

aial

AUSTRALIAN INSTITUTE
OF ADMINISTRATIVE
LAW INC

Tribunals • Courts

Privacy • Parliament

Human Rights • Reasons

Natural Justice • Government

Review • Accountability

Ombudsman • Constitution

Freedom of Information

Incorporating the
2014 National Lecture on Administrative Law
by The Hon Wayne Martin AC,
Chief Justice of Western Australia

aialFORUM

Editor: Elizabeth Drynan

NO 78

aialFORUM

Australian Institute of Administrative Law Incorporated.

Editor: Elizabeth Drynan

EDITORIAL BOARD:

Mr John Carroll
Professor Robin Creyke
Ms Alison Playford
Dr Geoff Airo-Farulla

Contributors are advised that articles published in the AIAL Forum
are also reproduced on the AIAL website <http://www.aial.org.au>
and the AUSTLII website <http://www.austlii.edu.au>

The AIAL Forum is published by
Australian Institute of Administrative Law Inc.
ABN 97 054 164 064
PO Box 83, Deakin West ACT 2600
Ph: (02) 6290 1505
Fax: (02) 6290 1580
www.aial.org.au

This issue of the *AIAL Forum* should be cited as (2014) 78 *AIAL Forum*.

The Institute is always pleased to receive papers from writers on administrative law who are interested in publication in the *AIAL Forum*.

It is recommended that the style guide published by the *Federal Law Review* be used in preparing manuscripts.

Manuscripts should be sent to the Editor, *AIAL Forum*, at the above address.

Articles marked # have been refereed by an independent academic assessor. The refereeing process complies with the requirements of the Department of Education. Refereeing articles is a service AIAL offers contributors to its publications including the *AIAL Forum* and the proceedings of the annual National Administrative Law Conference.

Copyright in the articles published in this publication resides in the authors.

Copyright in the form of the articles as presented in this publication and on the AIAL and AUSTLII websites resides in the Australian Institute of Administrative Law Incorporated.

ISSN 1322-9869



Printed on Certified Paper

TABLE OF CONTENTS

NATIONAL LECTURE ON ADMINISTRATIVE LAW : 2014 NATIONAL ADMINISTRATIVE LAW CONFERENCE <i>Hon. Wayne Martin AC</i>	1
RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW <i>Katherine Cook</i>	22
THE OAIC FOI EXPERIMENT <i>James Popple</i>	31
THE IMPACT OF THE EMERGING 'REASONING' GROUNDS OF REVIEW <i>John Carroll & Cain Sibley</i>	44
THE RELEVANCE OF WEDNESBURY/LI IN MERITS REVIEW <i>Richard Oliver</i>	55
THE CHANGING CONCEPT OF 'UNREASONABLENESS' IN AUSTRALIAN ADMINISTRATIVE LAW <i>Alan Freckelton</i>	61

PERIPHERAL VISION? JUDICIAL REVIEW IN AUSTRALIA

*The Honourable Wayne Martin AC**
Chief Justice of Western Australia

I was greatly honoured to have been invited by the Australian Institute of Administrative Law to deliver the 2014 National Lecture. I acknowledge the traditional owners of the lands on which we met, the *Wadjuk* people, who form part of the great Noongar clan of south-western Australia, and pay my respects to their Elders past and present.

The land on which we met is of particular significance to the *Wadjuk* people.¹ The nearby river, which is known to us as the Swan River, is known to the *Wadjuk* as *Derbarl Yerrigan*. *Derbarl Yerrigan* is one of the homes to the *Waugal*, which is a snake or rainbow serpent of great significance to the Noongar people, as it is associated with all sources of fresh water and therefore with the giving of life. It was the *Waugal* that made the Noongar people custodians of the land which they inhabit.

The hills which we know as the Darling Scarp and which can be seen to the east of this building represent the body of the *Waugal*, which created the curves and contours of the hills and gullies. The *Waugal* also carved out all the fresh waterways such as the rivers, swamps, lakes and waterholes, by scouring out the land with its body. At the foot of *Ga-rakatta*, which we know as Mt Eliza, which forms part of King's Park, the *Waugal* formed the *Derbarl Yerrigan* and the ground at the foot of that hill, which is not far from here, is another site of particular significance to the *Wadjuk*.

This land has a more recent cultural significance as the home of the University of Western Australia and as a place of great learning. Perhaps less significant in contemporary culture is the hotel not far from here at which one of the famous graduates of this university, Mr R J Hawke, set a record for the rapid ingestion of alcohol.

I have many fond memories of my undergraduate days at this campus, but they do not include the study of administrative law. That is not because I did not like studying administrative law or because, worse still, I have no present recollection of studying administrative law due to the passage of the years, or my emulation of the feats of R J Hawke. It is because I chose not to study administrative law. When making my selection, I looked briefly at the prescribed text for the course which was *Judicial Review of Administrative Action* by Professor SA de Smith. When I saw that he described judicial review as 'inevitably sporadic and peripheral' I decided that my time could be better engaged on a more useful subject. So, in the field of administrative law I am entirely self-taught. I hope that does not become too apparent during the course of this paper.

Judicial review and administrative justice

This paper is concerned with judicial review. Lawyers and judges often regard judicial review as the pre-eminent means of ensuring justice for individuals who have grievances against the state. Perhaps this is an illustration of the adage that if the only tool available is

* The Hon Wayne Martin AC Chief Justice of Western Australia presented this paper at the 2014 AIAL Administrative Law National Conference. Perth W.A., 24 July 2014. He acknowledges the significant contribution of Dr Jeannine Purdy to this paper.

a hammer, everything starts to look like a nail. The reality is that in contemporary Australia and, I suspect, most other comparable jurisdictions, judicial review is but one mechanism by which administrative justice can be secured. Measured in statistical terms, judicial review comprises a very small part of a broad church. Its congregation is mainly made up of government officials engaged in merits review, both internal and external, ombudsmen, and various other agencies, including those loosely classed as the integrity branch of government.² However, at the risk of torturing this metaphor, courts engaged in judicial review do occasionally make their way to the pulpit and announce tenets and principles to guide the broader congregation.

Nevertheless, it is true that the court is the last place to which most Australians would turn if they had an administrative grievance. The reasons for that are a topic for another day. But the many and varied barriers to access mean that only a minute number of administrative decisions and very few legislative initiatives are subject to judicial review. Those who think that any expansion of judicial review significantly undermines fundamental principles of democracy and accountability might keep that in mind.

Outline

Leaving to one side its effect on prospective administrative law students, Professor de Smith's famous description of judicial review as 'inevitably sporadic and peripheral'³ has been cited many times, including by Chief Justice Elias in last year's National Lecture.⁴ De Smith's disparaging description of judicial review was published 55 years ago, in the first edition of his seminal work. However the expression has fallen out of favour with more recent editors of that work who have favoured increasingly potent descriptions of the role of judicial review. The varying terminology in successive editions over the last 20 years or so provides a convenient montage of the development of judicial review in the United Kingdom. This development has culminated in a vigorous debate on whether judicial review in that country now undermines fundamental principles of democracy and accountability.

That montage provides a convenient contrast to developments in Australian administrative law over the same period and, in particular, the contemporary acknowledgement that Australian administrative law (at least at federal level) has an entrenched source in the Constitution of the Commonwealth. I consider whether the attribution of Australian administrative law to a source in a written constitution provides some answer to critics who assert that judicial review undermines the sovereignty of Parliament. I also examine whether the sourcing of judicial review within a written constitution has constrained Australian administrative law, taking it out of the 'main game' being played out in the courts of other countries. I address the question of whether judicial review in Australia has been debilitated by a kind of peripheral vision, capable of seeing only jurisdictional error and giving rise to what has been described as 'Australian exceptionalism'?⁵

The development of judicial review in the United Kingdom

'Sporadic and peripheral' origins

Professor de Smith was not the only learned commentator to regard judicial review as having limited impact. In 1980, Professor Donald Horowitz observed that 'judicial norms have generally only seeped into the cracks rather than, as courts might wish, flowed into the main channels of administrative life'.⁶ Fourteen years later, Professor Ross Cranston, now judge of the High Court of Justice (Queen's Bench Division), objected to:

the attention lawyers lavish on judicial review [which] diverts their gaze from more fundamental, if less glamorous, mechanisms to redress citizens' grievances and call government to account.⁷

When Professor Cranston described the proponents of modern judicial review as 'sedulous and lordly'⁸ I do not think it was meant as a compliment!

The 5th edition of De Smith - from 'sporadic and peripheral' to 'constant and central'

Just a year after Professor Cranston's comments, the fifth edition of *De Smith* was published, in 1995. The authors, the Rt Hon the Lord Woolf and Professor Jeffrey Jowell QC, observed in the preface that:

In the period between the first and fourth editions, significant developments in the law relating to judicial review of administrative action took place. Since then, even greater developments have occurred. The last edition retained de Smith's oft quoted words that judicial review was 'sporadic and peripheral'. This statement may still be accurate in the context of administrative laws as a whole. However, the effect of judicial review on the practical exercise of power has now become constant and central.⁹

The 6th edition of De Smith - no longer limited to review of administrative action

The sixth edition of *De Smith* was published in 2007. The authors of the fifth edition had by then been joined by Professor Andrew Le Sueur. The title of the work was changed from *Judicial Review of Administrative Action* to *De Smith's Judicial Review*. The authors explained the change on the basis that the previous title would now be 'partial and misleading'. Judicial review, under European Community law and in the interpretation of the rights conferred by the European Convention on Human Rights, now involved review not only of administrative action but also of primary legislation.¹⁰

Interestingly, in light of developments in Australia,¹¹ the authors observed that the sixth edition engaged more specifically with the constitutional foundations of judicial review than earlier editions. Their position was that 'courts in judicial review enunciate not merely the will of the legislature but the fundamental principles of a democratic (albeit unwritten) constitution'.¹²

They went further:

In recent years, it is increasingly being realised that in a constitutional democracy the role of judicial review is to guard the rights of the individual against the abuse of official power. This does not mean that the courts should necessarily be impeded in their ability to determine the public interest, or to achieve efficiency. Whether or not these rights are as clearly articulated as in countries with written constitutions, we have arrived at a situation described in an address by Lord Diplock delivered at a meeting to pay tribute to the work of the late Professor de Smith. He said that our system of administrative law is 'in substance nearly as comprehensive in its scope as *droit administratif* in France and gives effect to principles which, though not derived from Gallic concepts of *légalité* and *détournement de pouvoir*, are capable of achieving the same practical results'. Shortcomings and lacunae no doubt remain, but English administrative law is now one of the most celebrated products of our common law, and doubtless the fastest developing over the past half-century.¹³

The authors attributed significant changes to the latest edition of *De Smith* to these developments.

These changes were driven, in particular, by the explicit recognition that individuals in a democracy possess rights against the state – as enunciated both by the common law as well as the Human Rights Act 1998 and in European Community law. In addition, the relationships between the courts and other branches of government have been clarified in important ways. The principle of the sovereignty of Parliament has been, if not fatally undermined, at least substantially weakened as a shield against either unlawful administrative action or legislation which offends the rule of law. Constitutional principles such as the rule of law and separation of powers have been explicitly articulated as such, and their status has been enhanced. Above all, it has become clear that judicial review is not merely about the way decisions are reached but also about the substance of those decisions themselves.¹⁴

The authors also discuss the clash between the 'ultra vires' and the 'common law' justification for judicial review: whether the role of the courts is simply to implement the legislature's intent or whether it extends to applying independent principles of good administration developed through common law reasoning.¹⁵ The authors refer to the attempt to reconcile these theories through the 'modified ultra vires' theory.¹⁶ This theory acknowledges that judges independently create principles of good administration but holds that these should only apply when consistent with a general intention attributed to Parliament, that any power it confers should be exercised in accordance with the rule of law. As the authors observe:

In other words, legislative silence or ambiguity is read in the context of a continuing consent by Parliament to be bound by the rule of law as interpreted by the courts...

To the extent that the modified ultra vires justification seeks to weave judicial law-making into a constitutional context (under the principle of the rule of law) it is surely right. However, to the extent that it seeks to assign a general intent to Parliament, it is scarcely less artificial than the pure ultra vires justification. We prefer to place the justification of judicial review on a normative and constitutional basis: In our view Parliament *ought* to abide by the necessary requirements of a modern European constitutional democracy (one of which is the rule of law). From that proposition follows a second: that courts *ought* to make the assumption that the rule of law (and other necessary requirements of constitutional democracy) are followed by the legislature. These two propositions are qualified only to the extent that the courts may submit to the authority of Parliament when it seeks clearly and unambiguously to exclude the rule of law or other constitutional fundamentals. Under what circumstances the courts are required so to submit depends upon the continuing validity of the sovereignty of Parliament as our governing constitutional principle.¹⁷

These words predicted an ominous future for a jurisdiction without a written constitution, at least to Australian eyes. The declaration in explicit terms that the courts need only submit to Parliament's authority so long as its sovereignty remained 'our governing constitutional principle' was unprecedented. Of course, in jurisdictions with written constitutions, like Australia, the United States and Canada, the capacity of the Parliament to exclude the rule of law or other 'constitutional fundamentals', and the circumstances in which the courts can set aside the express will of the Parliament, are derived from the terms of the written constitution, as construed by the courts. However because those constitutions are the product of a democratic process, the courts' disallowance of laws which exceed the legislative powers conferred by the Constitution does not involve any derogation of Parliamentary sovereignty, but rather the identification of the boundaries within which Parliament is sovereign.¹⁸

R (Jackson) v The Attorney-General

It seems likely that the authors of *De Smith* may have been emboldened by the approach taken by the House of Lords in 2005 in *R (Jackson) v The Attorney-General*.¹⁹ The case concerned the validity of the *Hunting Act 2004* (UK), which prohibited the hunting of wild animals with dogs. The legislation was extremely controversial and did not receive the assent of the House of Lords, the members of which were presumably more enthusiastic about taking to the woods on horseback with a pack of baying dogs than the members of the House of Commons. However, the *Hunting Act 2004* had received royal assent without the consent of the House of Lords, in purported accordance with the *Parliament Act 1949* (UK).

The case turned upon statutory interpretation and was, in that respect, relatively uncontroversial. More controversial was Lord Steyn's observation that while the supremacy of Parliament was the general principle of the constitution of the United Kingdom, it was a construct of the common law created by judges who could, in exceptional circumstances, qualify the principle. Those exceptional circumstances would include an attempt to abolish judicial review or the ordinary role of the courts. Other members of the House made similar observations in varying terms.

Observers might have been forgiven for concluding that these observations in the House of Lords, reinforced by the distinguished authors of such a prominent text as *De Smith*, signalled a return to notions of natural law, promoted by Cicero and others, including Chief Justice Sir Edward Coke. In the Court of Common Pleas, Coke famously ruled that:

in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void.²⁰

Of course construing a statute so that it conforms to good sense and reason is a well-established principle of statutory construction (at least where the words of the statute allow). But adjudging a statute void because it fails to conform to the court's perception of good sense and reason smacks of an assault on parliamentary sovereignty bordering on treason, at least to those who are accustomed to find the source of a court's power to strike down a statute in a written constitution, rather than the potentially idiosyncratic views of the judiciary.²¹

Peace in our time?

By 2010 Dr Thomas Poole expressed the view that critiques of the general legitimacy of judicial review in the United Kingdom now had 'an abstract, even antique feel'. He observed:

the intense ideological conflicts that fuelled debates on judicial review a generation or so ago are now a distant memory ... [this may relate in part] to the *normalization* of the practice of judicial review, which has established itself just about everywhere as a fixture of the political landscape... A return to a lost Eden – or, depending on your point of view, that 'place of utter darkness, fittest called Chaos'²² – where minimalistic ('sporadic and peripheral') judicial review grubbed around in the political undergrowth is no longer a realistic option... Judicial review has become normal or normalized, then, a basic accoutrement of the rule of law within a constitutional democracy.²³

The hostilities resume

However, the peace was short-lived. In 2011 hostilities resumed with an opening salvo from now Lord Jonathan Sumption in the FA Mann lecture, which was delivered after the announcement of his appointment to the Supreme Court of the United Kingdom but prior to him taking up that appointment. Although not cited by Lord Sumption, the views he expressed were consistent with those previously expressed by Professor Ran Hirschl of the University of Toronto. In 2006, Professor Hirschl wrote:

Over the last few decades the world has witnessed a profound transfer of power from representative institutions to judiciaries, whether domestic or supranational... Even countries such as Canada, Israel, Britain, and New Zealand – not long ago described as the last bastions of Westminster-style parliamentary sovereignty – have gradually embarked on the global trend towards constitutionalization...

One of the main manifestations of this trend has been the judicialization of politics – the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies. Armed with newly acquired judicial review procedures, national high courts worldwide have been frequently asked to resolve a range of issues, from the scope of expression and religious liberties, equality rights, privacy, and reproductive freedoms, to public policies pertaining to criminal justice, property, trade and commerce, education, immigration, labor, and environmental protection.²⁴

Lord Sumption used a comparison between the scope of administrative law in France and in the United States to approach his topic which concerned the boundary between judicial and political decision-making. He asserted that judicial intervention in the workings of the state had been restricted in France, but enthusiastically embraced by the makers of the Constitution in the United States. He attributed the latter to an intent to 'contain the wishes

of the sovereign people by a system of checks and balances which included entrenched judicial power'.²⁵ In the UK, Lord Sumption saw the seeds of a return to natural law germinating in the soil of judicial review, with similar effect. In his FA Mann lecture, he asserted that 'the decisions of the courts in this area have edged towards a concept of fundamental law trumping even parliamentary legislation'.²⁶ In his view, although nominally an exercise in interpretation, a process of statutory construction focused upon the question 'what ought a good and wise Parliament to have wanted to achieve?' was in reality an inherently legislative exercise.²⁷ He stated:

the decisions of the courts on the abuse of discretionary powers are based, far more often than the courts have admitted, on a judgment about what it is thought right for Parliament to wish to do. Such judgments are by their nature political.²⁸

In Lord Sumption's view, the incorporation of the Human Rights Convention into English law significantly shifted the balance between political and legal decision-making in areas of major political controversy, such as immigration, penal policy, security and policing, privacy and freedom of expression. It also extended the scope of judicial review from executive decisions to primary legislation.²⁹ As is customary when criticising any perceived expansion of judicial power, Lord Sumption described the process as a transfer of power 'into the domain of judicial decision-making where public accountability has no place'.³⁰ As is also customary in such discourse, his Lordship observed that judicial intrusion into government policy lacks 'any democratic legitimacy'.³¹

Of course, Lord Sumption did not assert that all judicial review had these dire consequences. His attack focused on cases in which he considered that courts had in fact reviewed the merits of legislation or executive policy, and in those areas where 'Parliamentary scrutiny is generally perfectly adequate for the purpose of protecting the public interest'.³² In his view, such judicial intrusion threatened the broader concept of legitimacy which underpins a democracy with an uncodified constitution and which depends upon public accountability.³³ This was likely to lead to politicisation of the judiciary as had occurred in the United States, and to processes of judicial selection of the kind adopted in that country.³⁴

Sir Stephen Sedley returned fire in an article entitled 'Judicial Politics'.³⁵ Some guide to the tenor of the response is provided by the opening paragraphs. Reference is made to the infrequency with which members of the Bar have been appointed directly to the highest court in the United Kingdom, and in which Lord Sumption is compared to Justice Scalia of the US Supreme Court. Criticisms of Lord Sumption's conflation of executive government with the legislature and misapprehension of the scope of judicial review in France follow.

In his detailed response, Sir Stephen Sedley analysed each of the cases relied upon by Lord Sumption and contested the conclusions drawn. In particular, Sir Stephen contested Lord Sumption's proposition that the cases demonstrated judicial interference in 'macro policy'; instead he suggested that the cases essentially turned upon the proper construction of the relevant statutes. Sir Stephen also countered that there were many examples of cases where the courts declined jurisdiction in areas which were essentially political and which did not involve the determination of legal rights and obligations. He made the further point that almost all judicial review cases were concerned with the purported exercise by the executive of powers conferred by the legislature. The executive is not to be treated as immunised from judicial review by democratic credentials in the same way as the legislature.

Sir Stephen Sedley suggested that Lord Sumption's observations would have a discernible impact upon the standing of the judiciary and confidence in the administration of justice - as he put it: 'Smoke, in the public mind, means fire'. He concluded:

One leaves [Sumption's] lecture reflecting that if we had parliamentary confirmation hearings for new judicial appointees (something Sumption rightly opposes), this is the kind of manifesto we would get and that politicians would probably applaud. What would happen to a candidate who stood up for the integrity of modern public law and for judicial independence within the separation of powers is anybody's guess.³⁶

This concluding observation was, perhaps, a little harsh - after all, Sumption's appointment to the Supreme Court had been announced and his legal and intellectual credentials for that appointment were not in doubt.

The sequel to the debate

It seems that Sir Stephen Sedley's prophecy of the possible consequences of Lord Sumption's address came to pass. In December 2012 the Ministry of Justice of the United Kingdom released a consultation paper proposing reforms to judicial review.³⁷ The general effect of the proposed reforms was to limit the scope for judicial review by reducing the time limits within which proceedings could be brought, tightening the procedures relating to the grant of leave and increasing the fees payable. These steps were justified by 'concerns that [judicial review] has developed far beyond the original intentions of this remedy' and backed by the statistical growth in the use of judicial review to challenge decisions of public authorities from 160 applications in 1974, to 4,250 applications in 2000, and to over 11,000 by 2011.³⁸

The 7th edition of De Smith

The seventh edition of *De Smith* was published against this background. This edition contained a review of numerous occasions upon which senior ministers had 'thought it fit to encourage and engage in hostile public comment about particular judges, judgments or the role of judicial review in general'.³⁹ The authors observed:

While such tactics of confrontation and denunciation of judicial review may enable politicians to vent frustration and a handful of journalists to fill column inches, they cannot provide a stable basis for a relationship between executive and judiciary. That must be built upon mutual respect for the constitutional principles of the rule of law and separation of powers.⁴⁰

The authors were also critical of a passage in the 2012 Ministry of Justice consultation paper which asserted that 'the threat of judicial review has an unduly negative effect on decision makers', leading 'public authorities to be overly cautious in the way they make decisions, making them too concerned about minimising, or eliminating, the risk of a legal challenge'.⁴¹

The UK government's response

It seems that the Lord Chancellor, who is also Secretary of State for Justice, was not daunted by these observations. After implementing the 2012 proposals, a second consultation paper was published in September 2013 proposing another round of reforms to judicial review. Responding to that consultation paper, the Lord Chancellor observed:

In my view judicial review has extended far beyond its original concept, and too often cases are pursued as a campaigning tool, or simply to delay legitimate proposals. That is bad for the economy and the taxpayer, and also bad for public confidence in the justice system... Having considered [responses to the second consultation paper] with care I am satisfied both that there is a compelling case for reform and that it should proceed at pace.⁴²

The Human Rights Parliamentary Committee

However, this was not the last word on the subject. In a report by the joint parliamentary committee on Human Rights (UK) published shortly afterwards, the committee rejected each of the further proposals for reform advanced by government. It found that the basis for each was flawed and furthermore illustrated the conflict inherent in combining the role of Lord Chancellor with the role of Secretary of State for Justice.⁴³

The committee reported that, as the government acknowledged, the increase in applications for judicial review had been almost exclusively driven by immigration matters (much like recent experience in Australia), but had argued that the increase of approximately 21% in the number of non-immigration and asylum judicial reviews between 2000 and 2012 was significant.⁴⁴ The committee noted that others queried whether a total increase of 366 applications over a 12 year period was 'significant'.⁴⁵

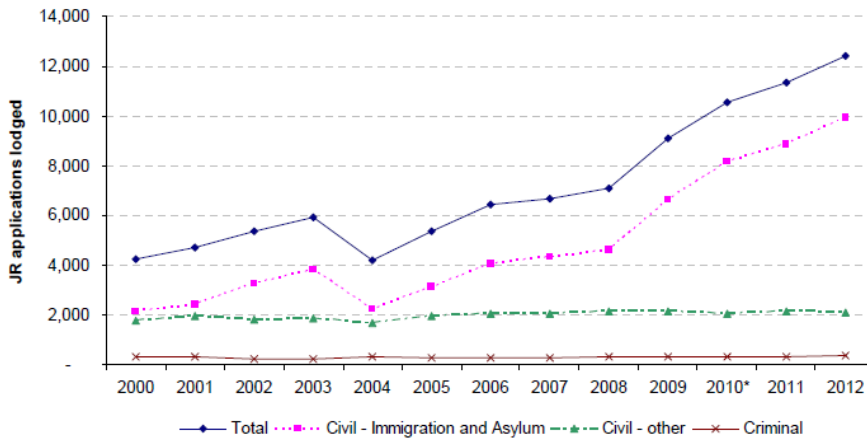


Diagram 1: UK judicial and court statistics on applications for judicial review 2000-12⁴⁶

The committee also noted the government's concern at 'the use of unmeritorious judicial reviews to cause delay, generate publicity and frustrate proper decision-making'.⁴⁷ Official data indicates that successful challenges to government action were few and far between (which also accords with Australian experience). Taking 2011 as an example, in the UK 174 applicants out of a little under 12,000 were successful - that is, a rate of about 1.6%.

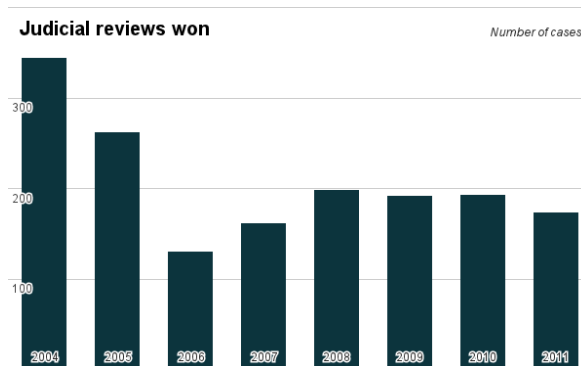


Diagram 2: UK judicial and court statistics on successful applications for judicial review 2004-11⁴⁸

However, as the committee has noted, it should not be inferred that 'unsuccessful applications' lack merit or are abusive. Cases may settle and may be withdrawn because the respondent conceded the merits of the case against them.⁴⁹ The committee concluded that official statistics 'cannot tell us anything reliable about the scale of abuse of judicial review' because data on the reasons why judicial review applications are withdrawn are not recorded.⁵⁰

Similar observations may be made with respect to the numerous applications made against the UK in the European Court of Human Rights. Over 80% of the applications made between 1959 and 2012 were declared inadmissible or struck out. By 2012, just over 1% of those applications had resulted in a judgment finding violation. During 2012, only 0.5% of the cases brought against the UK led to a finding of violation.⁵¹

Applications against the UK allocated to judicial formation²⁵

1959–1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total
6197	442	625	479	986	687	744	1003	843	886	1253	1133	2766	1547	1734	21325

Applications against the UK declared inadmissible or struck out

1959–1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total
5213	223	466	529	737	863	721	732	963	403	1240	764	1175	1028	2047	17104

Applications against the UK resulting in judgment (judgment finding violation)

1959 – 2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total
189 (103)	40 (30)	25 (20)	23 (19)	18 (15)	23 (10)	50 (19)	36 (27)	18 (14)	21 (14)	19 (8)	24 (10)	486 (289) (59%)

Tables 1-3: Applications made against the UK at the European Court of Human Rights between 1959 and 2012⁵²

Furthermore since the *Human Rights Act 1998* (UK) came into force, only 28 declarations of incompatibility of legislation with a right created by the European Convention on Human Rights have been made.⁵³ Such declarations neither invalidate the legislation nor are they binding on parties to proceedings.⁵⁴

While the official UK data may not be conclusive as to the merits or otherwise of the applications for the various forms of judicial review being sought, it is clear that the outcome rarely results in judicial officers directing government as to what is to be done. Viewed from a statistical perspective it would be very hard to sustain the proposition that the courts have usurped the roles of either the legislative or executive branches of government.

The debate with respect to the proposals to further restrict judicial review in the UK is continuing. It would be presumptuous of me to adjudicate upon the debate between Sumption and Sedley. As in most vigorous debates, each side advanced strong and weak points. Generally debate about the respective roles of the branches of government enhances public understanding of the systems of government. However, it is not clear that this particular debate had that effect. Its impact upon the future of judicial review in the United Kingdom remains unclear.⁵⁵

Judicial review in Australia

Judicial review has not been immune to controversy in Australia. At times the controversy has been couched in terms of 'judicial activism' and has come from senior government ministers and officials. The controversy following the decision of the High Court in the 'Malaysian solution' case⁵⁶ provides a recent example. Some commentators expressed the view that government criticism of the High Court on that occasion exceeded appropriate bounds, including the then Prime Minister's reference to an earlier decision of Chief Justice French, when sitting as a judge of the Federal Court, which was said to be inconsistent with his later decision in the High Court.⁵⁷

However, it seems to me that public controversy over the ambit of judicial review in Australia has been on a rather different scale, several magnitudes lower than the controversy recently experienced in the United Kingdom. It seems likely that a key reason for this is the democratic legitimacy associated with Australian judicial review because its primary source is the Constitution of the Commonwealth. Moreover, constitutional entrenchment of the judicial review jurisdiction of the courts has enhanced public appreciation of the proposition that in order for a system of government to conform to the 'rule of law' not only must officials act in accordance with the law and within the scope of powers conferred by law, but the courts must be able to determine when those powers have been exceeded. I examine these suggestions in more detail below.

Australian structures of government - a child of mixed parentage

Professor Peter Cane has characterised the Australian system of government as a child of mixed parentage:

on the one side, the British unitary constitutional monarchy, a product of 800 years of largely evolutionary institutional development; and on the other, the American federal republic, forged at a great constitutional moment in the revolutionary cauldron of the late eighteenth century.⁵⁸

The resultant hybrid consists of a Westminster-style political system operating under a US-style written constitution.⁵⁹ That written constitution not only embodies 'a formal, triadic, separation of powers'⁶⁰ but also distributes legislative, executive and judicial powers between the Commonwealth and State polities which together comprise the federation. The High Court has ultimate responsibility for the interpretation of the Constitution and supervises the exercise of the powers distributed by the Constitution.

The constitutional source of Australian administrative law

Over the last 20 years or so the profound effect which this structure has had upon the development and content of Australian administrative law has come to be recognised, and publicly acknowledged many times. For example, in the 2012 National Lecture in this series, Justice William Gummow AC observed:

for too long, in Australian law schools insufficient attention was paid to the consideration that, at least at the federal level, public administration essentially concerns the execution and maintenance of the *Constitution* and the laws of the Commonwealth. Section 61 places this within the executive branch. It is the superintendence, within the constitutional structure, of this executive activity which generates what we may call administrative law. But administrative law, so understood, is a subset of constitutional law.⁶¹

When the New South Wales Bar Association commissioned a portrait of the Honourable Mary Gaudron AC upon her retirement from the High Court she insisted that the text of

section 75(v) of the Constitution be stencilled across the top of the portrait. Justice Virginia Bell AC noted that:

As Mary Gaudron acknowledged in her speech at the unveiling of the portrait, the text is hardly Jeffersonian: it is the 'technical language of lawyers'. Her fondness for it is because it provides a signal guarantee of protection under the rule of law. It is a protection that is not found in the constitutions of other liberal democracies. The jurisdiction of the High Court to restrain an officer of the Commonwealth from exceeding his or her legal duty or, conversely, to compel an officer of the Commonwealth to perform his or her legal duty, cannot be ousted.⁶²

At the risk of pedantry, Her Honour's observations should be read as presuming the continued existence of the Constitution in its present form - that is, unaltered by popular referendum. Given the infrequency with which a majority of voters in a majority of States have agreed that the Constitution should be altered, that is a reasonable assumption to make.

So, while Australian administrative law has, of course, drawn heavily upon the development of administrative law in the United Kingdom, the jurisprudential sources of the law in each country fundamentally differ. In Australia the primary source of that law (at least at federal level) is embedded in the Constitution of the Commonwealth. In contrast, administrative law in the UK is sourced from the common law developed by the courts of that country, augmented by statutes passed by the Parliament, including those which have incorporated aspects of European law into the domestic law of the United Kingdom, including the European Charter of Human Rights.

The consequences of the constitutional source of judicial review in Australia

Entrenched judicial review jurisdiction

There are a number of important consequences which flow from this fundamental distinction. First, unless and until a majority of voters in a majority of States agree to change the Constitution, the administrative law jurisdiction of the High Court cannot be validly constrained either by legislation passed by the Parliament or by administrative action taken by the executive. Furthermore, since the decision in *Kirk v Industrial Court of New South Wales*,⁶³ it is clear that the legislative and executive powers of the States are similarly constrained. The jurisdiction of State Supreme Courts to determine when administrative or legislative jurisdiction has been exceeded is a defining characteristic of those courts, required under Chapter III of the Constitution, and cannot be eroded by State legislative or executive action.

Opinions may differ with respect to the desirability of extending the entrenched judicial review jurisdiction from the High Court to the State Supreme Courts. On the one hand it might be said that Chapter III of the Constitution, which is concerned with the judicial power of the Commonwealth, is an unlikely place to find a limitation upon the legislative powers of the States. On the other hand, if the judicial review jurisdiction of State Supreme Courts was not protected by the Commonwealth Constitution, it could be argued, with some force, that there is no protection for the rule of law in the governance structures applicable to the States, which is not consistent with a fundamental assumption of our federal structure.

However, whatever the views expressed at State level, it is now beyond argument that the Constitution of the Commonwealth gives the High Court jurisdiction to determine the proper boundaries and legitimate exercise of the powers conferred upon the other branches of government created by the Constitution. That jurisdiction includes, but is not limited to, the remedies to which reference is made in section 75 of the Constitution.

Democratic legitimacy

Another significant consequence of the Australian law of judicial review having its primary source in the Constitution is that it diminishes any assertion that the exercise of that jurisdiction somehow lacks democratic legitimacy. The Constitution was the outcome of a protracted process of public debate and referenda. Although the democratic processes of the late 19th century were not those we would expect today, and the extent of public participation in that process has been doubted,⁶⁴ as Elias CJ noted in last year's National Lecture, 'In jurisdictions without a formal constitutional distribution of powers, such as mine, the role of the courts is vulnerable'.⁶⁵

The prospect that a court might rule legislation passed by the Parliament invalid excited great controversy when it was countenanced by some members of the House of Lords in the fox hunting case. However, that prospect is the inevitable consequence of a written constitution which confers limited powers upon State and Federal legislatures. No serious commentator would question the power of the Australian courts to declare legislation invalid because it exceeds the powers conferred upon the relevant legislature under the Constitution. Sometimes the exercise of the power has caused great political controversy - for example, in the Bank Nationalisation case,⁶⁶ the Communist Party case,⁶⁷ or the Tasmanian Dams case.⁶⁸ It often provokes an understandable adverse reaction from the government responsible for the legislation invalidated, not uncommonly characterised by allegations of 'judicial activism'. However, the power of the court to declare legislation invalid is seldom, if ever, doubted. Furthermore, when a longer term perspective provided by history is taken, many would accept that the existence and exercise of the power has been beneficial. The three cases I have mentioned provide support for that view.

The ambit of judicial review

The constitutional source of Australian administrative law also has an impact upon the ambit of the courts' judicial review jurisdiction. In particular, the courts are at pains to distinguish between review for error of law which has the character of taking a purported exercise of power beyond jurisdiction, and review on the merits. Justice Brennan's observations in *Attorney-General (NSW) v Quin* are commonly cited to reinforce that distinction:

The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power ... the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.⁶⁹

In last year's National Lecture, Elias CJ described this view as providing the 'rather unattractive indication ... that the courts must be indifferent to "administrative injustice"'.⁷⁰

The same criticism can be directed at the use of the term 'jurisdictional error' to delineate the boundaries of the courts' jurisdiction. No doubt the term has a worthy provenance, and its use reinforces the constitutional source of the court's jurisdiction and evokes the fundamental rule of law values which underpin the exercise of that jurisdiction. It also highlights the limited role of the court in ensuring that the legislature remains within the jurisdiction granted to it under the Constitution or, in the case of executive action, within the jurisdiction conferred upon the executive by the legislature. However, one difficulty with the term is that it appears to deny the court any power to remedy injustice or error of law if it occurs within the exercise of the jurisdiction conferred. Put more bluntly, if the court can only intervene if the error is 'jurisdictional', it necessarily follows that there must be errors, including errors of law, which the court is powerless to remedy. From the perspective of the rule of law, this is not such a good look.

I suspect that the issue may be more semantic than substantive. Although the High Court has described what is meant by 'jurisdictional error' in general terms,⁷¹ it has resolutely resisted any attempt to specify the particular qualities or characteristics which define it. Those qualities, like beauty, lie in the eye of the beholder - relevantly in this discourse, the High Court. Indeed it seems that the expression 'jurisdictional error', which has become such a pervasive feature of Australian administrative law, is now acknowledged as nothing more than a label to distinguish cases in which the court concludes that judicial intervention is appropriate from those in which it is not.⁷² While the label conforms to the constitutional source of the court's jurisdiction, in substance the process may not be dissimilar to more overtly nuanced terminology used in other jurisdictions to describe the basis for judicial intervention, such as 'variable intensity unreasonableness review' or 'proportionality' analysis. And if this is so, criticism of Australian administrative law as 'exceptionalist' may be unjustified to that extent.

The question can be addressed another way. Professor Michael Taggart is one of those who has described Australian judicial review as exceptionalist. He has suggested that with reference to the deference to be shown to the executive, Australian courts draw a sharp distinction between questions of law and the exercise of discretionary power. While no deference is shown in relation to the former, for example the correct interpretation of statutory text, 'the courts could not defer more, in theory at least' in relation to the exercise of discretion.⁷³ Professor Taggart uses Ronald Dworkin's analogy of the doughnut to describe this theoretical version of judicial review in Australia:

[D]iscretion is the hole in the middle of the doughnut filled with policy and politics, and into which the courts will not enter.⁷⁴

This analogy, of course, does not accord with reality. One can easily see and feel the edge of a doughnut, and you can taste the difference between the doughnut and the hole. However, the boundaries between law and discretion (or merits) are much more elusive. The flexibility of the concept of 'jurisdictional error' recognises that the boundaries between the two are not drawn by bright lines and are often blurred. This flexibility allows Australian courts to take into account the same types of considerations as the courts in other jurisdictions which purport to have more flexible boundaries.

Another difficulty that I have with the doughnut analogy is that Australian courts review the exercise of discretion on the ground of an error of law even if that error is not 'discernable' provided the outcome of the exercise is 'unreasonable or plainly unjust'. This famous dictum of Dixon, Evatt and McTiernan JJ in *House v R*⁷⁵ expressed almost 80 years ago has been applied in many areas of the law, not least in the appellate review of the exercise of the sentencing discretion which occurs every day in courts all around Australia. The now controversial ambit of review on the ground of unreasonableness is a topic to which I will return.

How 'exceptionalist' is Australian administrative law?

In the remainder of this paper I will attempt to address the question of how 'exceptionalist' Australian administrative law is by reference to an admittedly unrepresentative sample of decisions. These have been chosen on the basis that some are said to represent a narrow or 'exceptionalist' approach to the ambit of judicial review, and others which appear to me to suggest a rather broader view. Of course it is also relevant to this debate that Australia does not have a legislated bill of rights. Other than those rights which can be implied from the terms of the Constitution, and which continue to cause controversy, this will of necessity distinguish judicial review in Australia from elsewhere, although perhaps not to the extent often assumed.

A narrow view?

The boundaries of public power

The decision of the High Court in *Griffith University v Tang*⁷⁶ attracted widespread and vociferous criticism. Professor Mark Aronson was characteristically direct when he described the decision as 'nothing short of breath-taking'.⁷⁷ The decision has been aligned with the earlier decision in *Neat Domestic Trading Pty Ltd v AWB Ltd*.⁷⁸ Each was concerned with the ambit of review when powers which arguably have the characteristic of powers exercised for public benefit are exercised by non-public bodies. Although these cases concerned the proper construction of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and its Queensland equivalent, critics suggest that they reflect an outmoded approach to the notion of administrative powers and duties, which fails to take account of the contemporary enthusiasm of government for outsourcing the exercise of those powers to non-public entities and organisations.

Detailed analysis of that criticism would further prolong this paper. It is sufficient to observe that Justice Keane provided a reasoned and coherent answer to those criticisms in the 2011 National Lecture.⁷⁹ There is a cogent argument that the distinguishing feature of those decisions was not the identity of the repository of the power (being a university and a private corporation respectively), but rather the nature of the power exercised. Put another way, the decisions demonstrate the capacity of Australian courts to delineate the appropriate boundary for judicial review by reference to particular facts and circumstances. Because the distinction between law and policy is inherently imprecise, and given the great variety of ways in which public power is exercised under contemporary systems of government, the lines drawn in any individual case will almost always be contestable. However, this does not mean that the process evident in these cases is different in principle to the processes undertaken in similar circumstances in other comparable jurisdictions.

Indefinite detention

In *Al-Kateb v Godwin*⁸⁰ the High Court upheld the validity of a decision to detain a person who had arrived in Australia without a visa even though it found, as a fact, that there was no real prospect of removing him from Australia in the reasonably foreseeable future. The outcome of the decision has been criticised. It is said to provide an example of excessive 'legalism'.⁸¹ However, there were essentially two issues in the case. The first was the proper construction of the relevant provisions of the *Migration Act 1958* (Cth). The second was the question of whether the Act was within the legislative power conferred upon the Parliament by the Constitution. Both of those questions were addressed by the court as questions of statutory construction.

If the court had departed from that conventional process because its outcome was repugnant to the sensitivities of some, the rule of law would have been significantly undermined. It seems likely that Lord Sumption would take the view that if a majority of Australians are offended by persons being detained indefinitely if they are in Australia without lawful authority, then the democratic process enables them to elect representatives who would change the law. As Gleeson CJ pointed out, comparison with dissimilar outcomes in other jurisdictions such as the United Kingdom, the United States and Hong Kong was invidious because the constitutional and statutory contexts were different. In particular, in each of those jurisdictions detention was discretionary rather than mandatory and His Honour noted that in systems of discretionary detention, issues of reasonableness in the exercise of the discretion provide an opportunity for judicial intervention.⁸² Put another way, the outcome in *Al-Kateb*, for the majority at least, was dictated by the legality of the

exercise of the power to legislate conferred upon the Parliament by the Constitution, not by the ambit of judicial review.⁸³

Reasons for decision

In *Public Service Board of NSW v Osmond*⁸⁴ the High Court decided that an administrative decision was not invalidated because the decision-maker failed to provide reasons in circumstances in which there was no statutory duty to do so. The decision has been criticised vociferously by many, notably the Hon Michael Kirby AC.⁸⁵ It has been suggested that the decision fails to reflect the significance of providing reasons justifying an administrative decision. That significance was put neatly in last year's National Lecture when Chief Justice Elias observed:

It is an aspect of human dignity that people know why official action is taken which affects them. If people are given the dignity of reasons, they want them to justify the outcome. If they do not, the decision is appropriately characterised as unreasonable and reviewable.⁸⁶

However, in New Zealand the right to reasons for administrative decisions is conferred by the *Official Information Act 1982* (NZ). In Australia, most jurisdictions⁸⁷ have enacted legislation conferring a general right to reasons for administrative decisions. The question which the High Court addressed in *Osmond* was not whether administrative justice is enhanced by the provision of adequate reasons for the decision, but whether the common law required the provision of reasons as a condition of the valid exercise of the power conferred. Lying beneath that was another question: should a right to reasons be a matter for the relevant legislature or for the court, in the enunciation of the common law. It is difficult to fault the conclusion that these are matters for the legislature, not the courts, if regard is had to:

- the vastly differing circumstances in which administrative decisions are made;
- the recognition in most statutory systems for the provision of reasons that some classes of decisions must be exempted; and
- the implications for public resources which would flow from the creation of a general right to reasons.

Any different view would arguably have justified a complaint from the legislature that the court had usurped its responsibility.

However, respect for the differential responsibilities of the legislature and the court cuts both ways. This is a proposition which was recently lost on the Parliament of Western Australia. Last year the Parliament voted to disallow rules of court promulgated by the judges of the Supreme Court which included a simplified procedure for the making of an order that an administrative decision-maker provide reasons for a decision the subject of judicial review proceedings. Significantly, the rules did not create any right to such an order and, of course, only potentially applied to those few cases challenging an administrative decision brought to the Supreme Court. Because no right to an order for reasons was created, it was clearly implicit in the rules that the discretion to make such an order would only be exercised if the provision of reasons was relevant to the resolution of the issues in the case. The procedure proposed in the rules was far from novel and was derived from practices adopted in the Supreme Court of New South Wales more than 13 years ago.⁸⁸ The procedure could hardly be described as radical. As Heydon J observed in *Zentai*:

A decision-maker can be compelled to produce documents revealing the reasons for a given decision, whether by a subpoena *duces tecum* or a notice to produce. That decision-maker can be compelled by interrogatories to reveal those reasons in writing, and by a subpoena *ad testificandum* to reveal those reasons in the witness box.⁸⁹

Nevertheless, the Parliament disallowed the relevant rules because of a view that they overrode the decision in *Osmond* and usurped its function.⁹⁰ That view is, with respect, plainly wrong. *Osmond* was concerned with the question of whether the provision of reasons was a condition of the validity of an administrative decision. The rules of court were concerned with the procedures to be followed in the court and by which material necessary for the administration of justice could be obtained by the court. The rules of court could not reasonably be characterised as conferring a general right to reasons for administrative decisions, or as usurping the function of the legislature. The legislature had, after all, expressly conferred upon the court the power to make rules for the procedure and the practice to be followed in the court, by the *Supreme Court Act 1935* (WA).

However, for present purposes my point is not that the court was right and the Parliament was wrong. In practical terms, the disallowance of the relevant rule can be easily overcome by the exercise of the general case management powers conferred by other rules of court. The more important point is that while the legislature can reasonably and properly expect the court to respect its responsibility to determine when and whether substantive laws should be altered, the legislature must give corresponding and equivalent respect to the long-established power of the court to determine the practices and procedures to be applied in the court.

Not that exceptional after all?

Turning to the other side of the coin, it seems to me that there are a number of cases which suggest that judicial review has not been unduly shackled by excessive legalism, nor does it have such a narrow ambit as to be properly characterised as 'exceptional' by reference to other comparable jurisdictions.

No deference

As I noted, Lord Sumption chose the United States as his exemplar of a jurisdiction in which the judicial function had expanded to jointly occupy at least part of the space occupied by executive government and legislature. However, the doctrine of deference enunciated by the Supreme Court of the United States in *Chevron USA v Natural Resources Defence Council Inc*,⁹¹ has been steadfastly resisted in Australia. Under that doctrine the courts defer to an administrative agency's legal interpretation of its statutory charter so long as that interpretation reflects a reasonable appreciation of the intent of the Congress. To the contrary, the High Court of Australia has made it clear that questions of statutory interpretation are legal questions which can only be resolved by the judicial branch of government in accordance with Chapter III of the Constitution.⁹²

The judicial emasculation of privative clauses

The constitutional source of administrative law in Australia has facilitated the judicial emasculation of privative clauses. The process which commenced in *R v Hickman*⁹³ was advanced significantly in *Plaintiff S157*⁹⁴ and largely completed in *Kirk*.⁹⁵ The approach taken in *Hickman* and *Plaintiff S157* was essentially a process of statutory construction which relied upon an apparently insoluble conundrum. That is, the legislature might confer power in terms which are so unconstrained as to significantly limit the scope of judicial review. However, the legislature has to stay within the scope of the relevant head of legislative power conferred by the Constitution. If the power is entirely unconstrained it will not properly be referable to the relevant head of power and therefore will be invalid; to the degree it is constrained it will be subject to judicial review.

In *Kirk*, the process was taken a significant step further by reference to Chapter III of the Constitution. The court held that any attempt by a Commonwealth or State Parliament to exclude the jurisdiction of the courts to review administrative action for jurisdictional error would infringe Chapter III of the Constitution. This is because it would deprive the court of a characteristic which is essential to its recognition as an appropriate repository of the judicial power of the Commonwealth. This construction of the Constitution entrenches the judicial review jurisdiction of the courts of Australia to a significantly greater extent than in other comparable jurisdictions.

Jurisdictional fact

Recent cases have seen the High Court take an expansive view of the 'jurisdictional facts' which must be satisfied to enliven the jurisdiction conferred upon the relevant decision-maker. Because these facts are conditions of the valid exercise of jurisdiction, the court can, indeed must, decide for itself whether the facts exist. So, a more expansive view of jurisdictional fact enlarges the ambit for judicial review.

Legislative provisions allowing for an administrative action to be taken if a designated official is 'satisfied' of something are commonplace.⁹⁶ The proper construction of such a provision is always a question to be determined in the context of the particular statute. However, there is a propensity in recent High Court decisions to construe such provisions as not merely referring to the relevant official's state of mind, but as requiring that the stipulated facts exist as a matter of objective fact.⁹⁷ Even if the jurisdictional fact is the formation of a view by a designated official, the court has power to inquire as to whether the view was vitiated by jurisdictional error, such as a misapprehension of the view which had to be formed, or of the process by which the view was to be formed.⁹⁸

Unreasonableness - Wednesbury revisited

A full consideration of the impact of the decision of the High Court in *Minister for Immigration and Citizenship v Li*⁹⁹ is a topic for a paper in itself.¹⁰⁰ In any event, as Zhou Enlai apocryphally observed of the French Revolution in the early 1970s, it may be too soon to tell what its impact will be.¹⁰¹ At least one well-informed commentator has described the decision as a large step in the reformulation of Australian public law.¹⁰² In that case, the High Court set aside the Migration Review Tribunal's refusal to grant an applicant for a visa a further adjournment when she had been endeavouring to demonstrate her entitlement to a visa for three years, on the ground that the decision was so unreasonable as to be invalid. On any view, the case does not bespeak a narrow or timid view of the ambit of judicial review.

The joint reasons of Hayne, Kiefel and Bell JJ move from the more constrained language usually used to describe unreasonableness in the *Wednesbury*¹⁰³ sense to the broader language of 'the legal standard of unreasonableness'. They suggest that the more specific instances of jurisdictional error recognised in the prior cases can be encompassed within this broader notion.¹⁰⁴ This broader notion appears to me at least, to be consistent with concepts relating to the ambit of judicial review developed in countries without written constitutions, such as the United Kingdom and New Zealand. If this is so, it suggests that the perception that Australian judicial review is shackled to, and constrained by, excessive legalism is illusory, and that the differences between judicial review in Australia and other comparable jurisdictions may be more semantic than substantive.

There is perhaps another point conveniently made by reference to the *Li* decision. Delineating the ambit of judicial review in Australia by reference to jurisdictional error is now well entrenched. However, as I noted, any attempt to define 'jurisdictional error' in anything

but the most general terms has been resisted. It follows that the court has scope to develop the common law of Australia on judicial review, and perhaps the proper interpretation of statutes dealing with that subject, by redeveloping and reformulating the ambit of the grounds which will establish jurisdictional error, such as unreasonableness. This again suggests that any perception that the Australian law of judicial review is unreasonably shackled or constrained by its constitutional source or by the language of 'jurisdictional error' is an illusion, perhaps derived from the language used, rather than its substance.

Conclusion

Critics of Australian judicial review have described it as 'exceptionalist' by reference to other comparable jurisdictions. They assert that its derivation from a written constitution leads to an unhealthy focus upon the separation of powers and a legalistic approach to statutory construction which has been to the detriment of broader notions of administrative justice. However, for the reasons I have endeavoured to develop in this paper, the structure of administrative law in Australia has entrenched the judicial review jurisdiction of the courts, now recognised as a vital aspect of the rule of law, and provided a democratic legitimacy to the exercise of that jurisdiction. This has been achieved without unduly constraining the proper development of a coherent and principled body of law which appropriately reflects and recognises the differing roles and responsibilities of the different branches of government.

Comparison with recent experience in the United Kingdom suggests that the structure of administrative review in Australia, and the approach taken by the High Court within that structure, has minimised perhaps inevitable controversy and tensions between the branches of government, at least by comparison to the apparent tensions and controversy which have emerged in the United Kingdom. If this is the consequence of being 'exceptional', to paraphrase Justice Patrick Keane,¹⁰⁵ it does not seem to me to be an accidental error that is awaiting correction by a sufficiently robust judiciary.

Endnotes

- 1 Information from Christopher Pease, available at Kaartdijin Noongar – Noongar Knowledge website, www.noongarculture.org.au/spirituality (accessed 11 July 2014).
- 2 The views I expressed on the topic of the so-called integrity branch of government in the 2013 Whitmore Lecture have caused sufficient controversy to discourage my re-entry into that arena - for a little while at least. (See 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government', available at: www.supremecourt.wa.gov.au/files/Whitmore%20Lecture%202013%20Chief%20Justice%20Martin%20%20Aug%202013.pdf accessed 11 July 2014).
- 3 Quoted in Maurice Sunkin, 'Conceptual issues in researching the impact of judicial review on government bureaucracies' in Marc Hertogh & Simon Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) p 47.
- 4 The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand 'National Lecture on Administrative Law' (Australian Institute of Administrative Law (AIAL) Conference, Canberra, 18 July 2013) p 7.
- 5 Prof Michael Taggart, "'Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1.
- 6 DL Horowitz 'The courts as monitors of the bureaucracy' in CH Weiss and AH Barton (eds) *Making Bureaucracies Work* (1980) p 91 quoted in Marc Hertogh, 'Through the Eyes of Bureaucrats: How Front-Line Officials Understand Administrative Justice' (2009) pp 37, 38.
- 7 Ross Cranston, 'Reviewing judicial review', in Genevra Richardson & Hazel G Genn (eds), *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (1994) p 80.
- 8 Note 7.
- 9 SA de Smith, Lord Woolf & Jeffrey Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) p vii.
- 10 Harry Woolf, Jeffrey Jowell & Andrew Le Sueur, *De Smith's Judicial Review* (6th ed, 2007) p vii.
- 11 Referred to above - the sourcing of Australian administrative law in the Commonwealth Constitution.
- 12 Note 10.
- 13 Note 10, p 8, para 1-010. As will be seen, it seems unlikely that Lord Sumption would agree with Lord Diplock's description of French administrative law as comprehensive.
- 14 Note 10, p vi.

- 15 Note 10, pp 8, 9.
- 16 Which the authors suggest could just as easily be called the 'modified common law' theory.
- 17 Note 10, p 10.
- 18 Moreover, there is a 'democratic legitimacy' associated with the role of the courts under the Australian Constitution which I examine later.
- 19 *R (on the application of Jackson and others) v Attorney General* [2005] UKHL 56; [2005] All ER 136.
- 20 Sir Edward Coke, John Henry Thomas & John Farquhar Fraser, *The Reports of Sir Edward Coke* (Volume 4) (1826) 'Dr Bonham's Case' (Mich Jacobi 1 In the Common Pleas at [118a]) p 375.
- 21 A judiciary which, in discourse of this kind, is almost invariably described as unelected and unaccountable.
- 22 Taken from Milton, *Paradise Lost* (1667) Book 1: The Argument.
- 23 Thomas Poole, 'Judicial review at the margins: Law, power and prerogative' *LSE Law, Society and Economy Working Papers* 5/2010 (2010) p 2. Dr Poole noted that this did not mean judicial review had become uncontroversial: 'Public law being a form of politics, it could hardly be so'.
- 24 Ran Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721 at 721.
- 25 Jonathan Sumption QC, 'Judicial and Political Decision-Making: The Uncertain Boundary' (The FA Mann Lecture, 2011) p 3.
- 26 Note 25, p 7.
- 27 Note 25, p 7.
- 28 Note 25, p 11.
- 29 Note 25, p 11.
- 30 Note 25, p 11.
- 31 Note 25, p 19.
- 32 Note 25, p 18.
- 33 Note 25, pp 21, 22.
- 34 Note 25, p 19.
- 35 Sir Stephen Sedley, 'Judicial Politics' *London Review of Books* (23 February 2012).
- 36 Note 35.
- 37 Ministry of Justice (UK), *Judicial Review: Proposals for Reform* (December 2012).
- 38 Note 37, p 9.
- 39 Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, Catherine Donnelly & Ivan Hare, *De Smith's Judicial Review* (7th ed, 2013) pp 32, 33.
- 40 Note 39, pp 33, 34.
- 41 Note 39, p 32.
- 42 Ministry of Justice (UK), *Judicial Review – proposals for further reform: the Government response* (February 2014) p 3.
- 43 Joint Committee on Human Rights (UK), *The Implications for Access to Justice of the Government's Proposals to Reform Judicial Review* (April 2014).
- 44 Note 43, p 13.
- 45 Note 43, p 13.
- 46 Ministry of Justice (UK), *Statistical Notice: Revision of Judicial Review Figures* (29 November 2013) p 3.
- 47 Ministry of Justice (UK), *Judicial Review—Proposals for Further Reform* (September 2013) para [1] quoted in Note 43, p 13.
- 48 Simon Rodgers, 'Judicial review statistics: how many cases are there and what are they about?' in *The Guardian*, 20 November 2012 (data available at: docs.google.com/spreadsheets/ccc?key=0AonYZs4MzlZbdC1Ta3dCTG1saDhzWFBGElwd2EyRIE#gid=0 accessed 5 June 2014).
- 49 Note 43, pp 13, 14.
- 50 Note 43, p 14.
- 51 Ministry of Justice (UK), *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments 2012–13* (October 2013), pp 18, 19.
- 52 Note 51, p 18.
- 53 Note 51, p 5.
- 54 *Human Rights Act 1998* (UK), s 4(6).
- 55 I note that Lord Sumption has recently given another lecture on a similar theme to his FA Mann Lecture, 'The Limits of Law' (27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013).
- 56 *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
- 57 See for example, Judicial Conference of Australia, 'The Prime Minister's criticism of the High Court' [undated].
- 58 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, p 114.
- 59 Peter Cane, 'Understanding Judicial Review and its Impact' in Marc Hertogh & Simon Halliday, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) p 23.
- 60 Note 59, p 23.
- 61 The Hon WMC Gummow AC, 'A Fourth Branch of Government' (AIAL National Administrative Law Conference, Adelaide, 19 July 2012) p 20.

- 62 Justice Virginia Bell AC, 'The Legal Content of the "Fair Go"' (Redfern Town Hall, 20 April 2011) p 9.
 63 *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531.
 64 As Tom Spencer summarised the original Constitutional referenda (in 'An Australian Rule of Law' (2014) 21 *Australian Journal of Administrative Law* 98 at 105):

George Williams remarks that only 52% of persons eligible to vote across Australia did so. Moreover, although 72% of those voters supported federation, 28% did not. State-by-State (there were no Territories) the figure is even less, with 56% of voters supporting federation in New South Wales for instance. Nor were most women or indigenous Australians allowed to vote, although Helen Irving remarks that women lobbied and contributed to the political process by which Federation occurred.

- 65 Note 4, p 19.
 66 *Bank of NSW v Commonwealth* [1948] HCA 7; (1948) 76 CLR 1.
 67 *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1.
 68 *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1.
 69 *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1 at 35, 36.
 70 Note 4, p 12. Although Elias CJ added that it 'must be read with the important qualification Sir Gerard makes that it is only where "merits" can be distinguished from "legality" that the courts cannot intervene'.
 71 For example, the High Court suggested, non-exhaustively, the categories to which 'jurisdictional error' might apply in *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 177-180.
 72 JK Kirk SC, 'The Concept of Jurisdictional Error' in Neil Williams SC (ed), *Key Issues in Judicial Review* (2014) 11, p 13; *Kirk v Industrial Court (NSW)* (2010) [56] - [57], [64] - [65], [71]. See also Mark Aronson & Matthew Groves, *Judicial Review of Administration Action* (5th ed) (2013) at [1.140].
 73 Note 5, p 13.
 74 Note 5, p 13.
 75 *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 505:

It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

- 76 *Griffith University v Tang* [2005] HCA 7; (2005) 221 CLR 99.
 77 Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1 at 23.
 78 *Neat Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; (2003) 216 CLR 277.
 79 The Hon PA Keane, 'Democracy, Participation and Administrative Law' (AIAL National Administrative Law Conference, Canberra, 21 July 2011).
 80 *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562.
 81 See for example, Juliet Curtin 'Never say Never: *Al Kateb v Goodwin*' [2005] 27 *Sydney Law Review* 355.
 82 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [3].
 83 Gleason CJ dissented, on the basis that the legislation did not evince a clear intent to authorise indefinite detention in the appellant's circumstances.
 84 *Public Service Board v Osmond* [1986] HCA 7; (1986) 159 CLR 565.
 85 The Hon Michael Kirby AC CMG, 'The Reason for Administrative Decisions – *Osmond* Revisited' (Council of Australasian Tribunals, Whitmore Lecture 2012).
 86 Note 4, p 10.
 87 Other than Western Australia, New South Wales and the Northern Territory.
 88 The first New South Wales Practice Note was Supreme Court Practice Note 119. It came into effect on 2 May 2001. The current Practice Note is Supreme Court Practice Note SC CL 3.
 89 *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28 at [94].
 90 Joint Standing Committee on Delegated Legislation, *Report 66 – Supreme Court Rules 2013* (October 2013).
 91 *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837.
 92 See for example, Gleeson CJ, Gummow, Kirby And Hayne JJ in *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at [42] - [43].
 93 *R v Hickman; ex parte Fox and Clinton* [1945] HCA 53; (1945) 70 CLR 598.
 94 *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476.
 95 *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531.
 96 See the examples given by James Hutton, 'Satisfaction is a Jurisdictional Fact - a Consideration of the Implications of SZMDS' in Neil Williams SC (ed) *Key Issues in Judicial Review* (2014), p 50.
 97 *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611; *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
 98 Per French CJ in *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 at [59].
 99 *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

- 100 See for example the Hon John Basten, 'Judicial Review of Executive Action: Tears of Scrutiny or Tears of Frustration?' in Neil Williams SC (ed) *Keys Issues in Judicial Review* (2014) p 35.
- 101 Richard McGregor, 'Zhou's cryptic caution lost in translation', *Financial Times*, (10 June 2011); it is now thought Zhou may have been referring to the 1968 student riots in Paris.
- 102 Note 100, p 35.
- 103 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223
- 104 *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [72].
- 105 Note 79, p 16.

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

President of the Australian Human Rights Commission reports on *JA v Commonwealth* (Department of Defence)

A young sailor (Mr JA) in the Australian Navy was arrested for being absent without leave and was detained for seven days pending a hearing by a service tribunal.

The President of the Australian Human Rights Commission found that Mr JA's detention was unlawful because it was not in accordance with the procedure established by the *Defence Force Discipline Act 1982* (Cth) (the *DFDA*).

In particular, s 95(2) of the *DFDA* required that when a person has been arrested for an offence under the *DFDA* and delivered into the custody of a commanding officer, the commanding officer or an officer authorized in writing by the commanding officer shall either charge the person with a service offence or release the person from custody within 24 hours.

Mr JA was not properly charged with a service offence because he was not charged by the commanding officer or an officer authorized in writing by the commanding officer. His continued detention was unlawful, and therefore in breach of Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

The President also found that Mr JA's detention was arbitrary, contrary to Article 9(1) of the ICCPR, because it was not necessary and not proportionate to Defence's legitimate aim of applying military discipline. A day and a half after his initial detention, Mr JA was taken to Frankston Hospital and detained there. From that time no action was taken to progress the hearing of the charge against him, which was the reason for his detention. His detention from that date until he was released was arbitrary.

Mr JA made a number of other complaints, which were not substantiated. The President was not satisfied that he had not been informed of the reasons for his arrest, or that the conditions of his detention amounted to cruel, inhuman or degrading treatment.

The Commission recommended that Defence pay Mr JA compensation in the amount of \$15,000 and provide him with an apology.

In response to the Commission's findings, Defence confirmed that it had amended its procedures to ensure that members of the Defence Force who are charged in accordance with s 95(2) of the *DFDA* are charged by a proper officer authorised in writing. It has also made amendments to the Australian Defence Forces Discipline Law Manual.

Defence also confirmed that it had made an offer of settlement to Mr JA.

A copy of this report: *JA v Commonwealth* (Department of Defence) is available online at <http://www.humanrights.gov.au/publications/ja-v-commonwealth-department-...>

<https://www.humanrights.gov.au/news/media-releases/president-reports-ja-v-commonwealth-department-defence>

President of the Australian Human Rights Commission President reports on Swamy v Percival

A man employed at a lead smelter in Alexandria, Sydney was subjected to discrimination in employment because of his religious beliefs, the Australian Human Rights Commission has found.

Mr Ganesh Swamy, a Hindu, complained that he had been harassed by his team leader Mr Brad Percival because of his religious beliefs.

Mr Swamy and his employer participated in a conciliation conference but the matter was ultimately unable to be settled by conciliation. Unlike other kinds of discrimination, there is no statutory right for a person to bring an action in a Commonwealth court alleging discrimination on the basis of religion. Where matters of this nature cannot be conciliated, it is necessary for the Commission to conduct an inquiry. During the course of the inquiry, the Commission found that the employer had not engaged in discrimination on the basis of religion. The findings in this report are limited to findings in relation to Mr Percival.

The Commission recommended that Mr Percival pay compensation in the amount of \$2,000.

A copy of this report: Swamy v Percival is available online at <http://www.humanrights.gov.au/publications/swamy-v-percival>.

<https://www.humanrights.gov.au/news/media-releases/president-reports-swamy-v-percival>

Child Abuse Royal Commission granted a two year extension

The Commonwealth Government has extended the Royal Commission into Institutional Responses to Child Sexual Abuse for a further two years.

The Governor-General will be asked to amend the current Letters Patent to enable the Royal Commission to deliver its final report by 15 December 2017.

The Attorney-General met the Chair of the Royal Commission, the Hon Justice Peter McClellan AM, on two occasions since the beginning of this year, to discuss the future program and additional needs of the Commission. On both of those occasions, Justice McClellan was assured, given the importance of the work in which it was embarked, the Government would look favourably upon any request for an extension of the Royal Commission reporting date.

Justice McClellan has assured the Government that this extension will be sufficient for the Commission to complete its work.

The extension will give the Commission the capacity to hear more stories from victims, conduct more public hearings and issue additional interim reports.

Institutions responsible for the care of children will be able to continue to learn from the ongoing work of the inquiry and be better able to prevent child sexual abuse from happening.

The Commission will continue to consult with experts, stakeholders and the community so that any recommendations made by the Commission are practical and respond to contemporary issues in child protection.

The Government will provide additional funding of up to \$125 million as part of the extension for the Commission and associated costs.

<http://www.attorneygeneral.gov.au/MediaReleases/Pages/2014/ThirdQuarter/2September2014-ChildAbuseRoyalCommissionGrantedATwoYearExtension.asp>

New ACT privacy laws introduce Territory Privacy Principles

On 1 September 2014, the ACT introduced a new set of Territory Privacy Principles (TPPs). The new *Information Privacy Act 2014* (ACT) gives the Office of the Australian Information Commissioner (OAIC) responsibility for investigating, resolving complaints, providing advice and conducting privacy assessments of ACT public sector agencies.

‘The OAIC welcomes the introduction of these new laws and principles that promote responsible and transparent handling of personal information by public sector agencies and contracted service providers,’ Australian Privacy Commissioner Timothy Pilgrim said.

Mr Pilgrim said that the first priority for ACT public sector agencies will be to make sure their privacy policies are up to date.

‘We will work with ACT public sector agencies to assist them to implement the new principles across government. We will be expecting agencies to take steps to update their privacy policies to ensure that they meet the requirements of the TPPs.’

ACT public sector agencies were previously covered by the *Privacy Act 1988* (Cth), but the ACT government chose to introduce the ACT-specific TPPs when federal privacy laws changed in March 2014.

The TPPs are very similar to the Australian Privacy Principles (APPs), but have been written to apply specifically to ACT public sector agencies. The TPPs cover areas such as:

- open and transparent management of personal information, including privacy policies
- collection, and notification of collection, of personal information
- use and disclosure of personal information
- access to and correction of personal information.

The Privacy Commissioner also said that the OAIC is committed to ensuring that ACT residents have all the information they need in order to understand their rights.

‘If someone has a privacy concern, they can call our Enquiries line on 1300 363 992, and we will be happy to answer questions or help them with their complaint.’

The OAIC website gives information about the legislation (including the OAIC’s role) for individuals, and about how to make a privacy complaint against an ACT public sector agency.

In preparation for the changes, the OAIC has also produced Privacy agency resource 3: Information Privacy Act 2014 — Checklist for ACT agencies, to help agencies assess their compliance with the new principles, and Privacy fact sheet 42: Australian Capital Territory Privacy Principles, which provides the principles in full.

<http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/new-act-privacy-laws-introduce-territory-privacy-principles>

Report into Serious Invasions of Privacy in the Digital Era released

The Australian Law Reform Commission's Final Report, *Serious Invasions of Privacy in the Digital Era* (Report 123, 2014) was tabled in Parliament on 3 September 2014 and is now publicly available.

The Terms of Reference for this Inquiry required the ALRC to design a tort to deal with serious invasions of privacy in the digital era. In this Report, the ALRC provides the detailed legal design of such a tort located in a new Commonwealth Act and makes sixteen other recommendations that would strengthen people's privacy in the digital environment.

ALRC Commissioner for the Inquiry, Professor Barbara McDonald, said 'The ALRC has designed a remedy for invasions of privacy that are serious, committed intentionally or recklessly and that cannot be justified as being in the public interest—for example, posting sexually explicit photos of someone on the internet without their permission or making public someone's medical records. The recommendations in the Report also recognise that while privacy is a fundamental right that is worthy of legal protection, this right must also be balanced with other rights, such as the right to freedom of expression and the freedom of the media to investigate and report on matters of public importance.

The ALRC has closely considered submissions from industry and the community, as well as common law principles and developments in other countries. The recommendations, taken together, would better protect people's privacy in the digital environment, while protecting and fostering freedom of speech and other public interests.'

The Report also recommends that a new Commonwealth surveillance law be enacted to replace existing state and territory laws, to ensure consistency of surveillance laws throughout Australia, and a number of other reforms to supplement the statutory cause of action.

During the course of the Inquiry, the ALRC produced two consultation papers, received 134 submissions and undertook 69 face to face consultations with media, telecommunications social media and marketing companies amongst other organisations, many expert academics, specialist legal practitioners, and judges, public interest groups and government agencies. Two legal roundtables in Sydney and London were also conducted.

ALRC President, Professor Rosalind Croucher thanked Professor McDonald for her work on this complex Inquiry. 'The ALRC had a very tight timeframe of ten months to complete this Report, and the quality of the work produced is a great credit to Commissioner McDonald and her team. I want to take this opportunity to thank all those who contributed their time and expertise to this Inquiry. Wide reaching consultation and engagement is a benchmark of the ALRC's work and contributes in a fundamental way to the quality of our recommendations. I consider that this Report will provide a significant contribution to the understanding of the law in relation to privacy and its sophisticated analysis will play a distinct role in the development of the common law and statutory protections of privacy.'

<http://www.alrc.gov.au/news-media/alrc-releases-report-serious-invasions-privacy-digital-era>

Recent Cases in Administrative Law

A failure to comply with the logical framework

FTZK v Minister for Immigration and Citizenship [2014] HCA 26 (27 June 2014)

On 8 December 1998, the appellant, a citizen of the People's Republic of China (the PRC), applied for a protection visa under s 36 of the *Migration Act 1958* (Cth), claiming to be a person in respect of whom Australia owed protection obligations under the Refugees Convention (the Convention).

The appellant claimed to have left the PRC because he had been persecuted on the ground of his religious beliefs. After the appellant left the PRC, he was implicated by two alleged co-accused in the crimes of kidnapping and murder of a 15-year-old school boy.

In refusing the appellant a protection visa, the Minister found, that notwithstanding that the appellant was a refugee, he was excluded from protection by Article 1F(b) on account of his alleged involvement in the crimes of kidnapping and murder in the PRC.

Article 1F(b) relevantly provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he or she has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee.

The appellant then applied to the Administrative Appeals Tribunal (AAT) for a review of the Minister's decision. The AAT held that it was not in dispute that the crimes alleged against the appellant were serious non-political crimes for the purposes of Article 1F(b). Further, the AAT was satisfied, on the basis of the timing of the appellant's departure from the PRC, the lies he told to obtain a business visa and to obtain protection under the Convention, and the appellant's conduct in escaping from detention and living unlawfully in Australia, that there were serious reasons for considering that the appellant had committed serious non-political crimes.

The appellant then appealed to the Full Federal Court, which dismissed his appeal. By grant of special leave, the appellant then appealed to the High Court.

The High Court unanimously held that the reasons of the AAT revealed jurisdictional error.

The High Court held that a correct application of Article 1F(b) to the facts required the AAT to consider whether the evidence was probative of 'serious reasons for considering' that the appellant had committed one or more of these crimes. The AAT took into account (and treated as determinative) the timing of the appellant's departure from the PRC, the lies he told to obtain a visa and to obtain protection under the Convention, and the appellant's conduct in escaping from detention and living unlawfully in Australia.

However, the High Court found that once it was recognised that the appellant had a well-founded fear of persecution for a Convention reason, an equally probable explanation for all those factors was his desire to escape China and live in Australia. None of these factors was logically probative of the appellant's commission of the alleged crimes.

Therefore, the AAT's process of reasoning did not comply with the logical framework imposed on its decision making by Article 1F(b). Accordingly, the AAT misconstrued the test it had to apply.

The High Court quashed the AAT's decision and ordered that a differently constituted AAT review the Minister's decision according to law.

The common law rules of evidence and the Administrative Appeal Tribunal

Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93 (25 July 2014)

On 3 January 2012, a delegate of the Civil Aviation Safety Authority (the Authority) cancelled the appellant's helicopter licence after he was involved in a helicopter crash in the Northern Territory.

The appellant sought merits review of the Authority's decision in the Administrative Appeals Tribunal (the AAT). The AAT affirmed that decision. The appellant then sought judicial review by the Federal Court. This was dismissed and the appellant then appealed to the Full Federal Court.

Before the Full Court, the appellant contended, among other things, that the AAT committed a jurisdiction error by failing to apply the standard of proof set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (the *Briginshaw* rule) in making grave or serious findings. The appellant argued that the requirement for the AAT to apply the *Briginshaw* rule was not a rule of evidence but rather a principle of law that the Tribunal was bound to apply.

The Full Court held that the rule in *Briginshaw* is a common rule of evidence derived from curial proceedings and s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* provides that the AAT is not bound by it or the other common law rules of evidence. What procedures the AAT decides to follow in any particular case, and whether the AAT decides to either apply or inform itself by reference to the common law rules of evidence, is a matter which has been left by the legislature to the AAT itself to determine. The manner in which the AAT proceeds cannot be pre-determined by any generally expressed 'principle of law', which is to be applied to some indeterminate fact findings which may be characterized as 'grave' or 'serious'.

While cases may be found where the AAT has applied the principle in *Briginshaw*, these cases are nothing more than the AAT proceedings in a manner which applies the common law rules of evidence. Section 33(1)(c) simply provides that the AAT is not 'bound' to apply these rules; it is not a prohibition upon the AAT applying those rules if it sees fit.

Standing and improper purpose – the rival property developer and the Minister

Boerkamp v The Hon Matthew Guy [2014] VSC 167 (14 April 2014)

The Eastern Golf Club is moving from Doncaster to the Yarra Valley. On 19 October 2012, the plaintiff, a successful property developer and an environmentalist, applied to the Victorian Civil and Administrative Tribunal for a review of the Yarra Ranges Shire Council decision to grant a permit to the Club to build a new golf course in the Yarra Valley. This was the second tribunal proceeding, after the plaintiff and a local environmental group had successfully appealed the Local Council's decision to approve the development.

However, before the second tribunal proceeding could be heard, the defendant, the Victorian Minister for Planning, approved the golf course (Amendment C130) under his powers in the *Planning and Environmental Act 1987* (the *PE Act*).

The plaintiff commenced proceedings in the Victorian Supreme Court challenging the Minister's decision to approve Amendment C130.

Standing

In his defence, the Minister first contended that the plaintiff did not have standing to seek or obtain the relief because he did not have any special interest in the validity of the Amendment C130 (*ACF v The Commonwealth* (the *ACF* case) (1980) 146 CLR 493). In the *ACF* case, the High Court held that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless he is permitted by statute to do so.

The plaintiff contended that the test in the *ACF* case is not the test for determining standing under the *PE Act*. The plaintiff contended that, among other things, he had a special interest in the validity of Amendment C130 by reason of (a) being a party to the second tribunal proceeding; (b) his interest in the environment of the Yarra Valley (including using it for recreational purposes); and (c) the impact that run off resulting from Amendment C130 may have on his commercial interests in the Yarra Valley.

The Court found that under the *PE Act* the threshold for standing is far easier to satisfy than the standing requirements described in the *ACF* case. The *PE Act* provides for members of a 'community' who are merely interested in or concerned with a proposal to participate in the planning process in appropriate circumstances. This means that persons who might otherwise be described as having a 'mere' intellectual or emotional concern may participate in the permit process and object to a permit, where their concern is genuine, demonstrable and based on proper planning considerations.

The Court held, in this case, having commenced the second tribunal proceedings and seen it rendered futile by the Minister's decision, that the plaintiff had a greater interest than an ordinary member of the community. The Court also found that his commercial and environmental interests in the Yarra Valley also meant he had standing.

Abuse of process

The Minister also contended that the second proceeding was an abuse of process because the plaintiff's true reason for bringing it was to increase his prospects of acquiring the Doncaster site, which was to be sold to a competitor, by delaying the move to the Yarra Valley and consequently, the settlement on the Doncaster site. It was alleged that, by lodging the objection, the plaintiff was trying to bring about a situation in which he might be able to take the 'prize' of the Doncaster land, in effect, by holding the Club to ransom by using the legal system to create crippling delays.

While the Court found that the plaintiff's dealings with the Club over the sale of the Doncaster site were troubling (including evidence of him offering to withdraw his objection to the Yarra Valley permit if the Doncaster land was sold to him), the evidence before the Court was insufficient to persuade it that the second tribunal proceeding was brought for a collateral and improper purpose.

Using an irrelevant consideration for an impermissible purpose

Duffy v Da Rin [2014] NSWCA 270 (15 August 2014)

On 15 September 2012 the appellant, Kevin Duffy, was elected as a councillor on Orange City Council. On 7 December 2012 the respondent, John Da Rin, applied to the Administrative Decisions Tribunal (the Tribunal) for an order dismissing the appellant from his office. The respondent alleged that the appellant was not qualified to be a councillor

because he was not entitled to be enrolled as an elector for Orange City Council (s 274 of the *Local Government Act 1993*). To be enrolled as an elector under the *Local Government Act*, he was required to be 'a resident of the ward' in which he stood for election (s 266(1)(a)) and a person is resident if 'the person's place of living' was in the ward (s 269(1)).

Until late April 2012 the appellant's residence and place of living was a property in Borenore, outside the electoral boundary. From late April, the appellant stayed in a spare room in his son's house in Orange. On 17 July 2012, the appellant notified the Australian Electoral Commission of his change of address. The closing date for the election was 30 July 2012.

The Tribunal found that the appellant had not established 'his place of living' in Orange and therefore was not 'resident' for at least one month before enrolling, as required to be eligible for election under the *Parliamentary Electorates and Elections Act 1912* (NSW) (the *State Elections Act*). The Tribunal ordered that the appellant be dismissed as an Orange City Councillor.

The appellant sought judicial review of the Tribunal's decision in the NSW Court of Appeal. The appellant contended, among other things, that the Tribunal had committed a jurisdictional error by (1) taking into account irrelevant considerations in deciding that his son's house was not his place of residence; and (2) by determining his 'place of living' by reference to the appellant's continuing connection with his previous residence.

The Court found that the impugned considerations taken into account by the Tribunal (including the appellant's motivation for moving to Orange and the degree to which he had severed connection with his former place of living) were not irrelevant as the appellant himself expressly relied on these in his evidence.

The Court explained that the phrase 'irrelevant considerations' is dependent on a construction of the relevant statute in order to identify matters, which the decision-maker is prohibited from taking into account: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* [1986] HCA 4 (*Peko*). The conventional view is that if matters to which regard is had do not fall within the category of those prohibited by statute, they will be categorised as either mandatory or permissible considerations, and a complaint as to the weight accorded to them will not invoke any possible error of law: see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Law Book Co, 2013) at [5.30] and [5.140].

However, the Court held that this statement is primarily designed to emphasize the importance of judicial restraint in reviewing statutory decision-making, whereas Mason J in *Peko* recognised the need for flexibility:

It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory.... I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision, which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'.

In the Court's view, this analysis is incomplete in that it did not address the weight given to permissible considerations and any possible flexibility with respect to impermissible considerations. 'Considerations' have different qualities, which are not recognised by a simple classification as permissible, mandatory or prohibited. Two considerations may each be relevant but may pull in opposite directions. A particular consideration may be relevant to one aspect of the reasoning process but not to other aspects. Thus a consideration, which

is only relevant for a specific purpose or in respect of a particular issue, may be impermissibly used for a different purpose or with respect to another issue. Such misuse could constitute an error of law.

The Court found that in this case, the error of the Tribunal was to accord particular significance to connections with the appellant's Borenore property as diminishing the significance of physical occupation of premises in Orange.

Under s 269 of the *Local Government Act*, a person can have a place of living while 'temporarily residing' away from what might be described as his or her permanent home. No doubt some degree of continuity or permanence is required, but any assessment of that element should have been guided by the one-month residence requirement in the *State Electoral Act*. It may be that short periods of absence during that relatively short period would be significant, but the mere fact that the place of living was not intended to be maintained permanently or indefinitely would not by itself preclude that place being a 'place of living' for the purposes of the *Local Government Act*.

THE OAIC FOI EXPERIMENT

*James Popple**

On 13 May 2014, the Australian Government announced that it intends to disband the Office of the Australian Information Commissioner (OAIC). The OAIC has had freedom of information, privacy and information policy functions since it was established on 1 November 2010.

The Attorney-General announced in a Budget media release that, from 1 January 2015, the OAIC's FOI merits review function will be transferred to the Administrative Appeals Tribunal (the AAT). The AAT will be the first avenue of external merits review of FOI decisions, as it was prior to the 2010 reforms. This change will be part of the amalgamation of various merits review bodies into a single 'super-tribunal'.¹ The Commonwealth Ombudsman will resume sole responsibility for investigating FOI complaints. The Attorney-General's Department (AGD) will take on the OAIC's function of issuing FOI guidance material for agencies and collecting and collating FOI statistics. An Office of the Privacy Commissioner will be re-established as an independent statutory office to administer the OAIC's privacy functions. The OAIC's information policy functions will not be transferred to any other body. The positions of Information Commissioner and Freedom of Information Commissioner will be abolished.

This article discusses how the FOI landscape in Australia was changed by the 2010 reforms, and how it will change again when the Government's announcement is implemented. With data for three full financial years (plus the first eight months) of the OAIC's operations, it is not too early to reflect on how well the OAIC has performed in the exercise of its FOI functions. This article also does that: it undertakes a (pre-mortem) evaluation of the OAIC FOI experiment—admittedly, not from a completely impartial position.

A new model for FOI review and complaint handling

On 1 November 2010, the *Freedom of Information Act 1982 (FOI Act)* was amended in the most significant way since it was first enacted.² Those amendments made it simpler for people to request access to government documents. Application fees were abolished. Charges were reduced, and removed entirely where a person requests access to their own personal information. Some of the exemptions were recast and narrowed. The emphasis of the *FOI Act* shifted from a reactive model of disclosure in response to individual requests, to a proactive model of publication of public sector information.³ The guiding principle underlying the amended *FOI Act* is that information held by the Government is to be managed for public purposes, and is a national resource.⁴

* *James Popple is the Australian Freedom of Information Commissioner. He is also an Adjunct Professor in the College of Law and the College of Engineering and Computer Science at the Australian National University. This paper was presented at the AIAL National Administrative Law Conference in Perth on 25 July 2014; further information about the 2013–14 financial year has been added. Dr Popple acknowledges the assistance of Mark Gallagher and Natasha Roberts, from the OAIC, in the preparation of this paper.*

At the same time that these reforms commenced, the *Australian Information Commissioner Act 2010* (the *AIC Act*) established the OAIC to oversee the operation of the *FOI Act* and the *Privacy Act 1988*, and to exercise strategic functions concerning government information management.⁵ This was the first time that responsibility for these three functions at the Commonwealth level had been brought together under the one independent statutory office. In relation to FOI, the explanatory memorandum explained:

... the Australian Information Commissioner, supported by the FOI Commissioner, will act as an independent monitor for FOI and will be entrusted with a range of functions designed to make the Office of the Australian Information Commissioner both a clearing house for FOI matters and a centre for the promotion of the objects of the FOI Act.⁶

The idea of an independent FOI regulator was not a new one. A joint report of the Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC) in 1995 had recommended the appointment of an FOI Commissioner to provide independent oversight of, and guidance about, the *FOI Act*.⁷ The ALRC/ARC view was that the arrangements at the time, with FOI oversight provided 'to some extent' by AGD and the Ombudsman, was fragmented and (in relation to AGD) not sufficiently independent of Government.⁸ Their proposal would have seen the establishment of an independent statutory office of the FOI Commissioner with functions falling into two broad categories: monitoring agency compliance with the *FOI Act*; and promoting and providing advice and assistance to agencies and the public about the Act.

An interesting point of commonality between the ALRC/ARC proposal and the 2010 amendments was the connection between FOI and broader government information-handling practices and trends. As the ALRC and ARC put it:

The administration and operation of the FOI Act is only one aspect of what might loosely be referred to as 'information policy'—the way the government manages, provides access to, publishes and charges for its information, and how this might be affected by changes in technology. The Review considers that it would be valuable for the FOI Commissioner to take an active interest in information policy.⁹

One area of difference between the ALRC/ARC proposal and the 2010 amendments relates to guidelines. The *FOI Act* gives the Information Commissioner the power to issue guidelines to which regard must be had for the purposes of performing a function, or exercising a power, under the Act.¹⁰ The ALRC and ARC argued that combining FOI advisory and review functions in a single statutory body could give rise to a perceived conflict of interest and lack of independence.¹¹

Under the ALRC/ARC proposal, FOI review and complaint functions would have remained with the AAT and the Commonwealth Ombudsman, respectively, although the proposal envisaged that the FOI Commissioner could play a role in improving communications between applicants, agencies and third parties at any stage of an FOI request.¹² Since the 2010 amendments, the OAIC has been the first avenue of external merits review of FOI decisions. An applicant for review cannot go to the AAT until the application for review has been finalised by the OAIC, or the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the decision under review be considered by the AAT.¹³ In practice, the AAT currently offers a second tier of external merits review of FOI decisions, the OAIC having provided the first.¹⁴ Similarly, since 2010, the OAIC has been the first avenue for FOI complaints. The Ombudsman and the OAIC each has the jurisdiction to investigate FOI complaints, and the power to transfer a complaint to the other body.¹⁵ In practice, most FOI complaints are investigated by the OAIC.

The effect of the 2010 reforms

The 2010 reforms had a significant impact on the FOI landscape in Australia:¹⁶

- The number of FOI requests increased. Between 2009–10 (the last full year before the reforms) and 2013–14, the number of FOI requests made to Australian Government agencies and ministers increased by 31.9%: from 21,587 to 28,463. Over those four years there was a 108.9% increase in the number of requests for information other than personal information. These requests are typically more complex to finalise than requests for personal information. The proportion of all FOI requests that were for personal information decreased from 87.2% to 79.7%. This decrease probably reflected the increased availability of online Government services allowing individuals to more easily access and amend their personal information. Other aspects of the 2009–10 reforms, such as the removal of the application fee for FOI requests and the reduction in charges, may also have contributed to the increase in the proportion of FOI requests for non-personal information.
- The number of applications for external merits review increased greatly. In 2009–10, the AAT received 110 applications for review of FOI decisions.¹⁷ In 2011–12 (the first full year after the reforms), the OAIC received 456 applications for review; in 2013–14, it received 524 applications—increases of 314.5% and 376.4%, respectively, over the 2009–10 number. No doubt the principal reason for this increasing use of external merits review of FOI decisions was the reduction in cost to applicants. In 2009–10, the AAT's application fee was \$682;¹⁸ there has been no application fee for review by the OAIC.
- The number of FOI complaints fluctuated. In 2009–10, the Commonwealth Ombudsman received 137 FOI complaints.¹⁹ In 2011–12, the Ombudsman and the OAIC together received 171 complaints; in 2013–14, they together received 127 complaints—an increase of 24.8% and a decrease of 7.3%, respectively, over the 2009–10 number.
- The cost to government increased. Between 2009–10 and 2013–14 the cost that agencies attributed to the *FOI Act* increased from \$27.5 million to \$41.8 million, an increase of 52.2% over four years.

OAIC performance

The OAIC's principal FOI functions are merits review (IC review) of FOI decisions made by Commonwealth ministers and agencies; investigation of complaints about agency action under the *FOI Act*; granting extensions of time for agencies to process FOI requests, and for applicants to seek IC review; and promoting awareness and understanding of the Act and its objects. Its performance in each of these areas is considered below.

Merits review of FOI decisions

Between 1 November 2010 and 30 June 2014, the OAIC received 1,663 applications for IC review and finalised 1,347 or 81.0% of them. Of the IC reviews finalised:

- 13% were invalid or out of jurisdiction and did not satisfy the requirements of s 54N of the *FOI Act*;
- 39% were closed under s 54W because, for example, the IC review applicant failed to cooperate or could not be contacted; or the application was frivolous, vexatious or an abuse of process (many of these were discontinued after the applicant was advised of the OAIC's preliminary assessment of their review, or received additional documents following the OAIC's involvement);

- 31% were withdrawn by the IC review applicant; or the original decision was varied by agreement between the parties, or by the original decision maker so as to be more favourable to the IC review applicant (ss 54R, 55F and 55G);
- 16% were finalised under s 55K with a written decision by a Commissioner affirming or varying the IC reviewable decision, or setting it aside and making a decision in substitution.

Table 1 gives details of the numbers of IC review applications that the OAIC received and finalised. In its first twenty months of operation, the OAIC received significantly more applications for IC review than it finalised, resulting in a backlog. But the rate of finalisation improved with each reporting year until, in 2013–14, the OAIC finalised 23.3% more IC reviews than it received.

Table 1: IC review applications received and finalised

<i>Year</i>	<i>Applications received / change* (%)</i>	<i>Reviews finalised / change* (%)</i>	<i>Reviews finalised as a proportion of apps received (%) / change (%)</i>	<i>Reviews on hand / change (%)</i>
2010–11	176	29	16.5%	147
2011–12	456 +72.7%	253 +481.6%	55.5% +236.7%	350 +138.1%
2012–13	507 +11.2%	419 +65.6%	82.6% +49.0%	438 +25.1%
2013–14	524 +3.4%	646 +54.2%	123.3% +49.2%	316 -27.9%
<i>Total</i>	1,663	1,347	81.0%	

* The rates of change for 2011–12 have been calculated on a pro-rata basis: they show the change from the 2010–11 figures multiplied by $\frac{12}{8}$ (because the OAIC operated for the last eight months of that year).

The significant improvement in 2012–13 was the result of the introduction of new internal processes; secondments to the OAIC from other Australian Government agencies; and the assignment of non-ongoing staff to work on IC reviews. At the time, the OAIC pointed out that this level of improvement was unlikely to be sustainable without additional resourcing for the OAIC or changes to the legislative framework (discussed below).²⁰

Further changes to internal processes resulted in further significant improvements in 2013–14. A concerted effort was made to finalise older matters still on hand while also prioritising the early resolution of new matters, so that a smaller proportion of matters remained on hand for long periods of time. As at 30 June 2013, the oldest unactioned IC review was 206 days old; as at 30 June 2014, the oldest such matter was 40 days old. As noted above, during 2013–14, the OAIC reached an important tipping point in its processing of IC reviews, finalising more matters than it received.

Investigation of FOI complaints

Between 1 November 2010 and 30 June 2014, the OAIC received 439 FOI complaints and finalised 407 or 92.7% of them. The main issues raised in complaints have been agencies' processing delay, unsatisfactory customer service, failure to acknowledge FOI requests, and failure to assist FOI applicants. In finalising complaints, the OAIC has made many recommendations, including 10 formal recommendations under s 86 of the *FOI Act*, for agency action. The OAIC also undertook an own motion investigation of the FOI processes of one agency.²¹

Table 2 gives details of the numbers of FOI complaints that the OAIC received and finalised. As it did with IC reviews, the OAIC received more FOI complaints than it finalised in its first twenty months of operation. But the rate of finalisation improved and the OAIC reached the tipping point (finalising more FOI complaints than were received) in 2012–13.

Table 2: FOI complaints received and finalised

<i>Year</i>	<i>Complaints received / change* (%)</i>		<i>Complaints finalised / change* (%)</i>		<i>Complaints finalised as a proportion of complaints rcvd (%) / change (%)</i>		<i>Complaints on hand / change (%)</i>	
2010–11	88		39		44.3%		49	
2011–12	126	-4.5%	100	+70.9%	79.4%	+79.1%	75	+53.1%
2012–13	148	+17.5%	149	+49.0%	100.7%	+26.9%	74	-1.3%
2013–14	77	-48.0%	119	-20.1%	154.5%	+53.5%	32	-56.8%
<i>Total</i>	439		407		92.7%			

* The rates of change for 2011–12 have been calculated on a pro-rata basis: they show the change from the 2010–11 figures multiplied by $\frac{12}{8}$ (because the OAIC operated for the last eight months of that year).

Other FOI activity

Between 1 November 2010 and 30 June 2014, in addition to this FOI review- and complaint-handling activity, the OAIC:

- received and finalised 8,028 requests for, or notifications of, extensions of time;
- declared six times that a person was a vexatious applicant under s 89K of the FOI Act;
- made and renewed a disclosure log determination under s 11C(2) of the Act;
- published and updated clear and comprehensive FOI guidelines (250 pages), 16 fact sheets for the public, and over 30 detailed agency guides on processing times, calculating charges, administrative access, third party objections, anonymous requests, statements of reasons, redaction, FOI training, website publication, disclosure logs, sample letters and frequently asked questions;
- responded to 3,544 phone enquiries and 1,728 written enquiries about FOI;
- conducted a public consultation on FOI charges and prepared a lengthy report to Government in 2012;²²
- held 13 meetings of the Information Contact Officers Network, a forum for FOI and privacy officers across all agencies; and
- provided 17 FOI reform training courses for Australian Government agencies and the Norfolk Island Administration.

Proposals for legislative reform

The OAIC adopted two approaches to dealing with its FOI workload: improving its administrative processes (as discussed above) and suggesting legislative reform.

On 31 October 2012, the then Attorney-General announced that she had asked Dr Allan Hawke AC to conduct a review of the *FOI Act* and the *AIC Act*. The OAIC made two substantial submissions to the review, proposing a series of changes that would have improved the FOI system as a whole and the OAIC's effectiveness in dealing with its FOI workload.²³ These proposals included:

- introducing a \$100 application fee for IC review of agency FOI decisions in cases where the applicant had not first sought internal review, to encourage greater use of internal review before external review;
- providing clearer powers to achieve early resolution of IC reviews by agreement between review parties;
- permitting the delegation of the IC review decision-making power from the Information Commissioner, FOI Commissioner and Privacy Commissioner to senior OAIC staff in relation to certain kinds of IC review decisions;
- introducing remittal powers for the Information Commissioner, to avoid situations where the Commissioner was effectively the original decision maker;
- simplifying the *FOI Act's* overly complex and burdensome third party review provisions, to allow more efficient resolution of reviews of access grant decisions; and
- making AAT review of FOI decisions available only on a point of law after an IC review decision, or for a decision referred to the AAT by the Information Commissioner under s 54W(b) of the *FOI Act*.

The OAIC's submissions also reiterated recommendations from the Information Commissioner's February 2012 *Review of Charges under the Freedom of Information Act 1982*. Those recommendations placed a greater emphasis on providing access in a speedy and flexible manner through administrative options (rather than formal FOI processes).²⁴ The submissions also detailed the OAIC's resourcing difficulties, notably its inability to fund staffing at a level to match initial workload projections prepared before the OAIC was established—projections which soon proved optimistic.

Dr Hawke's report was tabled in Parliament on 2 August 2013.²⁵ He made 40 recommendations for changes to the FOI framework. He adopted some of the OAIC's recommendations, including those relating to easier resolution of IC reviews by agreement, delegation and remittal powers, and third party review rights. While Dr Hawke supported the idea of an IC review application fee, he argued that the fee should be set at \$400 (reduced to \$100 in cases of financial hardship). He declined to consider possible reforms to the two-tier system of external review, recommending that it be considered in a future comprehensive review of the *FOI Act*. Government has not yet responded to the Hawke Review.

Criticism of the OAIC

Criticism of the OAIC, and of the model for FOI adopted by the 2010 reforms, has tended to fall into one or more of the following categories:

- criticism of delay;
- arguments preferring AAT review to IC review;
- arguments against a specialist FOI regulator; and
- criticism of the integrated model for FOI, privacy and information policy.

Delay

The OAIC has been criticised for delays in its FOI processing, especially in finalising IC reviews.²⁶ Some critics have asserted that external merits review by the OAIC takes longer than it does in the AAT: that IC reviews take longer than AAT FOI appeals.²⁷ Between 1 November 2010 and 30 June 2014, the AAT finalised six appeals from IC review decisions.²⁸ Each appeal took an average of 251.5 days to finalise.²⁹ During the same period, each IC review took an average of 251.7 days to finalise. With such a small number of AAT FOI appeals, any comparison with the OAIC's performance would be invidious. But, these numbers are strikingly similar.

Delay was clearly one reason for the Government's decision to disband the OAIC. In his Budget media release, the Attorney-General said:

The complex and multilevel merits review system for FOI matters has contributed to significant processing delays. Simplifying and streamlining FOI review processes by transferring these functions from the OAIC to the AAT will improve administrative efficiencies and reduce the burden on FOI applicants. The AAT will receive a funding boost to assist with the backlog and to better meet acceptable timeframes.³⁰

Regardless of the relative efficiencies of the OAIC and the AAT, the criticism of the OAIC for its delay in processing IC reviews is valid—at least, it was valid for the first couple of years of the OAIC's operations. As detailed above, there was a significant improvement in the OAIC's processing of IC reviews in each of 2012–13 and 2013–14. In the latter of those reporting periods, the OAIC finalised 71.5% of IC reviews within 12 months of receiving them: 24.4% were open for fewer than 90 days; 16.8% were open for 91–180 days; 30.2% were open for 181–365 days; only 28.5% were open for more than 365 days. There is, of course, still room for improvement. But these figures demonstrate that delay is no longer a significant issue.³¹

AAT review and IC review

As noted above, an applicant for merits review of an FOI decision cannot go to the AAT until their review has been finalised by the OAIC, or the Information Commissioner is satisfied that the interests of the administration of the *FOI Act* make it desirable that the decision be considered by the AAT. This aspect of the 2010 reforms has been criticised, on the basis that AAT review is preferable to review by the OAIC.

An article in the Media and Entertainment and Arts Alliance's 2014 *State of Press Freedom in Australia* argued that FOI applicants should have a direct right of review by the AAT following internal review.³² The article referred to the timeliness of the OAIC's processes (discussed above), and asserted that the OAIC's decisions are 'leading to greater secrecy and the appeals process is simply unfair'.³³ The basis of this assertion would seem to be that an applicant for review will more likely have a hearing, at which they can make oral submissions, before the AAT than before the OAIC.³⁴ The *FOI Act* gives the OAIC the power to conduct an oral hearing, but that power has not yet been exercised.

Since its establishment, the OAIC has endeavoured to resolve IC reviews through conciliation rather than by making formal decisions. This is not always possible. But, where it is possible, it can lead to a better result, and more quickly than would otherwise have been the case. The AAT takes a similar approach, but matters before the AAT that cannot be conciliated usually go to a hearing. No doubt some applicants—those who are well resourced and experienced—welcome the opportunity to participate in such a hearing. But, for those applicants who lack resources and experience, a conciliated outcome or an IC review decision 'on the papers' will usually be preferable.

The vast bulk of FOI merits review since 2010 has been conducted by the OAIC. This has meant that the OAIC has been uniquely able to develop a consistent jurisprudence that is informed by the pro-disclosure objects of the *FOI Act* and by the practical realities of FOI processing. A specialist merits review body will, sometimes, come to a different view than that of a generalist merits review body. One such difference in views occurred after the AAT made two decisions (in 2011 and 2012) about who qualifies as a 'person' eligible to make an FOI request.³⁵ Both cases arose under provisions of the *FOI Act* that were in operation prior to the 2010 amendments. Because of uncertainty about the applicability of those cases to the amended Act, the Information Commissioner issued a statement on the issue. The issue is one on which reasonable minds may differ. But what is most notable about the view that the Information Commissioner expressed in his statement is that it was not based solely on principles of statutory construction. It also took account of the operation of the *FOI Act* on a practical level across government and the interaction of the *FOI Act* with the *Privacy Act*. The OAIC is uniquely placed to factor aspects like these into its decision making, because of its engagement with the FOI system as a whole and its privacy functions.

A specialist FOI regulator

The Productivity Commission, in its April 2014 draft report on *Access to Justice Arrangements*, said that FOI and privacy regulators 'receive very small numbers of disputes ... and have very high average costs per complaint'.³⁶ The draft report recommended that governments rationalise ombudsmen services (such as FOI and privacy regulators) to improve efficiency and reduce costs. This recommendation was based on estimates that the Productivity Commission made of the comparative cost of a matter being processed by (amongst other bodies) the OAIC and the Commonwealth Ombudsman: the OAIC was estimated to be more than 13 times more expensive. However, when enquiries as well as complaints are counted for the OAIC (as they would appear to have been in relation to the Ombudsman) the cost per matter is the same for each body.³⁷ Cost per matter is a crude metric, but (when properly calculated) it suggests that the OAIC and the Ombudsman are comparable in their efficiency.³⁸

As noted above, a specialist FOI regulator is better placed to factor into its decision making an understanding of the practical operation of the *FOI Act* across government. The OAIC has brought this practical understanding to its IC review decision making.

The issue in '*AP*' and *Department of Human Services*³⁹ was whether the work involved in processing the FOI applicant's request would substantially or unreasonably divert the Department's resources from its other operations. The Department claimed that it would, based on its estimate of the work required. The OAIC obtained a sample of the documents at issue, and an OAIC officer assessed and edited that sample. Based on that assessment, a more reliable (and much lower) estimate was obtained. The IC review decision was that the amount of work involved in processing all of the documents would not substantially or unreasonably divert the Department's resources.

In '*BZ*' and *Department of Immigration and Border Protection*,⁴⁰ the Department declined to provide the FOI applicant with a copy of the video footage that he had sought, blurred so as to obscure the face of a third party. The Department said that it would cost almost \$4,000 to edit the footage. An OAIC officer prepared an edited copy of the footage in which the third party's face was obscured. This took less than an hour, using software that cost less than \$100. The IC review decision was that access be granted to the edited footage.⁴¹

Applying the crude metric of cost per matter, it seems that specialist FOI merits review can be provided at no greater cost than general merits review. And, in each of these examples,

the OAIC's practical experience and capacity informed its decision making in ways that might not have been available to a generalist merits review body.

The integrated model

The OAIC integrates FOI, privacy and information policy functions. This integrated model has been criticised. There are two aspects to this criticism: that the OAIC should not exercise both FOI advisory and FOI merits review functions; and that there can be a conflict between the proper exercise of the OAIC's various functions, especially its FOI and privacy functions.

The first aspect of this criticism echoes the argument of the 1995 report of the ALRC and the ARC, discussed above. In practice, however, the mix of review and advisory functions has proved to be mutually supporting, with the practical experience gained in reviewing FOI matters informing the preparation of guidelines, and the guidelines in turn providing a useful framework within which to conduct IC reviews.

Nonetheless, some agencies expressed concern, in submissions to the Hawke Review, about the OAIC's mix of FOI functions. Some also voiced concern that the OAIC was sometimes not willing to provide advice about specific matters for fear of compromising the Information Commissioner's ability to make a decision if the matter were later to come to the OAIC on review.⁴² There have been occasions where this has been the case. But, the OAIC has responded to hundreds of written and verbal FOI queries from agencies since its establishment.⁴³ On 75 occasions over 2012–13 and 2013–14 the OAIC provided detailed policy advice to agencies in response to complex FOI queries. The OAIC also published a great deal of FOI guidance material—in particular, the Information Commissioner's guidelines—to assist agencies with technical issues and to achieve best FOI practice.⁴⁴ Agencies' concerns about a lack of specific FOI advice seem to have arisen from dissatisfaction that the OAIC was not able to tell agencies how to resolve particular FOI requests. But an FOI decision maker has a statutory obligation to decide each FOI request on its merits. No agency with whole-of-government FOI advisory functions could provide more than general advice about how to make that decision, whether or not that agency was also responsible for merits review.

The second aspect of this criticism focusses on a purported conflict between the OAIC's functions. For example, the Australian Privacy Foundation has said that FOI and information policy functions 'sit uneasily' beside privacy functions.⁴⁵ Carolyn Adams has argued that the OAIC model has the potential to 'mute the voices of the Privacy and Freedom of Information Commissioners in the information policy debate', and that the creation of an individual statutory office for the FOI Commissioner would have been preferable.⁴⁶

In practice, the FOI and privacy functions have not been in conflict: they are complementary aspects of the public sector information management landscape. The *FOI Act* encourages disclosure, but recognises the importance of protecting individual privacy (for example, through the personal privacy exemption in s 47F and the requirement in s 27A that a decision maker consult before disclosing personal information). The *Privacy Act* recognises the value of transparency through Australian Privacy Principle 1, which requires entities subject to the Act to manage personal information in an open and transparent way. The *FOI Act* and *Privacy Act* contain parallel mechanisms for giving individuals access to personal information about them that government agencies hold, or amending or annotating that information (through Part V of the *FOI Act*, and Australian Privacy Principles 12 and 13).

As Juliet Lucy has said:

... this distinction [between privacy and FOI] is more apparent than real. Both privacy and FOI concern the individual's relationship with the state and both are premised upon the idea that the state should have obligations to the citizen in terms of handling and disclosing information. Both include provisions to protect personal information. The Commonwealth's recent acknowledgement that government information is a 'national resource' encapsulates the idea that information held by government is not simply 'owned' by the bureaucracy but should be managed in the community's interests (including individuals' interests in privacy).⁴⁷

The Hawke Review agreed that the combination of FOI, privacy and information policy functions in a single agency 'provides a logical basis for an integrated scheme for information management and policy'.⁴⁸ The integration of functions in the OAIC has facilitated consistent decision making in FOI and privacy. This integration of functions has also facilitated the preparation of consistent policy advice across FOI, privacy and information management. An example is the OAIC's guidance on de-identification, which discusses how agencies can balance transparency and privacy objectives by de-identifying personal information so that it can be shared or published without jeopardising personal privacy.⁴⁹ Another example is the OAIC's principles on open public sector information.⁵⁰ These were published early in the life of the OAIC, and build on the pro-disclosure principles enunciated in the *FOI Act* while promoting the protection of personal information. The OAIC applies the principles in its role of monitoring compliance by Australian Government agencies with the publication objectives of the *FOI Act*. The principles also inform the OAIC's promotion within government of open data, open licensing and proactive disclosure.

Conclusion

The 2014–15 budget papers estimate that the disbandment of the OAIC will save \$10.2 million over four years, after the Office of the Privacy Commissioner has been re-established and funding has been provided to the AAT (to conduct external merits review of FOI decisions) and to AGD (to perform FOI guidance and statistics functions).⁵¹ Implementing this reform will involve repealing the *AIC Act*, and amending the *FOI Act* and *Privacy Act*. The Government has not announced any changes to the *FOI Act* beyond those required to disband the OAIC and transfer responsibility for its FOI functions to other bodies.

So, what will be the effect of the proposed reforms? FOI applicants will still be able to complain about agency behaviour under the *FOI Act*, or seek independent external merits review of FOI decisions. Will there be any noticeable change to the FOI landscape?

One significant effect will be an increase in the cost of seeking merits review. There is no charge to seek IC review but, as Johan Lidberg points out:

The fee to lodge an appeal with the AAT is currently A\$816 [it has since risen to \$861]. Some of the FOI reviews could be exempt from the fee and part of the cost will be refundable if you win the appeal, but in most cases the fee will increase. Add to this the cost of legal representation needed before the AAT and most FOI applicants will probably think twice before they appeal.⁵²

Peter Timmins has raised the issue of legal representation:

Putting things back to the Administrative Appeals Tribunal, it's lawyers at 10 paces ... I think John and Mary Citizen are going to find themselves in the AAT, looking at a barrister or solicitor at the other end of the table, representing a government agency.⁵³

Increasing the cost of FOI merits review will benefit some applicants. As Richard Mulgan says:

... if re-imposing a significant fee leads, as it must, to a substantial reduction in the number of appeals, those who can afford to seek a review can expect a faster, more efficient service. For this reason, the changes have been welcomed by representatives of media businesses, which have chafed at the increasing delays caused by the flood of less well-off appellants.⁵⁴

An increase in the cost of applying for FOI merits review may be beneficial for the FOI system as a whole, not just for the better-resourced applicants. There is no doubt that the introduction of free external merits review of FOI decisions was a significant contributor to the dramatic increase in applications for merits review after the 2010 reforms. Given the OAIC's level of resourcing, and the statutory framework within which it operates, it was always likely that the OAIC would find itself with a backlog of unprocessed IC reviews after the first year or two of its operations.

But that backlog has gone. The OAIC is now processing FOI matters in a timely way. In the absence of extra resourcing, there were a number of legislative changes that would have improved the OAIC's productivity still further. In addition, the introduction of an application fee for IC reviews (not necessarily one as high as that for the AAT) would have made the OAIC's workload more manageable, while being only a small barrier to access to review.

Independent merits review of FOI decisions and investigation of FOI complaints will still be available after the OAIC has been disbanded. But the many benefits of having a specialist FOI regulator will be lost. And the benefits that have been realised from having an integrated approach to information management issues—FOI, privacy and information policy—will be lost, too.

Endnotes

- 1 Senator the Hon George Brandis QC, Streamlined arrangements for external merits review (2014) <<http://www.attorneygeneral.gov.au/MediaReleases/Pages/2014/SecondQuarter/13May2014-Streamlinedarrangementsforexternalmeritsreview.aspx>>.
- 2 The FOI Act was amended by the *Freedom of Information Amendment (Reform) Act 2010* (Cth). For more on the extent and significance of those changes, see the OAIC's Guide to the Freedom of Information Act 1982 <<http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-guides/guide-to-the-freedom-of-information-act-1982>> and FOI law reform webpage <<http://www.oaic.gov.au/freedom-of-information/foi-law-reform>>.
- 3 See, for example, the provisions of Part II of the FOI Act, which implement the information publication scheme. These provisions commenced on 1 May 2011.
- 4 FOI Act, s 3(3).
- 5 *Australian Information Commissioner Act 2010* (Cth) s 4.
- 6 Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2010 (Cth) 1.
- 7 Australian Law Reform Commission and Administrative Review Council, *Open Government—A review of the federal Freedom of Information Act 1982*, Report No 77 (1995) <<http://www.alrc.gov.au/report-77>> [6.4].
- 8 ALRC and ARC, above n 7, [6.2].
- 9 ALRC and ARC, above n 7, [6.23].
- 10 FOI Act, s 93A.
- 11 ALRC and ARC, above n 7, [6.20].
- 12 ALRC and ARC, above n 7, [6.16]–[6.20].
- 13 FOI Act, s 54W(b).
- 14 Between 1 November 2010 and 30 June 2014, the Information Commissioner was satisfied, under s 54W(b), that it was desirable that a decision under review be considered by the AAT in only 80 (or 4.8%) of the 1663 IC reviews lodged.
- 15 Ombudsman Act 1976 (Cth), s 6C; FOI Act, s 74.
- 16 Unless otherwise indicated, the figures in these four dot points are taken from: OAIC, *Freedom of Information Act 1982 Annual Report 2010–11* (2011); *OAIC Annual Report 2011–12* (2012); *OAIC Annual Report 2012–13* (2013); *OAIC Annual Report 2013–14* (2014). All are available at <<http://www.oaic.gov.au/about-us/corporate-information/annual-reports>>.

- 17 AAT *Annual Report 2009–10* (2010) <<http://aat.gov.au/Publications/AnnualReport/AnnualReport2010.htm>> 132.
- 18 AAT, above n 17, 142. The full fee was not always payable: for example, no fee applied for review of an FOI decision of the kind specified in Schedule 3 to the Administrative Appeals Tribunal Regulations. The AAT could also waive the fee in cases of financial hardship.
- 19 *Commonwealth Ombudsman Annual Report 2009-2010* (2010) <http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2009-10/download/PDF/ombudsman_anrep_2009_2010_full.pdf> 83. Note that the scope of complaints made to the OAIC is narrower than that of complaints made to the Ombudsman, which can investigate complaints about the merits of a decision.
- 20 For more detail, see OAIC, below n 23.
- 21 OAIC, *Processing of non-routine FOI requests by the Department of Immigration and Citizenship: Report of an own motion investigation* (2012) <<http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-omi-report/processing-of-non-routine-foi-requests-by-the-department-of-immigration-and-citizenship>>.
- 22 OAIC, *Review of Charges under the Freedom of Information Act 1982* (2012) <<http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-reports/review-of-charges-under-the-freedom-of-information-act-1982>>.
- 23 OAIC, *Submission to Dr Allan Hawke AC, Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, December 2012 <<http://www.oaic.gov.au/news-and-events/submissions/foi-submissions/review-of-freedom-of-information-legislation>>; OAIC, *Supplementary Submission to Dr Allan Hawke AC, Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, February 2013 <<http://www.oaic.gov.au/news-and-events/submissions/foi-submissions/review-of-freedom-of-information-legislation-supplementary-submission>>.
- 24 OAIC, above n 22.
- 25 Allan Hawke, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (2013) <<http://www.ag.gov.au/Consultations/Pages/ReviewofFOI.aspx>>.
- 26 See for example Michael McKinnon, 'Secrecy amid a flawed watchdog' in Mike Dobbie (ed), *Secrecy and surveillance: the report into the state of press freedom in Australia in 2014* (Media, Entertainment & Arts Alliance, 2014) 19; Jack Waterford, 'FOI squared translates as delay' *The Canberra Times* (online), 5 April 2014 <<http://www.canberratimes.com.au/comment/foisquared-translates-as-delay-20140405-365ny.html>>.
- 27 Jonathan Holmes, 'Abbott cuts an accidental win for transparency', *The Age* (online), 3 June 2014 <<http://www.theage.com.au/comment/abbott-cuts-an-accidental-win-for-transparency-20140603-zrvpr.html>>; Waterford, above n 26.
- 28 *Re Kline and Official Secretary to the Governor-General* [2012] AATA 247; *Re Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited* [2012] AATA 914; *Re Australian Broadcasting Corporation and Tennant* [2012] AATA 914; *Re Lee and Minister for Immigration and Citizenship* [2013] AATA 532; *Re Pangilinan and Secretary, Department of Immigration and Citizenship* [2013] AATA 574; *Re Nikjoo and Minister for Immigration and Border Protection* [2013] AATA 921.
- 29 This assumes that each appeal was lodged 28 days after the IC review decision appealed from.
- 30 Brandis, above n 1.
- 31 Inevitably, since the announcement of the impending disbandment of the OAIC, many OAIC staff have already obtained employment elsewhere. In its last few months, the OAIC will not be able to maintain the high level of productivity that it has attained over the last twelve.
- 32 McKinnon, above n 26.
- 33 McKinnon, above n 26, 20.
- 34 The basis for this assertion is not completely clear. The assertion might be based upon the belief of the article's author that a particular IC review decision (in which he was the applicant) was wrongly decided.
- 35 *Re CKI Transmission Finance (Australia) Pty Ltd and Australian Taxation Office* [2011] AATA 654; *Re Apache Energy Pty Ltd and National Offshore Petroleum Safety and Environmental Management Authority* [2012] AATA 296.
- 36 Productivity Commission, *Access to Justice Arrangements: Productivity Commission Draft Report* (2014) <<http://pc.gov.au/projects/inquiry/access-justice/draft>> 288–289.
- 37 The Productivity Commissioner estimated that it costs, on average, \$670 for the Commonwealth Ombudsman to resolve a complaint; its figure for the OAIC was \$9000. If enquiries and complaints were counted, the figure for the OAIC would be \$667. Even that figure is inflated. The Productivity Commission treated the OAIC's entire annual budget appropriation as being spent on FOI and privacy complaints and IC reviews. This ignores the OAIC's FOI and privacy advisory and guidance functions, and its information policy function. See OAIC, *Submission to Productivity Commission, Draft report on Access to Justice Arrangements* (2014) <<http://www.oaic.gov.au/news-and-events/submissions/productivity-commission-draft-report-on-access-to-justice-arrangements>>.
- 38 The Productivity Commission focused its analysis on comparisons between different types of ombudsmen, such as government and industry ombudsmen, privacy and FOI commissioners, and healthcare complaints bodies. However, a large proportion of the OAIC's FOI activity is its processing of IC reviews. To that extent, it would be more apt to compare the OAIC with the AAT. The Productivity Commission estimated that the average cost of resolving an application at the AAT is \$3538 for applications finalised without a hearing and \$16,641 for applications finalised with a hearing.

- 39 [2013] AICmr 78.
- 40 [2014] AICmr 55.
- 41 When an access refusal decision is set aside on IC review, it is for the agency—not the OAIC—to provide the documents to the applicant. But, in this case, there was no need for the Department to edit the footage itself: the Department could give the applicant the OAIC-edited footage.
- 42 See, for example, submissions to the Hawke Review from the Department of Education, Employment and Workplace Relations, the Department of Finance and Deregulation, the Department of Foreign Affairs and Trade and the Department of Immigration and Citizenship, available at <http://www.ag.gov.au/Consultations/Pages/FOIReviewSubmissions.aspx>.
- 43 In 2013–14 alone, the OAIC responded to 488 FOI enquiries from agencies.
- 44 Many agencies have commended the quality of the FOI guidelines and other guidance material. See, for example, submissions to the Hawke Review from the Australian Transport Safety Bureau, the Commonwealth Ombudsman, the Commonwealth Scientific and Industrial Research Organisation, the Department of Defence, the Department of Health and Ageing and the Department of Human Services, available at <http://www.ag.gov.au/Consultations/Pages/FOIReviewSubmissions.aspx>.
- 45 Letter from Australian Privacy Foundation to the OAIC, 20 November 2011, correspondence to the Information Commissioner and Privacy Commissioner <<http://www.privacy.org.au/Papers/OAIC-Openness-111120.pdf>> 1.
- 46 Carolyn Adams, 'One office, three champions? Structural integration in the Office of the Australian Information Commissioner' (2014) 21 *Australian Journal of Administrative Law* 77.
- 47 Juliet Lucy, Privacy, GIPA and FOI: State and Commonwealth Regulation of Information (2013) <http://media.wix.com/ugd/14df36_c0cb183143136081cb65e68924ea90e6.pdf> 7–8.
- 48 Hawke, above n 25, 19.
- 49 OAIC, *Information policy agency resource 1: de-identification of data and information* (2014) <<http://www.oaic.gov.au/information-policy/information-policy-resources/information-policy-agency-resources/information-policy-agency-resource-1-de-identification-of-data-and-information>>.
- 50 OAIC, Principles on open public sector information (2011) <<http://www.oaic.gov.au/information-policy/information-policy-resources/information-policy-agency-resources/principles-on-open-public-sector-information>>.
- 51 The Ombudsman will receive no additional funding to investigate FOI complaints. There was no reduction in funding for the Ombudsman when the 2010 reforms were implemented.
- 52 Johan Lidberg 2014, 'Transparency trade-off means FOI will get more expensive', *The Conversation* (online), 16 May 2014 <<http://theconversation.com/transparency-trade-off-means-foi-will-get-more-expensive-26742>>. For further examples, see Paul Farrell, 'Budget 2014: splitting watchdogs "would shut door on open government"', *The Guardian* (online), 12 May 2014 <<http://www.theguardian.com/world/2014/may/12/budget-2014-splitting-watchdogs-would-shut-door-on-open-government>>; Markus Mannheim, 'Abbott government's budget guts freedom of information watchdog as it switches focus to privacy', *The Canberra Times* (online), 15 May 2014 <<http://www.canberratimes.com.au/national/public-service/abbott-governments-budget-guts-freedom-of-information-watchdog-as-it-switches-focus-to-privacy-20140515-zrd81.html>>; Rodney Tiffin, 'The Abbott government's war on transparency', *Inside Story* (online), 5 June 2014 <<http://inside.org.au/the-abbott-governments-war-on-transparency/>>; Peter Timmins 'Abolish OAIC, evidence or no', *Open and Shut* (online), 27 May 2014 <<http://www.foi-privacy.blogspot.com.au/2014/05/abolish-oaic-evidence-or-no.html>>; Peter Timmins, 'The Time and cost equation for AAT review of FOI matters', *Open and Shut* (online), 5 June 2014 <<http://foi-privacy.blogspot.com.au/2014/06/the-time-and-cost-equation-for-aat.html>>.
- 53 ABC Radio National, 'Concerns about closure of FoI review office', PM, 15 May 2014 (Peter Timmins) <<http://www.abc.net.au/pm/content/2014/s4005459.htm>>.
- 54 Richard Mulgan, 'How the FOI watchdog was starved to death', *The Canberra Times* (online), 1 June 2014 <<http://www.canberratimes.com.au/national/public-service/how-the-foi-watchdog-was-starved-to-death-20140601-39ckf.html>>.

THE IMPACT OF THE EMERGING 'REASONING' GROUNDS OF REVIEW

*John Carroll and Cain Sibley**

The orthodox approach to judicial review has been that decision-makers have an area of authority into which courts do not intrude. Rather, a court would only intervene if the decision-makers strayed outside the limits of their legal authority. According to this approach, '[t]he proper role of the federal courts is to determine if the relevant ... executive act or decision was in breach of or unauthorized by the law or was beyond the scope of power given to the decision maker by the law';¹ the merits and demerits of the executive action under review 'are ... beside the point.'²

However, recent developments in judicial review suggest that less is being left to the decision-maker and more is seen as going to the authority of the decision maker to decide. In other words the merits is becoming a 'diminishing field' while the permissible scope of judicial review is growing.³

In particular, the emergence and enlargement of what we have called the 'reasoning' grounds of review have expanded the scope of judicial review. While this development would likely draw criticism from commentators as lacking principle or showing an undesirable 'plasticity' of the grounds of review,⁴ we argue that recent decisions from the judiciary give more valuable guidance to decision-makers about what is expected to avoid successful challenge. We also suggest that the actual ground of review used to challenge a decision is not particularly important; the reasoning grounds of review overlap and in many cases the same decision making defect can be analysed by reference to a number of grounds of review.

The reasoning grounds of review

Some grounds of review are easily referable to the authority of the decision-maker to make the decision. Failure to follow procedures required by law, no jurisdiction, error of law and even natural justice fall into this category. Other grounds of review do not relate to the procedure adopted by the decision maker but are more referable to the substance of the decision. This paper focuses on the latter category and, in particular, on grounds of review which at their heart go to the reasoning process adopted by the decision-maker.

Grounds of review which relate to the reasoning process include:

- failure to consider a relevant consideration;
- logicity and rationality grounds;
- unreasonableness; and
- no evidence.

* *John Carroll is a partner and Cain Sibley is a special counsel at Clayton Utz. This paper was presented at the 2014 AIAL National Administrative Law Conference. Perth, WA, 25 July 2014.*

These grounds of review, when stated in legal terms, provide little guidance to decision-makers. To put the matter a different way, how does a decision-maker avoid acting irrationally or unreasonably?

In our review of cases which have recently applied the reasoning grounds of review, we identified five key issues which identify what the courts expect from decision-makers making administrative decisions. The courts expect that decision-makers will:

1. show an understanding of significant arguments;
2. show engagement with relevant considerations;
3. show a weighing of factors for and against a particular decision;
4. be wary of summarily dismissing arguments; and
5. show a clear path of reasoning linking the facts and the conclusions to be drawn from those facts.

We deal with each of these issues in turn.

Showing an understanding of significant arguments

Decision-makers must ensure that their decisions respond to substantial and articulated arguments put forward for consideration. This point was made clear by the High Court in *Dranichnikov v Minister for Immigration and Multicultural Affairs*.⁵ That case involved a review by the Refugee Review Tribunal (RRT) of a decision not to grant protection visas to the Dranichnikov family.

The RRT upheld the decision not to grant the visas on the basis that there was no evidence 'to suggest that there is general persecution of businessmen in Russia.'⁶ In fact, as the High Court held, the Dranichnikovs had been arguing that there was persecution of businessmen 'who publicly criticised law enforcement agencies for failing to take action against crime or criminals',⁷ not the more general social group of 'businessmen in Russia.'

A majority of the High Court found that the RRT 'fail[ed] to respond to a substantial, clearly articulated argument relying on established facts'.⁸ Gummow and Callinan JJ held that the error of the RRT amounted to a failure to properly exercise its jurisdiction in terms similar to *Minister for Immigration and Multicultural Affairs v Bhardwaj*⁹; the RRT did 'not exercise jurisdiction in respect of a live application validly made to it.'¹⁰ Similarly, Kirby J found that the mistake of the RRT was 'so serious as to undermine the lawfulness of the decision in question in a fundamental way.'¹¹

In *Leggett v Queensland Parole Board*,¹² Dalton J of the Supreme Court of Queensland considered similar issues in relation to a parole decision. In that case, the applicant for parole made an argument for 'exceptional circumstances parole' based on the severe deterioration of his health since his sentencing. In particular, he had developed complications from pancreatic cancer (including life-threatening internal bleeding) and had severe type 1 diabetes with a very high risk of sudden onset hypoglycaemia. The suddenness of onset made it difficult for the applicant to manage his diabetes himself. The Parole Board refused his application and provided a statement of reasons, a document which Dalton J referred to as 'a most inadequate document' and one which 'does not display or reveal the reasoning process of the Board.'¹³ The conclusions of the parole board were expressed as follows:¹⁴

Based on the findings listed above, the Board considered that the Court was aware of the Applicant's personal circumstances at the time of sentencing and that his medical requirements can be adequately managed while incarcerated. Therefore, the Board determined that there were no issues identified

which would warrant the Applicants release to Exceptional Circumstances Parole at this time and therefore refused his Application.

Dalton J held that the Parole Board did not consider the substance of the applicant's case. His Honour held:¹⁵

Mr Leggett's case for exceptional circumstances parole was based on several factual points but this massive deterioration in his health since imprisonment was clearly the most significant of these points. There is no indication in the letters dated 28 March 2011, 14 December 2011, or in the reasons of 25 January 2012 that the Parole Board understood this was Mr Leggett's case. In fact the indications are to the contrary. The Parole Board did not deal with this case. It made no findings as to the deterioration in his health since imprisonment and made no determination of whether that deterioration amounted to exceptional circumstances. Having regard to the massive deterioration in the health of Mr Leggett since imprisonment, and having regard to the very clear way in which he articulated his case before the Parole Board, that failure to recognise and deal with the case by the Parole Board is remarkable. I have no difficulty in concluding both that Mr Leggett was denied natural justice and that the Parole Board did not consider relevant considerations in making its decision.

These cases represent one end of the spectrum; there is no requirement for a decision-maker to deal with every single piece of evidence or submission advanced. In *Linfox Australia Pty Ltd v Fair Work Commission*,¹⁶ the Full Federal Court held:¹⁷

[I]t is not necessary for those making a decision to refer to 'every piece of evidence and every contention' made by a party... [T]here remains no unqualified and universally applicable legal requirement to refer to every submission advanced. Much depends upon the importance of the submission to the claims being made. A failure to address a submission which is 'significant' and which touches upon the 'core duty' being discharged or which is 'centrally relevant' to the decision being made may in some circumstances found a conclusion that it has not been taken into account and may thereby expose jurisdictional error.

(citations omitted)

The Court also confirmed that decision-makers are not generally under an obligation to consider claims which are not actually advanced, particularly where the parties are legally represented (as was the case in *Linfox*). In this regard, the Court said:¹⁸

[A] decision-maker called upon to make a decision is generally required to resolve the claims made; there is no general requirement to resolve a claim 'never made, which might have been put on another basis'. There can be neither an 'error of law' nor a 'question of law' where a decision-maker does not deal with a submission which is not advanced for resolution. As a general rule, no error is committed by a decision-maker in not addressing issues of fact and law not the subject of argument.

(citations omitted)

In some circumstances, however, a decision-maker may be required to consider a claim which, although not expressly averted to, naturally and obviously arises from the materials. In this regard, Allsop J in *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁹ held:²⁰

A practical and common sense approach to everyday decision-making requires the unarticulated claim to arise tolerably clearly from the material itself. ... [The statutory task is] not to undertake an independent analytical exercise of the material for the discovery of potential claims which might be made, but which have not been, and then subjecting them to further analysis to assess their legitimacy.

1. Showing engagement with relevant considerations

We all know the respondents' incantation from *Wu Shan Liang*,²¹ that decisions are not to be read over-zealously²² or with an eye keenly attuned to the perception of error.²³ It is

clear that mention of a matter as having being considered is not conclusive²⁴ and likewise failure to mention a matter as having being considered does not necessarily mean that the decision-maker failed to consider it.²⁵ Rather, what appears to be required is that decision-makers show 'active intellectual engagement' with relevant considerations,²⁶ rather than merely reciting that they have been considered.

In *Minister for Immigration and Citizenship v Shume*,²⁷ Yates J had to decide whether the AAT had given consideration to what were described as 'primary considerations' relating to a person's character. His Honour held:²⁸

Although the Tribunal identified the second and third primary considerations in its reasons, it did so in terms which did no more than recite, in each case, the uncontroversial facts that the first respondent was not a minor when he began living in Australia, and that he arrived in Australia in 2008 and committed the offences for which he was imprisoned on 7 June 2009. It is impossible to tell from the Tribunal's reasons whether and, if so, how those facts were taken into account or what role they played in the Tribunal's decision-making.

Similarly, in *Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities*,²⁹ Marshall J considered whether the Minister had regard to advice relating to the conservation of the Tasmanian devil in the making of a decision. The Minister was required to 'have regard to' approved conservation advice in deciding whether to grant approval for an action. It was alleged that he did not give the approved conservation advice genuine consideration.

The approved conservation advice in relation to the Tasmanian devil was not provided to the Minister and there were only two references in the Minister's reasons to approved conservation advice: one which referred to the fact that he took into account 'any relevant conservation advice' and another which said the Minister considered 'conservation advices where relevant'. There was no reference to the actual approved conservation advice in relation to the Tasmanian devil.

While the Court found that the advice was before the Minister by other means, the legislation required the Minister to consider the approved conservation advice for the purposes of making a decision about the approval. Marshall J held:³⁰

The Minister was obliged to give genuine consideration to the document. Simply to say in a statement of reasons that he took into account 'any relevant conservation advice' does not answer the question whether he considered that the approved conservation advice in relation to the Tasmanian devil was relevant to his decision.

His Honour concluded:³¹

[I]t is irrelevant ... that most of the material in the advice was before the Minister by other means. The Act requires the Minister to have regard to the conservation advice. This means that genuine consideration must be given to the document. The Minister's failure to have regard to the document for the purpose of making his decision is fatal to its validity.

As mentioned, the failure to expressly mention a matter as having been considered is not necessarily fatal; the courts look to the decision as a whole to decide whether a matter has been properly considered. For example, in *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts*,³² it was argued that the Minister did not consider the impact on the species of a decision to give approval to the Royal Botanic Gardens and Domain Trust to relocate a colony of grey-headed flying foxes from the Royal Botanic Gardens in Sydney. In particular, Bat Advocacy argued that the Minister had failed to engage in a process of 'active intellectual engagement' in relation to that matter, and therefore had failed to consider a relevant consideration.

The Full Federal Court (Emmett, McKerracher and Foster JJ) held that the Minister did consider the effect on the species. It held that the decision as a whole, and the conditions imposed on the approval, showed that the impact on the species was the 'primary concern of the Minister'.³³ The Court went on to say that:

The total process culminating in the conditional approval was directed substantively to these issues. The number of times the expression 'critical habitat' was repeated in the Statement of Reasons was immaterial. Those concepts were at the core of a highly deliberative evaluation of a somewhat precarious balancing exercise.

Although, as in *Bat Advocacy*, it may be possible to infer from the context of a decision as a whole that a matter has been considered, it is, in the words of Flick J in *Salahuddin v Minister for Immigration and Border Protection*:³⁴

forever .. the preferred course for any administrator to expressly refer to such matters. To do so largely removes any room for argument and provides assurance to the parties - especially the frequently unrepresented claimant - that a case has been properly considered. A failure to do so exposes such a decision-making process to perhaps a well-justified perception on the part of a claimant that his decision has not been made in accordance with law.

A particular risk in terms of giving genuine consideration to an issue is the use of template or 'cut and paste' reasoning. In *SZRBA v Minister for Immigration and Border Protection*,³⁵ the issue was whether an independent merits reviewer properly considered the submission made on behalf of the applicant that a Department of Immigration and Citizenship (DIAC) report was more relevant, and should be given more weight, than a report prepared by the Department of Foreign Affairs and Trade. The decision-maker's reasons recorded that '[n]otwithstanding the advisers submission the Reviewer attaches particular weight to the recent report by the Department of Foreign Affairs and Trade (DFAT) ...'.³⁶

The evidence was that a similar form of words was used in 56 other decisions that the reviewer made.³⁷ The Full Federal Court found that the reviewer had not considered the submission that the DIAC report should be preferred over the DFAT report, based partly on the use of similar or identical reasoning in other cases. The Full Court held:³⁸

Our conclusion is that [the reviewer] used a method of cutting and pasting earlier decisions to produce his reasons on the appellant's application. This is probably not surprising where a large number of similar applicants make similar claims. One can perhaps sympathise with the position of a decision-maker who, confronted with the same argument 100 times, opts to copy what he has said on the earlier occasions.

There are, of course, risks with adopting such a practice as the facts of this case bear out. Chief amongst these is that the risk of overlooking the actual submissions made is increased. Allied with that risk, or perhaps overlapping it, is the potential to fail to consider each case on its own merits. ...

2. Showing how factors for and against a decision have been weighed

In some recent decisions, courts have indicated that reasons for decision should show how a decision-maker has grappled with an issue. The highest-profile decision in this vein is probably *Minister for Immigration and Citizenship v Li*,³⁹ a case decided on the basis of unreasonableness. The decision under review was one of the Migration Review Tribunal (MRT).

Li involved an applicant for a type of visa which required a successful skills assessment from Trade Recognition Australia (TRA) as a criterion for grant of the visa. Initially, Ms Li's application for a visa was refused by a delegate of the Minister for Immigration. She applied for review by the MRT. After the MRT hearing, Ms Li's migration agent informed the MRT that Ms Li's application to TRA was unsuccessful but that the decision of the TRA

was incorrect. The migration agent explained to the MRT why this was the case. The migration agent asked the MRT not to make a decision until after the TRA had reconsidered Ms Li's skills assessment application. The MRT decided not to do so. It informed Ms Li that the MRT 'considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further'. It refused Ms Li's application for review. Incidentally, after the MRT decision, Ms Li's migration agent was proved right; Ms Li was granted a skills assessment by the TRA.

In the joint judgment of Hayne, Kiefel and Bell JJ, their Honours held that:⁴⁰

it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

The majority found that the Tribunal's decision did lack an evident and intelligible justification. Hayne, Kiefel and Bell JJ held:⁴¹

The decision to refuse the adjournment request was explained by the Tribunal on the bases that: (a) Ms Li had been provided with enough opportunities to present her case; and (b) the Tribunal was not prepared to delay the matter any further. The reference to delay was not further explained by the Tribunal. The only significant delay would appear to be attributable to the Tribunal, which took some nine months to contact Ms Li after the lodgement of her application. In any event, what pressing need for a conclusion of the review was the Tribunal advertent to, a need which would have to be weighed against the object of s 360? The position of the Tribunal cannot be equated with that of a party to litigation who may be prejudiced by the delay of another. It may be accepted that the Tribunal is to act with some efficiency, as is stated in s 353(1) of the *Migration Act*, but such a consideration would again have to be weighed against the countervailing consideration of the purpose of [the relevant provisions].

The difficulty with the Tribunal's decision was that there was no balancing or weighing up undertaken. This analysis was applied by the Full Federal Court in similar circumstances in *Minister for Immigration and Border Protection v Singh*.⁴² In that case, the Court held that '[t]here was no objective or intelligible justification given by the Tribunal for refusing the adjournment.'⁴³

In another case, *Minister for Immigration and Border Protection v MZYTS*,⁴⁴ the Full Federal Court considered whether the Refugee Review Tribunal had properly addressed a post-hearing submission made by the visa applicant. The substance of that submission was that recent country information for Zimbabwe showed that 'ordinary' supporters of the Movement for Democratic Change in Zimbabwe were being subjected to organised violence. While the Court noted that the post-hearing submission was referred to as having been considered by the Tribunal, there was no consideration of the substance of that submission.

The Full Court held:⁴⁵

Nothing in the Tribunal's reasons suggests any re-evaluation by the Tribunal of what it put to the visa applicant at the hearing on this point, in the light of the post-hearing submission and the additional country information. Rather, the reasons suggest no consciousness of the contents of these post-hearing materials (as opposed to their existence), although the effect of that material was to support a proposition that circumstances in Zimbabwe had become increasingly dangerous for actual or perceived MDC supporters, and incidents of human rights abuses and serious political violence in Zimbabwe were growing during 2011. We are not suggesting the Tribunal was bound to accept the effect of that material, we are emphasising the absence of any consideration of it.

The Court also set out what it expected of the Tribunal in terms of dealing with the post-hearing submission:⁴⁶

The Tribunal's reasons disclose no process of weighing evidence and preferring some over the other. In the context of two or more pieces of apparently pertinent, but contradictory, evidence an expression of a preference for some evidence over other evidence generally requires an articulation of the different effects of the evidence concerned, and then some indication as to why preference is given. All these are matters for the trier of fact. The absence from the recitation of country information of the material referred to in the post-hearing submissions is indicative of omission and ignoring, not weighing and preference.

A case in which the court held that the decision-maker had adequately undertaken the weighing process is *Pierce v Rockhampton Regional Council*,⁴⁷ a case involving a decision to resume land. One of the arguments pressed by the applicants was that the Council failed to give due consideration to objections made to the proposal. McMeekin J gave this argument short shrift. His Honour held that a detailed report was prepared which outlined and analysed all of the objections. That report, despite the objections, recommended that the land be resumed.⁴⁸

3. Dismissing arguments or making findings summarily

While decision-makers are entitled not to believe submissions, recent decisions suggest that decision-makers should be careful about doing so summarily. One such example is *Tisdall v Webber*,⁴⁹ which concerned an investigation by a Professional Services Review (PSR) committee into a Dr Tisdall who had rendered 80 or more services on 20 or more days (the so-called '80/20 rule'). The relevant regulations had the effect that a doctor who breaches the 80/20 rule is taken to have engaged in 'inappropriate practice'. However, the regulations provided that if a doctor satisfied a PSR committee that 'exceptional circumstances' existed, then the doctor would not have engaged in inappropriate practice. A number of matters were prescribed in the Regulations as constituting exceptional circumstances, including an absence of medical services for patients of the doctor.

Dr Tisdall argued before the PSR committee that exceptional circumstances existed because there was a chronic shortage of doctors in the area in which he practised and because other doctors refused to see Dr Tisdall's patients. Dr Tisdall supplied material to the Committee which supported his contentions. The Committee decided that it was not satisfied that exceptional circumstances existed, and made a number of findings which it used to support that conclusion, including:

The number of services rendered by other practitioners in Dr Tisdall's area indicates that other practices 'likely had capacity to see additional patients'.

(a) The Committee 'did not accept that other practitioners would have refused to see Dr Tisdall's patients'.

(b) The Committee found 'that there were services available for these patients.'

The Full Federal Court (Justices Greenwood, Tracey and Buchanan) was highly critical of the way in which the PSR committee went about making its findings. Justice Buchanan said⁵⁰ that the evidence Dr Tisdall provided to the committee went 'unanswered'. His Honour went on to say:⁵¹

The Committee appears to have dealt with Dr Tisdall's case in large measure by making a speculative assumption ... that other practitioners had the capacity to see additional patients and would have been prepared to do so. How those findings were reconciled with the argument advanced for Dr Tisdall ... was not explained. The Committee simply declared ... that it did not accept that other practitioners would have refused to see Dr Tisdall's patients.

Justice Greenwood was similarly critical of the PSR committee's findings, saying:⁵²

[T]he Committee members are not entitled to make findings of fact ... based upon assumptions of likely capacity and likely disposition to see patients, unsupported by actual evidence, or simply based on inferences drawn from statistics which do not reveal facts about the reasons for statistical rates of attendance.

Another example is *Plaintiff M13/2011 v Minister for Immigration and Citizenship*⁵³ (a decision of Hayne J). In that case, a Malaysian woman applied for a protection visa on the basis that she feared persecution due to a previous relationship she had had with a man (which bore a child) from a different religion to her own, and which was said to be 'culturally inappropriate' in Malaysia.

A delegate of the Minister decided to refuse a protection visa because the delegate could 'find no reason as to why [the applicant] would not be able to relocate within Malaysia in order [to] seek greater anonymity, distance from her aggressors, and adequate protection'⁵⁴. Hayne J was critical of the finding of the delegate in circumstances where the delegate expressly said that he did not know where in Malaysia the applicant had been living. His Honour said:⁵⁵

The question of 'relocation' was treated as a possibility to be determined without regard to where the plaintiff had previously been living. And a place to which the plaintiff could relocate was not identified in the delegate's reasons ...

His Honour continued:⁵⁶

[T]he delegate did not refer at all to whether or how it would be reasonable or practicable for the plaintiff to live in 'greater anonymity' or to move to a place more distant from 'her aggressors' ...

4. Showing a clear link between facts and conclusions drawn

In *FTZK v Minister for Immigration and Border Protection*,⁵⁷ the High Court considered whether the reasoning of the Administrative Appeals Tribunal showed a logical connection between the facts as found and the conclusion drawn from those facts. The issue in that case was whether Article 1F(b) of the Refugees Convention applied to the applicant for a protection visa - namely, were there serious reasons for considering that the applicant has committed a serious non-political crime outside Australia prior to his arrival.

The Minister had refused the application for a protection visa, relying on Art 1F(b), based on the applicant's alleged involvement in the kidnapping and murder of a student in China in 1996.

The AAT found that there were serious reasons for considering that the applicant had committed a serious non-political crime and therefore that Art 1F(b) applied to him. Hayne J described the AAT's reasoning process as follows:⁵⁸

... First, Chinese authorities alleged that the appellant had committed the crimes and they provided transcripts of interrogation of two men (later convicted of and executed for participation in the crimes) who alleged that the appellant was complicit in their crimes. The Tribunal said that there was 'nothing in the evidence [before the Tribunal] to suggest that [the two men] conspired to name' the appellant (scilicet as a co-offender).

Second, the Tribunal found that the appellant had left China shortly after the crimes were committed and that he had provided false information to Australian authorities in order to obtain a visa to travel to and enter Australia. In addition, the Tribunal concluded that the appellant had 'deliberately provided false information when applying to the Australian authorities for a protection visa'.

Third, the Tribunal found that the appellant was evasive in giving evidence about his religious affiliations and about what had happened to him in China before he left that country. The evidence, the Tribunal concluded, was given in this way to strengthen his claim to remain in Australia.

Fourth, the Tribunal took into account that the appellant had attempted to escape from immigration detention.

The High Court held that these factors did not logically support or connect with a conclusion that there were reasons for considering that the applicant committed the crime of which he was accused. French CJ and Gageler J held:

No such connection was made or was able to be implied from the balance of the AAT's findings with respect to the conduct of the appellant in leaving China when he did, making false statements in support of his visa applications, or giving testimony to the AAT, which it did not accept, about his religious affiliations and fear of persecution if he returned to China. Those findings are consistent with the appellant having the purpose of leaving China and living in Australia.

The other members of the Court agreed that there was no logical connection between the findings of the AAT and a finding that there were 'serious reasons' to consider that the applicant had committed the crime.⁵⁹ Crennan and Bell JJ's reasons set out that the AAT apparently discounted an equally likely inference to be drawn from the findings of the AAT.⁶⁰

An equally probable explanation for all of these matters is a desire on the part of the appellant to live in Australia. That desire is not unique to the appellant, particularly as he has been found to fall within Art 1A(2) of the Convention. A correct application of Art 1F(b) to the facts required the Tribunal to ask of the evidence before it whether that evidence was probative of 'serious reasons for considering' that the appellant had committed one or more of the alleged crimes.

Another example of the High Court's approach to the path of the reasoning process is *Wingfoot Australia Partners Pty Ltd v Kocak*⁶¹ where the Court was asked to consider whether a statement of reasons provided by a medical panel, set up under Victorian workers compensation legislation, was inadequate thereby constituting an error of law. The relevant legislation required the medical panel to provide 'its written opinion and a written statement of reasons for that opinion'.⁶²

Although the Court confirmed that there is no '*free-standing common law duty to give reasons for making a decision*'⁶³, the Court found that what constitutes compliance with an obligation to provide reasons will depend on the particular statutory context. In this case, the Court held that:⁶⁴

What is to be set out in the statement of reasons is the actual path of reasoning by which the Medical Panel arrived at the opinion the Medical Panel actually formed for itself.

A little later, the Court said:⁶⁵

The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. If a statement of reasons meeting that standard discloses an error of law in the way the Medical Panel formed its opinion, the legal effect of the opinion can be removed by an order in the nature of certiorari for that error of law on the face of the record of the opinion. If a statement of reasons fails to meet that standard, that failure is itself an error of law on the face of the record of the opinion, on the basis of which an order in the nature of certiorari can be made removing the legal effect of the opinion.

5. Conclusion

Most of the judicial decisions discussed in this paper could have been decided on any of the reasoning grounds of review, highlighting the flexibility of the grounds and the overlap. Rather than analyse the foundations of these grounds of review, or how they fit within

judicial review theory, we have attempted to draw out how courts expect decision makers to go about their task. These factors are not a set of 'good government' principles⁶⁶ but rather mark some aspects of the reasoning process to which courts attach importance when applying the reasoning grounds of review.

In summary, regardless of the ground of review chosen as the vehicle for attack, courts expect decision makers to show an active engagement with relevant issues and to set out the path of reasoning in such a way as to show a logical connection between the facts as found and the conclusions drawn from them.

Endnotes

- 1 Bradley Selway QC, 'The Principle Behind Common Law Judicial Review of Administrative Action: The Search Continues' (2002) 30 *Federal Law Review* 217, 234.
- 2 *Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J). See also *A-G (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).
- 3 *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388, [46] (Santow JA). See also Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004), 165.
- 4 See, for example, Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004), 165.
- 5 [2003] HCA 26, [32] (Gummow and Callinan JJ, with Hayne J agreeing), [88] (Kirby J).
- 6 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26, [19].
- 7 *Ibid* [22] (Gummow and Callinan JJ, with Hayne J agreeing).
- 8 *Ibid* [24] (Gummow and Callinan JJ, with Hayne J agreeing), see also [64] (Kirby J).
- 9 (2002) 209 CLR 597 (*Bhardwaj*).
- 10 *Ibid* [32] (Gummow and Callinan JJ, with Hayne J agreeing).
- 11 *Ibid* [88] (Kirby J).
- 12 [2012] QSC 121.
- 13 *Ibid*, [22].
- 14 *Ibid*, [23].
- 15 *Ibid*, [29].
- 16 [2013] FCAFC 157
- 17 *Ibid*, [47] (Dowsett, Flick and Griffiths JJ).
- 18 *Ibid*, [48]-[49].
- 19 [2004] FCA 1695.
- 20 *Ibid*, [14]. This passage was cited with approval by the Full Federal Court in *Minister for Immigration and Citizenship v SZRMA* [2013] FCAFC 161, [68].
- 21 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.
- 22 *Ibid*, 272.
- 23 See *Politis v Federal Commissioner of Taxation* (1988) 16 ALD 707 (Lockhart J).
- 24 *Rich v Ingram* [2013] FCA 800, [85].
- 25 *Reece v Webber* (2011) 192 FCR 254, [65]. See also *Yendall v Smith Mithcell & Co Ltd* [1953] VLR 369, 379 cited with approval in *Agar v Kathleen* [2014] VSC 309, [89].
- 26 *Lafu v Minister for Immigration and Citizenship* [2009] FCAFC 140, [48]-[49] (Lindgren, Rares and Foster JJ).
- 27 [2013] FCA 158.
- 28 *Ibid*, [52].
- 29 [2013] FCA 694.
- 30 *Ibid*, [47].
- 31 *Ibid*, [49].
- 32 [2011] FCAFC 59 (*Bat Advocacy*).
- 33 *Ibid*, [58].
- 34 [2013] FCAFC 141, [22].
- 35 [2014] FCAFC 81.
- 36 *Ibid*, [9].
- 37 *Ibid*, [18].
- 38 *Ibid*, [19]-[20] (Siopis, Perram and Davies JJ).
- 39 [2013] HCA 18 (*Li*).
- 40 *Ibid*, [76].
- 41 *Ibid*, [80].
- 42 [2014] FCAFC 1.
- 43 *Ibid*, [75].
- 44 [2013] FCAFC 114.
- 45 *Ibid*, [41].

- 46 Ibid, [50].
47 [2014] QSC 104.
48 Ibid, [38]. See also *Seafish Tasmania Pelagic Pty Ltd v Burke, Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2014] FCA 117, [91]. *Seafish* also discusses that Ministerial decision-makers are entitled to rely on analysis prepared by their Departments: see at [93]-[95].
49 [2011] FCAFC 76.
50 Ibid, [115].
51 Ibid, [116].
52 Ibid, [86].
53 [2011] HCA 23.
54 Ibid, [18].
55 Ibid, [19].
56 Ibid, [20].
57 [2014] HCA 26.
58 Ibid, [27]-[30].
59 Ibid [31] (Hayne J) and [93] (Crennan and Bell JJ).
60 Ibid, [91].
61 [2013] HCA 43.
62 Ibid, [11].
63 Ibid, [43].
64 Ibid, [48].
65 Ibid, [55].
66 See J Jowell and A Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] *Public Law* 368 and Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004), 166.

THE RELEVANCE OF *WEDNESBURY/LI* IN MERITS REVIEW

*Richard Oliver**

The Queensland Civil and Administrative Tribunal (QCAT), like other ‘*super Tribunals*’ in Australia, including the Administrative Appeals Tribunal, has jurisdiction conferred on it to review decisions of administrative bodies. In Queensland, s 20 of the *Queensland Civil and Administrative Tribunal Act (QCAT Act)* sets out the Tribunal’s function:

- (1) The purpose of the review of a reviewable decision is to produce the correct and/or preferable decision¹;
- (2) The tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.²

It is often said that the Tribunal stands in the shoes of the original decision-maker.

In conducting a review application it is usually necessary for the Tribunal to engage in some fact finding process. It is the conclusions of fact reached, and the evidence relied on that may expose a decision to attack as being unreasonable in the *Wednesbury* (or *Li*) sense. This is what occurred in the matter of *Crime and Misconduct Commission v Flegg*.³ The Crime and Misconduct Commission (CMC) applied to QCAT to review the sanction for misconduct imposed on Sergeant Flegg in failing to discharge his duties as a police officer in the search and rescue operation for the Department of Immigration vessel, the *Malu Sara*. The CMC contended that the sanction imposed by Assistant Commissioner O’Regan was, in the circumstances, too lenient. The Tribunal, at first instance, confirmed the Assistant Commissioner’s decision.

This decision was then appealed to the Queensland Civil and Administrative Tribunal internal Appeal Tribunal. The sole ground of appeal to the QCAT Appeal Tribunal was that no reasonable Tribunal could have confirmed the decision of the Assistant Commissioner on sanction. The appeal was upheld on the ground of unreasonableness but in doing so the Appeal Tribunal interfered with certain findings of fact made by the primary tribunal.

There was then an appeal to the Queensland Court of Appeal. The decision of the Appeal Tribunal was reversed. The Court of Appeal, in the first decision, was critical of the Appeal Tribunal’s interference with findings of fact made by the Tribunal at first instance when the sole ground of appeal was based on the reasonableness of the decision on the facts found by the primary tribunal. After receiving further submissions from the parties, in the second decision the Court of Appeal, by a majority of 2 to 1, held that the decision was reasonable, in the *Li* sense, on the facts as found by the Tribunal at first instance.

The circumstance that gave rise to the review application brought by the Crime and Misconduct Commission was, it contended, the inadequacy of the sanction imposed on Sergeant Flegg for his admitted misconduct. The sanction was a demotion from the rank of

* *Richard Oliver is Senior Member, Queensland Civil and Administrative Tribunal. This paper was presented at 2014 AIAL National Administrative Law Conference. Perth WA. 25 July 2014.*

Sergeant 3.5 to rank of Senior Constable; the sanction was suspended for 2 years. The misconduct related to his role as the search and rescue coordinator involved in the search for the vessel *Malu Sara* on the evening of 14 October 2005 and the morning of 15 October 2005.

Background

Briefly, the facts concerning the case were that the vessel, *Malu Sara*, which was owned by the Department of Immigration and Multicultural and Indigenous Affairs left Saibai Island in the Torres Strait to sail to Badu Island on the morning of 14 October 2005. At 4:00 in the afternoon, the skipper of the vessel contacted Mr Stephen of the Department to say that the vessel was lost and in poor visibility. Sergeant Flegg, who had finished work at about 4pm that afternoon, was recalled to duty at 7:40pm to assume control of the search and rescue of the vessel. The vessel was not found and those on board perished.

Sergeant Flegg's conduct as search and rescue coordinator was investigated by the Queensland Police Service and ultimately he was charged with improper conduct in that he failed to take appropriate and required action in his role as search and rescue coordinator. Sergeant Flegg accepted that the charge against him was substantiated and after making submissions to the Assistant Commissioner as to the appropriate sanction to be imposed, the Assistant Commissioner imposed a sanction that Sergeant Flegg be demoted from the rank of Sergeant 3.5 to rank of Senior Constable 2.9 for a period of two years from 31 March 2011 to 31 March 2013. He was also directed to undertake certain courses and Performance Planning and Appraisals. The sanction was suspended for a period of two years.

Section 219G of the *Crime and Misconduct Act 2001* (Qld) confers a right on the Commission to review a decision of the Queensland Police Service. The review is then conducted under s 20 of the *QCAT Act* but is limited to the evidence before the Commissioner.⁴

As Sergeant Flegg accepted that the charges against him were substantiated, the review was confined to the question of sanction only. In determining whether or not the decision of the Commissioner should be set aside or confirmed, the original Tribunal had to regard the seriousness of the conduct and also take into account the various mitigating factors relating to Sergeant Flegg's circumstances.

In the end, the decision of the Assistant Commissioner was confirmed. In confirming the decision the tribunal made the following findings of facts which are conveniently summarised in the judgment of Gotterson JA in the Court of Appeal:⁵

- (a) The applicant commenced work at 8 am on 14 October 2005 and then, after finishing work that afternoon, was recalled to duty to at about 7.40 pm to assume control of the search and rescue of the *Malu Sara*.
- (b) The *Malu Sara* was new, was owned by the Commonwealth Government, and was commissioned to operate in and around the islands of the Torres Strait in all weather conditions. It was reasonable for the applicant to have proceeded on the assumption that the *Malu Sara* was seaworthy.
- (c) The applicant was 'overtasked in coordinating the search and rescue alone' and the (QPS) should have made available at least another officer to assist him. Subsequently, the QPS mandated that an officer in the applicant's position is not to operate alone.

- (d) Fatigue was certainly a factor in the applicant's performance while coordinating the search and rescue mission and when the situation deteriorated in the early hours of the morning of 15 October 2005, his judgement was likely to have been impaired on that account.
- (e) The applicant was not offered any relief during his work as Search and Rescue Mission Coordinator, nor was any available.
- (f) There was 'extraordinary delay in finalising the disciplinary proceedings' and the incident 'stalled' the applicant's career and 'left him with anxiety and uncertainty'.
- (g) The applicant had a 'good service record', and since the incident 'his conduct has been exemplary and he has acted up into the positions of Senior Sergeant which signifies the confidence his superiors have in him and the improbability that he is likely to engage in misconduct in the future'.
- (h) There had 'been a significant financial impact' on the applicant after his transfer from Thursday Island.
- (i) The applicant had accepted the charge against him was substantiated, and 'insight into his conduct and his failings' during the search and rescue mission.
- (j) The applicant's conduct fell short of what was expected of an officer with his experience and knowledge in the circumstances that prevailed on the night in question and the applicant accepted that to be so.

How did the QCAT Appeal Tribunal fall into error?

The QCAT Appeal Tribunal set aside the decision at first instance confirming the Assistant Commissioner's sanction and imposed the same sanction of demotion but removed the suspension.

However, in doing so, the Appeal Tribunal disturbed two findings of fact with respect to the mitigating circumstances. It is critical to bear in mind that the only ground of appeal was based on the reasonableness of the original Tribunal's decision and did not seek to disturb any findings of fact. Those two findings of fact made which, presumably, justified the setting aside of the original Tribunal's decision were firstly, there was no basis to conclude that the immigration vessel, the *Malu Sara*, was seaworthy and, secondly, that Sergeant Flegg approached the search and rescue on the basis that the distress calls were made for the convenience of the vessel's crew,⁶ thereby casting doubt on the legitimacy of the emergency.

Having rejected these two findings of fact the Appeal Tribunal went on to say that in light of those matters the sentence imposed 'can only be described as surprising'. Although the Appeal Tribunal approached the appeal on the question of reasonableness by having regard to the principles set out in *House v R*⁷ the Court of Appeal's approach focussed on reasonableness in the *Wednesbury/Li* sense.

Grounds raised before the Court of Appeal

Sergeant Flegg then appealed to the Court of Appeal. The grounds were, relevantly, that the Appeal Tribunal relied on facts contrary to those found by the Tribunal and secondly that the

Appeal Tribunal failed to have regard to other facts found by the Tribunal in determining that the decision was unreasonable.

The Court of Appeal explained that the grounds of appeal were ‘developed from an underlying principle that, as a matter of law, the Appeal Tribunal was constrained to decide the appeal to it on the facts as found by the Senior Member. That is to say, the Appeal Tribunal was not at liberty to make findings of fact anew’. There is of course nothing novel in this proposition insofar as it relates to appeals. This is particularly so where findings of fact are not challenged in the original appeal. The Court of Appeal made reference to what Brennan J said in *Waterford v The Commonwealth*⁸ which allowed an appeal from a decision of the Repatriation Review Tribunal ‘on a question of law’:

A finding by the AAT on a matter of fact cannot be reviewed on appeal unless the finding is vitiated by an error of law. Section 44 of the AAT Act confers on a party to a proceeding before the AAT a right of appeal to the Federal Court of Australia ‘from any decision of the Tribunal in that proceeding’ but only ‘on a question of law’. The error of law which an appellant must rely on to succeed must arise on the facts as the AAT has found them to be or it must vitiate the findings made or it must have led the AAT to omit to make a finding it was legally required to make. There is no error of law simply in making a wrong finding of fact. Therefore an appellant cannot supplement the record by adducing fresh evidence merely in order to demonstrate an error of fact.

The Court of Appeal then went on to say that because of the nature of the ground of appeal before the Appeal Tribunal was:

... one of unreasonableness in a *Wednesbury* sense, necessarily posits as the relevant frame of reference, the facts as found by the Senior Member. It is against those that the alleged unreasonableness of his decision is to be assessed. With this ground of appeal, there could be no scope for fact finding anew by the appellant tribunal.⁹

The above passage from the judgment of Gotterson JA demonstrates the critical importance of the fact finding process in a review application. Save for any challenge to them, it is the facts as found by the decision-maker on review from which a determination can be made as to whether the conclusion reached in the review application is said to be reasonable.

An Appellate Tribunal/Court cannot invent grounds of appeal where none are raised

The Court of Appeal had regard to the new findings of fact made by the Appeal Tribunal. It was against those findings that the Appeal Tribunal assessed the question of reasonableness. Because the Court of Appeal found that as there was no basis for disturbing those two findings of fact it concluded that the Appeal Tribunal failed to adhere to the underlying principle that as there was no specific challenge to the findings of facts in the application for leave to appeal, the question of whether ultimately the decision was reasonable had to be considered on the facts as found.

The appeal was allowed but rather than remit the proceeding to the Appeal Tribunal to consider the substantive ground of appeal of reasonableness, given the long history of this matter, the Court of Appeal decided to call for further submissions on the substantive issue in the appeal as it was in as good a position as the Appeal Tribunal to decide the issue.

On 11 March 2014 the Court of Appeal delivered its final decision on the substantive appeal. The Court was split, with the President, Justice Margaret McMurdo, concluding that the primary Tribunal decision was unreasonable and ought be set aside upholding the sanction imposed by the Appeal Tribunal. The majority, Gotterson JA and Margaret Wilson J, dismissed the appeal.

The majority judgment was written by Gotterson JA. In considering the only ground of appeal, the unreasonableness of the primary decision, he had regard to the High Court's consideration of *Wednesbury* reasonableness in *Minister for Immigration and Citizenship v Li*¹⁰. His Honour particularly commented on what the High Court said about the close analogy between judicial review of administrative action and the review of a judicial discretion in the context of unreasonableness to the principles governing the review of judicial discretion articulated in *House v The King*¹¹ and in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*. He referred to what the High Court said in *Li* at paragraph [76]:

The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

Justice Gotterson also had regard to what French CJ said in *Li*, that the ground of unreasonableness is not a vehicle for challenge to a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters, or has made an evaluative judgement with which the court disagrees, even though that judgement is rationally open to the decision-maker. Gageler J also described a test for unreasonableness as being stringent, noting that judicial determination of *Wednesbury* unreasonableness in Australia has in practice been rare.

The majority was not satisfied, when reference was made to the findings of fact with respect to the mitigating circumstances relating to Sergeant Flegg, that, in adopting the words of the plurality in *Li*, the conclusion lacked evident and intelligible justification. It should be noted that the CMC did not contend, either before the Appeal Tribunal or the Court of Appeal, that the primary decision lacked evident or intelligible justification.

Once the issues of the vessel's seaworthiness and the occupants' motivation for the distress call were considered, as found by the primary Tribunal, and when the two mitigating factors of fatigue and being overtaken (as well as the delay, good service record, financial impact and insight), not considered by the Appeal Tribunal, were brought back into focus, it could not be said the primary Tribunal's decision lacked evidence or intelligible justification.

The President, Justice McMurdo, in her dissenting judgment, applied the *Li* test¹², whether the decision lacked an evident and intelligible justification when all relevant matters were considered, and concluded that the test was satisfied. She did so on the basis of Sergeant Flegg's failure to contact the Australian Maritime Safety Authority at 2.26am when he first became aware that the vessel was sinking. This also had to be considered when regard was had to the central function of the Queensland Police Service to render help 'reasonably sought, in an emergency...by members of the community'.¹³ As this finding was open because these facts were undisputed, she was of the opinion the test was satisfied.

Conclusion

This series of decisions relating to Sergeant Flegg's conduct, demonstrate the following:

1. Where a Tribunal embarks on the review of an administrative decision, standing in the shoes of the original decision-maker, the ultimate decision must be able to withstand the reasonableness test as described in *Li*.
2. An appellate body is simply not permitted to substitute its own findings of fact in the absence of a specific challenge to the findings made by the decisionmaker.

3. The fact finding function, if there is one, is critical in order to establish that there is an evident and intelligible justification to the conclusion reached. It is unlikely that an appellate body will disturb findings of fact even when challenged, and it is these factual findings which demonstrate whether the conclusion is reasonable.
4. The High Court, in *Li*, has raised the bar in applying the *Wednesbury* reasonableness test to Tribunal decisions in a merits review, by specific reference to the need to establish that the decision lacks evident and intelligible justification on the facts as found by the primary Tribunal.

Despite the formulations by the High Court, this case demonstrates that the question of reasonableness still comes down to the subjective opinion of those casting a critical eye over the decision and the reasons for it.

Endnotes

- 1 The legislation in Queensland and Western Australia uses 'and': *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(1); *State Administrative Tribunal Act 2004* (WA) s 27(2). Other jurisdictions rely on the common law which has accepted 'or': *Shi v Migration Agents Registration Authority* (2008) 235 CLR 285 at [35], [72] per Kirby J, at [98] per Hayne and Heydon JJ, and at [140] per Kiefel J with whom Crennan J agreed.
- 2 Comparable legislation: *Victoria Civil and Administrative Tribunal Act 1998* (VIC), s 51; *State Administrative Tribunal Act 2004* (WA), s 27; *Administrative Decisions Review Act 1997* (NSW), s 63; *Civil and Administrative Tribunal Act 2013* (NSW), s 30; and *Administrative Appeals Tribunal Act 1975* (Cth), s 25.
- 3 [2012] QCAT 74.
- 4 *Crime and Corruption Act 2001* (Qld) s 219H – unless the Tribunal gives leave to lead further evidence.
- 5 *Flegg v CMC and Anor* [2013] QCA 376 at [20].
- 6 *CMC v Flegg* [2013] QCATA 029 at [19]-[20].
- 7 (1936) 55 CLR 499.
- 8 (1987) 163 CLR 54.
- 9 *Flegg v CMC* [2013] QCA 376 at [31].
- 10 (2013) 87 ALJR 618.
- 11 (1936) 55 CLR 499.
- 12 *Flegg v CMC and Anor* [2014] QCA 42 at [3].
- 13 *Flegg v CMC and Anor* supra [6] and [7].

THE CHANGING CONCEPT OF 'UNREASONABLENESS' IN AUSTRALIAN ADMINISTRATIVE LAW

*Alan Freckelton**

The ground of judicial review known as 'unreasonableness', or sometimes as 'Wednesbury unreasonableness'¹, has a long history in Australian administrative law. For most of its existence, a decision must have been found to be outrageous or completely devoid of merit – 'so unreasonable that no reasonable authority could ever come to it'² – to be struck down on this basis. For example, in *Australian Retailers Association v Reserve Bank of Australia*³ Weinberg J stated that 'the current view, in this country, seems to be ... to regard this ground as representing a safety net, designed to catch the rare and totally absurd decision which has somehow managed to survive the application of all other grounds of review'.

However, the High Court of Australia may now have left the door open for a wider interpretation of 'unreasonableness', perhaps similar to the Canadian 'standard of review' of unreasonableness, and to be taking steps towards the 'variegated unreasonableness' approach of the UK. This paper will briefly discuss the history of unreasonableness review in Australia and the current UK and Canadian approaches, before discussing the law as it stands in Australia in more detail.

Part 1 – The traditional approach to unreasonableness in Australia

History in the High Court prior to 2013

It appears that the first High Court decision based at least partly on a *Wednesbury* unreasonableness argument was *Election Importing Co Pty Ltd v Courtice*⁴, which was handed down on 1 July 1949. *Courtice* concerned a dispute over the imposition of import duties, and one of the grounds of the appeal was that Mr Courtice had exercised a discretionary power in an unreasonable manner. Williams J found that despite the fact that the discretion was unfettered on its face, 'the *Customs (Import Licensing) Regulations* do not in my opinion confer on the Minister or his delegate an arbitrary and uncontrolled power to revoke a licence'⁵. However, the appeal was dismissed primarily on evidential grounds – Williams J, after referring to *Wednesbury*, found that there was simply no evidence that Mr Courtice had acted in an unreasonable manner.

The High Court did not decide another unreasonableness case until the 1972 decision of *Parramatta City Council v Pestell*⁶, which concerned the council's ability to impose a 'local rate' on specified land, under s 121 of the *Local Government Act 1919 (NSW)*. Gibbs JA, as he then was, summed up the issue:⁷

[T]he legislature has left it to the council to form its opinion as to whether a particular work is of special benefit to a portion of the area. A court has no power to override the council's opinion on such a matter simply because it considers it to be wrong. However, a court may interfere to ensure that the council acts within the powers confided to it by law ... Even if the council has not erred in this way an opinion will nevertheless not be valid if it is so unreasonable that no reasonable council could have formed it.

* *Alan Freckelton LLM, University of British Columbia; ANU College of Law; Barrister and Solicitor with Veritas Law, West Vancouver, British Columbia, Canada.*

The High Court found that the Council had misconstrued its power under the Act. A particular concern was that 90 dwellings had been specifically excluded from the special rating provisions, and there was no clear reason why. Stephen J stated that ‘the facts make it clear that that portion of the council area left after excising the ninety-odd lots is not such a portion as is reasonably capable of being considered as the portion specially benefitted by the works here proposed’⁸. Fourteen years later, Mason J, as he then was, stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* that *Pestell* ‘embraced’ the *Wednesbury* test in Australia⁹.

Prior to the decision in *Minister for Immigration and Citizenship v Li*¹⁰, the High Court made the following important comments on the unreasonableness ground:

1. The basis of the unreasonableness ground was briefly discussed in *Kruger v Commonwealth* (the Stolen Generations Case), where Brennan CJ stated that ‘when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised’¹¹. Brennan CJ also noted that ‘[r]easonableness can be determined only by reference to the community standards at the time of the exercise of the discretion’¹².
2. In *Abebe v Commonwealth*¹³ the High Court found that s 476 of the *Migration Act 1958*, which at that time excluded a claim of *Wednesbury* unreasonableness from the jurisdiction of the Federal Court, was constitutionally valid.
3. It was made clear in *Eshetu v Minister for Immigration and Multicultural Affairs*¹⁴ that mere disagreement with an administrative decision is not sufficient for a finding of unreasonableness. Gleeson CJ and McHugh J stated:¹⁵

Someone who disagrees strongly with someone else’s process of reasoning on an issue of fact may express such disagreement by describing the reasoning as ‘illogical’ or ‘unreasonable’, or even ‘so unreasonable that no reasonable person could adopt it’. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.

4. Along similar lines, Mason CJ and Deane J of the High Court found in *Minister of State for Immigration and Ethnic Affairs v Teoh* that for a decision to be *Wednesbury* unreasonable, the decision-maker must make his or her decision ‘in a manner so devoid of plausible justification that no reasonable person could have taken that course’.¹⁶

SZMDS

The High Court gave detailed consideration to the unreasonableness ground in the 2010 decision of *Minister for Immigration and Citizenship v SZMDS*.¹⁷ The case involved an applicant for a Protection Visa¹⁸, who claimed a well-founded fear of persecution on the basis of his membership of a particular social group, namely homosexuals. The Refugee Review Tribunal (RRT) rejected his claim, not accepting that he was even homosexual. Section 65 of the *Migration Act 1958* provided (and still provides) that if the Minister is ‘satisfied’ that the applicant meets all criteria for the grant of a visa then he or she must grant it, and if not, the application must be refused.

The RRT decision was set aside by the Federal Court, which found that the ‘Tribunal’s conclusion that the applicant was not a homosexual was based squarely on an illogical process of reasoning’¹⁹. On appeal to the High Court, the Minister argued that the RRT’s findings were not illogical, and that even if they were, this did not amount to a ‘jurisdictional error’.

The leading judgment was given by Crennan and Bell JJ, with whom Heydon J agreed. Gummow ACJ and Kiefel J gave separate reasons, concurring on this point. Crennan and

Bell JJ started by finding that the Minister's satisfaction, referred to in s 65, was a jurisdictional fact.²⁰ The key passage in the judgment is at paragraphs 119 and 120:

119. Whilst the first respondent accepted that not every instance of illogicality or irrationality in reasoning could give rise to jurisdictional error, it was contended that if illogicality or irrationality occurs at the point of satisfaction (... s.65 of the Act) then this is a jurisdictional fact and a jurisdictional error is established. This submission should be accepted ...

120. An erroneously determined jurisdictional fact may give rise to jurisdictional error. The decision maker might, for example, have asked the wrong question or may have mistaken or exceeded the statutory specification or prescription in relation to the relevant jurisdictional fact. Equally, entertaining a matter in the absence of a jurisdictional fact will constitute jurisdictional error.

In other words, illogicality or irrationality in a finding of jurisdictional facts is a jurisdictional error and will result in the decision under review being set aside. Crennan and Bell JJ further elaborated on this point:²¹

In the context of the Tribunal's decision here, 'illogicality' or 'irrationality' sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s.65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words ... it is an allegation of the same order as a complaint that a decision is 'clearly unjust' or 'arbitrary' or 'capricious' or 'unreasonable' in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached.

However, Crennan and Bell JJ found that the RRT's findings were open to it on the evidence before it, and that 'a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker'²². The Federal Court decision was therefore set aside and the RRT decision restored.

The basis of the unreasonableness ground in Australia

Historically, an overwhelming consideration for Australian courts in deciding applications for judicial review, particularly on the 'unreasonableness' ground, is the distinction drawn by Australian courts between 'merits review' and 'judicial review'. There have been more cases than can possibly be referred to in which courts have stated that they are not to interfere in the merits of a decision, but the reasons *why* this is the case are rather obscure.

Australian courts have generally taken the view that a court must stay out of consideration of the 'merits' of a decision altogether. A frequently cited statement of the rule against merits review can be found in *Attorney-General (NSW) v Quin*, in which Brennan J (as he then was) stated:²³

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The key phrase is, of course, 'to the extent that they [the merits] can be distinguished from legality'. Margaret Allars makes the following points on that issue:²⁴

Three principles of judicial review qualify the operation of the legality/merits distinction. First, review for abuse of power where a decision is *Wednesbury* unreasonable is in practical terms review of the factual basis of the decision ... This ground effectively sanctions as review for legality what is review of the merits in extreme cases of disproportionate decisions. Second, according to the 'no evidence' principle, an agency makes an error of law in the course of making a finding of fact if there is a

complete absence of evidence to support the factual inference. The third qualification to the legality/merits distinction is the jurisdictional fact doctrine.

Allars cites in support of her proposition that the *Wednesbury* test allows for review of 'extreme cases of disproportionate decisions' the following passage from the judgment of Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*²⁵:

The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind ... Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned ... It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power ... I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'.

In my opinion, the only difference distinguishing *Wednesbury* unreasonableness, the UK approach of 'variegated unreasonableness', proportionality and full review of the merits is the degree of deference provided to the decision-maker. The judicial analysis is identical in each case, and the only difference is the *degree* of unreasonableness that must be demonstrated before the decision will be quashed.

Part 2 – The Canadian approach to judicial review – 'substantive review'

One distinctive feature of Canadian administrative law is that Canadian courts do not in general concern themselves with attempting to identify errors of law, let alone jurisdictional or non-jurisdictional errors, in administrative decisions. Instead, Canadian courts will generally show a degree of deference to the decision-maker, both on questions of fact and of law in which the decision-maker has particular expertise (commonly known as the administrator's 'home statute') and will not, in most cases, set a decision aside unless it is 'unreasonable'. However, there are situations, commonly involving questions of law in which the administrator has no particular expertise (often, but not always, involving the Charter), in which a court will simply substitute its opinion for that of the decision-maker. These two 'standards of review' are generally known as 'reasonableness' and 'correctness' respectively.

The origins of reasonableness – Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp

Canadian commentators agree that *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*²⁶ (*CUPE*) is one of the most significant cases in Canadian administrative law. To give one example, L'Heureux-Dubé J of the Supreme Court, writing extrajudicially, has commented that 'in the wake of *CUPE*, it could no longer be assumed that an administrative tribunal's interpretation of its statute would be subject to correction on judicial review simply because the reviewing judge disagreed with the board's interpretation'.²⁷ *CUPE* overturned a line of decisions in the 1970s, foremost amongst them *Metropolitan Life Insurance Co v International Union of Operating Engineers, Local 796*²⁸ and *Bell v Ontario Human Rights Commission*²⁹, in which the Supreme Court took a highly interventionist role in finding jurisdictional errors. *CUPE* ensured that the focus from that time on would be on the substantive reasonableness of the decision.

The facts in *CUPE* were fairly straightforward and the legislation involved in the case anything but. The union went on strike in 1979 and on 22 August 1979 made a complaint to

the Public Service Labour Relations Board of New Brunswick (the Board) that the Corporation was replacing striking staff with management personnel. The Corporation in turn complained that the union was picketing their premises. Both of these actions were said to be contrary to s 102(3) of the *Public Service Labour Relations Act (NB)*³⁰, which provided that:

Where subsection (1) and subsection (2) are complied with employees may strike and during the continuance of the strike

- (a) the employer shall not replace the striking employees or fill their position with any other employee, and
- (b) no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.

Dickson J, writing for the Supreme Court, stated that '[o]n one point there can be little doubt – section 102(3)(a) is very badly drafted ... it bristles with ambiguities'.³¹

The Supreme Court allowed the union's appeal and restored the decision of the Board. The crucial passage in the judgment can be found at paragraph 29:

The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so. Upon a careful reading of the Act, the Board's decision, and the judgments in the Court of Appeal, however, I find it difficult to brand as 'patently unreasonable' the interpretation given to s.102(3)(a) by the Board in this case. At a minimum, the Board's interpretation would seem at least as reasonable as the alternative interpretations suggested in the Court of Appeal.

Dickson J found that the interpretation of s 102(3) 'would seem to lie logically at the heart of the specialised jurisdiction confined to the Board'³². A court should only regard the Board's interpretation of its own legislation as a jurisdictional error when that interpretation is 'so patently unreasonable that its construction cannot rationally be supported by the relevant legislation'.³³ Dickson J also noted that because s 102(3) of the Act was badly drafted, there was no one clearly 'right' interpretation. None of the various interpretations of that subsection given by the lower courts, the Board or the parties was patently unreasonable, so the courts should let the decision of the Board stand. A decision will be reasonable if it is rational, in the sense that if it is a matter on which 'reasonable minds might differ'.³⁴

The result of *CUPE* is that courts are no longer to take a strictly legalistic view of a decision-maker's jurisdiction and, instead, at least in most cases, should focus on the substance of the decision and whether it is reasonable in all the circumstances. Canadian courts have been willing to find that there are often multiple reasonable interpretations of a statutory provision, and thereby allow the interpretation of the administrative decision-maker to stand.

Standards of review in Canadian administrative law

We have seen that in *CUPE*, the Supreme Court recognised that administrative decision-makers have a role conferred by Parliament (sometimes referred to as 'democratic credentials') and expertise in their field, and that their interpretations of their own enabling legislation (including matters of jurisdiction), while never *definitive*, should at least be given 'weight' in judicial review. By finding that the interpretation given to s 102 by the Board was not 'patently unreasonable', Dickson J at least implicitly created the concept of the 'standard of review' of an administrative decision.

Since 1979, four standards of review have existed in Canadian administrative law. Until 1997, there were two standards – ‘patent unreasonableness’ and correctness. In 1997, the Supreme Court introduced a third, intermediate standard of ‘reasonableness simpliciter’³⁵, instead of a ‘sliding scale’ of reasonableness. However, Canadian courts started expressing their dissatisfaction with the three-standards approach almost as soon as it was implemented³⁶, and it was inevitable that the Supreme Court would have to act to clarify the matter.

Dunsmuir v New Brunswick

The Supreme Court of Canada gave a reasonably clear restatement of when the reasonableness and correctness standards of review will be applied in the 2008 decision of *Dunsmuir v New Brunswick*.³⁷ David Dunsmuir was an employee of the New Brunswick Court of Queen’s Bench, who was dismissed from that employment under ‘at pleasure’ provisions of his contract after three reprimands. The letter of termination explicitly stated that he was not being dismissed for cause. Dunsmuir sought review of his termination under the *Public Sector Labour Relations Act*³⁸, arguing that despite the wording of the letter, he *had* in fact been dismissed for cause, and therefore had the right to certain procedural protections available under the *Civil Service Act*.³⁹

Majority judgment

The majority opinion was given by Bastarache and LeBel JJ, writing for themselves, McLachlin CJ and Fish and Abella JJ. Bastarache and LeBel JJ begin by defining the terms ‘reasonableness’ and ‘correctness’. The former is defined as follows:⁴⁰

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions ... In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The last sentence of this paragraph appears to mean, in my opinion, that it is possible for there to be more than one reasonable outcome in an administrative proceeding, and courts should be wary of simply substituting their view for that of the decision-maker. The term ‘deference’ is defined as follows:⁴¹

Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers ... Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference ‘is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers’ (*Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, at p 596, *per* L’Heureux-Dubé J, dissenting). We agree with David Dyzenhaus where he states that the concept of ‘deference as respect’ requires of the courts ‘not submission’ but a respectful attention to the reasons offered or which could be offered in support of a decision’.⁴²

It is important to note that deference is defined as ‘respect’ for the decision-making ability of the tribunal whose decision is under review on matters of both fact and (at least some) law. ‘correctness’ is defined as follows:⁴³

[T]he standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the

court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

Note that 'jurisdictional [issues] and some other questions of law' are still to be reviewed on a correctness basis. Most significantly, '[a]dministrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*'⁴⁴. Bastarache and LeBel JJ sum up at paragraph 64:⁴⁵

The [standard of review] analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

Finally, Bastarache and LeBel JJ go on to find that the appropriate standard of review of the arbitrator's decision was reasonableness, and that the arbitrator had acted unreasonably in his interpretation of s 97(2.1) of the *Public Sector Labour Relations Act* and his decision to reinstate Dunsmuir to his position. The decisions of the lower courts were therefore upheld.

Binnie and Deschamps JJ wrote separate concurring judgments. However, this paper does not address the issues they raised.

Summary

Cases decided since *Dunsmuir* have, in general, made it clear that the 'default' standard of review in Canada is that of reasonableness, and that questions relating to 'jurisdictional error' or 'merits review' will rarely if ever arise. Most importantly, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, Rothstein J, writing for the majority, found that *Dunsmuir* established a presumption that reasonableness is the applicable standard of review, unless the question in dispute relates to either constitutional law⁴⁶, a question of central importance to the legal system as a whole that it outside the expertise of the decision-maker, the question relates to jurisdictional lines between two or more competing tribunals, or that the question is one of 'true jurisdiction or *vires*'⁴⁷. Rothstein J also went so far as to say that 'it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review'⁴⁸. In other words, 'questions of true jurisdiction or *vires*' may still exist, but will be rare, and indeed the Supreme Court has not identified once since *Dunsmuir*.

In short, then, Canadian courts, when faced with an application of judicial review, are not concerned about unsustainable distinctions between 'judicial review' and 'merits review'. While it is still theoretically possible for a court to find that an administrative decision-maker has exceeded his or her jurisdiction, in the large majority of cases the question for the court will simply be whether, in all the circumstances, the decision is reasonable, while giving due deference to the decision-maker's 'democratic credentials' and expertise. The long and drawn out arguments about 'impermissible merits review', errors of fact and law, and jurisdictional and non-jurisdictional errors of law have no place in Canadian law.

Part 3 – Reasonableness review in the United Kingdom

UK law has evolved significantly since the seminal 1985 decision of *Council of Civil Service Unions v Minister for the Civil Service*⁴⁹ (the *GCHQ* case), and this brief examination of the UK law of judicial review will focus on the changes in the law since this judgment. It is my contention that since the *GCHQ* case, UK administrative law has been moving towards a

system similar to that of Canada's, albeit with different terminology, in which courts impose one standard of review for administrative decisions that impact on rights protected by the European Convention on Human Rights (ECHR), and a more stringent standard for other decisions.

The UK position is complicated by the fact that the *Human Rights Act 1998*⁵⁰ has incorporated the ECHR into UK law. The result has been that substantive review of administrative decision-making in the UK is expressed to be on different bases depending on the kind of law in question. When considering EU laws applicable in the UK, or UK laws expressly implementing EU laws in Britain (such as the *Human Rights Act*), British courts have undertaken a form of proportionality review common to European legal systems. In cases not involving any form of EU law, British courts have moved to a 'sliding scale' of reasonableness. The question that must be answered is whether there is in reality any difference between the two forms of review.

Reasonableness and irrationality – the GCHQ case

In *GCHQ*, the government attempted to introduce a policy whereby staff of the General Communications Headquarters, a crucial inter-governmental communications agency (and probably spy agency), were no longer permitted to be members of a trade union. The Council of Civil Service Unions (CCSU) sought judicial review of the decision, arguing that the union had a legitimate expectation that it would be consulted before any such decision was made, and that no such consultation had occurred. The House of Lords found that despite the lack of any statutory requirement to consult, the union *would* in fact generally have a legitimate expectation that it would be consulted before any decision adverse to its interests was made. However, no such requirement existed when national security issues were at stake, and this was one of those situations⁵¹. The CCSU therefore lost its case but did succeed in creating a legal duty to consult in most cases.

For the purposes of this article, however, the key part of the judgment can be found in the judgment of Lord Diplock. His Lordship stated:⁵²

... [O]ne can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety' ...

... By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'⁵³. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ...

'Wednesbury unreasonableness' is not, therefore, the 'man on the Clapham omnibus' test but an issue going to the constitutional division of responsibilities between the courts and legislature. It is not sufficient that the 'reasonable person' would regard a decision as unreasonable, and instead it must be so unreasonable that it could not be an exercise of the power that was intended by the Parliament.

Varying the Wednesbury principle – 'anxious scrutiny'

Despite the *GCHQ* case equating 'irrationality' with 'Wednesbury unreasonableness', only two years later we can see the first hint of a 'sliding scale' of reasonableness. A 'sliding scale' was first clearly applied in the 1987 case of *Budgaycay v Secretary of State for the Home Department*⁵⁴. In that case, the House of Lords was concerned with a deportation order issued against the applicant. The case was argued on the *Wednesbury* unreasonableness ground, but the House of Lords, allowing the application, stated:⁵⁵

[T]he most fundamental of human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

In other words, the more important the right at stake, the more carefully scrutinised an administrative decision will be. A decision will be more likely to be found to be outrageous and unsupportable when a fundamental right is impacted.

The 'anxious scrutiny' terminology was also called upon in two cases in the 1990s, both of which predated the *Human Rights Act*. In *R v Secretary of State for the Home Department, ex parte Brind*⁵⁶, the House of Lords considered directives made under the *Broadcasting Act 1981* preventing broadcasting of statements by persons representing groups that had been proscribed as terrorist organisations. Lord Bridge noted that there was not (at that time) any bill of rights under domestic UK law, but went on to state:⁵⁷

This surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are not perfectly entitled to start from the premise that any restriction on the right to freedom of expression requires to be justified, and nothing less than an important competing public interest will be sufficient to justify it.

Brind therefore stands for the proposition that where fundamental rights are involved, the courts will not wait for a 'red-haired teachers' type of situation before intervening.

In *R v Ministry of Defence, ex parte Smith*⁵⁸ a challenge was brought against the then existing policy of discharging known homosexuals from the armed forces. Quoting *Bugdaycay*, the House of Lords found that 'the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable',⁵⁹ but was not prepared to find that the decision was unreasonable, given that it impacted on matters of military discipline and potentially national security.

On the other hand, Ian Turner has identified a number of situations where courts will be reluctant to find that a decision of an administrator is unreasonable or 'irrational'.⁶⁰ These include matters relating to raising and spending public revenue,⁶¹ and the exercise of wide discretionary powers.⁶²

The Human Rights Act 1998

The *Human Rights Act* has been a major influence on the development of British administrative law and requires brief examination. Section 1 of the Act defines the term 'convention rights' in terms of a number of rights set out in the European Convention on Human Rights (ECHR) and a number of protocols. The *Human Rights Act* therefore incorporates the ECHR, at least in part, into domestic British law. Unlike the Canadian Charter, the *Human Rights Act* does not permit a court to invalidate primary legislation, but a court can issue a 'declaration of incompatibility' under s 4 of the Act.

A number of commentators have argued that the *Human Rights Act* has transformed British administrative law from a focus on procedure and rationality on the part of the decision-maker to a focus on the rights of the person affected. Thomas Poole writes as follows:⁶³

For the era we are now entering is marked by a much more direct and frequent recourse to arguments about rights – especially but not exclusively those of the European Convention on Human Rights (ECHR) ... While there had been an increase in rights talk in cases like *Bugdaycay*⁶⁴, *Witham*⁶⁵ and *Smith*⁶⁶ only the introduction of the HRA facilitated the kind of deep, structural change we have seen since.

Canada has gone through the same process with the Charter – only the introduction of the Charter has caused a definitive shift from a ‘jurisdictional analysis’ approach of the kind used in *Metropolitan Life*,⁶⁷ to a rights-based approach that is particularly obvious in *Doré v Barreau du Québec*.⁶⁸ That is, the idea of ‘rights-based’ administrative law jurisprudence is not something unique to the UK.

Irrationality after the Human Rights Act

Definition of ‘rationality’

There does not appear to have been any comprehensive restatement of the rationality principle since the *Human Rights Act* came into effect. That is, the rationality ground of review is still a ‘so unreasonable that no reasonable person could come to it’ ground, although the nature of the right impacted on will be a consideration in determining when a decision is taken to be unreasonable. However, the UK courts, in pursuing rationality review, have not taken the Canadian approach that there are clear and discrete ‘standards of review’ – instead, there is a spectrum or continuum of reasonableness. In *R (Mahmood) v Secretary of State for the Home Department*⁶⁹ Laws LJ referred to the ‘anxious scrutiny’ test and stated at paragraph 19:

... that approach and the basic *Wednesbury* rule are by no means hermetically sealed the one from the other. There is, rather, what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required.

At least in cases where there are no unqualified rights involved, the UK courts appear to take the view that a decision will not be irrational if there is some evidence to support it⁷⁰.

Moves towards a single test of judicial review?

Despite the acceptance of the proportionality approach in cases concerning the *Human Rights Act* and other EU laws applicable in the UK, British courts have continued to apply the reasonableness or irrationality test to other matters of substantive review. There have been a number of cases in which courts have suggested that the end of the irrationality approach is nigh, or even desirable, but there has not yet been any definitive move to do away with the doctrine altogether. For example, in *R (Association of British Civilian Internees – Far East Region) v Secretary of State for Defence*,⁷¹ Dyson LJ noted that the application of an irrationality test will often (although not always) yield the same result as a proportionality analysis.⁷² However, his Lordship then added that ‘it is not for this court to perform its [irrationality’s] burial rites’.⁷³ In other words, while *Wednesbury* had to be extended to cover a variable scale of review, the Lords were not prepared to move to a (then) little-tested proportionality regime for all administrative decisions.

Similarly, in *Doherty v Birmingham City Council*,⁷⁴ the House of Lords again found that a universal ‘proportionality’ test for review of all administrative decisions in the UK should not be introduced. This was despite the comment by Lord Walker that human rights ‘must be woven into the fabric of public law’⁷⁵ and a number of observations by Lord Mance. At paragraph 135 Lord Mance states:

The difference in approach between the grounds of conventional or domestic judicial review and review for compatibility with Human Rights Convention rights should not however be exaggerated and can be seen to have narrowed, with ‘the “*Wednesbury*” test ... moving closer to proportionality [so that] in some cases it is not possible to see any daylight between the two tests’ (*ABCIFER*,⁷⁶ para 34). The common law has been increasingly ready to identify certain basic rights in respect of which ‘the most anxious’ scrutiny is appropriate.

There are three key points in this paragraph. Firstly, the difference between *Wednesbury* and proportionality should not be exaggerated; there is often no 'daylight' between the tests, especially where 'anxious scrutiny' is involved. Secondly, *Wednesbury* unreasonableness and proportionality remain distinct tests and the former may not necessarily provide the same level of protection from administrative action. Finally, future cases may require further convergence of the tests.

Proportionality

Origins of the principle

Proportionality is a form of judicial review that began in continental Europe, and has been 'transplanted' into the UK as a result of the *Human Rights Act* and other EU legislation applicable to the UK. Margit Cohn explains the origins of proportionality as follows:⁷⁷

The principle of proportionality (*Verhältnismäßigkeitsgrundsatz*) is central to German public law ... The principle is now applied as an independent and perhaps the most important and extensive umbrella ground for examining the validity of administrative actions ... In its current form, the formula created by German courts comprises three subtests or limbs. First, the measure must be suitable for the achievement of the aim pursued. Secondly, no other milder means could have been employed to achieve that aim (a 'necessity' test). Finally, under a proportionality *stricto sensu* test, a type of cost-benefit analysis is required; for the measure to be upheld, the benefit at large must outweigh the injury to the implicated individual

That is, under a proportionality analysis, the court must effectively determine whether the decision was justified in terms of its objectives. The question could almost be rephrased as 'are the objectives justifiable, and do the ends justify the means'?

The prompt for the introduction of the proportionality principle into UK law, at least where the *Human Rights Act* is concerned, was the decision of the European Court of Human Rights in *Smith and Grady v United Kingdom*.⁷⁸ Having been unsuccessful before the UK courts, the applicants from *R v Ministry of Defence ex parte Smith*⁷⁹ took their case to the European Court and were successful. The European Court found that Smith's and Grady's rights under Article 8 of the ECHR had been infringed, and that although Article 8 is a 'qualified right', the Ministry of Defence could not justify the breach. The Court found that the UK reasonableness test, even applying the 'anxious scrutiny' test, was insufficient and stated:⁸⁰

The threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.

In other words, when considering rights provided for by the ECHR, 'irrationality' is too high a standard for a court to have to reach. Only a proportionality approach is sufficient.

Differences between the irrationality and proportionality approaches

The difference between the irrationality and proportionality approaches is usually explained as the latter requiring an additional step in analysis. In *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, Lord Clyde stated that a court, in applying a proportionality analysis, needed to consider the following three issues:⁸¹

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective

are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

The contrast with the irrationality ground was more clearly expounded in *R v Secretary of State for the Home Department, ex parte Daly*,⁸² in which Lord Steyn stated:

Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach ... I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, ex parte Smith* is not necessarily appropriate to the protection of human rights.

The exact difference between proportionality and a 'variable unreasonableness' analysis is not particularly clear, and indeed in *Daly* Lord Steyn admitted that '[m]ost cases would be decided in the same way whichever approach is adopted'.⁸³ Lord Steyn added:⁸⁴

This [the shift to proportionality analysis] does not mean that there has been a shift to merits review. On the contrary ... the respective roles of judges and administrators are fundamentally distinct and will remain so ... Laws LJ rightly emphasised in *Mahmood*,⁸⁵ at p 847, para 18, 'that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving Convention rights.

'Merits review'

It is notable that Lord Steyn in *Daly*⁸⁶ denies that courts engage in 'merits review'. British courts remain insistent that they do not undertake 'merits review' of administrative decisions. The exact difference between merits and judicial review is not always – perhaps never – clear, but the former Australian Solicitor-General, David Bennett QC, has defined the terms:⁸⁷

A merits review body will 'stand in the shoes' of the primary decision-maker, and will make a fresh decision based upon all the evidence available to it. The object of merits review is to ensure that the 'correct or preferable'⁸⁸ decision is made on the material before the review body. The object of judicial review, on the other hand, is to ensure that the decision made by the primary decision-maker was properly made within the legal limits of the relevant power.

'Merits review', on this definition, is a very wide term, ranging from internal review of a decision to a quasi-judicial hearing before a formally constituted tribunal, but not including proceedings before a court. To give one example, in *Huang v Secretary of State for the Home Department*⁸⁹ Mrs Huang, a failed applicant for humanitarian stay in the UK, appealed against the Home Department's decision to an 'adjudicator', as permitted by s 65 of the *Immigration and Asylum Act 1999*. That Act permitted a further appeal to the Court of Appeal from the adjudicator's findings on a question of law. Lord Bingham, writing for the House of Lords, found that the adjudicator, by focusing on whether there was an error in the original decision, did not fulfil his or her role. His Lordship stated:⁹⁰

It remains the case that the judge is not the primary decision-maker ... The appellate immigration authority, deciding an appeal under section 65, is not reviewing the decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up to date facts.

That is, the appellate authority had acted in too 'judicial' a manner in this case, and should have considered Mrs Huang's case *de novo* rather than simply examining the primary

decision-maker's decision for any errors. It is the *court* that is prohibited from engaging in 'merits review'.

Some cases have expressly stated that the difference between merits review and judicial review is that the latter affords a degree of deference to the decision-maker that the former does not. For example, the House of Lords stated in *Tweed v Parades Commission for Northern Ireland*:⁹¹

In addressing the critical question in any proportionality case as to whether the interference with the right in question is objectively justified, it is the court's recognition of what has been called variously the margin of discretion, or the discretionary area of judgment, or the deference or latitude due to administrative decision-makers, which stops the challenge from being a merits review. The extent of this margin will depend, as the cases show, on a variety of considerations and, with it, the intensity of review appropriate in the particular case.

That is, the stated difference between pure merits review and judicial review on the proportionality ground is that a judge may not simply substitute his or her decision for that of the primary decision-maker, where an administrative tribunal can and indeed sometimes must (such as in *Huang*⁹²). Instead, some degree of deference must be given to the primary decision-maker.

Finally, in *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*,⁹³ the substantive issue was whether the school's uniform policy breached the student's Article 9(1) rights when it refused her permission to wear a particular form of Islamic dress known as a 'jilbab' (other forms of Islamic dress were permitted). The House of Lords took the view that Parliament had left such decisions to schools, and that those schools were the 'experts' in what was acceptable or required in their local area. Lord Bingham noted at paragraph 33 that '[t]he school did not reject the respondent's request out of hand: it took advice, and was told that its existing policy conformed with the requirements of mainstream Muslim opinion'.

Baroness Hale gave a broadly concurring opinion, finding that the school's dress code was 'devised to meet the social conditions prevailing in the area at that time and was a proportionate response to the need to balance social cohesion and religious diversity'.⁹⁴ In other words, the school had a particular expertise and exercised its discretion in a reasonable and proportionate manner.

Lord Hoffmann commented at paragraph 64 of the judgment that 'a domestic court should accept the decision of Parliament to allow individual schools to make their own decisions about uniforms'. His Lordship also stated at paragraph 66:

What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2? The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done.

Taken together, these judgments illustrate the point that the school was both empowered by the Parliament to make the sort of decisions that it did, and had a better 'on the ground' knowledge of prevailing conditions than the court. Its decision was therefore reasonable and proportionate in all the circumstances.

Merits review, 'variable' review and proportionality – is there any difference?

The House of Lords in *Daly* stated that the acceptance of proportionality review for *Human Rights Act* issues 'does not mean that there has been a shift to merits review'.⁹⁵ Is this in fact

the case? Surely any kind of review on the basis of unreasonableness, or even patent unreasonableness, *is* a form of merits review. In any such case, the court is examining the substance of the decision and determining whether it meets a minimum level of reasonableness. This is so regardless of the degree of deference to be given to the primary decision-maker.

The view that there is no real difference between merits and proportionality review has also been taken by a number of commentators. For example, Bradley Selway has noted that ‘the new English approach clearly permits merit review subject only to whatever forbearance the judge, as a matter of policy, is prepared to give’.⁹⁶ It is important to note that even the orthodox *Wednesbury* approach is really a form of merits review, with a greater degree of deference given to the decision-maker than the ‘anxious scrutiny’ or proportionality approaches.

A number of commentators have also argued that, while it is important to distinguish between judicial and merits review, the difference, at least when undertaking a proportionality analysis, is really only one of degree, that degree being the degree of deference given to the decision-maker. Mark Aronson has commented as follows⁹⁷

Judicial review’s professed indifference to the substantive merits of the impugned decision is not always convincing, and not ultimately reconcilable with some of the grounds of review. (Review for ‘reasonableness, eg, clearly involves an examination of the impugned decision’s merits, albeit from a perspective of a large degree of deference.) But even though the difference between judicial review and merits review may at places be only one of degree, it is important to maintain that difference. Judicial deference to the views and actions of the primary decision maker is in one sense the essence of judicial review’s technique. That difference is underpinned by a political sense of the court’s secondary role in relation to the primary decision-maker, and by the practical sense of the latter institutional competence in the substantive issues relative to that of the court.

Again, can this distinction really be maintained? Does the existence of a level of deference, or a ‘margin of appreciation’, somehow transform merits review into judicial review? Again, I would argue that it does not. Regardless of whether any deference is given or not, the court is reviewing the merits of the decision. The only issue is whether it decides that a decision is *sufficiently* unreasonable or disproportionate to warrant it being set aside.

Summary

There has been a significant convergence in Canadian and UK administrative law since the 1980s. Both countries now use an approach involving a standard of review of reasonableness for most administrative decisions, and a proportionality approach for decisions involving fundamental rights (those protected by the Charter in Canada, and the HRA in the UK⁹⁸). Neither jurisdiction now attempts to argue that there is more than one standard of reasonableness. The most significant remaining difference is that the UK uses a variable scale of reasonableness in non-HRA decisions, while Canada still refuses (in the main) to admit that reasonableness is a continuum.

Both jurisdictions have moved to a rights-based approach to judicial review. This is most clearly seen in the UK in *Budgaycay*, in which the House of Lords, instead of simply examining the powers of the decision-maker, focused on the impact of the decision on the applicant. A corollary of this is that when a decision does impact on fundamental rights, particularly those protected by the Charter or the HRA, the decision-maker must provide justification for doing so, by way of written reasons, specifying the evidence before him or her. This requirement can be seen most clearly in *Smith*⁹⁹ and *Denbigh*¹⁰⁰ in the UK, and *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*¹⁰¹ in Canada.

Part 4 – *Minister for Immigration and Citizenship v Li* and subsequent Australian cases

Having examined the interpretation of ‘unreasonableness’ in both Canada and the UK, we can now turn to examine how the decision in *Minister for Immigration and Citizenship v Li*¹⁰² may have the potential to move Australia towards a form of ‘substantive review’ of administrative decisions that more closely follows the law in those countries.

The facts in Li

The basic facts in *Li* are set out in paragraph 3 of the judgment, in which French CJ states:

The first respondent applied for a Skilled – Independent Overseas Student (Residence) (Class DD) visa on 10 February 2007 which required satisfaction of a ‘time of decision criterion’ set out in cl 880.230(1) of Sched 2 to the [Migration Regulations 1994](#) (Cth) (the [Regulations](#)):

A relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation, and no evidence has become available that the information given or used as part of the assessment of the applicant’s skills is false or misleading in a material particular.

The application was supported by a skills assessment made on 8 January 2007 by TRA.¹⁰³ The assessment was found to be based on false information submitted to TRA by the first respondent’s former migration agent and on 13 January 2009 the Minister’s delegate refused the application for a visa.

The first respondent, through a new migration agent, applied to the MRT¹⁰⁴ for review of the delegate’s decision on 30 January 2009. The migration agent submitted a fresh application to TRA for a new skills assessment on 4 November 2009.

The MRT convened a hearing for 18 December 2009 and on 21 December 2009 wrote to the first respondent inviting comment upon allegedly untruthful answers given to departmental officers in connection with her initial application. It required a response by 18 January 2010, but advised the first respondent that she could seek an extension of time.

On 18 January 2010, the first respondent’s migration agent replied to the MRT’s letter of 21 December 2009 and advised that the application for a second skills assessment had been unsuccessful. The migration agent pointed out ‘two fundamental errors’ in TRA’s assessment and said that the first respondent had applied to TRA for review of its adverse decision. The migration agent requested the MRT to ‘forbear from making any final decision regarding her review application until the outcome of her skills assessment application is finalised’.

On 25 January 2010, without waiting for advice of the outcome of the migration agent’s representations to TRA, the MRT affirmed the delegate’s decision ... It did not explain its decision to proceed to a determination beyond saying:

The Tribunal considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further and in any event, considers that clause 880.230 necessarily covers each and every relevant assessing authority’s assessment.

Full Federal Court decision

Ms Li succeeded at the Full Federal Court in her argument that the MRT had acted unreasonably in making its decision prior to the new skills assessment being provided. The

Full Federal Court found that a refusal to adjourn the MRT hearing amounted to a jurisdictional error, and stated:¹⁰⁵

The appearance afforded by the MRT to an applicant by [an] invitation must be meaningful, not perfunctory, or it will be no appearance at all. The MRT is given power to adjourn proceedings from time to time: s 363(1)(b) of the Act. An *unreasonable refusal* of an adjournment of the proceeding will not just deny a *meaningful appearance* to an applicant. It will mean that the MRT has not discharged its core statutory function of reviewing the decision. This failure constitutes jurisdictional error for the purposes of [s 75\(v\)](#) of the [Constitution](#).

In other words, the MRT's unreasonable refusal to adjourn the hearing led to a breach of its own enabling legislation, and therefore to a jurisdictional error. The Minister sought and obtained special leave to appeal to the High Court.

High Court judgment

French CJ in the High Court found that the reasons of the MRT made 'no reference to the probability that [Ms Li] would be able, within a reasonable time, to secure the requisite skills assessment'.¹⁰⁶ The Chief Justice held that the concept of unreasonableness:¹⁰⁷

... reflects a limitation imputed to the legislature on the basis of which courts can say that parliament never intended to authorise that kind of decision. After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusion about the correct or preferable decision. However the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.

In a similar vein, French CJ also stated:¹⁰⁸

The rationality required by the 'rules of reason' is an essential element of lawfulness in decision-making. A decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power. It falls outside the framework of rationality provided by the statute. To that framework, defined by the subject matter, scope and purpose of the statute conferring the discretion, there may be added specific requirements of a procedural or substantive character. They may be express statutory conditions or, in the case of the requirements of procedural fairness, implied conditions.

As a result, French CJ found that the MRT decision to deny Ms Li the adjournment did not engage with the submission made on her behalf about the imminent decision by TRA. His Honour held that there was 'an arbitrariness about the decision, which rendered it unreasonable'.¹⁰⁹

In a joint judgment, Justices Hayne, Kiefel and Bell developed further the idea that unreasonableness is linked to rationality and logicity. Their Honours held that '[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification'.¹¹⁰ While their judgment admitted that in some cases a decision-maker may decide that 'enough is enough', and certainly an administrative tribunal cannot be expected to adjourn a matter indefinitely,¹¹¹ they held that it was not clear how the MRT reached that conclusion in the particular circumstances of Ms Li's case. As the decision lacked an 'evident and intelligible justification', it was unreasonable.

Hayne, Keifel and Bell JJ also noted:¹¹²

The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited

unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified.

Here we see a clear acknowledgement that 'reasonableness' has moved on from indefensible 'red-haired teachers' situations. Unreasonableness can be ascertained from looking at the decision as a whole and asking whether there is an intelligible basis to that decision. In this case, it was found that there was no attempt by the MRT to explain why Ms Li's request for an adjournment should be refused, looking at all the circumstances of her individual case, and this failure rendered the decision unreasonable.

Finally, Gageler J held that decision-making authority 'conferred by statute must be exercised according to law and to reason within limits set by the subject-matter, scope and purpose of the statute'.¹¹³ His Honour found that the MRT's decision lacked a true weighing-up of Ms Li's application for an adjournment, stating that '[t]he MRT identified no consideration weighing in favour of an immediate decision on the review and none is suggested by the Minister'.¹¹⁴ This is the same kind of reasoning as the joint judgment, looking at the matter from the opposite perspective – Hayne, Keifel and Bell JJ emphasised that the MRT failed to properly consider a request for an adjournment, while Gageler J takes the view that the MRT made a decision to proceed to an immediate conclusion of Ms Li's application. Either way, the decision was unreasonable, as it did not consider all the circumstances of Ms Li's case.

Gageler J also made some significant comments on the scope of unreasonableness in his judgment and indicated that it should move on from the classic *Wednesbury* formulation. His Honour stated that '[r]eview by a court of the reasonableness of a decision made by another repository of power 'is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process' but also with 'whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law'',¹¹⁵ expressly applying the Canadian reasonableness formulation. The 'possible, acceptable outcomes' formula has been applied in a number of cases since, although not expressly by the High Court.

In summary, the High Court in *Li* has expanded the unreasonableness formulation from outrageous and indefensible decisions to those that lack an 'intelligible basis', or those that fall outside a range of 'possible, acceptable outcomes'. The High Court now appears to be focused on whether the reasons for an administrative decision allow it to ascertain a justification for that decision, a theme taken up in the pre-*Li* decision of *SZOOR v Minister for Immigration and Citizenship*¹¹⁶ and a number of cases since. The reasonableness of a decision-maker's *procedures* will also be important.

Post-Li decisions

Li has been cited frequently by all levels of courts since it was handed down; it is not possible to examine all of the relevant decisions. The High Court has yet to revisit the reasonableness issue, except to briefly dismiss the plaintiff's unreasonableness argument in *S156-2013 v Minister for Immigration and Border Protection*.¹¹⁷ *Li* has, however, been successfully invoked in a number of court decisions, including:

1. *Minister for Immigration and Border Protection v Singh (Vikram)*,¹¹⁸ which involved a set of facts remarkably similar to *Li* itself, this time concerning an English test score instead of a skills assessment. The decision of the MRT to refuse an adjournment to allow Mr Singh to seek review of an International English Language Testing System (IELTS)

result with the testing authority was held to fall squarely within the *Li* scope of unreasonableness.

2. In *SZSNW v Minister for Immigration and Border Protection*¹¹⁹ an ‘independent merits reviewer’ had made findings adverse to the applicant’s credibility, after he raised an allegation of ‘sexual torture’ that had not been disclosed to the primary decision-maker. The Federal Circuit Court found that a decision is unreasonable ‘when a decision maker makes a choice that is arbitrary, capricious or without common sense’,¹²⁰ and was particularly critical of the way in which the reviewer appeared to ignore procedural instructions for dealing with applicants for refugee status who make claims of this kind.¹²¹ The decision was therefore set aside.
3. In *SZRHL v Minister for Immigration and Citizenship* the Federal Court noted:¹²²

[H]aving regard to [*Li*], it must now be accepted that the Tribunal is constrained to undertake its ‘core function’ of review reasonably, which includes exercising, reasonably, ancillary discretionary powers granted to the Tribunal for that purpose. A decision on review would only transgress this underlying requirement of reasonableness and thereby constitute jurisdictional error if the decision were so unreasonable that no reasonable Tribunal could have so decided the review application. That is a conclusion to be reached with restraint, having regard to the constitutional separation of powers and recognition that the task of determining eligibility for the grant of a protection visa is one consigned by Parliament to the Executive, not to the Judiciary.

This was another credibility case, in which the applicant made claims before the Refugee Review Tribunal (RRT) that the RRT considered had not been made to the primary decision-maker. The issues in question *had* been mentioned in the applicant’s original protection visa application form, although they had not been expanded on since. The adverse credibility finding made by the RRT was therefore based on an incorrect set of facts, and the court found that they could therefore have ‘been deprived of the possibility of a successful outcome on the merits of their protection visa applications’.¹²³ The RRT decision was therefore unreasonable and was set aside.

It is also worth noting that *Li* has been applied by a number of state Supreme Courts, seemingly most frequently in Victoria. For example, *Topouzakis v Greater Geelong City Council*¹²⁴ involved a decision by the Council to exclude an employee from leisure centres managed by it, which effectively terminated his employment. A number of patrons had campaigned to have the applicant dismissed after a previous criminal conviction incurred by him came to light, a conviction of which the Council was already aware. After quoting from *Li*, the Supreme Court of Victoria stated that the issue in the case at hand was ‘whether the Council’s decision to impose the ban is ‘reasonable’ in the sense that there is evident and intelligible justification for it and whether the ban is proportionate to the breaches of the local law identified by the Council’.¹²⁵ In the end, the Court found that the decision to ban the applicant from the premises contravened Council by-laws, as it was made on the basis of a perceived lack of remorse on the part of the applicant, rather than the safety of patrons of Council property.

Part 5 – Conclusions

In *Li*, the High Court has moved the ‘reasonableness’ ground beyond the kinds of outrageous decisions envisioned by *Wednesbury* and closer to the Canadian and UK concepts of this ground of review. While it is true that *Li* did not expressly endorse any kind of ‘variegated unreasonableness’ concept, the High Court has clearly indicated that ‘reasonableness’ can now only be ascertained by looking at all the circumstances of an applicant’s case, and the impact of a decision on them, an approach which has its roots in *Budgaycay*,¹²⁶ and is also similar to the ‘possible, acceptable outcomes’ approach of *Dunsmuir*.¹²⁷ Therefore, the High Court is moving towards the wider concepts of unreasonableness in those jurisdictions.

It will be interesting to see how this movement progresses. In the UK, a proportionality approach is used to assess the reasonableness of decisions covered by the HRA, and a ‘variegated reasonableness’ approach to others. In Canada, cases such *Doré v Barreau du Québec*¹²⁸ indicate that a proportionality approach will decide cases involving Charter rights, and the *Dunsmuir* reasonableness test will decide other cases (unless a rare ‘true question of jurisdiction or vires’ arises). Australia lacks any kind of constitutional Bill of Rights, but perhaps a similar kind of approach could take root all the same – rights protected by, say, the *Racial Discrimination Act 1975* and other Acts which can form the basis of complaints to the Human Rights Commission could require a proportionality approach to review of decisions impacting on those rights, while other decisions could be reviewed on the *Li* unreasonableness test. This day may be a long way off, but the real future for Australian administrative law has to be in the direction of a rights-based jurisprudence, and not simply the current fixation on jurisdictional errors of law. *Li* might be one small step on that journey.

Endnotes

- 1 Referring to *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.
- 2 Ibid at 230.
- 3 [2005] FCA 1707 at paragraph 555, citing M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004).
- 4 (1949) 80 CLR 657.
- 5 Ibid at paragraph 12. The finding that an apparently unfettered discretion must nevertheless be exercised reasonably is similar to the Supreme Court of Canada’s decision in *Roncarelli v Duplessis* [1959] SCR 121.
- 6 (1972) 128 CLR 305.
- 7 Ibid at paragraph 2 of the judgment of Gibbs JA.
- 8 Ibid at paragraph 13 of the judgment of Stephen J.
- 9 (1986) 162 CLR 24 at paragraph 15 of the judgment of Mason J.
- 10 [2013] HCA 18.
- 11 (1997) 146 ALR 126 at 135.
- 12 Ibid.
- 13 *Abebe v the Commonwealth; Re Minister for Immigration and Multicultural Affairs, ex parte Abebe* (1999) 162 ALR 1.
- 14 (1997) 197 CLR 611.
- 15 Ibid at paragraph 40.
- 16 (1995) 183 CLR 273 at 290.
- 17 [2010] HCA 16.
- 18 Under s 36 of the *Migration Act 1958*, the key criterion for the grant of a Protection Visa is that the applicant has been found to be a refugee as defined by the *Convention Relating to the Status of Refugees*.
- 19 *SZMDS v Minister for Immigration and Citizenship* [2009] FCA 210 at paragraph 29.
- 20 Referring to *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 207 ALR 12.
- 21 Supra n17 at paragraph 30.
- 22 Ibid at paragraph 135.
- 23 (1990) 170 CLR 1 at 36.
- 24 Margaret Allars, ‘*Chevron* in Australia: A Duplicitous Rejection?’, (2002) 54 *Administrative Law Review* 569 at 583-4.
- 25 *Peko-Wallsend*, supra n9 at paragraph 15 of the judgment of Mason J.
- 26 [1979] 2 SCR 227.
- 27 Madame Justice Claire L’Heureux-Dubé, ‘The “Ebb” and “Flow” of Administrative Law on the “General Question of Law”’ in Michael Taggart (ed), *The Province of Administrative Law*, (Hart Publishing, 1997) at 308-9.
- 28 [1970] SCR 425.
- 29 [1971] SCR 756.
- 30 RSNB 1973, c P-25.
- 31 Supra n26 at 299.
- 32 Supra n26 at paragraph 15.
- 33 Ibid at paragraph 16.
- 34 See for example *SZMDS*, supra n17 at paragraph 131.
- 35 *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748.
- 36 See in particular *Toronto (City) v Canadian Union of Public Employees, Local 79* [2003] 3 SCR 77 and *Council of Canadians with Disabilities v VIA Rail Canada Inc* [2007] SCC 15.
- 37 [2008] 1 SCR 190.
- 38 RSNB 1973 c P-25.
- 39 SNB 1984, c C-5.1.

- 40 Supra n37 at paragraph 47.
 41 Ibid.
 42 David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy', in Michael Taggart (ed), *The Province of Administrative Law*, (Hart Publishing, 1997) at 286.
 43 Supra n37 at paragraph 50.
 44 Ibid at paragraph 59.
 45 Ibid at paragraph 64.
 46 On this point now see *Doré v Barreau du Quebec* [2012] SCC 12.
 47 [2011] SCC 61 at paragraphs 54 and 57-61. See also John Evans, 'Standards of Review in Administrative Law', paper prepared for the 2012 British Columbia Administrative Law Conference at 3.
 48 Ibid at paragraph 42.
 49 [1984] 3 All ER 935.
 50 1998 c 42.
 51 Supra n49 at 944 – 945.
 52 Ibid at 950-1.
 53 *Wednesbury*, supra n1. *Wednesbury* actually envisaged two kinds of unreasonableness – the use of a power for an improper purpose, or a decision that is 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (supra n1 at 229) referred to by Paul Craig as 'substantive unreasonableness' – Craig, *Administrative Law* (6th ed), Sweet and Maxwell, 2008 at paragraph 17-002 (p 532). It is the latter meaning of the term that has popularly become known as '*Wednesbury* unreasonableness'.
 54 [1987] AC 514.
 55 Ibid at 531.
 56 [1991] 1 AC 696.
 57 Ibid at 748-9.
 58 [1996] QB 517.
 59 Ibid at 554.
 60 Ian Turner, 'Judicial Review, Irrationality and the Limits of Intervention by the Courts', [2010] 21 *Kings Law Journal* 311 at 322-3.
 61 *Nottinghamshire County Council v Secretary of State for the Environment* [1986] 2 AC 240.
 62 *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 2 AC 418.
 63 Thomas Poole, 'The Reformation of English Administrative Law', (2009) 68 *Cambridge Law Journal* 142 at 145.
 64 Supra n54.
 65 *R v Lord Chancellor, ex parte Witham* [1998] QB 575.
 66 Supra n58.
 67 Supra n28.
 68 Supra n46.
 69 [2001] 1 WLR 840.
 70 See for example *R v Johns ex parte Derby City Council* [2011] EWCA 375 (Admin).
 71 [2003] QB 1397.
 72 Ibid at paragraphs 33 and 34.
 73 Ibid at paragraph 35.
 74 [2009] 1 AC 367.
 75 Ibid at paragraph 109.
 76 *British Civilian Internees*, supra n71.
 77 Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of Administration in the United Kingdom', (2010) 58 *American Journal of Comparative Law* 583 at 608-9.
 78 (1999) 29 EHRR 493.
 79 Supra n58.
 80 Supra n78 at 543.
 81 [1999] 1 AC 69 at 80.
 82 [2001] 2 AC 532.
 83 Ibid at paragraph 27.
 84 Ibid at paragraph 28.
 85 Supra n69.
 86 Supra n82.
 87 David Bennett, 'Balancing Merits Review and Judicial Review', (2003) 53 *Administrative Review* 3 at 7.
 88 Referring to *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68.
 89 [2007] 2 AC 167.
 90 Ibid at paragraph 13.
 91 [2007] 1 AC 650 at paragraph 55.
 92 Supra n89.
 93 [2007] 1 AC 100.
 94 Ibid at paragraph 98.
 95 *Daly*, supra n82 at paragraph 28.

- 96 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues', (2002) 30 *Federal Law Review* 217 at 223-4 at 224.
- 97 Mark Aronson, 'Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law*, (Hart Publishing, 1997) at 47-8.
- 98 *Doré*, supra n46 (Canada); *Daly*, supra n82 (UK).
- 99 Supra n68.
- 100 Supra n93.
- 101 [2011] SCC 62.
- 102 Supra n10.
- 103 Trades Recognition Australia.
- 104 Migration Review Tribunal.
- 105 [2012] FCAFC 74 at paragraph 29.
- 106 Supra n10 at paragraph 21.
- 107 *Ibid* at paragraph 28.
- 108 *Ibid* at paragraph 26.
- 109 *Ibid* at paragraph 31.
- 110 *Ibid* at paragraph 76.
- 111 *Ibid* at paragraph 81.
- 112 *Ibid* at paragraph 68.
- 113 *Ibid* at paragraph 90.
- 114 *Ibid* at paragraph 122.
- 115 *Ibid* at paragraph 105, citing *Dunsmuir v New Brunswick*, supra n37 at paragraph 47.
- 116 [2012] FCAFC 58 at paragraph 8, citing the decision of the Supreme Court of Canada in *Newfoundland Nurses*, supra n101.
- 117 [2014] HCA 22 at paragraph 44.
- 118 [2014] FCAFC 1.
- 119 [2014] FCCA 134.
- 120 *Ibid* at paragraph 52.
- 121 *Ibid* at paragraph 47.
- 122 [2013] FCA 1093 at paragraph 19.
- 123 *Ibid* at paragraph 37.
- 124 [2014] VSC 87.
- 125 Supra n151 at paragraph 71.
- 126 Supra n63.
- 127 Supra n37.
- 128 Supra n46.