

CONSTITUTIONAL LAW: FEDERAL JURISDICTION  
AND RESHAPING INSTITUTIONS

**'JURISDICTIONAL' FACTS AND 'HOT' FACTS:  
LEGAL FORMALISM, LEGAL PLURALISM,  
AND THE NATURE OF AUSTRALIAN  
ADMINISTRATIVE LAW**

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*This article is a study of the interrelationship between two intellectual impulses in Australian administrative law — legal formalism and legal pluralism. It concerns the operation of jurisdictional fact review in planning and environmental cases, focusing on the line of case law that led to the High Court decision in Corporation of the City of Enfield v Development Assessment Commission (2000). The analysis shows that these two intellectual impulses are closely entwined in doctrine, but each operates on a different basis of what a 'fact' is. Facts from a legal formalist perspective are understood as objective and hard-edged while from a legal pluralist perspective they are more likely to be conceptualised as contested and uncertain.*

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## I INTRODUCTION

This article is an exploration of the interrelationship between legal formalism and legal pluralism in Australian administrative law. It focuses upon the operation of jurisdictional fact in planning and environmental cases, and in particular the line of case law that led to the High Court decision in *Corporation of the City of Enfield v Development Assessment Commission* ('*Enfield*').<sup>1</sup> That case is part of what is described as the 'resurgence' of jurisdictional fact review.<sup>2</sup> The concept of jurisdictional fact is recognised as an example of legal formalism while the subject matter of the case, planning law, is an example of legal pluralism. By examining the *Enfield* line of cases, not only can the interrelationship between legal formalism and legal pluralism be seen, but also how each of these concepts rests on different understandings about the nature of public administration.

This article is structured as follows. First, I provide a brief sketch of Australian administrative law, and the concepts of legal formalism and legal pluralism and how they are commonly understood to have operated in Australian administrative law. In Part III I focus upon fact-finding in administrative law and environmental law to illustrate how legal formalism and legal pluralism conceptualise administrative fact-finding, and thus the role of public administration, differently. This creates challenges in applying the concept of jurisdictional fact in environmental and planning cases. In Part IV I then illustrate these differences and concepts in the line of *Enfield* cases. In conclusion I argue my analysis offers the potential for a revised cartography of Australian administrative law.

Four caveats are important to note before starting. The first is this article is not an exhaustive analysis of jurisdictional fact, legal formalism, or legal pluralism. I am also acutely aware that my depictions of legal formalism and legal pluralism are painted with a very broad brush. This is because my objective is not to chart these ideas with pinpoint accuracy and more to get debate going about the legal culture of Australian administrative law. Webber describes the notion of legal culture as paying

attention to the texts of the law and to the distinctive ordering of priority, in different legal traditions, among these texts. But it also incorporates the broader range of considerations that actors routinely rely upon, sometimes implicitly,

<sup>1</sup> (2000) 199 CLR 135.

<sup>2</sup> Mark Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12 *Public Law Review* 17. See also *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 ('*Timbarra Protection Coalition*').

sometimes expressly, in their interpretation and application of the law: presumptions as to the underlying principles of justice; expectations as to institutional role (the role of courts vis-à-vis legislatures, the role of provincial versus central governments, the role of state regulation in relation to private ordering); general norms of social interaction and fair dealing emergent in particular social practices; and a sense of law's historical evolution and future potential.<sup>3</sup>

One aspect of this exercise is to question the narrative of Australian administrative law as being primarily a manifestation of legal formalism, but I am interested in encouraging greater exploration of how legal culture, judicial review doctrine, and understandings of public administration are co-produced.<sup>4</sup> I am of course not the first to explore the legal culture behind judicial review doctrine.<sup>5</sup> What is distinct about this contribution is its attempt to also integrate understandings of public administration and insights from areas of 'applied' administrative law into the analysis. I should stress I see this inquiry as very much a first step.

Second, I am aware that comparing two 'isms' — legal formalism and legal pluralism — and talking in terms of 'jurisdictional' and 'hot' facts results in a text that feels heavy with jargon. The use of jargon as an attempt to avoid hard questions is never desirable, but the use of isms and adjectives can also be an attempt to get the essence of things. It is in that spirit that I use it here.

Third, I am not interested in critique. The purpose of my inquiry is to try to map some of the complexities of administrative law rather than to damn or praise particular legal approaches, institutions or doctrines. In particular, there is real virtue in looking at how the same legal dispute can be characterised differently as it moves up the legal hierarchy.<sup>6</sup> Not only does this article show the range of legal possibilities in administrative law, but also how those understandings relate to understandings of public administration.

<sup>3</sup> Jeremy Webber, 'Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken' (2004) 29 *Australian Journal of Legal Philosophy* 27, 34.

<sup>4</sup> For my earlier attempts at exploring this in the context of merits review, see Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, 2007) ch 4.

<sup>5</sup> See Michael Taggart, "Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1; Mark Aronson, 'Process, Quality, and Variable Standards: Responding to an Agent Provocateur' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5.

<sup>6</sup> For a similar analysis in another jurisdiction, see Sidney Shapiro and Elizabeth Fisher, 'Chevron and the Legitimacy of "Expert" Public Administration' (2013) 22 *William & Mary Bill of Rights Journal* 465.

Fourth, my focus is primarily on the interplay between jurisdictional fact and planning and environmental law. This was the interrelationship in *Enfield*, and has been the interrelationship in a number of other cases.<sup>7</sup> These are also my own two areas of expertise. With that said, jurisdictional fact operates in many other areas of legal pluralism — immigration law for example.<sup>8</sup> It would be interesting and useful to engage in a similar inquiry in those other fields as well.

## II AUSTRALIAN ADMINISTRATIVE LAW: LEGAL FORMALISM AND LEGAL PLURALISM

This article began life as a paper as part of the conference to celebrate the life of Sir Zelman Cowen.<sup>9</sup> Cowen in many ways was a legal cartographer — he was interested in charting boundaries (both internal and external to the law<sup>10</sup>) in a diverse range of areas and exploring the challenges in that charting process. Cowen never wrote directly in the fields I work in — administrative law and planning and environmental law — but in reading his work I was reminded that the interface between those two areas of law is largely an interface between legal formalism and legal pluralism.<sup>11</sup> Australian judicial review doctrine is generally understood as a manifestation of the former, while ‘applied’ administrative law areas such as environmental and planning law are examples of the latter. Before proceeding further it is useful to explain what I mean by both these terms.

Legal formalism can be defined in many different ways, not always flattering.<sup>12</sup> Here, I use it to mean a style of legal reasoning that gives authority to

<sup>7</sup> See Part III(C) below.

<sup>8</sup> See, eg, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*‘Plaintiff M70’*).

<sup>9</sup> Zelman Cowen Conference, Melbourne Law School, The University of Melbourne, 26–27 March 2014.

<sup>10</sup> On internal and external approaches, see Christopher McCrudden, ‘Legal Research and the Social Sciences’ (2000) 122 *Law Quarterly Review* 632.

<sup>11</sup> This is also recognised by Cane: see Peter Cane, ‘The Making of Australian Administrative Law’ in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 314.

<sup>12</sup> See Christopher Forsyth, ‘Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law’ (2007) 66 *Cambridge Law Journal* 325, 326.

formal legal concepts.<sup>13</sup> In Australian administrative law, legal formalism can be understood to be the product of a number of factors (including legal education),<sup>14</sup> but is primarily due to the dominance of the written constitution.<sup>15</sup> This leads not only to the High Court understanding the judiciary's role 'strictly' due to the separation of powers but also to it exercising its powers in ways that adhere to the constitutional framework.<sup>16</sup> Thus, for example, the significance given in the case law to the prerogative writs in s 75(v) of the *Constitution*.<sup>17</sup>

Poole has suggested there are five features of formalist reasoning: 'an emphasis on rules and the avoidance of principles'; de-contextualising decisions under review; adherence to strict canons of statutory construction; the sidelining of international law; and conservatism.<sup>18</sup> The last two of these factors need not concern us here, but the first three have resulted in a commitment to ensuring that when courts are required to determine legal boundaries they do so by deploying 'formal, conceptual, and logical analysis'.<sup>19</sup> This has led to a body of administrative law doctrine in which the highly legalistic idea of 'jurisdictional error' not only dominates but also has, over the last decade or so, been strengthened.<sup>20</sup> Such a doctrine does indeed depend on the idea that statutes provide rigid frameworks that mark the boundaries of administrative power. Such boundaries can be policed through statutory construction and, theoretically, without reference to context. I will say more on this below.

Yet to only focus on legal formalism as it has manifested itself in the High Court's judicial review doctrine is to ignore two features of the Australian

<sup>13</sup> This is adapted from *ibid* 327–8. Forsyth relies on the analysis in P S Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987) 1–2.

<sup>14</sup> Taggart, above n 5, 7.

<sup>15</sup> Chief Justice J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.

<sup>16</sup> Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 83–4.

<sup>17</sup> *Craig v South Australia* (1995) 184 CLR 163; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

<sup>18</sup> Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 15, 25.

<sup>19</sup> Taggart, above n 5, 7, citing Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106.

<sup>20</sup> Note Chief Justice Spigelman has referred to it as the 'triumph' of jurisdictional error: Chief Justice Spigelman, above n 15, 85.

administrative law landscape. The first, which has been well-charted, is the existence of a significant generalist tribunal system.<sup>21</sup> The second is the fact that much administrative law is 'applied' — that is, it is administrative law adapted to a specific subject area. The process of adaption has resulted in tailored legal regimes in which institutions, decision-making processes, and review and appeal have all been crafted in light of the type of problems that an administrative regime is attempting to address. Both tribunals and this process of adaption may be thought of as state-sponsored legal pluralism.<sup>22</sup> Legal pluralism has a range of different definitions,<sup>23</sup> but here I use it to denote the idea that tribunals and specialist administrative regimes deploy legal doctrines, concepts, and frameworks in distinctive ways. As Arthurs has noted, "pluralism" reminds us that there is nothing less at issue in our analysis of administrative law than an inquiry into the nature of the legal system itself'.<sup>24</sup>

The focus in this article is upon the application of administrative law in the planning and environmental law context. Legal pluralism in this context has two strands.<sup>25</sup> The first is the creation of specialist administrative regimes through legislation, delegated legislation and policy to address planning and environmental problems. These regimes are a mix of institutions, administrative processes, and differing forms of legal ordering ranging from formal law to policies.<sup>26</sup> As Leventhal noted in the United States context, the novel nature of these regimes throws up many complex legal issues and as such sets the law 'ablaze'.<sup>27</sup>

<sup>21</sup> See Cane, *Administrative Tribunals and Adjudication*, above n 16. For an official recognition of the importance of such pluralism, see Commonwealth Administrative Review Committee, Parliament of Australia, *Report* (1971).

<sup>22</sup> H W Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985).

<sup>23</sup> Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.

<sup>24</sup> H W Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1, 42.

<sup>25</sup> For a detailed overview of the applied administrative law nature of these regimes, see Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environment Law: Text, Cases, and Materials* (Oxford University Press, 2013) chs 7, 11, 18.

<sup>26</sup> This can be seen by reference to any good environmental law textbook: see, eg, Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2013); D E Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Lawbook, 3<sup>rd</sup> ed, 2014).

<sup>27</sup> Harold Leventhal, 'Environmental Decisionmaking and the Role of the Courts' (1974) 122 *University of Pennsylvania Law Review* 509, 510.

The second strand is the creation of specialist environmental tribunals and courts to act as forums in which to consider a range of legal actions in regard to these regimes.<sup>28</sup> This development in Australia can be seen as predating,<sup>29</sup> but also bolstered by, the development of the generalist administrative tribunal system at the federal level. By 2000 nearly all states had some such tribunal.<sup>30</sup> Due to the fact that a strict version of the separation of powers does not operate at the state level,<sup>31</sup> many of these adjudicative institutions combine both adjudicative and administrative functions.<sup>32</sup> The powers of these courts and tribunals have also often been adapted to address the nature of the disputes before them.<sup>33</sup>

As a scholar of both administrative law and planning and environmental law in a range of different jurisdictions, the interrelationship between legal formalism and legal pluralism is my legal and scholarly reality. Each of these ideas represents different manifestations of the interface between law and administration,<sup>34</sup> and different ideas about how to hold public administration

<sup>28</sup> For example, the New South Wales Land and Environment Court currently has eight different classes of jurisdiction: *Land and Environment Court Act 1979* (NSW) ss 17–21C.

<sup>29</sup> Specialist tribunals have a long history. In relation to the United Kingdom, see Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge University Press, 2006).

<sup>30</sup> See generally Malcolm Grant, 'Environmental Court Project: Final Report — Report to the Department of Environment, Transport and the Regions' (2000).

<sup>31</sup> This is a factor that has formally limited the federal Administrative Appeals Tribunal: see Peter Cane, 'Merits Review and Judicial Review — The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213.

<sup>32</sup> Elizabeth Fisher, 'Administrative Law, Pluralism and the Legal Construction of Merits Review in Australian Environmental Courts and Tribunals' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 325.

<sup>33</sup> See, eg. Gary Edmond, 'Secrets of the "Hot Tub": Expert Witnesses, Concurrent Evidence and Judge-Led Reform in Australia' (2008) 27 *Civil Justice Quarterly* 51; Patrick Ky, 'Qualifications, Weight of Opinion, Peer Review and Methodology: A Framework for Understanding the Evaluation of Science in Merits Review' (2012) 24 *Journal of Environmental Law* 207.

<sup>34</sup> Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3<sup>rd</sup> ed, 2009). See also Martin Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992); Peter Cane, 'Theory and Values in Public Law' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford University Press, 2003) 3; Paul Craig, 'Theory and Values in Public Law: A Response' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford University Press, 2003) 23.

to account.<sup>35</sup> Their coexistence also reflects a deeper set of ambiguities that pervade all administrative law systems concerning the nature of law.<sup>36</sup> On the one hand, in line with legal formalism, there is a belief that administrative law is a distinct and authoritative body of posited law. On the other hand, there is a belief (that aligns with legal pluralism) that administrative bodies are constituted not just by law and can be held to account in many different ways, not just through legal processes. The simultaneous operation of legal pluralism and legal formalism thus is representative of the fact that the role of law in holding public administration to account is not settled, and is unlikely ever to be.

With all that said, it is also important to be explicit that the distinction between legal formalism and legal pluralism is not a distinction between law and ad hoc politicised decision-making. Nor is it a distinction between judicial intervention and judicial deference. Both these assumptions often haunt discussions, and are perhaps due to a Diceyan tradition transfixed on ideas of 'ordinary law'.<sup>37</sup> The problem with these assumptions is not just that they oversimplify, but also that they misrepresent the complexity of both legal formalism and legal pluralism in two ways.

The first is such assumptions ignore the fact that understandings of legal reasoning, public administration and the problems they address are 'co-produced' with each other.<sup>38</sup> That is, each model envisages distinctive roles for law and public administration that interrelate with understandings of the problems that public administration is meant to be addressing. I will explore this in the next Part.

The second accidental misrepresentation is that it is easy to get the impression that legal formalism and legal pluralism operate in separate spheres and are not intertwined. The operation of legal formalism is not blind to the importance of context. Thus while an emphasis on statutory construction is a

<sup>35</sup> See ideas of inside and outside accountability discussed in Sidney Shapiro, Elizabeth Fisher and Wendy Wagner, 'The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy' (2012) 47 *Wake Forest Law Review* 463.

<sup>36</sup> Richard M Thomas, 'Deprofessionalization and the Postmodern State of Administrative Law Pedagogy' (2002) 42 *Journal of Legal Education* 75.

<sup>37</sup> Arthurs, 'Rethinking Administrative Law', above n 24, 13.

<sup>38</sup> On co-production, see Sheila Jasanoff, 'The Idiom of Co-production' in Sheila Jasanoff (ed), *States of Knowledge: The Co-production of Science and Social Order* (Routledge, 2004) 1. On its application in the administrative law context, see Fisher, *Risk Regulation and Administrative Constitutionalism*, above n 4, ch 1.



focus upon formal legal reasoning, it is also a focus on context.<sup>39</sup> Likewise, legal pluralism does not operate without any regard to ideas of formal legal authority. The creation of tribunals is not an abandonment of the rule of law.<sup>40</sup> More importantly, legal formalism and legal pluralism must often operate simultaneously.

### III FACTS IN ADMINISTRATIVE AND ENVIRONMENTAL LAW

As Aronson has noted, much of the discussion about legal formalism has been a discussion about judicial discretion in the carrying out of judicial review.<sup>41</sup> The same adjudicative focus can be seen in relation to legal pluralism — tribunals, and not the novel nature of specialised regimes, have often been the focus of scholarly analysis. Thus while '[a]dministrative discretion used to be the question of administrative law',<sup>42</sup> questions concerning the nature and role of public administration have remained relatively sidelined by administrative law scholars. Yet, as noted above, legal formalism and legal pluralism are also implicit theories of public administration.<sup>43</sup>

Legal formalism in the administrative law context promotes an idea that public administration is capable of operating within clearly identifiable legal boundaries.<sup>44</sup> If it were not, ideas of jurisdictional error would be meaningless. Legal boundaries can only be determined, however, if the tasks of public administration are circumscribed and categorisable, whether in terms of law, discretion, policy or fact.<sup>45</sup> In contrast, legal pluralism operates on the basis that the problems public administration addresses are complex and require the flexible, ongoing exercise of discretion.<sup>46</sup> As that is the case, law, fact, and policy are not divisible, and are not in need of division, as the focus is upon the active exercise of discretion in solving complex problems. As this is the

<sup>39</sup> See, eg, *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, 710 [6], 714 [23] (Spigelman CJ) ('*Woolworths v Pallas Newco*').

<sup>40</sup> Justice Brian J Preston, 'The Enduring Importance of the Rule of Law in Times of Change' (2012) 86 *Australian Law Journal* 175.

<sup>41</sup> Aronson, 'Process, Quality and Variable Standards', above n 5, 27.

<sup>42</sup> *Ibid* 28 (emphasis in original).

<sup>43</sup> This can be seen in Harlow and Rawlings, above n 34.

<sup>44</sup> Examples from the literature are 'red light theories': *ibid* ch 1; and the 'rational-instrumental paradigm': Fisher, *Risk Regulation and Administrative Constitutionalism*, above n 4, 28–30.

<sup>45</sup> See Taggart, above n 5, 28.

<sup>46</sup> For examples in the literature, see 'green light theory': Harlow and Rawlings, above n 34, ch 1; and 'deliberative constitutionalism': Fisher, *Risk Regulation and Administrative Constitutionalism*, above n 4, 30–2.

case, all activities of public administration, not just those concerned with law, are important to hold to account. The merits review powers of tribunals (in which they stand in the shoes of a primary decision-maker) are understood to be the way to ensure good public administration because reviewing all aspects of a decision is the way to ensure legitimacy.

Much could be said about this distinction between how these two intellectual impulses promote different understandings of public administration. For my purposes, let me concentrate on how the role of facts is conceptualised under legal formalism and legal pluralism. The need for an institution to carry out wideranging factual inquiry is a common justification for the growth of public administration.<sup>47</sup> Yet what is understood to be a 'fact' and the relationship between fact-finding and legal accountability differs in regard to legal formalism and legal pluralism. This is best illustrated by how facts are treated in judicial review doctrine and in planning and environmental law.

#### *A Jurisdictional Facts*

Facts play an important but primarily 'negative' role in judicial review doctrine. This is because facts are not generally understood to be within the province of judicial review. Questions of law are for the courts to determine and questions of fact, along with questions of policy and merits, are generally within the province of administrative power.<sup>48</sup> That distinction is both entrenched and complicated in Australian administrative law.

It is entrenched because of the dominance of legal formalism. This is because legal formalism operates on the basis that clear sources of legal authority can be identified and reasoned from. This requires a distinction to be drawn between law and things that are not law. At the same time, the fact/law distinction is complicated for a number of reasons. As noted above, what is a 'fact' is not an easy thing to define, and nor is 'law'.<sup>49</sup> Whatever boundaries are created to operationalise administrative power, such boundaries become blurred very quickly. Likewise, judicial review doctrine recognises both explicit and implicit examples of where courts do review factual inquiries.<sup>50</sup>

<sup>47</sup> Cass R Sunstein and Edna Ullmann-Margalit, 'Second-Order Decisions' (1999) 110 *Ethics* 5.

<sup>48</sup> Taggart, above n 5; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5<sup>th</sup> ed, 2013) 187–8 [4.10].

<sup>49</sup> Timothy Endicott, 'Questions of Law' (1998) 114 *Law Quarterly Review* 292.

<sup>50</sup> Aronson and Groves, above n 48, ch 4.

One example of the latter category is the idea of jurisdictional fact. It is an idea that currently has greater popularity in Australia than in other jurisdictions — a situation that arguably reflects the dominance of legal formalism. The concept of jurisdictional fact also has a relatively long history in Australian administrative and constitutional law,<sup>51</sup> but saw a ‘resurgence’ with the popularity of legal formalism from the late 1990s.<sup>52</sup>

Jurisdictional fact is understood as a subset of the doctrine of jurisdictional error<sup>53</sup> and thus the cases where the concept is applied are examples of legal formalism in action — perfect examples of what Sir Anthony Mason has described as a ‘dense, grinding judicial style’.<sup>54</sup> The reason why jurisdictional fact is part of the doctrine of jurisdictional error is because it rests on the idea that an error by a decision-maker in regard to determining certain facts is an error concerning whether they have legal authority. As Leeming notes, ‘[t]he principles as to how one determines whether something is a jurisdictional fact are settled, but necessarily imprecise’.<sup>55</sup>

The settled aspect refers to the idea that a jurisdictional fact is understood to be a fact that is so ‘essential’ to the power of an administrative decision-maker that that decision-maker can only exercise that power if that fact exists.<sup>56</sup> In this sense the existence of the fact ‘enlivens’ the power of the decision-maker.<sup>57</sup>

<sup>51</sup> See, eg, *Architects Registration Board (Vic) v Hutchison* (1925) 35 CLR 404. See also the general analysis of jurisdiction in *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369.

<sup>52</sup> Aronson, ‘The Resurgence of Jurisdictional Facts’, above n 2.

<sup>53</sup> Chief Justice Spigelman, above n 15, 85.

<sup>54</sup> Sir Anthony Mason, ‘Justice of the High Court’ in Timothy L H McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 3, 5, quoted in Taggart, above n 5, 7.

<sup>55</sup> Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012) 65, quoting *Ross Mining NL v Timbarra Protection Coalition Inc* [1999] HCATrans 145 (14 May 1999) 204–5 (Gummow J). Chief Justice Spigelman also notes Gummow J’s use of the ‘settled but necessarily imprecise’ formula: see Chief Justice Spigelman, above n 15, 86.

<sup>56</sup> *Timbarra Protection Coalition* (1999) 46 NSWLR 55, 63–4 [37] (Spigelman CJ); *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 243 ALR 784, 800–1 [59] (Stone J) (*‘Anvil Hill First Instance’*). For a list of different formulations, see Chief Justice Spigelman, above n 15, 85.

<sup>57</sup> *Enfield* (2000) 199 CLR 135, 148 [28] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Plaintiff M70* (2011) 244 CLR 144, 179 [57] (French CJ).

The existence of the fact needs to be 'legally antecedent' to a decision-maker exercising their power.<sup>58</sup> For a fact to take on this role it needs to be clearly identifiable and 'objective'.<sup>59</sup> As Spigelman CJ noted in *Woolworths Ltd v Pallas Newco Pty Ltd* ('*Woolworths v Pallas Newco*');

A factual reference that is appropriately characterised as preliminary or ancillary to the decision-making process or which is, in some other manner, extrinsic to the facts and matters necessary to be considered in the exercise of the substantive decision-making process itself, is a reference of a character that the Parliament intended to exist objectively.<sup>60</sup>

Facts are thus definite objects, 'criter[ia]',<sup>61</sup> that independently exist and can be identified as existing extrinsically or intrinsically to decision-making power. Thus a distinction needs to not only be drawn between fact and law, but also between jurisdictional and non-jurisdictional fact. The need to determine that a fact exists does not stop it being jurisdictional<sup>62</sup> but the more complex a fact, the less likely it is to be so.<sup>63</sup> As this is the case, whether something is a jurisdictional fact or not is understood as a matter of statutory interpretation.<sup>64</sup> There is a laundry list of factors that are relevant to this process of interpretation,<sup>65</sup> many of which are also relevant to more mainstream ideas of jurisdictional error.<sup>66</sup>

A consequence of finding that a particular fact is a 'jurisdictional fact' is that the court can reopen the factual inquiry and hear evidence on it. This is an important operational aspect of the concept. As Stone J notes in *Anvil Hill*

<sup>58</sup> *Woolworths v Pallas Newco* (2004) 61 NSWLR 707, 718 [47] (Spigelman CJ). See also *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2008) 166 FCR 54, 59 [21] (Tamberlin, Finn and Mansfield JJ).

<sup>59</sup> *Woolworths v Pallas Newco* (2004) 61 NSWLR 707, 713 [19] (Spigelman CJ); *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2008) 166 FCR 54, 58 [16] (Tamberlin, Finn and Mansfield JJ).

<sup>60</sup> (2004) 61 NSWLR 707, 718 [49].

<sup>61</sup> *Enfield* (2000) 199 CLR 135, 148 [28] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Plaintiff M70* (2011) 244 CLR 144, 179 [57] (French CJ).

<sup>62</sup> *Plaintiff M70* (2011) 244 CLR 144, 179–80 [57] (French CJ).

<sup>63</sup> See *Woolworths v Pallas Newco* (2004) 61 NSWLR 707, 719 [53]–[59] (Spigelman CJ).

<sup>64</sup> Leeming, above n 55, 65; *Woolworths v Pallas Newco* (2004) 61 NSWLR 707, 710 [6] (Spigelman CJ).

<sup>65</sup> See the analysis in cases such as: *Woolworths v Pallas Newco* (2004) 61 NSWLR 707; *Timbarra Protection Coalition* (1999) 46 NSWLR 55; *Anvil Hill First Instance* (2007) 243 ALR 784.

<sup>66</sup> See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

*Project Watch Association Inc v Minister for the Environment and Water Resources:*

A better way of stating the jurisdictional fact proposition is that to say that the minister's determination of the fact is not conclusive and that [the] court has power to review the finding on the basis of evidence as to the existence or non-existence of the fact.<sup>67</sup>

This raises questions about the capacity of courts to engage in this type of review.<sup>68</sup> This is because concluding that a fact is jurisdictional requires a court to not just focus on legal reasoning but also factual reasoning. Jurisdictional fact may be a manifestation of legal formalism, but its operation leads to legal pluralism. This is particularly the case when legal formalism conceptualises facts in such a way that they are definitely not law.

### B 'Hot' Facts

Environmental and planning law is applied administrative law and in being so, facts, factual inquiry and factual categories play a particularly significant role. This is because environmental law is often a response to 'hot situations'.<sup>69</sup> Callon used this phrase to refer to polycentric situations where there are no agreed frames of action, facts are uncertain, and there are a range of conflicting normative values.<sup>70</sup> While other areas of administrative law build on existing common law ideas (such as entitlements and human rights),<sup>71</sup> environmental law is creating new frames of action that often cut across conventional legal frames of action.<sup>72</sup> Thus environmental law creates obligations for those wishing to carry out activities, creates third party rights, gives legal identity to various aspects of the natural environment, and, most significantly, creates 'novel' frameworks for decision-making.<sup>73</sup>

<sup>67</sup> (2007) 243 ALR 784, 801 [59].

<sup>68</sup> Aronson and Groves, above n 48, 239–40 [4.510].

<sup>69</sup> Elizabeth Fisher, 'Environmental Law as "Hot Law"' (2013) 25 *Journal of Environmental Law* 347.

<sup>70</sup> See Michel Callon, 'An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology' in Michel Callon (ed), *The Laws of the Markets* (Blackwell, 1998) 244, 260.

<sup>71</sup> Charles A Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733; Poole, above n 18.

<sup>72</sup> Even if they are constitutional: see *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324.

<sup>73</sup> Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford University Press, 2005); Elizabeth Fisher, 'Blazing Upstream? Strategic Environmental As-

These frameworks are created to deal with the complex and uncertain factual realities of environmental problems and such frameworks tend to have three features in this regard. The first, as noted in the last Part, is that they are a mixture of both soft and hard law in the form of policy and legislation. Second, there is a strong emphasis on decision-making processes that require decision-makers to both assess different forms of information and involve a range of parties and institutions in decision-making.<sup>74</sup> Administrative process is thus a central feature of environmental law and there is an assumption that such processes act as accountability mechanisms.<sup>75</sup> Finally, and most significantly for my analysis, a key aspect of these regimes is that law and policy create new 'factual' categories. If an activity or object falls into that category then the administrative processes described above are triggered.

Two of the best examples of such factual categories are development consent categories and impact assessment screening. In regard to the former, many planning law regimes operate on the basis of identifying the types of developments that are, or are not, permissible.<sup>76</sup> The role of the administrative decision-maker is thus to determine whether a development falls into a particular category. Likewise, impact assessment regimes require administrative decision-makers to determine whether some form of environmental or other type of impact statement procedure is required on the basis that an activity meets a certain threshold — usually that it is likely to have a significant effect on the environment.<sup>77</sup> In both cases, law is creating factual categories with legal significance. In doing so there is an awareness, consistent with legal pluralism, that the decision of whether something falls into a category or not is not a purely factual one but also involves judgement, values and a range of other factors.<sup>78</sup> Moreover, such categories can be understood to act as 'boundary objects'. Susan Leigh Star described boundary objects as a

sort of arrangement that allow different groups to work together without consensus. However, the forms this may take are not arbitrary. They are essentially

assessment as "Hot" Law' in Gregory Jones and Eloise Scotford (eds), *The Strategic Environmental Assessment Directive: A Plan for Success* (Hart Publishing, 2016, forthcoming).

<sup>74</sup> Fisher, Lange and Scotford, above n 25, ch 7.

<sup>75</sup> In relation to both private and public decision-makers, see Eric W Orts, 'Reflexive Environmental Law' (1995) 89 *Northwestern University Law Review* 1227. Cf Joseph L Sax, 'The (Unhappy) Truth about NEPA' (1973) 26 *Oklahoma Law Review* 239.

<sup>76</sup> Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (Federation Press, 3<sup>rd</sup> ed, 2012) ch 3.

<sup>77</sup> *Ibid* ch 5.

<sup>78</sup> Fisher, Lange and Scotford, above n 25, 845–53.

organic infrastructures that have arisen due to ... 'information needs' ... I would now add 'information and work requirements,' as perceived locally and by groups who wish to cooperate.<sup>79</sup>

In other words these factual categories are working categories that enable decision-makers to know what type of administrative process should apply and whom it should involve. Development consent categories and impact assessment screening are thus fundamental to these legally pluralist regimes but facts are not so much understood as definite things but rather as objects that allow working administrative infrastructures to operate.<sup>80</sup>

This understanding of facts will shape how decision-makers are held to account. Alongside these regimes, environmental law is creating new dispute resolution structures in the form of environmental courts and tribunals. As already noted, these institutions are forms of state-sponsored legal pluralism. These specialist bodies are equipped with quite flexible review, evidentiary and legal powers. It is also the case that most of these specialist courts are carrying out merits review of environmental decision-making. This means that merits adjudication plays a particularly important role in environmental law not just because it is resolving disputes, but because in doing so it is defining categories and the boundaries of action. In other words, an assessment of the facts is part of the day-to-day operation of the accountability of environmental decision-making.

This is legal pluralism in action and the fact/law distinction only becomes relevant on appeal to a higher court<sup>81</sup> or when a specialist court is carrying out a judicial review function.<sup>82</sup> To put it another way, legal pluralism is the norm and legal formalism the exception. This is not to say that the consideration of facts by administrative tribunals is straightforward,<sup>83</sup> but that these institutions have been created on the basis that facts are as important to the validity of decisions as an assessment of law is.

<sup>79</sup> Susan Leigh Star, 'This Is Not a Boundary Object' (2010) 35 *Science, Technology, & Human Values* 601, 602.

<sup>80</sup> On infrastructure, see generally Geoffrey C Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press, 1999).

<sup>81</sup> *Brimbella Pty Ltd v Mosman Municipal Council* (1985) 79 LGERA 367.

<sup>82</sup> *Walker v Minister for Planning* (2007) 157 LGERA 124.

<sup>83</sup> Administrative Review Council, *Environmental Decisions and the Administrative Appeals Tribunal*, Report No 36 (1994) [2.25]–[2.31] 10–11, discussing complex environmental litigation in the Administrative Appeals Tribunal. See also Ky, above n 33.

C *A Fact as Both a 'Jurisdictional' Fact and a 'Hot' Fact?*

What can be seen in the last two sections is that facts can be understood in different ways. In relation to legal formalism, facts are definite objects that can be identified. In contrast, legal pluralism has a more complex understanding of administrative factual inquiry and thus facts. These distinctive understandings of facts do not exist in splendid isolation from each other. Indeed, the two factual categories discussed above — cases concerning whether a development falls into certain development consent categories and the threshold to be met in environmental assessment regimes — are often argued, and found to be, jurisdictional facts.<sup>84</sup>

This is not surprising. Factual inquiry is important in these administrative law regimes and the application of development assessment categories and impact assessment thresholds represent turning points in which decision-making can go down one path or another. The problem is that 'jurisdictional' facts and 'hot' facts are understood very differently. Jurisdictional facts are supposedly 'objective' and identifiable — discrete 'criteria' that can be identified and thus the application of them policed. 'Hot' facts are enmeshed with other aspects of decision-making. Not only is untangling them from other aspects of a decision tricky but this also means it is difficult for a reviewing court to reopen an analysis into only those particular facts.

As this is the case, it is not surprising that a number of judges express disquiet at identifying 'hot' facts as 'jurisdictional'. As Justice Pearlman, Chief Judge of the Land and Environment Court of New South Wales noted in *Plumb v Penrith City Council*:

A consequence of the determination being a jurisdictional fact is that the Court is obliged to decide the jurisdictional fact for itself ... and evidence is admissible as to the existence or non-existence of the jurisdictional fact. But this case throws into stark relief the consequential difficulty involved. A decision as to whether or not a development is likely to significantly affect threatened species can never truly be an objective fact — it must always be a matter of opinion. That is because it involves 'likelihood'; that is, the future possibility of the occurrence of an event, and, as to that, it depends upon expert scientific opinion. In

<sup>84</sup> Environmental and planning cases where this argument was successful include: *Enfield* (2000) 199 CLR 135; *Timbarra Protection Coalition* (1999) 46 NSWLR 55; *Gales Holdings Pty Ltd v Tweed Shire Council* (1999) 110 LGERA 235; *Woolworths v Pallas Newco* (2004) 61 NSWLR 707; *Parks and Playgrounds Movement Inc v Newcastle City Council* (2010) 179 LGERA 346; *Fullerton Cove Residents Action Group Inc v Dart Energy Ltd [No 2]* (2013) 195 LGERA 229.



this case, as I shall presently outline, the expert opinion is divided. All five experts who gave evidence are eminent in their field, and yet two consider that the development is likely to significantly affect [Cumberland Plain Woodland] and three consider that it is not.<sup>85</sup>

Justice Pearlman is not objecting to review by the Court but rather the depiction of a 'hot' fact in overly simplistic terms. Others have expressed concerns with how a finding of jurisdictional fact will result in judicial intervention in complex regulatory schemes.<sup>86</sup> The reluctance to find 'hot' facts to be 'jurisdictional' facts can also be seen in regard to the way in which the main focus of statutory interpretation is to ensure factual inquiry that requires the operation of discretion and judgement are not found to be jurisdictional.<sup>87</sup>

At the same time, however, it cannot be doubted that the determination of development consent categories and impact assessment screening are crucial pivot points in these regimes. Development will not be regulated or will be allowed if it falls outside a development consent category.<sup>88</sup> Public consultation will not occur in relation to a project unless an environmental assessment is required.<sup>89</sup> The determination of a 'hot' fact is 'essential' to the power of the decision-maker.<sup>90</sup> It is also the case that under some regimes, a factual inquiry by an administrator may be subject to merits review if the legal action is brought by the person who made an application, but be subject to judicial review if the legal action is brought by a third party. Thus arguments for not reviewing facts because of their nature look odd, particularly when planning and environmental law decision-making is in the collective interest, not just in the interests of the individual making the application. To put the matter another way the statutory scheme, taking into account the powers given to

<sup>85</sup> [2002] NSWLEC 223 (2 December 2002) [16] (citations omitted).

<sup>86</sup> Linda Pearson, 'Jurisdictional Fact: A Dilemma for the Courts' (2000) 17 *Environmental and Planning Law Journal* 453, 467.

<sup>87</sup> For discussion of the complex appeal and review mechanisms in regard to environmental assessment in New South Wales, see, eg, Lyster et al, above n 76, 171.

<sup>88</sup> *Enfield* (2000) 199 CLR 135; *Woolworths v Pallas Newco* (2004) 61 NSWLR 707.

<sup>89</sup> Andrew Edgar, 'Judicial Review of Public Consultation Processes: A Safeguard against Tokenism?' (2013) 24 *Public Law Review* 209.

<sup>90</sup> *Ibid* 217.

primary decision-makers, tribunals and courts, may result in an a system of accountability that does not fully reflect the public interest.<sup>91</sup>

The consequence of this tension is that both generalist and specialist courts have taken a range of different approaches to reviewing development consent category determinations and impact assessment screening decisions. These approaches can be understood as different ways to reconcile the discretionary nature of these decisions with the fundamental role they play in determining when, and how, the power of a decision-maker will be exercised. For ease of analysis I divide these approaches into two groups.

The first group of cases is those which categorise issues such as development assessment determination and impact assessment screening as exercises of discretion and therefore reviewable under the conventional grounds of judicial review of discretion, such as the irrelevant/relevant consideration grounds and *Wednesbury* unreasonableness.<sup>92</sup> Although that is the starting point, the nature of such review varies. Thus it can be a form of review largely policing the outer rational limits of the exercise of power.<sup>93</sup> It can be a form of review more carefully scrutinising the reasoning of the decision-maker.<sup>94</sup> Specialist courts such as the Land and Environment Court of New South Wales have taken this approach, but have also carried out site visits and heard evidence from expert witnesses.<sup>95</sup> Thus while the judge stresses that they will not substantively review the primary decision, they inform themselves so as to carry out substantive review.<sup>96</sup>

<sup>91</sup> For a recent study of this in a related field, see Douglas E Fisher, 'The Rule of Law, the Public Interest and the Management of Natural Resources in Australia' (2014) 31 *Environmental and Planning Law Journal* 151.

<sup>92</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene MR).

<sup>93</sup> *Friends of Hinchinbrook Society Inc v Minister for the Environment [No 2]* (1997) 69 FCR 28; *Londish v Knox Grammar School* (1997) 97 LGERA 1.

<sup>94</sup> *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

<sup>95</sup> Note that the broad evidentiary powers of this Court only relate to jurisdiction classes 1–3 (that is, not judicial review): see *Land and Environment Court Act 1979* (NSW) s 38. Note also that many of these cases are brought pursuant to the general enforcement section of *Environmental Planning and Assessment Act 1979* (NSW) (s 123), which is a class 4 proceeding: *Land and Environment Court Act 1979* (NSW) s 20(1)(c).

<sup>96</sup> *Prineas v Forestry Commission (NSW)* (1984) 53 LGERA 160; *Bailey v Forestry Commission (NSW)* (1989) 67 LGERA 200.

The second set of approaches is to rule that development consent categories and impact assessment screening do involve finding a jurisdictional fact.<sup>97</sup> Again however, there may be a range of approaches to review that lead to this conclusion. Thus the approach may be to understand the review as akin to merits review and thus arguably still within the judicial review paradigm.<sup>98</sup> Another approach is to focus on the role of the court in collecting evidence so as to determine the factual question itself.<sup>99</sup> Alternatively, there are cases where the court rules a fact is jurisdictional but explicitly ‘defers’ to the primary decision-maker.<sup>100</sup>

In other words, the courts have found a number of ways to balance the tension between a fact being ‘hot’ and it being so important that it is ‘jurisdictional’. That balance is found through a careful study of the administrative scheme and reference to doctrine. How that tension is resolved in regard to a particular section can evolve over time. Overall this can be understood as judges attempting to reconcile legal formalism and legal pluralism. That reconciliation is dynamic and constantly being renegotiated. This can be seen through an examination of the line of cases that includes the High Court decision in *Enfield*. That case stands as a powerful and authoritative statement concerning the nature and scope of jurisdictional fact review. It is also a case about development consent category determination. The resolution of the case thus required the judges to engage with both legal formalism and legal pluralism.

#### IV ENFIELD

*Enfield* concerned the Corporation of the City of Enfield challenging the South Australian Development Assessment Commission’s (‘DAC’) granting of development consent to an extension of a waste facility owned and operated by Collex Waste Management Services Pty Ltd (‘Collex’). That extension also involved the treatment of different liquid wastes. The DAC determined that the extension of a liquid waste facility was ‘general industry’, not ‘special

<sup>97</sup> *Timbarra Protection Coalition* (1999) 46 NSWLR 55; *Enfield* (2000) 199 CLR 135.

<sup>98</sup> *Fullerton Cove Residents Action Group Inc v Dart Energy Ltd [No 2]* (2013) 195 LGERA 229, 290 [231] (Pepper J). See the discussion of different types of merits review in Fisher, *Risk Regulation and Administrative Constitutionalism*, above n 4, ch 4. See also Cane, ‘Merits Review and Judicial Review’, above n 31.

<sup>99</sup> *Enfield City v Development Assessment Commission* (1996) 91 LGERA 277.

<sup>100</sup> *Corporation of the City of Enfield v Development Assessment Commission* (1997) 69 SASR 99.

industry', under South Australian planning law. DeBelle J in earlier litigation noted:

The significance of the proper classification of the proposed use lies in the fact that the procedure to be implemented in determining whether planning consent should be granted differs according to whether the proposed use is or is not a special industry and as such a prohibited use. If the proposed use is a special industry and, therefore, a prohibited use in this general-industry zone, the Commission cannot grant planning consent unless:

- (a) it has given public notice of the application; and
- (b) unless the Council and the Minister concur in the grant of planning consent.<sup>101</sup>

If it were determined to be general industry it would be a permitted development and thus given consent. Thus the DAC's decision, like all development consent category determinations, played a significant role in defining the subsequent power of the DAC but also of other decision-makers.

As with other planning regimes, DAC's decision-making not only involved other institutions such as local authorities but was also embedded in a framework of legislation, delegated legislation and local development plans. These different legal documents constituted and limited the DAC's power. The details of the framework need not bother us here but there is no doubt that this was a legally pluralist regime. It is also interesting to note that over the history of the litigation (between 1994 and 2000) that regime underwent revision and reform. It should also be noted that a second legal strand in this line of cases concerns the differences between actions at common law and in equity and the review and relief available under each.<sup>102</sup> These issues also need not concern us.

The *Enfield* case that ultimately ended up in the High Court related to a third challenge that the Corporation of the City of Enfield had brought against the DAC's granting of development consent to Collex for the extension of the waste plant. The Council originally brought a common law judicial review challenge against the development consent in 1994 on conventional judicial review grounds. That consent was invalidated on the ground that the power to

<sup>101</sup> *Corporation of the City of Enfield v Development Assessment Commission* (1994) 63 SASR 22, 23 (DeBelle J).

<sup>102</sup> *Enfield* (2000) 199 CLR 135, 143–6 [16]–[23] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

make the decision was not delegated properly and thus the DAC never made the decision that it was mandated to make.<sup>103</sup>

Before that first action had been resolved, Collex submitted another development application similar to the one that was the subject of the first case, although excluding permission for aspects of the development which were thought to be the most odorous. After the first case was decided the DAC granted consent to this application and another application identical to the original application.<sup>104</sup> The Corporation of the City of Enfield challenged both these consents.<sup>105</sup> This time they focused on the determination that the development was not special industry. DeBelle J did not use the language of 'jurisdictional fact' but his Honour did conclude that a court could review a decision to ensure that the decision-maker had not conferred power on itself that it did not have. He stated:

the question whether the Commission has properly exercised its powers turns on whether it has correctly decided whether the proposed use falls within the objective criteria specified in the definition of special industry. In other words, the question whether the Commission has power in this case to grant planning consent without giving public notice and without the concurrence of the Council depends on whether it has correctly decided that the proposed use is not a special industry.<sup>106</sup>

Note here the procedural consequences that DeBelle J mentions arise from the factual determination. DeBelle J is thus recognising the pivotal importance of the determination. In this case only affidavit evidence was provided and DeBelle J quashed the decision on the basis that there was not enough evidence before the Court, and thus decided to hear more evidence on the matter to determine if it was special industry.<sup>107</sup> That order was invalidated by consent at a further hearing.<sup>108</sup>

<sup>103</sup> *Enfield City Council v Development Assessment Commission* (1994) 82 LGERA 439, 452 (Matheson J).

<sup>104</sup> *Corporation of the City of Enfield v Development Assessment Commission* (1994) 63 SASR 22, 23–5 (DeBelle J).

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid* 29–30.

<sup>107</sup> *Ibid* 31.

<sup>108</sup> *Enfield City v Development Assessment Commission* (1996) 91 LGERA 277, 279 (DeBelle J).

The DAC once again granted consent. Again, DeBelle J, hearing this new action, made no mention of 'jurisdictional fact' but rather referred to the case as being concerned with jurisdictional error.<sup>109</sup> His Honour noted:

The Commission was required to determine the nature of the development. That determination in turn affected the procedure required to be followed for the purpose of determining whether to grant development consent.<sup>110</sup>

This is a similar conceptualisation of the determination of 'special fact' as a 'hot' fact. DeBelle J considered evidence from a number of expert witnesses<sup>111</sup> and his judgment also contained an analysis of the background to the development.<sup>112</sup> His Honour concluded that the project should have been determined to be 'special industry' because it was likely to release offensive odours several times a year.<sup>113</sup> A factor in coming to this conclusion was an assessment of the ability of Collex to manage these emissions,<sup>114</sup> an issue that overlapped with a separate ground of review concerning whether planning conditions could affect whether a development was general industry (his Honour determined it could not).<sup>115</sup>

DeBelle J's judgment is similar to other first instance judicial review cases in this area.<sup>116</sup> While the implicit finding that the classification of a development as special industry is a jurisdictional fact clearly legitimates the merits review approach he takes, the lines between judicial and merits review are blurred. His Honour was also focused on understanding the entire legislative scheme.

The proponent of the development appealed to the Full Court of the South Australian Supreme Court and one of the main grounds was whether the determination of the development as 'special industry' was a jurisdictional fact.<sup>117</sup> Bleby J (with whom the other two judges of the Court agreed) noted the ability of a superior court to determine jurisdictional facts but discussed

<sup>109</sup> Ibid 279, 300.

<sup>110</sup> Ibid 281.

<sup>111</sup> Ibid 290–4.

<sup>112</sup> Ibid 278–80, 282–90.

<sup>113</sup> Ibid 299–300.

<sup>114</sup> Ibid 298, 300.

<sup>115</sup> Ibid 296.

<sup>116</sup> See, eg, *Gray v Minister for Planning* (2006) 152 LGERA 258.

<sup>117</sup> *Corporation of the City of Enfield v Development Assessment Commission* (1997) 69 SASR 99, 116 (Bleby J).

their reluctance, which his Honour supported, to review fact-finding by specialist tribunals.<sup>118</sup> He stated:

where planning issues and questions of assessment and judgment are concerned, this Court should give considerable weight to the decision on such matters of a specialist tribunal. The proper classification of this development as a 'special industry' includes a qualitative assessment of the likely effect on occupiers of one piece of land of an activity carried out on another piece of land.<sup>119</sup>

Thus, even though the determination of 'special industry' was a jurisdictional fact, Bleby J concluded that a court should be 'deferring in grey areas of uncertainty to the practical judgment of the planning authority'.<sup>120</sup>

Moreover, in studying the overall statutory regime,<sup>121</sup> his Honour stressed that the determination of whether it was special industry was only one step (albeit an important one) in the planning process. His Honour stated:

As I have already observed, whether a development is non-complying for the purposes of the relevant development plan will often involve questions of judgment. The [*Development Act 1993 (SA)*] also contemplates that the planning regime is one which is resolved over a period of time as more information concerning the development is assembled and assessed. It will not necessarily be judged solely on what is put to the planning authority by the applicant.<sup>122</sup>

Bleby J went on to consider that iterative information gathering process explicitly. His Honour noted 'reaching a planning decision involves an ordered process, requiring time and the assembly of relevant information'.<sup>123</sup> The review by the Court should thus be along the lines of more conventional judicial review approaches.<sup>124</sup> Reviewing the decision on the deferential basis set out, his Honour concluded that the original decision of the DAC should stand.<sup>125</sup>

Bleby J's analysis can be understood as approaching the question of jurisdictional fact through the lens of legal pluralism. He spends much of his

<sup>118</sup> Ibid 117.

<sup>119</sup> Ibid 118.

<sup>120</sup> Ibid 119.

<sup>121</sup> Ibid 119–21.

<sup>122</sup> Ibid 119.

<sup>123</sup> Ibid 120.

<sup>124</sup> Ibid 121.

<sup>125</sup> Ibid 124.

analysis understanding the development regime writ large, and his concern is how the reopening of facts by a court would fit into that scheme.<sup>126</sup>

The Corporation of the City of Enfield then appealed to the High Court, which articulated the concept of jurisdictional fact in powerful terms: "The term "jurisdictional fact" (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion".<sup>127</sup>

The attention of the Court was primarily upon one particular statutory provision, s 35 of the *Development Act 1993* (SA). Thus, while the lower courts analysed the larger scheme, this judgment focused on legislation. The majority of the Court held that s 35 'stipulates in direct terms a precondition which obliges, without certain concurrences, refusal of a grant of consent'.<sup>128</sup> It thus entailed the determination of a jurisdictional fact.

The Full Court had also concluded it was a jurisdictional fact but the High Court allowed the appeal because the Full Court's deferential approach led it into error.<sup>129</sup> The majority went on to explicitly question the validity of the United States doctrine from *Chevron USA Inc v Natural Resources Defense Council Inc*<sup>130</sup> in Australian administrative law, arguing that it would lead to a potential 'de-legalisation' of the administrative process.<sup>131</sup> The High Court thus stressed the constitutional importance of judicial review,<sup>132</sup> but also recognised that a reviewing court should be sensitive to the nature of the factual questions being reviewed.<sup>133</sup> Gaudron J, in delivering a concurring judgment, also stressed the inappropriateness of deference.<sup>134</sup> Her Honour noted:

Where, as here, the legality of an executive or administrative decision or of action taken pursuant to a decision of that kind depends on the existence of a particular fact or factual situation, it is the function of a court, when its jurisdiction is invoked, to determine, for itself, whether the fact or the factual situation does or does not exist. To do less is to abdicate judicial responsibility.

<sup>126</sup> Ibid 121.

<sup>127</sup> *Enfield* (2000) 199 CLR 135, 145 [28] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

<sup>128</sup> Ibid 150 [34].

<sup>129</sup> Ibid 151 [38].

<sup>130</sup> 467 US 837 (1984). For discussion, see Shapiro and Fisher, above n 6.

<sup>131</sup> *Enfield* (2000) 199 CLR 135, 151–2 [41]–[42] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

<sup>132</sup> Ibid 152–4 [43]–[44].

<sup>133</sup> Ibid 154 [45]–[46].

<sup>134</sup> Ibid 158 [59].



However, there may be situations where the evidence before the court is the same or substantially the same as that before the primary decision-maker and minds might reasonably differ as to the finding properly to be made on that evidence. In that situation a court may, but need not, decline to make a different finding from that made by the primary decision-maker, particularly if the latter possesses expertise in the area concerned. Even so, in that situation, the question is not so much one of 'judicial deference' as whether different weight should be given to the evidence from that given by the primary decision-maker.<sup>135</sup>

I quote this at length because what can be seen is that Gaudron J is conceptualising facts in a very different way from the lower courts. A jurisdictional fact is an identifiable criterion on which evidence can be heard. This differs from the complexity of how hot facts are conceptualised. The problem of course is that a jurisdictional fact and a hot fact can be one and the same.

Before the case was returned for rehearing to DeBelle J, Collex applied to admit new evidence.<sup>136</sup> That application was refused but the fresh evidence arose because the plant had now been operating for a number of years and the problem with emissions had not been what DeBelle J had concluded they would be. In light of this, the parties decided that

a fresh application for development consent would be made to the DAC. When that occurs, it will be for the DAC to reach its own conclusion on whether the development is a special industry in the form in which it is now built and operated, and in the light of all the evidence which may properly be placed before it.<sup>137</sup>

The consideration of the factual question was thus returning to the primary decision-maker.

## V REFLECTIONS AND CONSEQUENCES

The above analysis, in the spirit of Cowen, is an exercise in legal cartography, or perhaps it is better characterised as an act of revisionist legal cartography. My aim has been to re-plot a small part of the topography of Australian administrative law. My re-plotting has been admittedly rough but my purpose

<sup>135</sup> Ibid 158–9 [60] (citations omitted).

<sup>136</sup> *Collex Waste Management Services Pty Ltd v Corporation of the City of Enfield* [No 2] [2000] SASC 140 (2 June 2000).

<sup>137</sup> Ibid [31].

is to encourage lawyers and scholars to develop more powerful maps so they are thus able to navigate the administrative law landscape more nimbly. Let me suggest three ways it does this.

The first way is in regard to the fact/law distinction. Some scholars are cynical about that distinction because it can be manipulated.<sup>138</sup> The above analysis makes clear that what is 'law', 'legal reasoning', 'fact' and 'factual inquiry' are not fixed. But it also makes clear that these terms are not endlessly open to interpretation. How each of these concepts is understood will be dependent on ideas embedded in legal culture. As Chief Justice Spigelman has noted, jurisdictional fact is not a 'blank cheque to the judiciary to intervene whenever a judge believes the outcome to be undesirable'.<sup>139</sup> This is not to say that the flexibility in interpretation does not provide opportunities for the aspiring litigant,<sup>140</sup> but that flexibility has limits.

I would also suggest it has even greater limits when the roles of legal pluralism and legal formalism are more explicitly acknowledged. As we can see in the jurisdictional fact cases, the determination of whether something is a jurisdictional fact does often turn on a choice between a legally formalist vision of administrative power in which the legal boundaries of public administration are assiduously policed and a legally pluralist vision of public administration where public administration is held to account in other ways. Indeed, much of the disquiet about jurisdictional fact is because it is at odds with quite finely calibrated legally pluralist regimes.<sup>141</sup>

The second way in which the above analysis might provide a useful navigation tool follows on from this. It is often suggested that 'jurisdictional error' is opaque and conclusory reasoning.<sup>142</sup> As this is held to be the case, critics then argue that the reasoning in judicial review doctrine should focus on more substantive values. But the analysis above suggests that the reasoning is not as opaque as it first looks. Rather, it requires careful engagement with the statutory and legal context to be made sense of.<sup>143</sup> Explicitly referring to values such as fairness and reasonableness is not that form of engagement. As

<sup>138</sup> A stance noted by Aronson and Groves, above n 48, 195 [4.90].

<sup>139</sup> Chief Justice Spigelman, above n 15, 87.

<sup>140</sup> Elizabeth Fisher, Pasky Pascual and Wendy Wagner, 'Understanding Environmental Models in Their Legal and Regulatory Context' (2010) 22 *Journal of Environmental Law* 251.

<sup>141</sup> Aronson and Groves, above n 48, 239–40 [4.510].

<sup>142</sup> Leeming, above n 55, 48.

<sup>143</sup> I am not the only one to make this point: see *ibid* 49–50; Chief Justice Spigelman, above n 15, 86. See also the very careful analysis of the significance of statutory context in Aronson, 'The Resurgence of Jurisdictional Facts', above n 2.

Allan has noted in another context, legal reference to these concepts could be argued to be simply swapping one form of legal formalism for another.<sup>144</sup>

What is really needed is close attention to the statutory scheme and the legal regime it creates — a regime which will often be embedded in legal pluralism.<sup>145</sup> What is also needed is a keen eye for also how doctrinal concepts such as jurisdictional fact are malleable forms of common law reasoning that evolve in different judicial hands. Kirby J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* noted:

The reference to ‘jurisdictional fact’ in this area of discourse presents a somewhat awkward concept. It encompasses a set of legal, factual, evidentiary and procedural considerations about the way in which the administrative decision-maker went about reaching the opinion (or satisfaction) that supplied the foundation for his or her jurisdiction.<sup>146</sup>

He was discussing Gummow J’s judgment in *Minister for Immigration and Multicultural Affairs v Eshetu* that concluded that pre-conditions that a decision-maker must be satisfied of can be jurisdictional facts.<sup>147</sup> From a purely legal formalist perspective this approach is ‘awkward’<sup>148</sup> but Gummow J’s approach can also be understood as informed by ideas of legal pluralism. Thus for example, his was decision clearly influenced by concerns that a legislature could oust a court’s judicial review jurisdiction through a specific choice of words.<sup>149</sup>

None of that makes issues to do with fact, law and jurisdiction easy, but then nor are issues to do with the virtues and vices of judicial intervention. I am doubtful that these issues will never raise tears,<sup>150</sup> and students will continue to feel ‘edgy’<sup>151</sup> but it is more likely they will be understood in all their nuance if law in its various manifestations is taken seriously.

<sup>144</sup> T R S Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?’ (2002) 61 *Cambridge Law Journal* 87, 101.

<sup>145</sup> *Ibid* 100.

<sup>146</sup> (2003) 198 ALR 59, 87 [125] (citations omitted).

<sup>147</sup> (1999) 197 CLR 611, 651.

<sup>148</sup> Note Gummow J also used this term: *ibid*.

<sup>149</sup> *Ibid*.

<sup>150</sup> See Mark Aronson, ‘Jurisdictional Error without the Tears’ in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330.

<sup>151</sup> See Mark Aronson, ‘Jurisdictional Error and Beyond’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 248, 281.

The third and final benefit of the above map is to put to one side the idea that legal pluralism is not law. As noted in Part II, that is an assumption that reflects Dicey's legacy. It also finds expression in a misdescription I came across in researching this article. As part of that research, I purchased a second hand copy of the first edition of Zelman Cowen's constitutional law work — *Federal Jurisdiction in Australia*<sup>152</sup> — over the internet. The copy I purchased had been incorrectly described on the website as 'Feral Jurisdiction in Australia'. While one wonders where the book had been shelved, it sums up the clichéd vision of the relationship between legal formalism and legal pluralism. The concept of jurisdiction, whether used in a constitutional or administrative sense, connotes authority and control.<sup>153</sup> It is also understood as one of great technicality to the point of 'aridity' — a point emphasised by Cowen himself in his introduction to the book.<sup>154</sup> In contrast, the word 'feral' denotes untamed and uncultivated wildness. Feral things do not yield to neat technical boundaries — they are anarchical or laws unto themselves. Legal pluralism, I would suggest, is often characterised this way. It is the absence of law. Yet as this article has shown, the relationship between legal formalism and legal pluralism is not one about a choice between jurisdiction and a feral state. Rather, both exist in tandem in Australian administrative law and they both need to be taken seriously in order to take law seriously.

<sup>152</sup> Zelman Cowen, *Federal Jurisdiction in Australia* (Oxford University Press, 1959).

<sup>153</sup> See Leeming, above n 55, 1.

<sup>154</sup> Cowen, above n 152, ix. See also Aronson, 'Process, Quality and Variable Standards,' above n 5, 23.