Case Note

Hossain v Minister for Immigration and Border Protection: A Material Change to the Fabric of Jurisdictional Error?

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Abstract

In *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780, the High Court of Australia unanimously endorsed a pragmatic approach to jurisdictional error. This case note argues that the decision, which introduces a threshold of materiality not quite in line with earlier judicial authority, occasions a less-than-desirable reformulation of the concept. It argues that the Court's reliance on factual circumstances extends beyond the established principles of statutory interpretation, in relation to context and precedent, and administrative law, in relation to the constitutionally significant legality/merits distinction. The case note argues that the dissenting judgment of Mortimer J in the Federal Court of Australia decision in *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31 is preferable as it avoids the departures from principle inherent in the High Court's reasoning and ultimately carries fewer problematic implications for individuals attempting to challenge administrative decisions.

I Introduction

In *Hossain v Minister for Immigration and Border Protection*,[1] the High Court of Australia unanimously endorsed a pragmatic approach to jurisdictional error by building a requirement of materiality into a concept that has 'long eluded definition'.[2] This case note compares the three judgments handed down by the Court with the dissenting judgment of Mortimer J in the Full Court of the Federal Court of Australia.[3] It argues that the approach adopted by the High Court, which relies on an analysis of factual circumstances, extends beyond the established principles of statutory interpretation and administrative law. The case note concludes that Mortimer J handled the difficulties presented by the concept of jurisdictional error in a manner that avoided departures from principle.

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1 (2018) 92 ALJR 780 ('*Hossain*').

2 Chief Justice James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21(2) *Public Law Review* 77, 84.

3 *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31, 41–57 [35]–[101] ('*Hossain (FCAFC)*').

In Part II, this case note identifies the issues before the High Court in *Hossain*. Part III examines the judgments of the High Court in *Hossain* and Mortimer J in *Hossain (FCAFC)* against established interpretative principles in relation to context and precedent. In Part IV, the case note analyses those judgments against established principles of administrative law in relation to the constitutionally significant legality/merits distinction.

II The High Court Decision in *Hossain*

Hossain concerned two criteria that the Administrative Appeals Tribunal was required to consider in deciding whether or not to grant a partner visa under s 65 of the *Migration Act 1958* (Cth) ('*Migration Act*'). First, the application was required to be validly made within 28 days of the applicant ceasing to hold a previous visa 'unless the Minister [was] satisfied that there [were] compelling reasons for not applying' that criterion.[4] Second, the applicant was required not to have outstanding debts to the Commonwealth, 'unless the Minister [was] satisfied that appropriate arrangements [had] been made for payment'.[5] The Tribunal refused to grant the visa on the basis of non-satisfaction of both criteria. The error was attached to the first, in that the Tribunal had assessed whether there were compelling reasons at the time the application was made, rather than at the time the Tribunal made its decision.[6] As the Tribunal had misunderstood and misapplied the Regulation, the error was premised on an incorrect interpretation of the statute.

The determination of whether the error was jurisdictional, as opposed to a non-jurisdictional error of law, was critical because of the privative clause contained in s 474 of the *Migration Act*.[7] That section attempts to exclude judicial review of migration decisions by providing that decisions made under the Act are final and conclusive;[8] not susceptible to review by any court,[9] and not subject to the constitutional writs that function as judicial review remedies.[10] Privative clauses cannot oust the original jurisdiction of the High Court, entrenched in s 75(v) of the *Australian Constitution*, to review administrative decisions affected by jurisdictional error.[11]

The High Court's determination that the error was non-jurisdictional meant that the privative clause was operative. As the Tribunal's decision was final, conclusive, and not susceptible to judicial review remedies, it was upheld.[12] This conclusion was reached through a method of analysis that departed, at times, from established understandings of statutory interpretation and the legality/merits distinction integral to administrative law. The identified departures will be considered in turn.

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4 *Migration Regulations 1994* (Cth) sch 2 cl 820.211(2)(d)(ii), sch 3 criterion 3001.
5 Ibid sch 2 cl 820.223(1)(a), sch 4 criterion 4004.
6 *Hossain* (2018) 92 ALJR 780, 785 [10] n 5 (Kiefel CJ, Gageler and Keane JJ).
7 Ibid 793–4 [65] (Edelman J).
8 *Migration Act 1958* (Cth) s 474(1)(a).
9 Ibid s 474(1)(b).
10 Ibid s 474(1)(c).
11 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('*Plaintiff S157/2002*').
12 *Hossain* (2018) 92 ALJR 780, 789 [38] (Kiefel CJ, Gageler and Keane JJ), 798 [39] (Nettle J), 797 [80] (Edelman J).

III Principles of Statutory Interpretation: Context and Precedent

A *The Understanding before* Hossain

Section 65 of the *Migration Act* has historically been regarded as a statutory precondition in the form of a subjective jurisdictional fact. The decision-maker is required to possess a state of satisfaction before the power and obligation to grant a visa arises.[13] The state of satisfaction must be formed reasonably and on a correct understanding of the law.[14] The duty imposed on the decision-maker under s 65 has been described as

> binary: the Minister is to do one or other of two mutually exclusive legally operative acts — to grant the visa under s 65(1)(a), or to refuse to grant the visa under s 65(1)(b) — depending on the existence of one or other of two mutually exclusive states of affairs (or 'jurisdictional facts') — the Minister's satisfaction of the matters set out in each of the sub-paragraphs of s 65(1)(a), or the Minister's non-satisfaction of one or more of those matters.[15]

In the context of statutory preconditions, the process of discerning what facts,[16] opinions, procedural steps or judgments are jurisdictional,[17] and, in turn, what errors are jurisdictional, has long been regarded as an exercise in statutory interpretation.[18] Bateman and McDonald argue that the 'statutory approach' became dominant over the last 40 years,[19] culminating in the 'cementing of legislative purpose as the ultimate reference point for the functional consequences of unlawful administrative action'.[20] The seminal authority on that approach is expressed in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky v Australian Broadcasting Authority*:

> A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of

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13 See, eg, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651 ('*Eshetu*'); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 620–21 (Gummow ACJ and Kiefel J), 643–4, 648 (Crennan and Bell JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 179–80 (French CJ), 194–5 (Gummow, Hayne, Crennan and Bell JJ); *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, 35 (Gageler and Keane JJ) ('*Wei*').

14 *Eshetu* (1999) 197 CLR 611, 651–4 (Gummow J), quoting *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430 and citing *Buck v Bavone* (1976) 135 CLR 110, 118–9 (Gibbs J).

15 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179, 188–9 [34] (Crennan, Bell, Gageler and Keane JJ) (citations omitted).

16 *Timbarra Protection Inc v Ross Mining NL* (1999) 46 NSWLR 55, 64.

17 Spigelman, above n 2, 85.

18 See, eg, Chief Justice Robert French AC, 'Statutory Interpretation and Rationality in Administrative Law' (Speech delivered at the Australian Institute of Administrative Law National Lecture, Canberra, 23 July 2015) published in (2015) 82 (Nov) *Australian Institute of Administrative Law ('AIAL') Forum* 1.

19 Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153.

20 Ibid 164.

> purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'.[21]

The 'statutory approach' marks a rejection of absolute propositions as to what constitutes jurisdictional error,[22] in favour of an inquiry into the subject matter and specific statutory context.[23] The central concept is legislative *intention*: whether it was a statutory purpose that an error would render a decision invalid.[24] This analysis is consistent with the aim of interpretation: to ascertain the intention manifested by the words used by the legislature.[25]

Accepting the centrality of statutory interpretation in the process of identifying jurisdictional requirements and, in turn, jurisdictional errors, it is important to recognise the limits of the interpretative principles that have developed both within and outside of administrative law. Legislative intention may be discerned by an examination of the statute's text, context and purpose,[26] having regard only to 'extrinsic materials to which reference might properly be made'.[27] These principles are an aspect of the common law.[28] The modern common law approach,[29] expounded in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[30] considers context in its widest sense. It includes the existing state of the law and the mischief that, by legitimate means, one may discern the statute was intended to remedy.[31] Judicial pronouncements on context have, so far, stopped short of suggesting that factual circumstances influence constructional choice.

B *A Shift in Understanding: The High Court's Reasoning*

In *Hossain*, despite acknowledging that the task was a constructional one,[32] the High Court considered factual circumstances to assess whether the identified statutory breach was material to the Tribunal's decision. In determining whether the error was jurisdictional, the inquiry extended beyond the statutory text and purpose, and beyond the conventional understanding of context.

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21 (1998) 194 CLR 355, 390–1 [93] ('*Project Blue Sky*'), quoting *Tasker v Fullwood* [1978] 1 NSWLR 20, 24.

22 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573–4 [71]–[73] ('*Kirk*'), signifying a refusal to 'mark the metes and bounds of jurisdictional error' and a disavowal of the 'rigid taxonomy' expressed in *Craig v South Australia* (1995) 184 CLR 163 ('*Craig*').

23 *Area Concrete Pumping Pty Ltd v Inspector Childs* (2012) 223 IR 86, 108. The *Project Blue Sky* approach has been applied repeatedly since: see, eg, *Plaintiff S157/2002* (2003) 211 CLR 476, 488–9 (Gleeson CJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 225, 227.

24 French, above n 18, 6.

25 See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 264–5 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–9 (Gummow J); *River Wear Commissioners v Adamson* [1877] 2 App Cas 743, 763 (Lord Blackburn).

26 *Project Blue Sky* (1998) 194 CLR 355, 384 [78].

27 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 409 (Brennan J).

28 French, above n 18, 5.

29 Westlaw, *Laws of Australia* (at 15 April 2013) 25 Interpretation and Use of Legal Sources, '25.1 Australian Domestic Laws' [25.1.790].

30 (1997) 187 CLR 384 ('*CIC Insurance*').

31 Ibid 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

32 *Hossain* (2018) 92 ALJR 780, 787–8 [27]–[28] (Kiefel CJ, Gageler and Keane JJ), 793 [64], 794–5 [67] (Edelman J).

The majority judgment of Kiefel CJ, Gageler and Keane JJ endorsed an interpretative presumption that the statute incorporates a threshold of materiality.[33] Non-compliance with a statutory term will not meet the threshold if, in the circumstances in which the decision was made, compliance could have made no difference to the decision.[34] The Tribunal did breach the implied condition attached to s 65 by misconstruing and misapplying the 28-day criterion. However, its non-satisfaction as to the debt criterion meant that the breach could not have made a difference to the decision in fact made.[35] Put differently, although the majority acknowledged that the state of satisfaction was not based 'on a correct understanding and application of the law',[36] because of the factual circumstances, an error that otherwise would have gone to jurisdiction was regarded as non-jurisdictional.

Justice Edelman acknowledged that construction does not depend solely on the text, and that statutes are construed in light of the 'principles and history of judicial review'.[37] His Honour referred to the common law 'principle' that the consequences intended by Parliament to follow an error will usually depend on the gravity of that error.[38] It is questionable whether this is, in fact, a principle, as opposed to a piecing together of judicial authorities that briefly mention, but do not explain, the role of 'gravity'. Citing *Project Blue Sky*, his Honour framed the question as: 'which breaches of a provision does the legislation, either expressly or, more commonly, impliedly, treat as depriving the decision maker of power?'.[39] Justice Edelman stated that it is unlikely the legislature would have intended that an immaterial error would render a decision invalid.[40] His Honour explained that an error will not usually be material, and thus will not 'affect' the exercise of power,[41] unless there is a possibility that the error could have altered the decision. Generally, this means that an error is not material unless it has deprived the applicant of 'the possibility of a successful outcome'.[42] This, according to his Honour, is 'the usual implication that an immaterial error will not invalidate a decision made under [s 65]',[43] where materiality is assessed against the existing facts before the Tribunal.[44]

Justice Nettle substantially agreed with the reasons of Edelman J,[45] but explained circumstances that depart from the 'general' rule, where an error might be jurisdictional despite not depriving a party of the possibility of a successful outcome.[46]

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33 Ibid 788 [29].
34 Ibid 788 [30].
35 Ibid 789 [35].
36 Ibid 789 [34].
37 Ibid 793 [64].
38 Ibid.
39 Ibid 794 [67].
40 Ibid 794–5 [67].
41 Ibid 795 [71], relying on *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82] in response to the Minister's submission that the error must 'affect' the decision to be jurisdictional in nature.
42 *Hossain* (2018) 92 ALJR 780, 795–6 [72].
43 Ibid 796 [76].
44 Ibid 796–7 [78].
45 Ibid 789 [39].
46 Ibid 789 [40].

In arriving at these conclusions, the High Court referred to specific statements in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[47] *Project Blue Sky*,[48] *Minister for Immigration and Citizenship v SZIZO*,[49] *Kirk*,[50] and *Wei*.[51] Although these cases did broaden the considerations that the court may have regard to, arguably, the reasoning in *Hossain* extends their reach. The trajectory of considering factual circumstances, and its limits, may be charted as follows. In *Peko-Wallsend*, Mason J suggested in the context of a failure to consider a mandatory relevant consideration that '[a] factor might be so insignificant that the failure to take it into account could not have materially affected the decision'.[52] *Peko-Wallsend* related to a discretion, whereas *Hossain* concerned a jurisdictional fact. Given that the case law has drawn a distinction between the two kinds of statutory creatures, it is difficult to accept an extension of *Peko-Wallsend* in the absence of an express judicial statement as to why it should be applied in a different context.

In *Project Blue Sky*, the High Court considered the public inconvenience that would result if non-compliance with a statutory term rendered a decision invalid. Members of the public should be in a position to order their affairs on the basis of apparently valid decisions.[53] The Court was concerned with the expense, inconvenience and loss of investor confidence that would follow a finding that a decision was legally ineffective.[54] Public inconvenience does not relate to the particular consequences of the particular breach, but to inconvenience that follows a particular interpretation and inconvenience that Parliament could not have intended. The inquiry remains premised on objective intention, as ascertained by the mechanisms of the statutory scheme and the way in which interests are *necessarily* affected. That is, it is concerned with the inevitable effects on certain groups of people as opposed to the specific effects on individuals appearing before the court. The public inconvenience test has not come to prominence in recent years,[55] and the courts that have engaged with it have placed it within, and not apart from, the conventional interpretative task.[56] Inconvenience is relevant when it assists the court in arriving at the meaning intended by Parliament.[57] Once that meaning is discerned, it sets precedent.

In *SZIZO*, the High Court found that there was no legislative intention that any departure from procedural steps would result in invalidity 'without consideration of the extent and consequences of the departure'.[58] The Court went on to say:

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47 (1986) 162 CLR 24 ('*Peko-Wallsend*').
48 (1998) 194 CLR 355.
49 (2009) 238 CLR 627 ('*SZIZO*').
50 *Kirk* (2010) 239 CLR 531.
51 (2015) 257 CLR 22.
52 *Peko-Wallsend* (1986) 162 CLR 24, 40.
53 *Project Blue Sky* (1998) 194 CLR 355, 392 [97] (McHugh, Gummow, Kirby and Hayne JJ).
54 Ibid 392 [98].
55 Moreover, the three cases that did refer to public inconvenience were at State level: see *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206; *Minister Administering Crown Lands Act 1989 v New South Wales Aboriginal Land Council* [2018] NSWLEC 26 (8 March 2018); *Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd* [2009] WASC 125 (14 May 2009).
56 See Graeme Hill, 'Applying *Project Blue Sky* — When Does Breach of a Statutory Requirement Affect the Validity of an Administrative Decision?' (2015) 80 (May) *AIAL Forum* 54, 74 n 98.
57 *CIC Insurance* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
58 *SZIZO* (2009) 238 CLR 627, 640 [35].

> The respondents acknowledge that they suffered no injustice by reason of the Tribunal's omission and they do not take issue with the Full Court's characterisation of the result in the circumstances as being 'rather absurd'. The admitted absurdity of the outcome is against acceptance of the conclusion that the legislature intended that invalidity be the consequence of departure from any of the procedural steps leading up to the hearing.[59]

Read in context, the extracted sentence is not quite aligned with the analysis offered in *Hossain.* It remains contingent on statutory interpretation, with the conventional focus on purpose and legislative intention. This is consistent with the Court's conclusion that, as the purpose of the provision was to facilitate a fair hearing, the legislature would not have intended that a breach that did not amount to a denial of procedural fairness would invalidate a decision. Relevantly, procedural requirements are often regarded as non-jurisdictional.[60] On this analysis, the direct connection between purpose, intention, and the circumstances of the breach is different to the implied or presumed threshold of materiality endorsed in *Hossain*.

In *Kirk*, the High Court introduced the assessment of 'gravity' by quoting Jaffe's 'opinion'[61] that 'the word "jurisdiction" is not a metaphysical absolute but simply expresses the gravity of the error'.[62] The Court did not explain to what extent Jaffe's 'opinion' should form part of the Australian understanding of jurisdictional error, if at all. It is difficult to accept that this singular reference grounds what Edelman J identified as a 'principle' or 'common restriction' in *Hossain*.[63]

Wei was heard by a three-person bench of the High Court. The majority, Gageler and Keane JJ, stated that jurisdictional error 'consists of a *material breach* of an express or implied condition of the valid exercise of a decision-making power conferred by [the *Migration Act*]'.[64] The notion of 'material breach' is different to the notion of materiality proffered in *Hossain*. It focuses on the particular non-compliance with the statutory requirement and considers the extent of the breach in relation to that requirement. It does not concern how material the error was to the final decision. This is a subtle but essential distinction.

In the cases preceding *Hossain*, references to materiality or gravity were directed to the operation of the statutory scheme as opposed to the wider factual scenario. If *Hossain* represents an extension of what the court can consider, or a novel use of materiality, the extension is problematic. It cannot be reconciled with two key aspects of statutory interpretation: that the wide context does not include the specific facts at hand; and that the rules of precedent apply to interpreted provisions.[65]

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59 Ibid (citations omitted).

60 *Plaintiff S157/2002* (2003) 211 CLR 476, 504, 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Project Blue Sky* (1998) 194 CLR 355, 389–90 [92].

61 *Kirk* (2010) 239 CLR 531, 570–71 [64].

62 Ibid, quoting Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70(6) *Harvard Law Review* 953, 963.

63 *Hossain* (2018) 92 ALJR 780, 793–4 [64]–[65].

64 *Wei* (2015) 257 CLR 22, 32 [23] (emphasis added).

65 *Laws of Australia*, above n 29, '25.4 Judicial Statements' [25.4.260]. See also *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646, 661; *R v London Transport Executive; Ex parte Greater London Council* [1983] QB 484, 490–1; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270.

C *The Preferred Understanding: Justice Mortimer's Reasoning*

Dissenting in the Full Court of the Federal Court, and finding that the matter should have been remitted to the Tribunal for reconsideration, Mortimer J adopted a reasoning process that avoided potential inconsistencies with the established principles of statutory interpretation.

Justice Mortimer began by acknowledging that whether or not an error is jurisdictional depends on the proper construction of the statutory power in accordance with the principles set out in *Project Blue Sky*.[66] Although her Honour saw materiality as a proper consideration, on her view, materiality or gravity, in the sense described by Jaffe,[67] went to *how* the decision-maker was required to and *in fact did* discharge the statutory task.[68] Her Honour's analysis accords with the line of authority considered above. Gravity and materiality relate to the nature of the error relative to the power under consideration, such that where an error is made, the decision-maker's jurisdiction is 'constructively unexercised'.[69]

If the High Court, in *Hossain* and in earlier cases, has consistently treated jurisdictional error as a conclusion arrived at after an exercise in construction,[70] that conclusion would conventionally hold precedent value. The Court's reasoning might now lead to the result that in one circumstance, an error will be non-jurisdictional, while in another, the same error will be jurisdictional. This could undermine the certainty attached to the precedent effect of interpreted statutes, particularly so in cases that relate to established jurisdictional facts. While flexibility is generally desirable, in this sense it carries 'the risk of uncertainty and administrative inconvenience'.[71] Uncertainty is problematic for potential litigants, particularly those faced with a privative clause, when assessing the threshold question of whether an administrative decision can be challenged.

Justice Mortimer did not accept that 'the very same error — misunderstanding the proper construction and operation of a visa criterion — can be jurisdictional in one case and non-jurisdictional in another'.[72] Instead, her Honour outlined what she preferred as the correct approach, namely:

> to accept an error of this kind is jurisdictional and then to ask whether there is utility in the grant of relief to an applicant, because of a second basis for the decision on review. The answer to that question will depend on the circumstances of each case.[73]

Justice Mortimer found that if the matter was remitted to the Tribunal, the debt criterion would no longer be an issue given that, at the time of the Court proceedings,

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66 *Hossain (FCAFC)* (2017) 252 FCR 31, 46 [57].
67 Ibid 48–9 [65].
68 Ibid.
69 Ibid 49 [65].
70 Ibid 46 [57]; *Hossain* (2018) 92 ALJR 780, 787–9 [27]–[28] (Kiefel CJ, Gageler and Keane JJ); *Kirk* (2010) 239 CLR 531, 570–71 [64], 574 [73].
71 Stephen Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17(2) *Australian Journal of Administrative Law* 92, 104.
72 *Hossain (FCAFC)* (2017) 252 FCR 31, 49 [67].
73 Ibid [70].

Mr Hossain had repaid the Commonwealth debt.[74] Thus, looking forward to a potential re-examination by the Tribunal, there was utility in granting relief. On this approach, the factual circumstances are considered after the statute has been interpreted, when the utility question is at hand. This means that the precedent effect of an interpreted provision is not clouded by fact-specific considerations and the wide context identified in *CIC Insurance*[75] is not extended beyond proper limits.

IV Principles of Administrative Law: The Legality/Merits Distinction

A *The Understanding before* Hossain

The process whereby the Court, in the face of a privative clause, accepts an error, but labels it as non-jurisdictional, necessarily involves some form of deference to the administrator. Arguably, the High Court's decision in *Hossain* facilitates a pragmatic fact-based deference unsupported by Australian authority. The notion of deference has implications for the constitutionally significant legality/merits distinction.

In an influential article, Justice Ronald Sackville identified the twin pillars of administrative law: first, that courts are not concerned with the merits of administrative decisions, but only with their legality; and second, that because the courts are responsible for declaring the law, they must bear the exclusive responsibility of performing that task.[76] The judgment of Brennan J in *Attorney-General (NSW) v Quin*[77] might be seen as the seminal authority for Sackville's statements of principle. An essential characteristic of the judicature is that it declares and enforces the law which determines the limits of administrative power.[78] In performing that task, the court is not to balance competing policy considerations or inquire into the merits of administrative decisions. This is an instance of the constitutional separation of powers and the rule of law,[79] infringement of which will put the legitimacy of the courts at risk.[80] Justice Gageler described the distinction as follows: 'To the judges the law; to the others the merits'.[81]

The legality/merits distinction, and the judgment of Brennan J in *Quin*, informed the High Court's treatment of the doctrine that emerged from the judgment of Stevens J in the United States ('US') Supreme Court case of *Chevron USA Inc v*

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74 Ibid 56–7 [100].
75 (1997) 187 CLR 384.
76 Justice Ronald Sackville, 'The Limits of Judicial Review of Executive Action — Some Comparisons between Australia and the United States' (2000) 28(2) *Federal Law Review* 315, 319–23. See also Stephen Gageler SC, 'The Legitimate Scope of Judicial Review: The Prequel' (2005) 26(3) *Australian Bar Review* 303, 304.
77 (1990) 170 CLR 1, 35–6 ('*Quin*').
78 Ibid, citing *Marbury v Madison* (1803) 5 US (1 Cranch) 137, 177 (Marshall CJ).
79 Sir Anthony Mason, 'Judicial Review: A View from Constitutional and Other Perspectives' (2000) 28(2) *Federal Law Review* 331, 337.
80 *Quin* (1990) 170 CLR 1, 35–6 (Brennan J).
81 Gageler, above n 71, 104.

Natural Resources Defense Council Inc.[82] The *Chevron* doctrine allows the judiciary to defer to agency interpretations where a statute is silent or ambiguous with respect to a specific issue.[83] The question for the US court is not whether the interpretation is correct, but whether it is reasonable.[84] *Chevron* deference has been justified on the basis of the repository's fact-finding and policy-making competence, its electoral accountability, and the implication that Congress, in drafting the statute in ambiguous terms, intended to leave the interpretative task to the administrator.[85]

In *Corporation of the City of Enfield v Development Assessment Commission*,[86] the High Court of Australia rejected *Chevron* deference. Whether it did so explicitly or only implicitly,[87] what is clear is that 'the Court regarded the doctrine as amounting to an abdication of the judicial responsibility to declare and enforce the law'.[88] First, the Court found that the *Chevron* doctrine, 'even on its own terms',[89] addressed competing interpretations of ambiguous statutory provisions. It did not concern the issue before the Court, which involved fact-finding of objective jurisdictional facts.[90] The Court acknowledged that, even in the US, it was unsettled as to whether the doctrine applied to agency interpretations of jurisdiction-defining provisions.[91] Second, the Court explained that the doctrine may have undesirable consequences, in that the decision-maker may choose to adopt one of many competing reasonable interpretations to fit the facts to the desired result, transforming legal issues into policy issues, abdicating judicial interpretative responsibility, and insulating decisions from judicial scrutiny.[92] Finally, the Court found that *Chevron* deference was inconsistent with basic principles of Australian administrative law, such as the legality/merits distinction discussed by Brennan J in *Quin*.[93]

The High Court has, however, accepted what Justice Gageler terms another kind of deference in the form of 'respectful regard for the judgment or opinion of … an expert [administrator]'.[94] On questions of fact and usage, the Court has attached weight to the opinion of administrators.[95] This development has, however, been described as a 'far cry' from building a notion of *Chevron* deference into Australian judicial review.[96] Instead, it appears to be more analogous to what Justice Gageler

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82 (1984) 467 US 837 ('*Chevron*').
83 Ibid 842–4.
84 Ibid 843.
85 Cass R Sunstein, 'Law and Administration after *Chevron*' (1990) 90(8) *Columbia Law Review* 2071.
86 (2000) 199 CLR 135 ('*Enfield*').
87 Compare *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, 712 [16] (Spigelman CJ); *Contra* Mason, above n 79, 339.
88 Mason, above n 79, 339.
89 *Enfield* (2000) 199 CLR 135, 151 [40].
90 Ibid.
91 Ibid 151–2 [41].
92 Ibid 152 [41]–[42].
93 Ibid 152–4 [43]–[44].
94 Justice Stephen Gageler, 'Deference' (2015) 22(3) *Australian Journal of Administrative Law* 151, 152.
95 See *R v Williams; Ex parte Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 153 CLR 402, 411; *Eshetu* (1999) 197 CLR 611, 655 (Gummow J); *Enfield* (2000) 199 CLR 135, 154–5 [45]–[48].
96 Peter Cane and Leighton McDonald, *Principles of Administrative Law* (Oxford University Press, 2nd ed, 2013) 157.

identifies as '*Skidmore* deference', emerging from the US Supreme Court case of *Skidmore v Swift & Co*.[97] *Skidmore* deference is different to *Chevron* deference because it involves a court giving weight to a question of interpretation that, on the statute's proper construction, is made a question for the court, rather than the administrator.[98] The judiciary retains interpretative authority.

B *A Shift in Understanding: The High Court's Reasoning*

The High Court's approach in *Hossain* might blur the constitutionally significant legality/merits distinction. In practical effect, the question of materiality facilitates a pragmatic fact-based deference. The administrator's misapplication or incorrect interpretation of a statutory test will be permitted to stand if the court, after inquiring into the factual circumstances, determines that the breach is immaterial to the decision made. The dangers of this approach are two-fold: not only could it amount to an abdication of judicial responsibility in the manner warned of in *Enfield*,[99] but it could also allow the judiciary to impinge on the executive role. In practical effect, the administrator might decide questions of law,[100] and the judiciary, when assessing materiality, might impermissibly inquire into the merits of the administrative decision. Against the Australian constitutional context, the rationale underpinning *Chevron* deference, and the rationale required to underpin *Hossain's* pragmatic deference, is not available to the Australian court.

Hossain represents a kind of deference not quite contemplated in *Chevron*.[101] Although *Enfield* concerned an objective jurisdictional fact, and *Hossain* concerned a subjective jurisdictional fact, the framework of *Hossain* is certainly closer to the form of deference contemplated and rejected in *Enfield* than the kind endorsed in *Chevron*. This is supported by the High Court's own reasoning in *Enfield*, whereby a jurisdictional fact was described as 'a criterion, satisfaction of which mandates a particular outcome',[102] the precise terminology that has been used to describe s 65. In *Enfield*, Gaudron J stated:

> Once is it appreciated that it is the rule of law that requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise, *it follows that there is very limited scope for the notion of 'judicial deference' with respect to findings by an administrative body of jurisdictional facts.*[103]

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97 323 US 134, 140 (1944).

98 Gageler, above n 94, 153.

99 (2000) 199 CLR 135, 152 [41] (Gleeson CJ, Gummow, Kirby and Hayne JJ), 158 [60] (Gaudron J).

100 As interpretative questions are questions of law: see *May v Military Rehabilitation and Compensation Commission* (2015) 233 FCR 397, overturned on appeal, but not on that point.

101 See, eg, *Crowell v Benson* 285 US 22, 56–7 (1932).

102 *Enfield* (2000) 199 CLR 135, 148 [28]. See also Aronson and Groves comparing deference to administrative determinations of the law with administrative findings of jurisdictional facts: Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 6th ed, 2017) 200.

103 *Enfield* (2000) 199 CLR 135, 158 [59] (emphasis added).

Allars calls this an accountability test, or an additional screening mechanism when jurisdictional facts are subject to judicial review.[104] If *Hossain* is an extension of *Chevron* deference, the extension is problematic. The rationale underpinning the US courts' acceptance of the *Chevron* doctrine is not present within the current Australian context. Although regard is had to the administrator's expertise, Australian courts have not made references to electoral accountability. In addition, there is no indication that the Australian courts have ever, overtly at least, treated vague statutory terminology as a reason for recognising that parliaments have allocated interpretative authority to administrators.

Perhaps more fundamentally, Australia's separation of powers doctrine has been described as more rigid than the US model.[105] The constitutional separation of powers is integral to Australian administrative law. The current understanding of the relationship between the branches of government is addressed in the High Court's unanimous endorsement of Lord Diplock's statement that

> Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.[106]

In *Craig*, the Court went on to say that:

> The position is, of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal.[107]

The presumption is that Parliament did not intend to confer interpretative authority on administrative decision-makers. Even so, Parliament's expression of intention is constrained by the constitutional separation of powers. It is difficult to reconcile these principles with the interpretative *presumption*, and not an express Parliamentary statement, endorsed by the judgments in *Hossain*: that the statute incorporates a threshold of materiality in the event of a breach, and jurisdictional error generally only arises when the threshold is met.[108] Against the constitutional context, the reasons handed down by the High Court do not disclose a rationale as to why a pragmatic fact-based deference is necessary or even justified.

Justice Gaudron's rejection of deference in *Enfield*, on the basis of the rule of law,[109] connects to the general judicial reluctance to decline to grant relief after finding that an error has occurred. It has long been recognised that a court may, depending on the circumstances of the case, exercise a discretion to refuse a remedy.

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104 Margaret Allars, '*Chevron* in Australia: A Duplicitous Rejection?' (2002) 54(2) *Administrative Law Review* 569, 587–90.

105 Spigelman, above n 2, 83; Bradley Selway QC, 'The Principle Behind Common Law Judicial Review of Administrative Action — The Search Continues' (2002) 30(2) *Federal Law Review* 217, 233.

106 *Craig* (1995) 184 CLR 163, 179, quoting *In re Racal Communications Ltd* [1981] AC 374, 383. See also Sackville, above n 76, 330.

107 *Craig* (1995) 184 CLR 163, 179.

108 *Hossain* (2018) 92 ALJR 780, 788 [29] (Kiefel CJ, Gageler and Keane JJ), 796 [76] (Edelman J), 789 [39] (Nettle J).

109 *Enfield* (2000) 199 CLR 135, 157–8.

In *Re Refugee Tribunal; Ex parte Aala*, the High Court quoted Gaudron J in support of the proposition that the discretion to refuse a remedy for a trivial breach of the rules of procedural fairness is not exercised lightly.[110] A remedy will only be denied where adherence to the rules of procedural fairness could not possibly have altered the final decision.[111] The standard is high,[112] such that the mere appearance that the decision would have been the same is insufficient.[113] The high standard protects against an impermissible judicial inquiry into the merits of the decision.

C *The Preferred Understanding: Justice Mortimer's Reasoning*

The reasoning adopted by Mortimer J in the Federal Court avoids some difficulties attached to the legality/merits distinction. It is true that, in exercising the discretion to refuse relief, a court might allow a decision involving an incorrect agency interpretation to stand. However, in reaching that conclusion, the court, and not the administrator, has performed the interpretative task. On Mortimer J's approach, a court may characterise particular errors as either jurisdictional or non-jurisdictional in every case, according to established principles and without regard to differing factual scenarios, and then impose a separate discretionary test for whether a remedy should not be granted. In so doing, the court acknowledges that the agency's misapplication of the statutory term goes to jurisdiction, but the analysis is divided into 'two separate questions': whether jurisdiction was exceeded, and whether a remedy should not issue.[114] This methodology is consistent with the established discretions to refuse remedies, including the trivial breach discretion.[115] The first question, within which the interpretative task is entirely contained, is non-flexible.[116] Facts are only considered within the second, and more flexible, question of discretion.

The High Court's determination in *Hossain* indicates that the materiality threshold carries a lower standard than that attached to the established discretions. As a result, there is now a greater possibility that no remedy will issue for what would, on application of established interpretative principles and without regard to factual circumstances, amount to a jurisdictional error. If the standard is not high, the process of deciding whether compliance with a statutory condition could have resulted in a different decision, or whether a party has been deprived of the possibility of a successful outcome, might encourage an inquiry into the merits of the decision. Justice Mortimer was aware of this possibility. Her Honour stated that

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110 (2000) 204 CLR 82, 107–8 (Gaudron and Gummow JJ), 89 (Gleeson CJ) ('*Aala*'). See also 136–7 (Kirby J).

111 Ibid 109.

112 Ibid 88–9 (Gleeson CJ), 109, 117 (Gaudron and Gummow JJ), 130–1 (Kirby J); *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 147.

113 Cane and McDonald, above n 96, 107–8.

114 *Aala* (2000) 204 CLR 82, 106–7 (Gaudron and Gummow JJ), 89 (Gleeson CJ), quoted in *Hossain (FCAFC)* (2017) 252 FCR 31, 55–6 [96].

115 For example, if there has been delay, waiver of rights or collateral motives: see *Aala* (2000) 204 CLR 82, 136–7 (Kirby J).

116 Akin to the non-flexible threshold question of whether a statute conditions an exercise of power upon observance of the principles of natural justice. Here, flexibility also arises in the second, circumstance-specific question: *Kioa v West* (1985) 159 CLR 550, 612 (Brennan J).

'the Court must be astute not to descend into merits review by endorsing what it considers to be the "inevitable" outcome given the reasoning of the Tribunal, which reasoning is affected by error'.[117]

Justice Mortimer offered an 'alternative analysis' of the facts of *Hossain*, on the basis of the materiality submission ultimately accepted.[118] Comparison of her Honour's analysis against that of the High Court indicates a potential blurring of the legality/merits distinction by the High Court. The Court treated the two bases for the Tribunal's decision as separate and independent — an error in relation to one criterion could not have affected the Tribunal's exercise of its review power or its approach to the other criterion.[119]

Justice Mortimer, however, identified that both criteria contain discretionary elements. A discretion is attached to what constitutes 'compelling reasons'[120] and 'appropriate arrangements'.[121] The Tribunal also has a discretion to decide when it will make its decision, including at what point the debt criterion should be met,[122] acknowledging that circumstances may change during the course of the review.[123] Justice Mortimer was not convinced that if the meaning of 'compelling reasons' was correctly understood the conclusion reached in relation to either the 28-day criterion or the debt criterion would certainly have been the same.[124] In relation to 'compelling reasons', there may have been matters in the material that would have caused the Tribunal to reconsider its approach to the respondent's circumstances.[125]

In relation to 'appropriate arrangements', the Tribunal, in maintaining an open and persuadable mind, might have exercised its discretion to delay the making of its decision so as to give the respondent time to satisfy the criterion.[126] The majority of the High Court correctly labelled this as 'conjecture'.[127] The point is not, however, that the discretion would necessarily have been exercised and that more time would have been given. Rather, Mortimer J's reasoning suggests that the mere possibility of the discretion being exercised means the outcome was not strictly inevitable. In deciding that the decision would have been the same, notwithstanding the discretionary elements of the statutory tests and the discussion of Mortimer J, the High Court appears to have broadened the circumstances in which a remedy will be refused and applied a lower standard than that which, for the purposes of the rule of law, is attached to the usual discretion to refuse a remedy. A lower standard increases the likelihood that an applicant who proves the existence of error will, nevertheless, be denied a remedy.

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117 *Hossain (FCAFC)* (2017) 252 FCR 31, 50 [72].
118 Ibid 49–55 [71]–[95].
119 *Hossain* (2018) 92 ALJR 780, 789–90 [41] (Nettle J), 790 [44] (Edelman J).
120 See above n 4 and accompanying text.
121 See above n 5 and accompanying text.
122 *Hossain (FCAFC)* (2017) 252 FCR 31, 50 [72].
123 Ibid 51–2 [77].
124 Ibid 50 [72].
125 Ibid 51 [75].
126 Ibid 51–2 [77].
127 *Hossain* (2018) 92 ALJR 780, 789 [36] (Kiefel CJ, Gageler and Keane JJ).

As Edelman J stated, the consideration of materiality 'looks backwards to whether the error would have made any difference to the result'.[128] Although looking backwards might be justified pragmatically, it puts the judiciary in the position of the decision-maker, where there is a risk of entering into the merits of the decision. According to Mortimer J's approach, the discretion to refuse relief involves a higher threshold, and the judiciary will not, through speculation, readily assert that the decision would have been the same. Whether there will be utility in remitter 'will depend on the particular visa criteria in issue, the state of the evidence *before the Court*, and the decision-maker's reasons'.[129] The test of utility looks forward, to whether it is worth putting the question before the Tribunal again. It retains flexibility while avoiding the constitutional implications associated with the High Court's reasoning.

V Conclusion

In *Hossain*, the High Court of Australia faced a difficult task. Jurisdictional error consists of 'undefined, probably undefinable content',[130] and, as the majority in *Hossain* quoted, 'new formulas attempting to rephrase the old are not likely to be more helpful than the old'.[131] This case note has argued that the threshold of materiality is one such formula. It is unhelpful because it conflicts with the established principles of statutory interpretation, in terms of contextual considerations and precedent. It also conflicts with the established principles of administrative law, in terms of the constitutionally significant legality/merits distinction. The solution offered by Mortimer J is preferable, as it differentiates between an exercise in construction and an exercise in the discretion to refuse relief. It is a standard solution: consistent with the authority on materiality and gravity, consistent with the principles of statutory interpretation, and consistent with the twin pillars of administrative law.

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128 Ibid 796 [74].

129 *Hossain (FCAFC)* (2017) 252 FCR 31, 56–7 [100] (emphasis added).

130 Justice Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38(2) *Australian Bar Review* 139, 150, quoting Chief Justice James Spigelman, 'Public Law and the Executive' (2010) 34(1) *Australian Bar Review* 10, 17.

131 *Hossain* (2018) 92 ALJR 780, 786 [17] (Kiefel CJ, Gageler and Keane JJ), quoting *Universal Camera Corporation v National Labor Relations Board*, 340 US 474, 489 (1951).