lawlor Automotive Pty Ltd*[51] the Federal Court ruled that the Administrative Appeals Tribunal could, in effect, exercise concurrent jurisdiction with the courts in being able to overturn a decision on the ground that it was legally invalid.

---

[47] *Id.* 194-195.
[48] [1971] 1 N.S.W.L.R. 192.
[49] *Id.* 201; *cf. Pyx Granite Co. Ltd* v. *Ministry of Housing and Local Government* [1960] A.C. 260.
[50] *Kelly* v. *Coats* (1981) 35 A.L.R. 93.
[51] (1979) 41 F.L.R. 338; (1979) 2 A.L.D. 1.

Finally, the attitude of Australian courts to sections that seek to prevent courts from reviewing decisions of tribunals is worth noting. Privative or ouster clauses, as they are commonly known, have received scant treatment over the years from English courts. It is said that it is only if a decision is not void that such a clause can deny the court jurisdiction to review it. The widening of the range of decisions said to be void in *Anisminic*[52] and the later attempts to add decisions affected by error of law to this category, seem in practical terms to have negated the use of such clauses.[53] Australian courts have, however, always been prepared to pay greater heed to ouster clauses than have the English courts. Dixon J. in *R.* v. *Murray; ex parte Proctor*[54] said:

> They [ouster clauses] have been read . . . as meaning that, where the tribunal has made a bona-fide attempt to exercise its authority in a matter relating to the subject with which the legislation deals and capable reasonably of being referred to the power possessed by the tribunal, the acts of the tribunal shall not be invalidated. . . .[55]

In *Ex parte Farley & Lewers Ltd; Re Transport Workers' Union of Australia (N.S.W. Branch)*[56] Wallace P. said:

> I am not in favour of a clearly and widely worded privative clause appearing as here in an Act constituting and governing a tribunal of the stature of the Industrial Commission being avoided except in the remote contingency of serious and manifest lack of jurisdiction. The High Court in my opinion has always tended (except perhaps in constitutional cases) to give a considerably wider effect to privative clauses than have the courts of England.[57]

This same attitude is reflected in the recent decision of the New South Wales Court of Appeal in *Houssein* v. *Under Secretary, Department of Industrial Relations and Technology and Industrial Commission of New South Wales*[58] where the exclusory effect of an ouster clause in the Industrial Arbitration Act 1940 (N.S.W.) was implemented.[59]

As has been mentioned previously, Australian courts have sought to retain the distinction between errors going to jurisdiction and errors of law. If this distinction is maintained, there is of course room for the operation of ouster clauses. This was acknowledged, albeit reluctantly, by Hunt J. in *Jet 60 Minute Cleaners Pty Ltd* v. *Brownette*[60] in relation to a clause limiting review of decisions of the Consumer Claims Tribunal to jurisdictional errors and breaches of natural justice. The error in that case was held to be a non-jurisdictional error of law and accordingly the ouster clause operated to prevent the Supreme Court's intervention.[61] However,

---

[52] [1969] 2 A.C. 147.
[53] But *cf. South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 3 W.L.R. 318.
[54] (1949) 77 C.L.R. 387.
[55] *Id.* 398.
[56] (1966) 67 S.R. (N.S.W.) 171.
[57] *Id.* 175.
[58] [1980] 2 N.S.W.L.R. 398.
[59] See also the cases cited *supra* n. 40-41.
[60] (1981) 3 A.L.N. No. 19.
[61] This is not to say that ouster clauses will not be by-passed if a court considers that an error goes to jurisdiction. For example, while not referring to the *Anisminic*

ouster clauses are crude devices to prevent the courts from exercising a legitimate supervisory role over the actions of tribunals. The perceived need for their inclusion in legislation reflects the view of the legislature that there is something undesirable about judicial review in this area. How much better would it be if courts could dispell this distrust by their own actions. They can achieve this by showing restraint in their intervention. While the ouster clause may be seen as a device used by the executive (through its control over the legislature) to attempt to isolate its actions from the application of the rule of law, in another sense it is an indictment of the judiciary that such clauses are enacted. It means that the courts have failed to indicate clearly what is the basis for their interference with tribunal action. They have been seen to denigrate the status of tribunals instead of supporting the performance by them of their essential role in our present society. The courts are obliged to ensure that tribunals do not improperly exceed their powers, that they apply the law correctly and that they give parties before them a fair hearing. But this supervision must not become such that the courts appear to take over the decision-making function of the tribunals. Tribunals must not be added to the judicial hierarchy or their legitimate role of dispute resolution in a manner different from, and without the constraints imposed upon, courts will be lost. A failure to recognise this will almost certainly result in more attempts to exclude judicial review altogether. Courts and tribunals each have a function to perform and each is equipped to perform best its own function.

---

case, the South Australian Full Court held that the Industrial Commission had exceeded its jurisdiction in failing to take account of a relevant consideration when declining jurisdiction: *R.* v. *Industrial Commission of South Australia; ex parte Minda Home Incorporated* (1975) 11 S.A.S.R. 333. See also *Ex parte Wurth; Re Tully* (1954) 55 S.R. (N.S.W.) 47.