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Essays in Honour of Dennis Pearce

Editors

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Chapter 2

The Master of Words: Who Chooses Statutory Meaning?

Stephen Gageler

Defining the question

My topic lies at the intersection of the two main fields in which Professor Dennis Pearce has made his extraordinary contribution to Australian public law over the past 50 years: administrative law and statutory interpretation. The reference in the title I have chosen for the topic to the 'master of words' might well be thought to describe Dennis Pearce himself: astute and controlled. In fact, the title derives from language attributed to an obtuse and erratic anthropomorphic egg in the passage in Lewis Carroll's 'Through the Looking Glass', mockingly invoked by Lord Atkin in his famous dissent in *Liversidge v Anderson*.[1]

> 'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all'. (emphasis added)

Liversidge v Anderson was a case in which the right of the moving party to liberty turned on the interpretation of a statutory rule which authorised discretionary executive detention in a time of total war. The statutory rule said that the Secretary of State 'may make an order' directing that a person be detained '[i]f the Secretary of State has reasonable cause to believe [that the] person [is] of hostile origin or associations'. The question, as Lord Atkin framed it, was whether the words expressing the precondition to the exercise of the power – 'if the Secretary of State has reasonable cause' – were to be read to mean 'if the Secretary of State thinks that he has reasonable cause'. The answer, as Lord Atkin gave it, was 'no'. That negative answer to a question framed in those terms is and has long been orthodox in Australia.[2]

1 [1942] AC 206 at 245.
2 *George v Rockett* (1990) 170 CLR 104 at 112.

Liversidge v Anderson was an extreme case. It was, however, but an extreme example of a commonplace problem encountered in the judicial review of administrative decision-making in a statutory context: words have been used in a statute to define a precondition to, or a condition of, the exercise of power by an administrative decision-maker; the words admit of a range of potential meanings; and the administrative decision-maker has acted or proposes to act on one of those meanings. The question at one level is whether those statutory words are to be given the meaning on which the administrative decision-maker has acted or proposes to act, or some other meaning. The question at a different and higher level is: which is to have the authority to give meaning to those statutory words – the decision-maker or the court? Which is to be master?

A recent example

The significance of the level at which the question is posed is best illustrated by a more recent and much less dramatic home-grown example of the problem. *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[3] was a judicial review case which arose under Part IIIA of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)). Part IIIA sets out an elaborate regulatory procedure under which third parties can obtain rights of access to services provided by infrastructure facilities owned and operated by others. The first stage of that procedure involves the declaration of the service by a designated Commonwealth Minister, typically the Treasurer, on the recommendation of the National Competition Council, and subject to review on the merits by the Australian Competition Tribunal. One of the criteria of which those administrative decision-makers are required to be satisfied before declaration of a service can occur is 'that it would be uneconomical for anyone to develop another facility to provide the service'.

What does it mean to be 'uneconomical for anyone to develop another facility to provide the service'? Does 'uneconomical' refer to a development of another facility that would come at a net social cost so as to be a waste of national resources, or does 'uneconomical' refer to a development of another facility that would not be privately profitable?

The Australian Competition Tribunal (comprised of a Federal Court judge, an economist and a businessperson), with the benefit of extensive legal argument and of extensive economic evidence, adopted a net social

3 (2012) 246 CLR 379.

cost test in 2000 and again in 2001. The Productivity Commission reviewed Part IIIA and endorsed that test in 2001. The National Competition Council and the Treasurer applied the net social cost test repeatedly over the next decade. In 2010 the Tribunal (again comprised of a Federal Court judge, an economist and a businessman), again with the benefit of extensive legal argument and of extensive economic evidence, adopted a refinement of the net social cost test: a 'natural monopoly' test. In 2011 the Full Court of the Federal Court unanimously upheld that natural monopoly test on judicial review of the 2010 decision of the Tribunal.[4] In 2012 the High Court, by majority, rejected the net social cost test and its natural monopoly variation. 'Attention', the majority said, 'must focus upon the language of the relevant provisions', and '[t]extual considerations point away from the construction adopted by the Tribunal and point towards adopting a privately profitable construction of [the] criterion'.[5]

The Productivity Commission again reviewed Part IIIA in light of the High Court's decision and recommended in 2013 a return to a natural monopoly test. Choosing its own economic language with precision, the Productivity Commission recommended in particular that the criterion for declaration should be satisfied where the costs that would be incurred from the facility meeting total foreseeable market demand for the service over the declaration period are lower than the costs that would be incurred under the least costly alternative scenario.[6] Given the High Court's determination of the meaning of 'uneconomical' in Part IIIA as it now stands, implementation of the Productivity Commission's 2013 recommendation (were it to occur) would obviously require legislative amendment.

My point in referring to *Pilbara Infrastructure* is not to speculate about the possibility of a legislative response to a recent court decision. My point is to illustrate the approaches which might, or might not, be available to a court in determining an issue about the validity of an administrative decision where that issue turns on the meaning of ambiguous language in a complex statutory scheme.

John Basten has drawn attention to the circumstance that it was simply assumed in *Pilbara Infrastructure* on judicial review of the decision of the Tribunal in the Federal Court, and on appeal from the Federal

4 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57.

5 (2012) 246 CLR 397 at 418 [95]-[96].

6 Productivity Commission, *National Access Regime* (Inquiry Report No 66, 2013) 162-167.

Court to the High Court, that the meaning of 'uneconomical' in the criterion for declaration in Part IIIA of the *Competition and Consumer Act* was a matter for the court.[7] The question, at the level at which it was argued and decided in both courts, was whether the statutory criterion on its proper construction had one meaning (the meaning on which the Tribunal had acted) or another meaning. A question not considered in the Federal Court or in the High Court, because it was not argued, was whether the statutory criterion on its proper construction might have made the meaning of 'uneconomical' a matter for the Tribunal.

How that higher level question might have been answered if it had been argued and considered in *Pilbara Infrastructure* or in any other particular case is of no present concern. My present concern is with the meta-question of whether, and if so how, that higher level question might have been available to have been argued under Australian law.

Who asks?

The meta-question falls to be answered within a constitutional structure in which two propositions must now be treated as settled, if ever they were in doubt.

The first proposition is that all power in Australia is limited by law. Legislative power is limited by the Constitution. Administrative power conferred by legislation is limited by legislation. The extent to which administrative power conferred by legislation might also be limited directly by the Constitution or by common law or equitable principles is of no present moment. In ancient and recently rediscovered parlance, the limited power of an administrative decision-maker is called 'jurisdiction'. Transgressing the limits of that power is called 'jurisdictional error'. Nothing turns on the terminology. 'Jurisdiction' might equally be called 'authority to decide',[8] and a decision affected by 'jurisdictional error' might equally be called an 'unauthorised decision'. In even more ancient and continuing parlance, when used in relation to the authority of an administrative decision-maker, 'jurisdiction' might equally be called 'vires', and an administrative decision affected by 'jurisdictional error' might equally be called an 'ultra vires' decision.

7 J Basten, 'The Scope of Power: Determining the Limits' (Paper presented at AGS Administrative Law Conference Canberra, 20 June 2013) 12.

8 For example, M Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012).

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The second proposition is that, within the limits of their own jurisdictions, Australian courts are alone the arbiters of the legislated limits of administrative power in the same way as Australian courts are alone the arbiters of the constitutional limits of legislative power. The jurisdictional coverage of Australian courts has been held to be such as to leave little, if any, room for legislated limits on administrative power which are incapable of being arbitrated by a court. The High Court has constitutionally conferred jurisdiction to determine the legislated limits of administrative power conferred on Commonwealth officers by Commonwealth legislation.[9] State Supreme Courts have constitutionally entrenched jurisdiction to determine the legislated limits of administrative power conferred by State legislation,[10] subject to appeal to the High Court.[11]

The unique and essential function of Australian courts to determine the legislated limits of administrative power has been described in the crisp and emphatic early 19th century language of Marshall CJ of the Supreme Court of the United States in *Marbury v Madison*,[12] as an aspect of the judicial duty 'to say what the law is' in the course, and for the purpose, of resolving a controversy about legal rights.[13] The same function of determining the legislated limits of administrative power has been described in the late 19th century language of Professor Dicey[14] as an aspect of the 'rule of law'.[15] Whichever way it is described, the function forms a foundational part of our constitutional structure and our constitutional inheritance.

Short of some tectonic shift which is beyond the scope of my topic to contemplate, answering the meta-question of which is to be the master of statutory words must proceed on that constitutional bedrock. The question is one exclusively for a court to ask and to answer. The question for a court becomes how, if at all, it might be open to the court to determine that the law which limits the power of an administrative decision-maker leaves the meaning of a word or words in a statute to be determined by an administrative decision-maker?

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9 Section 75(v) of the Constitution.

10 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581.

11 Section 73 of the Constitution.

12 5 US 87 at 111 (1803), as quoted in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35.

13 For example, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

14 AV Dicey, *The Law of the Constitution* (Macmillan and Co, London, 1885) 188-203.

15 For example, *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56].

A question of fact?

One long-standing approach has been for a court to determine that the meaning of a particular word or group of words is a question of fact and that, as a question of fact, the question is within the authority of the administrative decision-maker to decide subject to the implied statutory limitation that the administrative decision-maker can only decide on a meaning that is reasonably open.[16]

Two categories of words have traditionally been recognised as giving rise to questions of fact of that nature. One category has been designated 'ordinary English words'. The other category has been designated 'technical terms'. The two categories can overlap in that a single phrase may contain elements of both.[17] Whether a particular word or group of words falls within either or both of those categories is a question of law for the exclusive determination of a court. Whether a particular meaning of a word or group of words falling within either of those categories is reasonably open is also a question of law for the exclusive determination of a court. The authority of the administrative decision-maker is limited to determining a particular meaning from within the range of meanings that can be determined by a court to be reasonably open.

Whether or not a particular English word is 'ordinary' has often been seen as an issue of some nicety. So, too, whether or not a particular term is 'technical'. The word in issue in *Pilbara Infrastructure* is a good example. The word 'uneconomical' can be found in an English dictionary and is sometimes used in ordinary speech. Does that make it an 'ordinary' English word? The word 'uneconomical' obviously also forms part of the lexicon of the discipline of economics in which it admits of a range of contestable meanings depending on the context. Does that make it a 'technical' term? In Part IIIA of the *Competition and Consumer Act*, 'uneconomical' is used in pivotal provisions of a complex scheme of economic regulation. Does that context make it less ordinary? Does that context make it more technical?

In *Collector of Customs v Pozzolanic Enterprises Pty Ltd*,[18] the Full Court of the Federal Court propounded an essentially functional criterion for distinguishing those statutory words that are 'ordinary' from those that are not. If their application to a set of facts simply involves matching

16 See generally S Gageler, 'What is a Question of Law?' (2014) 43 *Australian Tax Review* 68.

17 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389.

18 (1993) 43 FCR 280 at 288-289.

that set of facts with a factual description, the words are 'ordinary', with the consequence that their meaning is a question of fact. If their application to a set of facts involves the making of a value judgment about the scope and operation of the statute in which the words appear, the words are not 'ordinary', with the consequence that their meaning is a question of law.

The *Pozzolanic* criterion provides quite limited scope for a court to determine that the law which limits the power of an administrative decision-maker leaves the meaning of a particular word or group of words in a statute to be determined by an administrative decision-maker. The conclusion that the meaning of that word or those words is one of fact to be determined by the administrative decision-maker would not be open if the determination of meaning would involve the administrative decision-maker forming and acting on a view about the scope and operation of the statute. The determination of meaning by engaging in such a process would involve the administrative decision-maker answering a question of law.

More recent case law in the United Kingdom may herald a more flexible approach being taken there to distinguishing at least in some contexts between questions of fact and questions of law: one which goes beyond treating the drawing of the distinction as 'purely objective' and which takes account of the 'expediency' of committing a particular question to the determination of a court as opposed to committing that question to the determination of an administrative decision-maker.[19]

Here, the High Court has to date not unreservedly embraced the *Pozzolanic* criterion and has not had occasion to consider the more recent case law in the United Kingdom. What it has observed is that 'no satisfactory test of universal application has yet been formulated' for drawing a distinction between questions of fact and questions of law.[20]

Outside whatever scope might exist for a court to determine that the meaning of a particular word or group of words is a question of fact, the question of might it be open to the court to determine that the law which limits the power of an administrative decision-maker leaves the meaning of a word or words in a statute to be determined by an administrative decision-maker becomes: how, if at all, might it be open to a court to determine that a question of law is one to be determined by an administrative

19 For example, *R (Jones) v First Tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48 at 64-65 [45]-[47].

20 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 394; *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at 157 [39].

decision-maker? The same question can be reframed: when, if at all, might a court determine that a question of law is non-jurisdictional?

A non-jurisdictional question of law?

Divergent judicial approaches to when a court might determine a question of law to be within the jurisdiction of an administrative decision-maker emerged in the second half of the 20th century in the United Kingdom and the United States. It is instructive to note those divergent approaches and the Australian reaction to them.

The watershed in the United Kingdom was the decision of the House of Lords in 1968 in *Anisminic Ltd v Foreign Compensation Commission*.[21] What *Anisminic* actually decided is perhaps less clear but less important than what it has been taken to have decided.[22] As interpreted in later decisions of the House of Lords, *Anisminic* has been taken to have decided that thenceforward the United Kingdom Parliament was to be understood to have conferred decision-making power on an administrative decision-maker only on the condition that the power was to be exercised on a correct legal basis, with the result that a misdirection in law in making the decision rendered the decision ultra-vires.[23] As explained by Lord Diplock in *In re Racal Communications Ltd*,[24] *Anisminic* was a 'legal landmark' which 'made possible the rapid development in England of a rational and comprehensive system of administrative law based on the foundation of the concept of ultra vires'. Lord Diplock explained:

> It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity.[25]

21 [1969] 2 AC 147.

22 See generally P Craig, *Administrative Law* (Sweet & Maxwell, London, 7th ed, 2012) 481-482 [16-011], 489-498 [16-022]-[16-029]; I Hare, 'The Separation of Powers and Judicial Review for Error of Law' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Clarendon Press, Oxford, 1998) 118-119.

23 *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682 at 701-702.

24 [1981] AC 374 at 382.

25 Ibid 382-383.

Lord Diplock continued:

> Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.[26]

The High Court adopted the first of those statements of Lord Diplock in *BHP Petroleum Pty Ltd v Balfour*.[27] The High Court went on to approve the second of those statements of Lord Diplock in *Craig v South Australia*,[28] adding that '[t]he position is, of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal'. Accordingly, said the High Court, '[i]f such an administrative tribunal falls into an error of law which [among other things] causes it to identify a wrong issue [or] to ask itself a wrong question … it exceeds its authority or powers', '[s]uch an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it'. Yet the High Court has resisted going as far, as Lord Diplock might subsequently have gone in *O'Reilly v Mackman*,[29] as to say that *any* mistake of law on the part of an administrative decision-maker *must* mean that the decision-maker asked a question which the decision-maker had no power to determine so as to obliterate what he described as 'esoteric distinctions between errors of law … that went to … jurisdiction, and errors of law … within … jurisdiction'. The High Court has rather continued to accept that an error of law, even as to the proper construction of a statute conferring jurisdiction, does not necessarily result in asking a question which the administrative decision-maker has no power to determine.[30] To the contrary, there are 'mistakes

26 Ibid 383.

27 (1987) 180 CLR 474 at 480-481.

28 (1995) 184 CLR 163 at 179. See also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82].

29 [1983] 2 AC 237 at 278.

30 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371-372, 376-377; *Public Service Association (SA) v Federated Clerks' Union of Australia, SA Branch* (1991) 173 CLR 132 at 141, 148-149, 152-153, 165; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 [31]-[32], 228-229 [85].

and mistakes'.[31] Not every error of law is a jurisdictional error, and not every jurisdictional error is or involves an error of law.[32]

The watershed in the United States was the decision of the Supreme Court in 1984 in *Chevron USA Inc v Natural Resources Defense Council Inc*.[33] As one of the most frequently cited cases in US administrative law history,[34] *Chevron* has generated a very large body of case law as well as a vast secondary literature. The *Chevron* doctrine is much debated, but its basic features are not much in doubt. Famously, *Chevron* requires a court reviewing a decision of an administrative agency to proceed by a two-step inquiry. At '*Chevron* Step One', the court must determine 'whether Congress has directly spoken to the precise question at issue'.[35] If Congress has directly spoken, the court must apply Congress's 'clear' meaning.[36] If Congress has not directly spoken, the court proceeds to '*Chevron* Step Two'. At *Chevron* Step Two, the court determines whether the agency's interpretation 'is based on a permissible construction of the statute'[37] with the result that 'a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by [the] agency'.[38] In summary:

> '[T]he *Chevron* two-step' instructs reviewing courts to determine: (1) whether Congress's intent is clear or ambiguous and (2) if ambiguous, whether the agency's interpretation is 'reasonable'. If the agency's interpretation is reasonable, the court will uphold the agency's decision.[39]

The Supreme Court recently explained *Chevron* in *City of Arlington v Federal Communications Commission*.[40] There it was said:

> *Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered

31 *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.
32 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1175-1176 [53]-[60].
33 467 US 837 (1984).
34 SG Breyer et al, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (Aspen Publishers, New York, 6th ed, 2006) 247.
35 467 US 837 at 842 (1984).
36 Ibid 842-843.
37 Ibid 843.
38 Ibid 844.
39 RC Dolehide, 'A Comparative "Hard Look" at Chevron: What the United Kingdom and Australia Reveal about American Administrative Law' (2010) 88 *Texas Law Review* 1381 at 1386.
40 185 L Ed (2d) 941 (2013).

> by an agency, 'understood that the ambiguity would be resolved, first and foremost by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.' *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.[41]

The High Court considered *Chevron* in *Corporation of the City of Enfield v Development Assessment Commission*.[42] To the extent *Chevron* might be characterised as a doctrine which requires a court to defer to the opinion of an administrative decision-maker on a question of fact or law which a court must answer to determine the jurisdiction of the administrative decision-maker, the High Court must be taken firmly to have rejected it as inconsistent with the bedrock constitutional principle which the High Court reiterated, in terms explicitly derived from *Marbury v Madison*, that in Australia the courts have a singular duty to declare and enforce the law which determines the limits of the power conferred on an administrative decision-maker by statute. The High Court did not, however, reject *Chevron* to the extent of rejecting *Chevron*'s view of the permissible scope of decision-making authority that might be conferred by statute on an administrative agency. To the contrary, the High Court adopted as applicable to the Australian constitutional structure an important distinction made by Professor Monaghan in an influential article entitled '*Marbury* and the Administrative State' published one year before *Chevron*.[43] Quoting earlier language of Professor Jaffe, Professor Monaghan had noted that 'there is in our society … a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon [administrative] power by the constitutions and legislatures'.[44] Professor Monaghan had then continued:

> But judicial review of administrative action stands on a different footing from constitutional adjudication, both historically and functionally. In part no doubt because alternative methods of control, both political and administrative in nature, are available to confine agencies within bounds, there has never been a pervasive notion that limited government mandated

41 Ibid 950-951.
42 (2000) 199 CLR 135 at 152-153 [43].
43 (1983) 83 *Columbia Law Review* 1.
44 Ibid 32-33, quoting LL Jaffe, *Judicial Control of Administrative Action* (Little, Brown, Boston, 1965) 320 at 321.

> an all-encompassing judicial duty to supply all of the relevant meaning of statutes. Rather, the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.[45]

There is, Professor Monaghan was saying, and the High Court was accepting, no systemic reason within a constitutional tradition founded on *Marbury v Madison* why a court cannot determine that on the true construction of a statute a question of law is one left by the statute to be determined by an administrative decision-maker. That is to say, there is no systemic reason why every question of law must be a question going to jurisdiction. In the language of Professor Manning, a reviewing court applying *Chevron* interprets ambiguity as a legislative delegation of interpretative discretion to an agency and 'satisfies its *Marbury* obligation simply by accepting an agency's reasonable exercise of discretion within the boundaries of the authority delegated by [the legislature]'.[46]

Common to both *Anisminic* and *Chevron* is an acceptance of the same foundational proposition that courts alone are the arbiters of the legislated limits of administrative power. Common to both is also an acceptance that a statute conferring administrative power is capable of conferring authority on the administrative decision-maker to decide some questions of law. The critical difference between them lies in the presumption which a court adopts in construing the legislated limits of the decision-making power which a statute confers on the administrative decision-maker. The *Anisminic* presumption is that the determination of a question of law is outside the authority conferred on the administrative decision-maker. The *Chevron* presumption is that, like the determination of a question of fact or a question of administrative policy, the determination of a question of law is within the authority conferred on the administrative decision-maker subject to an implied statutory limitation that the administrative decision-maker can only decide on a legal meaning that is reasonably open.

The approach to emerge in Canada in the first decade of this century, following an influential article by Professor David Dyzenhaus in 1997,[47] has steered a flexible middle course between those two presumptions. The

45 (1983) 83 *Columbia Law Review* 1 at 33.

46 JF Manning, 'Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules' (1996) 96 *Columbia Law Review* 612 at 627.

47 D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 279-307. For example, *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 221 [48].

Canadian approach has been to recognise both *Anisminic*-like 'correctness review' and *Chevron*-like 'reasonableness review' as being available and to choose between those two standards of review of decisions made by administrative decision-makers on a statute-by-statute basis. The Supreme Court of Canada succinctly explained its approach in 2012 in *Catalyst Paper Corporation v Corporation of the District of North Cowichan*:[48]

> A court conducting substantive review of the exercise of delegated powers must first determine the appropriate standard of review. This depends on a number of factors, including the presence of a privative clause in the enabling statute, the nature of the body to which the power is delegated, and whether the question falls within the body's area of expertise. Two standards are available: reasonableness and correctness. If the applicable standard of review is correctness, the reviewing court requires, as the label suggests, that the administrative body be correct. If the applicable standard of review is reasonableness, the reviewing court requires that the decision be reasonable, having regard to the processes followed and whether the outcome falls within a reasonable range of alternatives in light of the legislative scheme and contextual factors relevant to the exercise of the power.

If *Craig* left any doubt that it is the *Anisminic* presumption that prevails in Australia, that doubt was dispelled by the decision of the High Court in 2003 in *Plaintiff S157/2002 v Commonwealth*.[49] The influence of the presumption can also be seen in the subsequent reasoning of the High Court in 2010 in the *Offshore Processing case*.[50] The administrative processes of assessment and review considered in that case having been found to have a statutory foundation, it was said to follow that those processes were governed and limited by principles which were 'well established'.[51] The Court went on:

> There being no exclusion by plain words of necessary intendment, the statutory conferral of the powers … is to be understood as 'conditioned on the observance of the principles of natural justice'. Consideration of the exercise of the power must be procedurally fair to the persons in respect of whom that consideration is being given. And likewise, the consideration must proceed by reference to correct legal principles, correctly applied.[52]

That implicit embracing of the *Anisminic* presumption in Australia explains why it was so readily assumed in *Pilbara Infrastructure* in

48 [2012] 1 SCR 5 at 11 [13].
49 (2003) 211 CLR 476.
50 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.
51 Ibid 352 [73].
52 Ibid 354 [78].

argument in the Federal Court in 2012 and in the High Court in 2013 that the meaning of 'uneconomical' in the criterion for declaration in Part IIIA of the *Competition and Consumer Act* was a matter for the court rather than the Tribunal whose administrative decision was under review.

Enfield, while rejecting the *Chevron* presumption, nevertheless confirmed that there can be circumstances in which an Australian court would determine that the *Anisminic* presumption was displaced and that a statute conferred authority on an administrative decision-maker to determine a question of law. The line of cases which were distinguished in *Plaintiff S157/2002*, deriving from the analysis of Dixon J in *R v Hickman; Ex parte Fox and Clinton*[53] and *R v Murray; Ex parte Proctor*,[54] provides an historical example of statutes conferring authority on administrative decision-makers without conditioning the decision in every case on compliance with a standard of legal correctness as determined by a court. The *Hickman* line of cases interpreted a privative clause in a statute as expressing a legislative intention to expand the scope of the authority conferred by that statute on an administrative decision-maker. The clause was interpreted to bring a decision made in fact by an administrative decision-maker within the legislated limits of the decision-maker's authority if three conditions or 'provisos' were satisfied: the decision was a bona fide attempt to exercise the power; it related to the subject-matter of the statute; and it was 'reasonably capable of reference to the power' given to the administrative decision-maker.[55] There may in that line of cases have been something of a gap between rhetoric and application evident even in the decision in *Hickman* itself. That point is brought out in the following succinct summary of *Hickman* given by Gleeson CJ in *Plaintiff S157/2002*:[56]

> The Board [the decision-maker in *Hickman*] had power to settle industrial disputes in a certain industry. In that regard, it had to follow certain procedures. … [I]t was claimed that a purported decision was beyond power because the dispute in question was between parties who were not in the relevant industry. It might have been thought that the view that they were in the relevant industry was at least fairly open. There was certainly a bona fide attempt by the Board to pursue its powers. Even so, the 'decision' … in the Court's opinion did not on its face appear to be within power.

53 (1945) 70 CLR 598.
54 (1949) 77 CLR 387.
55 (1945) 70 CLR 598 at 615.
56 (2003) 211 CLR 476 at 487-488 [18].

The decision in *Hickman* was found not to be within power because the need for the industrial dispute to be between parties who were within the same industry was held, on the proper construction of the statute conferring dispute settlement power on the Board, to be what would later come to be called an 'inviolable limitation'.[57]

So, what is the answer?

Which then is to be the master: which is to have the authority to give meaning to any one or more particular statutory words – an administrative decision-maker or a court? Does the Australian legal system supply or even permit the giving of a simple answer? Taking mastery of a word and choosing to make that word have the meaning I wish it to have, I can do no better than to borrow from the same obtuse and erratic anthropomorphic egg to whom I have already referred.

> After a minute Humpty Dumpty began again … 'Impenetrability! That's what I say?' 'Would you tell me, please,' said Alice 'what that means?' 'Now you talk like a reasonable child,' said Humpty Dumpty, looking very much pleased. 'I meant by "impenetrability" that we've had enough of that subject.'

57 For example, *R v Coldham; Ex parte Australian Workers' Union* (1982) 153 CLR 415 at 419.