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A negotiation concluded? The normative structure of error of law review of fact-finding

Emily Hammond*

This article makes a narrow descriptive claim with a view to offering wider observations on the normative structure of the current Australian law of judicial review. In *Haritos v Federal Commissioner of Taxation*[1] (*Haritos*), a unanimous five-member bench of the Federal Court of Australia radically reworked a limit on the concept of *error of law* in fact-finding maintained by members of the High Court of Australia in *Minister for Immigration and Citizenship v SZMDS*[2] (*SZMDS*). My aim in making this claim is not to criticise the result. Quite the contrary: by showing the nature and significance of the *Haritos* departure from *SZMDS*, I hope to show that it is a welcome articulation of the ground of error of law in fact-finding. The Federal Court's intervention is welcome because it rejects the need, asserted in *SZMDS*, to maintain a distinction between findings required by legislation and other material findings. On the *Haritos* approach, review for error of law promotes *generally applicable* norms for fact-finding in administration of public powers. In particular, such norms as apply to findings required by statute can also apply to findings that are material to discretionary decisions. Thus, the *Haritos* approach promotes a culture of justification for the exercise of unstructured discretionary public powers affecting individuals that is absent in the method for supervising fact-finding presented in *SZMDS*.

The conflicting approaches to error of law in fact-finding in *SZMDS* and *Haritos* may be seen, I suggest, as products of two contrasting intellectual approaches to the normative structure of judicial review. Writing in 2017, Bateman and McDonald described two intellectual approaches to the legal norms for administrative action — a 'grounds approach' and a 'statutory approach':

> One expresses the legal norms of administrative law as a set of rules and principles described as 'grounds of review' which exist ex ante a statute conferring power on an administrator. The other expresses these norms as the product of a parliamentary intention arrived at through a process of statutory interpretation undertaken ex post the enactment of a statute conferring administrative power.[3]

As Bateman and McDonald emphasised, the difference between these two intellectual approaches to review cannot be reduced to a disagreement about the juristic basis for the

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1 [2015] FCAFC 92; (2015) 233 FCR 315.

2 [2010] HCA 16; (2010) 240 CLR 611, endorsing a ground for review for constructive lack of jurisdiction articulated in earlier cases: *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 (*Eshetu*), [127]–[145]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165 (*S20/2002*), [34]–[37] (McHugh and Gummow JJ); *Minister for Immigration and Multicultural Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992, [38] (Gummow and Hayne JJ).

3 W Bateman and L McDonald 'The Normative Structure of Australian Administrative Law' (2017) 45 FLR 153, 155.

legal norms of administrative law.[4] Differences in the 'formal grammar of the law' and the 'basic structure of its justification'[5] correspond with differences in the law's normative impact:

> Although the statutory approach may be thought to bring gains in terms of the legitimacy of judicial review, it jettisons the normative functions of predictability, applicability and universality which are more meaningfully associated with the grounds approach.[6]

This is the specific insight from Bateman and McDonald's analysis that I adopt for this article. A grounds-based approach favours the articulation of *generally applicable* norms for the exercise of statutory powers. On a grounds-based approach, norms apply to *material* steps in the exercise of a power — that is, steps on which the exercise of the power in fact turn, even if not specifically required by statute. The statutory approach, in contrast, implies norms from legislatively set conditions for the exercise of a power. On the statutory approach, the particulars of the statutory power determine whether norms are engaged. When it comes to review of fact-finding for error of law, the grounds-based approach is likely to produce norms that attach to *any* material findings, irrespective of whether the findings are specifically required by statute. This can include findings that become a basis for an exercise of discretionary power by way of a decision-maker's policy. A statutory approach in contrast supports the application of rationality norms to findings specifically required by the enabling statute.

My contention is that reading the shift in approach to the error of law ground from *SZMDS* to *Haritos* in these terms elevates the significance of the conflicting views of error of law in fact-finding between the two cases. It prompts us to think about this as an episode in an ongoing negotiation over the normative structure of legality of fact-finding and the capacity for the error of law ground to promote legal rationality requirements for the implementation of policies adopted for the exercise of unstructured discretionary powers.

Conflicting views of error of law in fact-finding

In this section, I demonstrate the conflicting approaches to *error of law* in fact-finding with reference to the two cases.[7] I show that the Federal Court deployed, for fact-finding generally, a rationality criterion that the High Court had endorsed for one kind of finding only. This was contrary to the instructions of the Court in *SZMDS* that the criterion did *not* apply in review of 'intra mural' facts[8] for error of law.

My focus here is on review for 'error of law' in contrast to 'jurisdictional error'. These two categories of error offer distinct touchstones for supervisory jurisdiction and remedies against administrative action. Jurisdictional errors are those material errors that invalidate a decision — that is, result in a decision 'lacking characteristics necessary for it to be given

4 Ibid 157–8.
5 Ibid 154.
6 Ibid 155.
7 Compare M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) 209.
8 The term 'intra mural' is used by Gummow ACJ and Kiefel J in *SZMDS* [2010] HCA 16 [38] apparently with reference to findings made within jurisdiction, including as the basis for an exercise of discretionary power.

force and effect by the statute pursuant to which the decision-maker purported to make it'.[9] 'Error of law', in contrast, extends to material errors, constituted by breach of applicable legal requirements, whether they invalidate the decision or not.[10] 'Jurisdictional error' sets the ambit for certain supervisory jurisdictions, including those that are constitutionally entrenched,[11] and therefore understandably draws focus in scholarship on Australian judicial review. Yet review for 'error of law' is widely available in review on the common law remedial model,[12] under the *Administrative Decisions (Judicial Review) Act 1974* (Cth) and state equivalents,[13] and in appeals on questions of law.[14] The scope of the concept of 'error of law' is therefore a matter of significant practical interest.

SZMDS and the statutory approach to error of law in fact-finding

SZMDS, a much-discussed decision of the High Court of Australia, endorsed a bespoke rationality criterion for factual findings that are required by statute as a precondition to power.[15] Following *SZMDS* it is orthodox to say that *if* a statute requires an administrator to form a state of mind as to particular facts as a precondition to power *then* serious irrationality in the administrator's fact-finding will invalidate a purported exercise of the power — that is, there is a constructive lack of statutory authority if a state of mind regarding facts identified in the statute, required as a precondition to power, is 'irrational, illogical and not based on findings or inferences of fact supported on logical grounds'.[16]

9 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 [24] (Kiefel CJ, Gageler and Keane JJ).

10 That is, Australian law maintains a distinction between jurisdictional and non-jurisdictional error of law — see analysis and case for the distinction in L Crawford and J Boughey, 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30 PLR 18.

11 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

12 Including on an application for certiorari for error of law on the face of the record or for an injunction or declaration — see critical appraisal in Crawford and Boughey, above n 10.

13 Including the *Administrative Decisions (Judicial Review) Act 1976* (Cth) s 5(1)(f).

14 For example, the *Administrative Appeals Tribunal Act 1974* (Cth) s 43.

15 These kinds of findings are a special type of jurisdictional fact — the 'fact' that is the precondition or criterion enlivening the power is not the state of affairs specified in the statute but the decision-maker's state of mind regarding that state of affairs. There are fundamentally different review methodologies for the two types of jurisdictional fact. Finding an elegant and uncontroversial form of words to make this 'awkward' distinction is difficult. Some contrasting adjectives (objective/subjective; narrow/broad) have been suggested, while others use the phrase 'state of mind jurisdictional fact' (or similar) to distinguish these from 'true' or 'traditional' jurisdictional facts: see P Cane, L McDonald and K Rundle, *Principles of Administrative Law* (Oxford, 3rd ed, 2018), 182–90 [4.4.2.1]; Aronson, Groves and Weeks, above n 7, 246–7 [4.490]; J Hutton, 'Satisfaction as a Jurisdictional Fact — A Consideration of the Implications of SZMDS' in N Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 50.

16 [2010] HCA 16; (2010) 240 CLR 611, 625 [40] (Gummow ACJ and Kiefel J dissenting). This formulation makes clear that the rationality criterion applies to the anterior findings on which the ultimate conclusion is based — see further Gummow ACJ and Kiefel J's application of the criterion to two matters that the RRT had fixed on as inconsistent with a fear of persecution on the ground of sexuality (626–628 [43]–[53]), which their Honours described as 'critical findings'. Justices Crennan and Bell held that 'illogicality or irrationality may constitute a basis for judicial review in the context of jurisdictional fact-finding' (648 [132]) but did not specifically endorse the formulation that expressly extends the rationality criterion to anterior findings. Their Honours emphasise that this rationality criterion applies only 'at the point of satisfaction (for the purposes of s 65 of the Act)' (643 [119]). Their Honours did, however, evaluate the 'rationality' of the two critical findings (648–50 [132]–[136]). SZMDS has been viewed as authority that the rationality criterion extends to those anterior findings that are critical to a finding of jurisdictional fact: see, for example, *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 [91] (Beazley P; Bathurst CJ agreeing).

Discussion of *SZMDS* has focused, quite naturally on two big ticket items:

1. the content of the *SZMDS* test for serious irrationality;[17] and
2. whether serious irrationality in non-jurisdictional fact-finding can give rise to *jurisdictional error*.[18]

In this article, however, I emphasise that all four members of the Court who addressed the status of the rationality criterion warned that it should *not* be adopted as a criterion for detecting *error of law* in fact-finding. (The other member of the Court, Heydon J, specifically refrained from making any statement on the availability of the criterion as a ground for review.) The judgments are worth examining closely.

Acting Chief Justice Gummow and Justice Kiefel

The intention to corral the *SZMDS* criterion, and ensure it is not used in review for error of law, is clearly stated in the joint reasons of the dissenting judges, Gummow ACJ and Kiefel J. Their Honours explained that the rationality requirement applies to findings of jurisdictional fact only[19] and does not extend to 'alleged deficiencies in what might be called "intra mural" fact-finding by the decision maker in the course of exercising jurisdiction to make a decision'.[20] They point out that, so confined, adopting the criterion does not amount to endorsing English authorities which have extended a rationality criterion to all material facts.[21] Further:

> Confusion of thought, with apprehension of intrusive interference with administrative decisions by judicial review will be avoided if the distinction between jurisdictional fact and other facts then taken into account in discretionary decision making is kept in view.[22]

It is indisputable that Gummow ACJ and Kiefel J sought to prevent the rationality criterion being used in review of discretionary powers for *jurisdictional error*.[23] It is clear, however, that their Honours' comments drove further, to review for error of law.[24] It seems that in their discussion of the availability of review for serious irrationality, their Honours' overriding concern was to show that the rationality criterion neither threatens the merits/legality distinction as it operates in review for error of law nor disturbs the orthodox scope of review for error of law in fact-finding as a very confined site of supervisory jurisdiction.[25] Their Honours stressed that, because irrationality in fact-finding generally does not constitute an error of law, application of the criterion in the context of jurisdictional fact-finding can be reconciled with key influential judicial statements on the scope of *legality* — Mason

17 See, for example, M Smith, '"According to law, and not humour": Illogicality and Administrative Decision-making after SZMDS' (2011) 19 AJAL 33; Hutton, above n 15, 50, 61–5; T Baw, 'Illogicality, Irrationality and Unreasonableness in Judicial Review' in Williams (ed), above n 15, 66, 68–72.
18 See, for example, M Allars, 'Distinction between Jurisdictional and Non-Jurisdictional Errors' in D Mortimer (ed), *Administrative Justice and its Availability* (Federation Press, 2015), 74, 92–6.
19 [2010] HCA 16 [42].
20 Ibid [38].
21 Ibid [26].
22 Ibid [39].
23 That is, the serious irrationality ground for review is distinct from the *Wednesbury* ground for review of discretionary decisions. Contrast *SZMDS* [2010] HCA 16 [128]–[129] (Crennan and Bell JJ).
24 See also Aronson, Groves and Weeks, above n 7.
25 [2010] HCA 16 [5]–[6].

CJ's influential articulation of the scope of error of law in fact-finding in *Australian Broadcasting Tribunal v Bond*[26] and Brennan J's observations on the merits/legality divide in *Attorney-General (NSW) v Quin.*[27] One aspect of the reconciliation is, of course, that the standard of judicial scrutiny for rationality must be calibrated to avoid review on the factual merits.[28] This is well established. However, Gummow ACJ and Kiefel J's reasons also make a distinct, and more controversial, point — that restricting the incidence of the rationality requirement to jurisdictional fact-finding reconciles its use with the legality/merits divide.

This emphasis on the restricted incidence of the rationality requirement, as a means of reconciling its use with the legality/merits divide, is evident in their Honours' observations on English public law. They approve, from the Australian side, the divergence in Australian and English public law after the House of Lords extended rationality review from findings of jurisdictional fact to findings taken into account in discretionary decision-making.[29] Their discussion highlights that Australian courts continue to reconcile the standards applied to findings of jurisdictional fact and the legality/merits divide *without* seeking to characterise the standards as generally applicable legal norms for fact-finding. They state that, in contrast with English public law today, Australian law supports the traditional understanding that a jurisdictional fact itself is 'the appropriate marker for enforcement of legality'.[30]

Justices Crennan and Bell

The joint reasons of Crennan and Bell JJ in *SZMDS* address review for *jurisdictional error*. However, Crennan and Bell JJ do state that error of law is *not* a precondition to jurisdictional error and refer with approval to judicial discussion of this point by Gummow and McHugh JJ in the earlier case, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[31] (*Applicant S20/2002*). The joint reasons in the earlier case clearly articulate the importance of keeping 'serious irrationality' separate from error of law. The logic establishing this position can be explained as follows.

In *Applicant S20/2002*, the respondent Minister had argued that a lack of reason or logic involved in a finding of fact cannot give rise to jurisdictional error because it does not constitute an error of law and the presence of an error of law is essential for a finding of jurisdictional error.[32] Their Honours' response to this submission conceded that the lack of reason or logic referred to in the test of jurisdictional error does not constitute an error of law.

26 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355–7; [2010] HCA 16; (2010) 240 CLR 611, 624 [38].
27 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6; [2010] HCA 16; (2010) 240 CLR 611, 619 [18]–[19].
28 Compare the often-cited observation that 'irrational' may be merely an emphatic way of expressing disagreement with a finding — *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611, 626 [40] (Gleeson CJ and McHugh J).
29 [2010] HCA 16 [31], referring to *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511, 514, 519–20, where Wilcox J emphasised that the novelty of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, as understood by Australian lawmakers at the time, was that it extended a recognised ground for review of jurisdictional fact to review of any facts taken into account in an exercise of discretionary power.
30 [2010] HCA 16; (2010) 240 CLR 611, 619 [18].
31 Ibid 643–4 [119].
32 The Minister's submission is recorded in these terms in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30 [53].

However, their Honours rejected the Minister's premise that the presence of an error of law is essential for a finding of jurisdictional error:

> The introduction into this realm of discourse of a distinction between errors of fact and law, to supplant or exhaust the field of reference of jurisdictional error, is not to be supported ...[33]

Justices Gummow and McHugh went on to elaborate further reasons for rejecting the Minister's submission that the presence of an error of law is essential for a finding of jurisdictional error by observing that the concept of 'error of law' plays a role in appeals and legislatively created systems of review 'constructed with a scope which spans more than jurisdictional error'.[34] This observation (elaborated over six paragraphs) has been read as pointing to the need for a stricter standard for rationality review in review for jurisdictional error than may be permitted in review for error of law.[35] (This reading appears to follow the logic that jurisdictional error is a more serious form of error than error of law — perhaps because it invalidates a decision or because the courts' authority to provide a remedy for error of law is not constitutionally entrenched). However, read in context, it seems that Gummow and McHugh JJ were making a different point — that the wider scope of review for error of law — meaning the range of non-jurisdictional fact-finding it touches — necessitates that it imposes narrow minimal constraints on fact-finding. The traditional view (that want of logic in fact-finding does not constitute error of law) is warranted because review for error of law potentially touches on all material fact-finding: the concept of error of law in fact-finding is constrained because error of law is used as the touchstone for appeals and statutory systems that have the widest possible scope for consideration of factual error.[36]

In summary, the High Court authorities establishing the serious irrationality criterion for review of findings of fact had consistently and expressly maintained that the criterion was *not* to be used in review for error of law, precisely, it seems, because error of law extends to all material findings of fact. While attention has tended to focus on the circumstances in which serious irrationality gives rise to *jurisdictional error*, this seems to me only part of the picture. All members of the Court who have endorsed the serious irrationality criterion have emphasised that serious irrationality in 'intra mural' fact-finding is *not* an error of law.

Haritos applies SZMDS serious irrationality as a criterion for error of law

Haritos appears, on the face of it, to flatly contradict the High Court's careful demarcation between serious irrationality and error of law in *SZMDS*. As is well known, *Haritos* established that so-called 'mixed questions of fact and law', including questions about the legality of fact-finding, can ground an appeal from the Administrative Appeals Tribunal to the Federal

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33 Ibid [54].

34 Ibid [57].

35 See, for example, K Stern and M Sherman, 'The Boundaries Between Fact and Law in Administrative Review' in Williams (ed), above n 15, 172, 174 — that is, 'scope' is read as the intensity of the standard applied in review. I suggest it may instead be read to mean the *incidence* of the standard — that is, the breadth of fact-finding that engages the standard.

36 *S20/2002* [2003] HCA 30 [60].

Court[37] — that is, legally erroneous fact-finding gives rise to a 'question of law' that engages the statutory appeal avenue 'on a question of law'.[38] That ruling, supported by extensive reasoning, led to the Federal Court addressing the questions of law raised by the taxpayer's allegations of legal error in material findings made by the Tribunal. Here, the Federal Court treated *SZMDS* irrationality as an error of law in fact-finding — that is, having resolved that 'question of law' extends to an allegation of an error of law in fact-finding, the Federal Court went on to hold that the application of the *SZMDS* criterion to a material finding by the Administrative Appeals Tribunal (AAT) presented a question of law.[39]

The question of law answered in the taxpayer's favour in *Haritos* was whether an AAT decision on taxpayers' objection to an income tax assessment involved findings of fact that were erroneous in law. The relevant statutory provision requires the taxpayer to establish that the assessment 'is excessive or otherwise incorrect and what the assessment should have been'.[40] The *Haritos* taxpayers argued that the Australian Taxation Office's assessment of their personal income from their commercial cleaning business had incorrectly included payments from the business that were in fact payments to subcontractors. The taxpayers gave testimony and provided business records, but also called witnesses who provided evidence of industry benchmarks for subcontractor payments, to corroborate the taxpayers' evidence. The finding that the Federal Court held to be legally erroneous was a finding made by the Tribunal as reason to reject the evidence of three witnesses. The Tribunal rejected the testimony of the witnesses on the basis that it was based on assertions by the taxpayers, not verifiable independent knowledge of industry practice. This was incorrect. The Federal Court held that the Tribunal's rejection of the testimony as corroborative because of an asserted source in the taxpayers' evidence that does not exist 'is irrational or illogical in the sense referred to in *SZMDS*'.[41]

The Federal Court expressly assimilated the *SZMDS* criterion with 'error of law' and applied it to the specific finding made by the Tribunal about the nature of the corroborative evidence:

> The approach by the Tribunal involved an error of law. The error was ... the drawing of a conclusion about the nature or character of [the corroborative] evidence that was irrational, illogical and not based on findings or inferences supported by logical grounds.[42]

37 [2015] FCAFC 92 [110]–[202]. The Court's discussion ranges over the full gamut of 'mixed questions', including whether fact-finding is legally erroneous, and other 'mixed questions', such as the meaning of statutory words that carry their 'ordinary' meaning; whether facts fully found are capable of falling within or without the description used in a statute; and whether an exercise of discretionary power involves an error of statutory interpretation. Leave to appeal to the High Court on the scope of 'question of law' in s 44 was refused on the grounds that there were no prospects of success: *Commissioner of Taxation of the Commonwealth of Australia v Haritos* [2015] HCATrans 337. D Kerr, 'What is a question of law following *Haritos v Federal Commissioner of Taxation?*' [2016] FedJSchol 18, n 9, notes that the ruling has been considered authoritative for similarly worded statutory appeals from tribunals to state courts.

38 [2015] FCAFC 92 [192], [197].

39 That is, *after* the lengthy survey of the case law ([110]–[202]), culminating in the conclusions on the scope of 'question of law' ([192]–[202]), the FCAFC turns to the questions of law raised by the Tribunal's treatment of the taxpayer's evidence ([209]–[227]).

40 *Taxation Administration Act 1953* (Cth) s 14ZZK(b)(i); see *Haritos* [2015] FCAFC 92 [5].

41 [2015] FCAFC 92 [217].

42 Ibid [217].

Further, the Federal Court explained that this error of law — the Tribunal's conclusion about the nature of the corroborative evidence — provides a basis for relief in an appeal because it is *material* to the decision made by the Tribunal.[43] This was not a case where an impugned finding (here the conclusion about the character of the evidence) is an ultimate finding identified in a statute, such that the error might be analysed as an erroneous application of law to facts.[44] Nor was this reasoned as a case of the Tribunal misconstruing an applicable legal rule of evidence or proof in drawing its conclusion about the nature of the evidence.[45] The only legal principle the Federal Court invoked in relation to the Tribunal's treatment of the evidence was the *SZMDS* rationality principle.

Taken at face value, the Federal Court's recognition of *SZMDS* irrationality as error of law is a significant departure from the position articulated in High Court decisions endorsing the *SZMDS* criterion, without any express acknowledgment or articulation by the Federal Court to that effect. The Federal Court appears to have reasoned that, if it can be a jurisdictional error to make a jurisdictional finding which is 'irrational or illogical' in the *SZMDS* sense, it must therefore be an error of law to make a material finding which is 'irrational or illogical' in the *SZMDS* sense:

> It may be an error of law to make a decision which is irrational, illogical and not based upon findings or inferences of fact supported by logical grounds ... In this case we are not concerned with whether the lack of reason or logic relates to a matter going to jurisdiction so as to amount to jurisdictional error.[46]

As discussed further below, the idea that jurisdictional error is an error of law of a particular kind (for example, an error of law in relation to a jurisdictional task) has an attractive simplicity. However, to think this way about irrationality in fact-finding flies in the face of the High Court's careful demarcation between the *SZMDS* rationality criterion and error of law. To bring the *SZMDS* rationality criterion over from jurisdictional error to legal error presupposes that legal error is implicit in every jurisdictional error. Yet that is indistinguishable from the Minister's submission on the relationship between legal error and jurisdictional error that was specifically rejected by Gummow and McHugh JJ in *Applicant S20/2002* in terms restated by four members of the High Court in *SZMDS*.

Before closing this account of *Haritos*, I should address the possibility that the application of 'serious irrationality' in *Haritos* can be squared with *SZMDS* on the basis that the Tribunal's decision was a state of mind jurisdictional fact. Certainly, *SZMDS* does not preclude recognition that serious irrationality *constituting jurisdictional error* is an error of law.[47] However, I do not think it is compelling to square *Haritos* and *SZMDS* this way. One difficulty is that the relevant statutory provision, in form at least, does not appear to establish a state

43 Ibid [213].

44 That is, it exceeds the 'either way margin' permitted for a decision applying the law correctly stated to the facts fully found, noting that the cases conflict as to the coverage and extent of the margin (or margins) as discussed in M Aronson, 'Unreasonableness and Error of Law' (2001) 26 UNSWLJ 315, 323–8; Aronson, Groves and Weeks, above n 7, 220–2 [4.8].

45 The FCAFC in *Haritos* gave separate consideration to a distinct submission that the Tribunal misconstrued the statutory the burden of proof, doing so 'on the assumption that we are wrong in holding that the Tribunal's decision in relation to subcontractor expense was irrational and illogical': [2015] FCAFC 92 [229].

46 Ibid [212].

47 Compare ibid [202]. See also *State Super SAS Trustee Corporation v Cornes* [2013] NSWCA 257, [12] (Basten JA) and other authorities cited by Aronson, Groves and Weeks, above n 7, 216.

of mind jurisdictional fact.[48] More fundamentally, it is impossible to ignore the Federal Court's specific statement that it was not necessary, in an appeal on a question of law, that the erroneous finding be a finding of jurisdictional fact.[49] There is no indication in *Haritos* that the Federal Court considered that serious irrationality is an error of law *only* when it is involved in a finding of jurisdictional fact, and every indication the other way. The Federal Court applied the criterion to a conclusion about the nature of corroborative evidence, making no attempt to finesse this as an application of the criterion to a finding of 'jurisdictional fact'.

Conflicting approaches to error of law in fact-finding — significance and implications

In this section, I turn to consider the wider implications of the *Haritos* divergence from *SZMDS*. I begin by acknowledging that it is unclear whether 'serious irrationality' marks a significant change in the content of 'error of law' in fact-finding. Yet, even acknowledging this to be the case, I suggest we can see the *Haritos* departure from *SZMDS* as a significant moment in an ongoing negotiation over the normative structure of legality norms for fact-finding.

Difficult to point to a definitive shift in content of error of law in fact-finding

It would, I accept, be difficult to show that *Haritos* marks a fundamental change in the content of 'error of law'. Indeed, an argument might be made that *Haritos* involves a conventional application of the longstanding orthodox concept of legal error in primary fact-finding — that is, making a finding (or drawing an inference) for which there is no probative material (or facts capable of supporting the inference) properly before the decision-maker.[50] This is persuasive given the Federal Court's description of the Tribunal's error as reaching a conclusion about the source of the testimony that 'was equivalent to finding a fact with no evidence … or to drawing a conclusion that it was reasonably open to make a finding, when it was not so open'.[51] In its review of the authorities, the Federal Court describes legal errors in fact-finding in terms that track the orthodox 'no evidence' ground.[52]

48 The *Taxation Administration Act 1953* (Cth), s 14ZZK(b)(i), required the taxpayers to prove that the assessment was 'excessive or otherwise incorrect' and 'what the assessment should have been'. The Tribunal's task was therefore to decide whether the taxpayers had met this statutory burden of proof. The absence of the form of a 'subjective jurisdictional fact' may not be insurmountable. The distinction between a statutory requirement to make a finding as a *precondition to power* on the one hand and as *the basis for the exercise of a power* on the other has been criticised: see, for example, *D'Amore v Independent Commission Against Corruption* (2013) 303 ALR 242, [24] (Basten JA). Extension of the 'jurisdictional fact' analysis to a factual state of affairs specified in legislation as the basis for an exercise of power would draw support from *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 [59] (French CJ).

49 [2015] FCAFC 92 [212].

50 Here treating 'no evidence' and 'not reasonably open' as two aspects of one overarching requirement that findings and inferences have a foundation in probative material: see, for example, *Haider v JP Morgan Holdings Aust Ltd t/as JP Morgan Operations Australia Ltd* [2007] NSWCA 158, [33] (Basten JA); *Republic of Turkey v Mackie* [2019] FSC 103, [22] (Bell J).

51 [2015] FCAFC 92; (2015) 233 FCR 315, 388 [217].

52 For example, in listing examples of questions of law that may be raised by a Tribunal determination of fact, the only qualitative rationality norm for fact-finding is 'whether there is evidence to support a finding of fact': ibid [182].

The question that this throws up is whether there is any difference between the *SZMDS* 'serious irrationality' criterion and the age-old test for legal error in fact-finding.[53] On the one hand, a 'no change' thesis is difficult to square with the fact that members of the High Court took care to quarantine the rationality requirement for findings of jurisdictional fact from the concept of *error of law* (as discussed above). As discussed above, that was a carefully maintained distinction, articulated to meet concerns that the *SZMDS* rationality test amounts to merits review and with the stated intention to ensure that the *SZMDS* test would not apply to findings taken into account in discretionary decision-making. The care taken by members of the High Court to quarantine the rationality test from error of law is hard to understand if it was *simply* the orthodox, long-established requirement that there be some probative material for material findings.

There are other indications that the criterion of serious irrationality goes beyond the traditional review to correct findings made in the absence of *any* probative material.[54] The impression that 'serious irrationality' and 'no evidence' are one and the same might be said to draw support from the joint reasons of Crennan and Bell JJ in *SZMDS*. Specifically, Crennan and Bell JJ adhered to an *objective* rationality test, which asks whether a finding could be made by a rational or logical decision-maker on the material before the decision-maker (eschewing a *subjective* rationality test, which asks whether the reasons given by the decision-maker are rational and logical).[55] In this respect, their Honours' reasons are consistent with the *objective* presentation of the traditional test for error of law in fact-finding.[56] Yet, even acknowledging this continuity, it would seem that an objective rationality test poses a more flexible and holistic criterion for review of a finding than the traditional 'no evidence' test for error of law. The inquiry is not simply whether there is *some* probative material for the finding. Justices Crennan and Bell explain that the criterion extends to whether a reasonable person could make the finding on 'the material before the decision-maker', or 'the evidence as a whole'.[57] Even allowing that this poses an *objective* test, it would seem to operate in a more flexible and holistic way than the traditional no evidence ground applied to primary fact-finding. The difference between the *SZMDS* criterion and the traditional no evidence ground for error of law is inchoate, but it appears undeniable that it coincides with some adjustments in supervisory practice. It may perhaps be that *SZMDS* criterion extends rationality norms traditionally confined to ultimate findings to anterior findings.[58] This might be said to permit

53 That is, making a finding that lacks any foundation in the probative material properly before the decision-maker: see the influential discussion in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356–7 (Mason CJ).

54 Compare Stern and Sherman, above n 35, 172, esp 177–8. The possible differences between the 'serious illogicality' ground and traditional legal errors in fact-finding are discussed further in, for example, Smith, above n 17, 51; Hutton, above n 15, 50, 61–5; Baw, above n 17, 66, 68–72.

55 The distinction between a subjective and objective rationality requirement for fact-finding is made by G Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24 MULR 543, 561–8; and taken up in comment on *SZMDS* in, for example, Smith, above n 17, 50, and Hutton, above n 15, 61–5.

56 See the detailed treatment in Smith, above n 17, 50; Hutton, above n 15.

57 [2010] HCA 16 [135].

58 See, for example, *Health Care Complaints Commission v Sultan* [2018] NSWCA 303, [86] (Beazley P; Simpson AJA agreeing), citing *Wesiak v D & R Constructions (Aust) Pty Ltd* [2016] NSWCA 353 [73] (McDougall J; Beazley P and Simpson JA agreeing). The examples of 'serious irrationality' given by Crennan and Bell JJ in *SZMDS* [2010] HCA 16 [135] would appear to track various formulations of legal error in *ultimate* findings and/or application of law to fact, including *The Australian Gas Light Company v The Valuer-General* (1940) 40 SR (NSW) 126, 138 (Jordan CJ); *Hope v Bathurst City Council* (1980) 144 CLR 1, 8–9 (Mason CJ); *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 156 (Glass JA).

a slightly more overtly qualitative judgment on the rationality of anterior findings, including whether the probative material for those findings is so scant or trivial it cannot rationally support the finding.[59]

On the other hand, there is some judicial support for the view that the *SZMDS* criterion was simply a new label for the 'no evidence' ground. In a case decided shortly after *SZMDS*, Basten JA found it 'convenient to assume' that the traditional requirement for *probative* material for a finding or inference explains the *SZMDS* requirement that findings or inferences be 'supported by logical grounds':

> Implicit in the statement that there is no evidence to 'support' a particular finding, is the characterisation of a relationship between the evidence and the finding. It is the same relationship inherent in the concept of 'relevance', on which the laws of evidence depend. That relationship depends on a process of reasoning which must be logical or rational. Thus, evidence is relevant which, if accepted, 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding' …[60]

Basten JA subsequently confirmed his view that a 'lack of logic' in fact-finding amounts to making a finding for which there is no evidence and for this reason is not confined to jurisdictional facts.[61] There is support for this view in other state authorities.[62] Yet High Court decisions concerning error of law in fact-finding decided after *SZMDS* have tended to articulate the error of law in traditional terms.[63] In one instance, the High Court held that a finding of fact was irrational, but the case was argued without any reference to *SZMDS* and decided on the basis that the irrationality evidenced a wrong understanding of the applicable statutory criteria.[64] All of this is to say that it remains uncertain whether, or how, 'serious irrationality' changes the scope of error of law in fact-finding.

Emerging focus on quality of reasons for discretionary decisions

No matter where the content of 'error of law' ultimately lands, there is, I suggest, one clear point of difference between *Haritos* and *SZMDS* — that is, the approach taken by the Federal Court in *Haritos* fundamentally rejects the idea (evident in *SZMDS*) that there is a need for supervisory practice to draw a distinction between findings required by statute and other material findings, including those taken into account in discretionary decisions.

59 Compare *SZLGP v MIC* [2008] FCA 1198, [22] (Gordon J).

60 *Amaba Pty Ltd v Booth* [2010] NSWCA 344 [21]–[26].

61 *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 [204]–[205], [235]–[236] (Basten JA; Bathurst CJ agreeing).

62 Basten JA's articulation of 'supported by logical grounds' is adopted and applied in *Ballina Shire Council v Knapp* [2019] NSWCA 146, [38] (Payne JA; Basten and Macfarlan JJA agreeing).

63 That is, as making a finding for which there is no probative material or drawing an inference that is 'not open'; or acting on a wrong understanding of applicable statutory criteria or legal rules of evidence. See, for example, *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, [2010] HCA 32; *Osland v Secretary, Department of Justice* (2010) 241 CLR 320. In *Republic of Nauru v WET040 [No 2]* [2018] HCA 60, the High Court (Gageler, Nettle and Edelman JJ) allowed an appeal from a Supreme Court of Nauru judgment that Tribunal implausibility findings were speculative or mere conjecture, holding that basic inconsistencies in the material before the Tribunal afforded a rational basis for the Tribunal's implausibility finding.

64 *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26, discussed in J Forsaith, 'Illogicality By Any Other Name: The High Court's Decision in FTZK and How to Use It' (2016) 86 *AIAL Forum* 61.

Taking a broader view of supervisory practice in the Federal Court, that Court's divergence from a strict statutory approach to supervision of fact-finding is stark. So, for example, in review of state of mind jurisdictional facts for jurisdictional error in the period between *SZMDS* and *Haritos*, Federal Court authorities had settled on a flexible and functional approach that did not limit review to findings required by statute, whether that be the ultimate finding identified in statute or integers of that ultimate finding.[65] In this context, the Court had said that to focus exclusively on integers of the statutory criteria would be wrong because it would 'put out of account the actual course of decision-making by the Tribunal'.[66]

Similarly, the Federal Court has adopted a flexible and functional approach to review of fact-finding in the context of discretionary powers following the High Court's restatement of the reasonableness requirement for discretionary decisions in *Minister for Immigration and Citizenship v Li*[67] (*Li*). *Li* raises many significant questions that have been discussed extensively in scholarly comment and judgments. For present purposes, I note that certain comments made in the joint reasons of Hayne, Kiefel and Bell JJ in *Li* have been read as endorsing a *subjective* reasonableness requirement for discretionary decisions,[68] which is to say a requirement that a discretionary decision-maker have reasonable reasons for their decision.[69] Notably, three of the five members of the *Haritos* Federal Court had provided joint reasons in an earlier case, stating that the 'intelligible justification' for an exercise of discretionary power must lie within the reasons given by the decision-maker.[70] As later Federal Court authorities make clear, there is no distinction drawn in this regard between matters of *permitted* and *mandatory* relevance.[71]

The Federal Court in *Haritos* did not specifically address the significance of *Li* to the concept of 'error of law'.[72] Nonetheless, it is evident that *Li* has led the Federal Court to adopt a more explicit focus in judicial review on the quality of the reasons for discretionary decisions. We might infer that this change in focus in reasonableness review fundamentally changes the context in which the Federal Court would view the *SZMDS* prescription for a 'two-track'

65 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99, [98] (Robertson J); approved *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR431, 451 [70]; *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 [47]–[54]. This expansive approach is discussed by Aronson, Groves and Weeks, above n 7, 271–4.

66 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 [98].

67 [2013] HCA 18; (2013) 249 CLR 332.

68 See for example J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Williams (ed), above n 15, 35, 44.

69 *Li* [2013] HCA 18 [72] fixes the ground on whether *the decision-maker has been unreasonable* and states that such a conclusion can be drawn if the decision-maker has 'committed a particular error in reasoning' or 'reasoned illogically or irrationally'. The two distinct ways unreasonableness may be framed are discussed, for example, in L McDonald, 'Rethinking Unreasonableness Review' (2014) 25 PLR 117, 120.

70 See, for example, *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 [47] (Allsop CJ; Robertson and Mortimer JJ).

71 See, for example, *Muggeridge v Minister for Immigration and Border Protection* (2017) 255 FCR 81; [2017] FCAFC 200, 94–5 [30], [55]–[57] (Charlesworth J; Flick and Perry JJ agreeing), applying the dictum from *Singh* to support holding a discretionary decision unreasonable because 'illogicality or unreasonableness in the legal sense' affected an evaluation in fact made as the permitted (not mandated) basis for a discretionary decision. There is continuing disagreement as to whether the reasonableness requirement draws down to *material* or *critical* reasons.

72 The Federal Court found it unnecessary to consider whether the Tribunal's finding in relation to the subcontractor expenses was 'so unreasonable that no reasonable decision-maker could have made it': [2015] FCAFC 92 [228].

approach to legality of fact-finding. The case for making a distinction between findings required by statute and other material findings has been significantly weakened, given the direction for reasonableness review of discretionary decisions indicated by *Li*.

Ongoing negotiation over the normative structure of error of law in fact-finding?

I have argued that *Haritos* marks a stark shift in approach to 'error of law' in fact-finding from the case of *SZMDS* and that this aligns with a greater focus in supervisory practice, following *Li*, on the quality of the reasons for discretionary decisions. What might we make of this?

First, the contrast between the two cases reminds us that a grounds-based approach is better placed to promote a culture of justification in the exercise of unstructured statutory powers, including, relevantly, in relation to fact-finding. *SZMDS* illustrates that it is a statutory approach to legality that drives a distinction between findings required by statute and findings adopted, under non-enacted policy, as the basis for the exercise of discretionary powers. Judicial supervision of the latter tends to be discouraged on the statutory approach. Rationality is required when administrators make findings required by *statute* but not when they make findings as a matter of *policy*. In contrast, a grounds-based approach to legality recognises that norms attach to findings that are material to the exercise of a public power affecting an individual. The norms apply to findings material to an exercise of public power precisely because the public power is exercised on the basis of the finding.[73]

As mentioned above, the *Haritos* departure from the *SZMDS* approach to error of law in fact-finding may draw support from shifts in thinking about the concept of 'legal reasonableness' as an implied condition on the exercise of discretionary statutory powers in and following *Li*. *Li* indicated that the implied reasonableness requirement includes a rationality requirement and illustrated that, while this requirement attaches to the exercise of statutory power, it also 'draws down' to material steps in the decision-making process. It is possible that this will, in time, prompt articulation of a rationality requirement for material findings of fact as an aspect of the legal requirement of reasonableness. If the reasonableness requirement is developed in this way, it would certainly confirm and support the extension of the concept of error of law in *Haritos*.

Second, if the *Haritos* approach to the concept of error of law in fact-finding is confirmed by the High Court, it might be said that this demonstrates the resilience of a grounds-based approach to judicial review for error of law. It should be noted that the longstanding, orthodox ground of review for 'error of law' in fact-finding enforces a *general norm* for defensible fact-finding, identified by courts *ex ante* a statute. *Haritos* reasserts this conventional aspect of the error of law ground for review of fact-finding.

Third, this in turn raises the possibility that we may be moving towards a point where the two contrasting intellectual approaches to judicial review might co-exist through a demarcation.

73 Compare Federal Court authorities holding that the 'intelligible justification' for a discretionary decision must be found in the reasons in fact given for the decision: above n 71.

While the statutory approach may prevail in the identification of *jurisdictional error*,[74] the grounds-based approach will remain influential in review for *error of law*.[75] The relationship between error of law and jurisdictional error can be simplified as *Haritos* implies — a 'jurisdictional error' may be viewed as a material legal error occurring in the performance of a jurisdictional task.[76] Even if the constitutional context requires a statutory approach to identifying jurisdictional error, this need not preclude a grounds-based approach to review for error of law. As such, despite the ascendancy of the statutory approach to review for jurisdictional error, the benefits of a grounds-based approach[77] — predictability, applicability, universality — can be preserved within the administrative law system through its continuing influence on *error of law*.

This way of thinking about the relationship between jurisdictional error and error of law — jurisdictional error as a material legal error affecting a jurisdictional task — draws support from judicial statements in *Craig v South Australia*.[78] It offers an attractive way of articulating that judicial review for jurisdictional error and error of law are both concerned with *legality*.[79] Moreover, retaining the grounds-based approach to error of law ties our understanding of legality to the nature of the norms enforced in judicial review. This in turn gives us a functional and substantive way to understand supervisory jurisdiction as an exercise of judicial power. The power exercised by the reviewing court is properly characterised as judicial by reference to the norms being enforced. In the case of judicial supervision of the rationality of fact-finding, for example, we see that this is an exercise of judicial power because the rationality norm is a justiciable legal norm applied to a finding that is material to an exercise of public power that engages the courts' supervisory jurisdiction. Contrast the formalism inherent in the idea that a rationality norm is legal when it is applied to a finding required by statute as a precondition to power but not otherwise.

74 Compare Bateman and McDonald, above n 3; Crawford and Boughey, above n 10. Note, there would seem to be differences of approach on the detailed application of this — for example, as to whether legal errors in findings that are *critical* to the decision reached but *not required* by statute give rise to jurisdictional error. See, for example, *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 [98].

75 Contrast Bateman and McDonald's observation, with reference to the ascendancy of the statutory approach to giving content to the category of jurisdictional error, that '[o]nce legislative purpose and jurisdictional error were grafted, there remained less meaningful work left to be done by the grounds of review in identifying and applying the legal norms of administrative law': above n 3, 170. This conclusion may be based in part on Bateman and McDonald's argument, at 168–71, that *Blue Sky* marked an elision of tests for legality and validity, such that *Blue Sky* thinking has a centripetal force on *legality* (as well as *validity*).

76 The concept of a 'jurisdictional task' appears to be connected to the contextual understanding of jurisdictional error. Cases suggest it may include deliberative tasks such as making findings that are preconditions to power; considering matters that have mandatory relevance under the statute; and, in cases where a duty of procedural fairness is implied, considering submissions of substance which, if accepted, would be capable of affecting the outcome of the case.

77 See Bateman and McDonald, above n 3.

78 *Craig v South Australia* (1995) 184 CLR 163, 179. See also *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 [61] (Edelman J; Nettle J agreeing). This does not appear to be inconsistent with other recent judicial explanations of the concept of 'jurisdictional error', albeit that they emphasise that jurisdictional error arises from failure to comply with 'statutory preconditions or conditions': see, for example, *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 [23]–[24] (Kiefel CJ; Gageler and Keane JJ).

79 Compare *Osland v Secretary, Department of Justice* (2010) 241 CLR 320, 351 [71] (French CJ; Gummow and Bell JJ), citing *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, 79 [15] (Gaudron, Gummow, Hayne and Callinan JJ).

Fourth, it may be that the High Court will in due course look more closely at the shift in the concept of 'error of law' between *Haritos* and *SZMDS* and in doing so revisit the justification for confining rationality review to findings required by statute. There are unresolved questions about the relationship between unreasonableness and irrationality in the findings of fact on which an exercise of discretion is based. There are still incentives for governments to propose unstructured administrative discretions as a means to restrict the scope of review.[80] We may yet see judicial attention return to the question whether Ch III jurisprudence favours the *SZMDS* two-track approach to legality — one for findings that are required by statute as preconditions to power and one for other material findings.[81]

Conclusion

Haritos marks a significant shift in judicial thinking about the concept of error of law in fact-finding. I have suggested the case may be read as reasserting a grounds-based approach to review for error of law, after a period in which an alternative statutory approach appeared to be ascendant in the thinking of the High Court. That is, *Haritos* is a welcome turn against the view adhered to in SZMDS — that there are different standards for legality in material fact-finding, depending on whether the fact-finding is specifically required by statute or not. On this reading of *Haritos*, it represents an important readjustment of supervisory practice, as it ensures that review for error of law is able to give effect to generally applicable norms for rational fact-finding in support of administrative powers, including discretions.

80 Compare J Gleeson, 'Taking Stock After *Li*: A Comment on Professor Gummow's Essay' in Mortimer (ed), above n 18, 33, 34.

81 That is, closer attention may articulate an aspect of Ch III jurisprudence that would explain the statutory approach; contrast deployment of the *Constitution* as 'more a rhetorical trump-card than a source of reasoned justification': Bateman and McDonald, above n 3, 167.