AIAL FORUM ISSUE 88

AIAL FORUM

ISSUE 88 JULY 2017

JULY 2017

Australian Institute of
Administrative Law

July 2017 Number 88

AIAL FORUM

Australian Institute of Administrative Law Incorporated.

Editor: Kirsten McNeill

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 (2017) 88 AIAL Forum.

Publishing with 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 Australian Guide to Legal Citation 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.

The AIAL Forum is included in the ERA 2015 Submission Journal list.

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

ISSN 1322-9869

Printed on Certified Paper

TABLE OF CONTENTS

RECENT DEVELOPMENTS

Katherine Cook

President of the Administrative Appeals Tribunal

The Hon Justice Duncan Kerr's term as President of the Administrative Appeals Tribunal (AAT) expired on 15 May 2017.

Justice Kerr will remain as a Judge of the Federal Court of Australia.

Justice Kerr has provided strong leadership to the AAT and will be remembered as a very successful President. His particular legacy is his oversight of the amalgamation of most of the Commonwealth's merits review tribunals into a single entity — the most important reform to Australian administrative law in 40 years.

This amalgamation delivered the framework first envisaged when the Tribunal was established in 1975. Justice Kerr's calm and competent leadership of that massive undertaking leaves the AAT significantly strengthened and has further enhanced the AAT's strong reputation, both within Australia and internationally, as a world's best-practice merits review tribunal.

The Turnbull government will shortly announce the appointment of another eminent Australian judge to be the next President of the AAT. In the meantime, the Hon Justice John Logan RFD will act as President.

Note: On 28 June 2017 the Attorney-General announced the appointment of Justice Robert Thomas as the new President of the AAT. Justice Thomas is a Justice of the Queensland Supreme Court and the President of the Queensland Civil and Administrative Tribunal.

<www.attorneygeneral.gov.au/Mediareleases/Pages/2017/SecondQuarter/President-of-the-Administrative-Appeals-Tribunal.aspx>

Top judge to continue as VCAT President

Attorney-General Martin Pakula has announced the extension of appointment of the Hon Justice Greg Garde AO RFD as President of the Victorian Civil and Administrative Tribunal (VCAT) for a further year.

Justice Garde was appointed as a Judge of the Supreme Court and President of VCAT in 2012.

During his time, Garde J has overseen a number of key projects, including the introduction of VCAT's new fee regime, which introduced measures designed to promote affordability, access to justice and the early settlement of disputes.

These reforms, introduced in July 2016, have seen a significant increase in the number of people pursuing civil claims as many more Victorians turn to VCAT to enforce their rights.

Prior to his appointment to VCAT, he was a barrister for 38 years and practised in a broad range of commercial and civil law areas. He also served as Chairman of the Environmental, Planning and Local Government Law Section of the Commercial Bar Association.

He was appointed Queen's Counsel in 1989 and has lectured in the areas of constitutional and administrative law at RMIT.

In addition to his legal expertise, Garde J also served in the Australian Army Reserve from 1967 until 2004, when he transferred to Standby Reserve.

During his service, he held the position of Commanding Officer at both the Monash University Regiment and the 4th/19th Prince of Wales Light Horse Unit before becoming Commander of the 4th Brigade (Victoria's Brigade) from 1992 until 1994.

He holds the Reserve Forces Decoration (4th Clasp) and was appointed a Member of the Order of Australia in the Military Division in 1995 and an Officer of the Order of Australia in the Military Division in 2005.

He also served as Chief of Reserves and Head of Reserve Policy — the highest position for a reserve officer in the Australian Defence Force.

Justice Garde graduated from the University of Melbourne with a Bachelor of Arts and Laws and a Master of Laws. He signed the Victorian Bar Roll in 1974. As an undergraduate, he won a number of university exhibitions, including in Australian constitutional law, equity (joint) and applied mathematics.

VCAT is the busiest tribunal in Australia and finalises more than 85 000 cases a year at more than 46 venues across Victoria.

<http://www.premier.vic.gov.au/top-judge-to-continue-as-vcat-president/>

New Commonwealth Ombudsman, Mr Michael Manthorpe

On 8 May 2017, Mr Michael Manthorpe PSM was appointed as Commonwealth Ombudsman for a five-year term. Coming to the role from the Department of Immigration and Border Protection, where he led the Visa and Citizenship Services Group, he brings with him a wealth of experience from his many years in senior leadership roles across the public service.

In March 2015, Mr Manthorpe became the Deputy Secretary of Visa and Citizenship Services Group in the Department of Immigration and Border Protection, which has end-to-end responsibility for visa and citizenship programs.

In 2014, Mr Manthorpe was the Deputy Secretary of the Portfolio Reform Task Force which oversaw the bringing together of the Department of Immigration and Border Protection and the former Australian Customs and Border Protection Service, thereby creating the integrated Department of Immigration and Border Protection and the Australian Border Force.

Prior to joining the Department of Immigration and Border Protection, Mr Manthorpe was with the Department of Education, Employment and Workplace Relations and its predecessors for 25 years, where he worked across workplace relations, employment, early childhood, corporate, strategy and other program and policy matters.

He was awarded the Public Service Medal in 2010 for his leadership of the government's handling of the insolvency of ABC Learning childcare centres.

Mr Manthorpe grew up in Queensland and studied journalism and history at the University of Queensland.

<http://www.ombudsman.gov.au/about/current-ombudsman>

Reviewer appointed to examine SACAT operations

The South Australian Government has appointed retired Supreme Court Justice the Hon David Bleby QC to conduct an independent review of the operation of the South Australian Civil and Administrative Tribunal (SACAT).

Under the *South Australian Civil and Administrative Tribunal Act 2013*, the Government is required to undertake a review of SACAT's operations following SACAT's first two years of operation.

The review is expected to be completed later this year and will be tabled in both houses of Parliament.

SACAT hears housing disputes, guardianship matters, advanced care directives, mental health treatment orders, administration orders, matters involving consent to medical treatment and reviews of Government decisions — taking on matters that had previously been dealt with through the Residential Tenancies Tribunal, the Guardianship Board, the Housing Appeals Panel, and various matters from the Magistrates Court, District Court and Supreme Court.

Mr Bleby was appointed Queens Counsel in 1982 and served as a Supreme Court Justice between 1997 and 2012.

<https://www.agd.sa.gov.au/sites/g/files/net2876/f/20170406-mr-ag-sacat.pdf?v=1492041027>

New discrimination protections in force in the ACT

From April 2017, the law in the ACT includes new and improved protection against discriminatory treatment.

The *Discrimination Act 1991* (ACT) has been extended to incorporate protection from discrimination on five new grounds:

- accommodation status;
- employment status;
- status as a victim of family or domestic violence;
- immigration status; and
- physical features.

Some existing grounds have also been updated to provide further clarity and to strengthen protection available from discrimination on the basis of:

- gender identity;
- intersex status;

- irrelevant criminal record; and
- parent/family/carer/kinship responsibilities.

The amendments build upon existing protections against discrimination, including on the basis of disability, race, sex, sexuality, gender identity, industrial activity, age, profession, trade or calling.

<http://hrc.act.gov.au/new-discrimination-protections-force/>

Human rights of children protected

The Victorian Equal Opportunity and Human Rights Commission has welcomed the Supreme Court's finding that the Victorian Government acted unlawfully under the *Charter of Human Rights and Responsibilities 2006* (Vic) in *Certain Children v Minister for Families and Children & Others* [2016] VSC 796. The Commission intervened in the case to ensure that the children's human rights were considered and protected.

'It is an important day for the protection of children's rights under the Charter of Human Rights in Victoria', Victorian Equal Opportunity and Human Rights Commissioner Ms Kristen Hilton said.

'The rights of children are protected by law and the Charter has proved to be a powerful mechanism to uphold these rights and require that children are treated as children in our justice system.

'The Court has found that holding children in a maximum security adult prison, subjecting them to long periods of isolation in adult cells, and failing to consider how this environment heightens their risk of mental health problems is not compatible with our human rights legislation.'

The Court found that the decision to gazette the Grevillea Unit at Barwon Prison as a youth justice facility and to transfer children there was unlawful and not compatible with the ss 17 and 22(1) of the *Charter of Human Rights and Responsibilities*: the right to the protection of the best interests of the child and the right of all persons deprived of liberty to be treated humanely.

'Many of the children in our youth justice system have a history of abuse, neglect, mental health concerns or have an intellectual disability. The harmful effects of isolation and confinement in an adult prison are even more acute for such children who have particular vulnerabilities and associated complex needs'.

'I encourage the Government to ensure our youth justice framework is underpinned by human rights principles and protects children's best interests', Ms Hilton said.

An exemption granted under s 8B of the *Control of Weapons Act 1990* (Vic) to allow the use of oleoresin capsicum spray and extendable batons within the Grevillea Unit was also found to be incompatible with the Charter.

<https://www.humanrightscommission.vic.gov.au/home/news-and-events/commission-news/item/1561-human-rights-of-children-protected>

Recent decisions

The scope of section 36(2) of the Acts Interpretation Act

Minister for Immigration and Border Protection v Kumar & Ors [2017] HCA 11 (8 March 2017)

On Monday, 13 January 2014, the first respondent applied for a subclass 572 (Vocational Education and Training Sector) visa (572 visa) at the Perth office of the Department of Immigration and Border Protection. Relevantly, at that time, cl 572.211 of sch 2 to the *Migration Regulations 1994* (Cth) specified that, at the time of the making of an application for a 572 visa, the first respondent needed to hold a valid Subclass 485 (Temporary Graduate) (485 visa). However, the first respondent's 485 visa had expired one day earlier, on Sunday, 12 January 2014.

In May 2014, a delegate of the Minister for Immigration refused to grant the first respondent a 572 visa because, on the date he applied, the first respondent was no longer the holder of 485 visa and therefore did not meet cl 572.211.

The first respondent then applied to the then Migration Review Tribunal for a review of the delegate's decision. The Tribunal affirmed that decision, finding that the first respondent did not satisfy cl 572.211, as he did not hold a 485 visa when he applied for a 572 visa.

The first respondent then sought judicial review of the Tribunal's decision in the Federal Circuit Court of Australia. The first respondent contended, among other things, that s 36(2) of the *Acts Interpretation Act 1901* (Cth) (the AIA) operated so that he continued to meet cl 572.211 on Monday, 13 January 2014. Section 36(2) of the AIA provides, among other things, that if an Act 'requires or allows a thing to be done' and 'the last day' for the doing of the thing is a Saturday, Sunday or holiday then the thing may be done on the next day that is not a Saturday, Sunday or holiday.

The Federal Circuit Court dismissed the application, holding that, because cl 572.211(2) identified a state of affairs that must exist rather than prescribing or allowing a thing to be done, s 36(2) of the AIA had no operation.

On appeal, the Federal Court of Australia quashed the Federal Circuit Court's decision. The Federal Court held that, because the last day for the first respondent to apply for the 572 visa was Sunday, 12 January 2014, s 36(2) of the AIA operated to allow the application to be made on Monday, 13 January 2014.

By grant of special leave, the Minister appealed to the High Court.

The Minister contended that *Migration Act 1958* (Cth) and Migration Regulations do not impose a time limit on the making of an application for a 572 visa. Section 36(2) operates to extend time in a case in which the last day for doing a thing that is required or allowed by an Act falls on a Saturday, a Sunday or a holiday. The first respondent's application for a 572 visa, made on 13 January 2014, was not time-barred. It was accepted as a valid application. However, the first respondent's circumstances on 13 January 2014 were such that he did not satisfy the criterion specified in cl 572.211(2)(d)(iia) or any other of the criteria for the grant of a 572 visa.

The High Court held that s 36(2) of the AIA, properly construed, was not engaged because no time limit is imposed expressly, or by implication, under the *Migration Act 1958* (Cth) and the Migration Regulations on the making of an application for a 572 visa.

The High Court held that the language of s 36(2) cannot be read as deeming the thing to be done as if it were being done on the earlier date or as deeming a state of affairs that existed on the earlier date to be in existence on the later date. As the first respondent did not meet the criteria for the grant of the 572 visa at the date of his application, the High Court made orders reinstating the orders of the Federal Circuit Court.

Is an assistant Minister bound by a direction of a senior Minister?

Bochenski v Minister for Immigration and Border Protection [2017] FCAFC 68 (Bromberg, Bromwich and Charlesworth JJ) (27 April 2017)

In March 1988, the appellant arrived in Australia with his family from Poland. He was seven years old. He was later convicted of a series of offences and spent several years in prison.

On 13 January 2015, nine days before the appellant was due to be released from prison, his visa (a Class BF Transitional (Permanent) visa) was cancelled by a delegate of the Minister for Immigration. The appellant's visa was cancelled pursuant to the mandatory character grounds under s 501(3A) of the *Migration Act 1958* (Cth) because he had a 'substantial criminal record' (ss 501(6)(a) and (7)(c)).

When his prison sentence ended, he was taken into immigration detention.

On 19 February 2015, the appellant made a request to the Minister for Immigration to revoke the cancellation decision pursuant to s 501CA(4) of the *Migration Act 1958* (Cth). Thirteen months later, on 18 March 2016, the Parliamentary Secretary to the Minister for Immigration, using the title 'Assistant Minister for Immigration', decided that he was not satisfied that the appellant passed the character test and was not satisfied that the original decision should be revoked for any other reason. Relevantly, at that time, Direction 65, made on 22 December 2014 by the former Minister, was in force. The direction, entitled *Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, provided directions binding upon the decision-makers (person) to whom it was addressed in the performance of functions and exercise of powers under the *Migration Act 1958* (Cth). Nowhere in the Parliamentary Secretary's reasons did he refer to Direction 65.

The appellant then applied for judicial review of the Parliamentary Secretary's decision by the Federal Court. On 22 August 2016, the primary judge dismissed the appellant's application for judicial review.

The appellant appealed to the Full Federal Court. A threshold issue was whether the Parliamentary Secretary was a 'person' bound by Direction 65.

Appellant contended, among other things, that the Parliamentary Secretary was a 'person' bound by Direction 65 by force of s 499(2A), making applicable parts of that direction mandatory relevant considerations required to be taken into account in the exercise of jurisdiction to make the revocation decision. The appellant asserted that the terms of s 499 of the *Migration Act 1958* (Cth) by which directions may be issued by the Minister were such that they bound not just delegates of the Minister but also any other 'Minister' administering the Department of Immigration and Border Protection and the *Migration Act 1958* (Cth) who was subordinate in rank or status to the Minister who issued such a direction, most clearly by the designation of being a Parliamentary Secretary *to* such a Minister.

The Minister contended that the Parliamentary Secretary was not so bound. Indeed, the Minister's case went further, asserting that, in keeping with well-established principles of administrative law, the Parliamentary Secretary would have erred in treating himself as being

bound by the Direction. The Minister argued that the Parliamentary Secretary treating himself as bound by Direction 65 would constitute an unlawful fettering of his discretion which was to be limited only by the terms of the statutory provisions governing the exercise of the revocation power (*Neat Domestic Trading Pty Limited v AWB Limited* [2003] HCA 35, 286–7 [17] (Gleeson CJ), citing and quoting from *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407, 496–7; see also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 590).

The Full Court found that, although customs and practices of the Parliament and the practicalities of politics, as well as the appointment of the Parliamentary Secretary *to* the Minister, probably mean that the Parliamentary Secretary is subordinate to the Minister in a day-to-day sense, a Parliamentary Secretary is not placed by the *Constitution* or by the *Migration Act 1958* (Cth) in any subordinate position when it comes to exercising powers under that Act.

Rather, as the High Court observed in *Re Patterson; Ex parte Taylor* [2001] HCA 51, [184], the Full Court held that the effect of s 64 of the *Constitution* is that those appointed as Ministers of State must be members of the Federal Executive Council. That reasoning necessarily places all such Ministers of State at the peak of federal executive power as advisors to the Governor-General by reason of s 62 of the *Constitution*. Those appointed to offices prescribed by the Parliament as contemplated by s 65, and appointed to administer departments of State of the Commonwealth established by the Governor-General in Council under s 64, are Ministers of State. Therefore, there is no constitutional distinction between cabinet Ministers, Ministers or Parliamentary Secretaries — they are equal.

The Full Court found that customs, practices, practicalities, titles and even political realities do not afford any proper basis for concluding that the exercise of the power otherwise equally bestowed is subject to differential operation going to the heart of the exercise of discretion. Were the Minister able to bind the Parliamentary Secretary in the manner of the exercise of a power otherwise equally bestowed, that power would not, at least in its implementation and exercise, be equal, at least in relation to any topic upon which the Minister chose to give a direction under s 499(1) of the *Migration Act 1958* (Cth). One repository of power would be fettered by the direction of the other. In this way, the exercise of legislative power would be qualified by the exercise of executive power in a manner not specifically provided for by Parliament. Clear and express words would be needed to achieve such an outcome. Such words are not found in s 499.

The scope of the FOI exemption for Cabinet documents in South Australia

Department of State Development v Pisoni [2017] SADC 34 (Tilmouth J) (6 April 2017)

Mr Pisoni made an FOI application for access to, among other things, the 6 December 2013 minutes of a meeting of the Economic Development Board. When the Board denied his application, he sought review from the South Australian Ombudsman. The Ombudsman ordered the release of the Board minutes to Mr Pisoni.

The Department of State Development sought a judicial review of the Ombudsman's determination in the District Court. The department contended that the document should be protected by the Cabinet confidentiality exemption under the *Freedom of Information Act 1991* (SA) (FOI Act).

When compared to the FOI Act regimes in other Australian jurisdictions, the Cabinet deliberation exemption in the FOI Act is cast in wider terms in the protection it affords

Cabinet deliberations or decisions, inasmuch as it contains the additional words 'concerning any', which are not present in any of the parallel provisions in other Australian jurisdictions.

The Court held that a 'deliberation' does not encompass material not discussed or considered by Cabinet (*Re Rae and Department of Prime Minister & Cabinet* (1986) 12 ALD 589) or the formal decision made by Cabinet simpliciter (*Re Porter and Department of Community Services and Health* (1988) 14 ALD 403). That is, the protection is aimed at preventing the disclosure of information that sheds light on Cabinet discussions and decision-making processes (*Secretary to the Department of Infrastructure v Louise Asher MP* [2007] VSCA 272).

However, in this case, the document does not contain any reference to the content of information concerning a deliberation or decision of Cabinet. Rather, that material merely contains a description of subject matters to be placed before Cabinet. Furthermore, it simply contains aspirational views of the Board as to the outcome of a future Cabinet meeting, which could hardly be said to 'disclose information concerning any deliberation or decision of Cabinet'. For these reasons, the attack on the determination of the Ombudsman must fail.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN AUSTRALIA

Justice John Griffiths*

This article highlights some topical matters in judicial review of administrative action in Australia, primarily focusing on judicial review of Commonwealth administrative decision-making which has a legislative foundation.

One topical matter is the dramatic shift in terms of numbers away from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) to review for jurisdictional error. A related matter is whether this shift unduly focuses the judicial review function on an assessment of statutory purpose as opposed to an approach which concentrates on the individual heads of judicial review.

Judicial review for jurisdictional error has constitutional underpinnings in this country not only at a Commonwealth level but, following the High Court's decision in *Kirk v Industrial Court (NSW)*[1] (*Kirk*), also at a state level. Jurisdictional error is emerging as a jurisprudentially acceptable doctrine for preserving the availability of judicial review even in the face of strongly worded privative clauses, especially in the field of migration.

Another notable feature of the existing state of administrative law in Australia is how many current or emerging principles are derived from judicial review challenges to migration and refugee decisions. This may be contrasted with earlier periods in our legal history, when many of the principles were established in other legislative contexts, relating mainly to taxation and industrial relations.

One of the common criticisms of the doctrine of jurisdictional error is the uncertainty which it is said to produce, particularly for public administrators who may feel frustrated by what they see as the fluid and unpredictable operation of that doctrine. This criticism echoes the dissatisfaction sometimes expressed about the practical difficulties of applying flexible principles of procedural fairness. Some would prefer a return to what they see as the greater certainty produced by the statutory codification approach exemplified in the ADJR Act or perhaps in formulas or slogans as reflected in concepts such as 'unreasonableness', 'illogicality' or 'proportionality'.

A central theme will be to highlight how jurisdictional error has the potential to provide a more satisfactory doctrinal basis for judicial review, albeit one which is intellectually more demanding on legal advisors, courts and lawmakers alike. That is mainly because it requires intense attention to be given to the relevant legislative basis for administrative action (as well as to the facts) in order to establish the limits of lawful executive power. The contemporary approach eschews the talismanic effect of slogans and formulas.

---

* *Justice Griffiths is a Judge of the Federal Court of Australia. This is an edited version of the keynote address given at the ANU Public Law Weekend, October 2016, Canberra.*

The doctrine of jurisdictional error

Much ink has been spilled on the utility of the concept of jurisdictional error. At the heart of the debate lies the perennial topic of the legitimacy of judicial review. In Australia, the debate can only properly be understood in the context of the separation of powers — a point which was nicely expressed by Allsop CJ:

> Administrative law is an area in which legal theory and values play vital roles. The essence of Australian administrative law is the dominant political theory that underpins Australian society: the division of government into three arms or branches of Parliament, Executive and judicature. There is nothing inevitable about this. It is a governmental and legal organisation of power based on secular society, and suspicion of power and those who wield it drawn in its modern form from the European, English and American political and intellectual struggles of the 17th and 18th centuries. The grasp of that elemental tripartite framework is essential to understanding the approach by the High Court of Australia to administrative law. The place of s 75(v) of the *Constitution* guaranteeing the citizen (and most influentially, the non-citizen) the right to seek review in the original jurisdiction of the highest court in the country of the exercise of power by officers of the Commonwealth is central and pervasive in the structure and content of Australian administrative law (Commonwealth and State) and the structure of Australian constitutionalism.[2]

This is not the time for a detailed analysis of *Kirk*. Its key features may be summarised as follows:

(a) at the heart of the concept of jurisdictional error is the notion of the 'authority to decide' — a notion which itself is driven by 'the public policy necessity to compel inferior tribunals to observe the law';
(b) as Professor Jaffe has noted, the identification of some questions as 'jurisdictional' 'is almost entirely functional', and the word 'jurisdictional' 'is not a metaphysical absolute but simply expresses the gravity of the error';
(c) notwithstanding the English position whereby any error of law by an inferior court or tribunal renders a decision *ultra vires*, constitutional considerations in Australia require the maintenance of the distinction between jurisdictional and non-jurisdictional errors;
(d) a distinction must also be drawn between inferior courts and administrative tribunals in applying the concept of jurisdictional error, not the least because tribunals cannot authoritatively determine questions of law, but courts can;
(e) it is neither necessary nor possible to attempt to mark the metes and bounds of jurisdictional error, and the grounds identified in *Craig v South Australia*[3] should not be seen as providing 'a rigid taxonomy' of jurisdictional error; and
(f) after carefully analysing relevant provisions of the *Occupational Health and Safety Act 1983* (NSW), it was held in *Kirk* that the Industrial Court had fallen into jurisdictional error by erroneously construing s 15 (which caused the Court to misapprehend the limits of its functions and powers) and by failing to comply with the rules of evidence.

Kirk is a landmark decision in Australian administrative law. But it leaves open many unanswered questions as to whether any particular error by an administrative decision-maker involves a jurisdictional error. This uncertainty may frustrate some people, but it is largely unavoidable given the wide diversity of legislative contexts and factual circumstances which potentially frame a judicial review challenge to a particular exercise of executive power. Inevitably, these complexities mean that one size does not fit all.

That is not to say that the task of identifying jurisdictional error is at large. Helpful guidance can be obtained from subsequent decisions which have grappled with the issue. These decisions reinforce the danger of approaching the task from the outset as involving a 'tick the box' type exercise by front-end loading established heads of judicial review. The

codification of the heads of judicial review in the ADJR Act has undoubtedly performed an educative function, but, as Robertson J has pointed out, the listing of those heads has diverted attention from the prior necessity of construing the legislation.[4] The task of identifying jurisdictional error is far more sophisticated. It essentially involves the following steps:

(a) a close analysis of the enabling legislation which purports to authorise the particular administrative action, with a view to determining the true nature of the decision-maker's task and authority and any relevant procedural constraints which apply;
(b) an identification of the alleged error or mistake, whether it involves misconstruction of a legislative provision or some other error, including an error in fact-finding;
(c) error identification may be facilitated by an available statement of reasons for the challenged decision, but the absence of such reasons does not necessarily pre-empt judicial review; and
(d) bearing in mind the limits of the judicial review function, ask whether what has gone wrong is of such significance and materiality in the context of the decision-maker's legislative powers and function that the gravity of the error rises to the height of a jurisdictional error.

Two decisions of Robertson J helpfully illustrate the post-*Kirk* approach. In *Minister for Immigration and Citizenship v SZRKT*[5] (*SZRKT*), the issue was whether the Refugee Review Tribunal fell into jurisdictional error by ignoring the protection visa applicant's corroborative evidence. The Tribunal had found the applicant was not a credible witness because it considered he had given untruthful evidence about his studies in Pakistan. No reference was made to an academic transcript in evidence before the Tribunal which showed that the applicant had studied Persian, yet the Tribunal found that the applicant's claim to have done so was implausible. The Minister contended that, even if the Tribunal had failed to consider the transcript, jurisdictional error would not arise as long as the Tribunal had not overlooked the applicant's claim to be a refugee because the Persian studies issue was not material to that claim.

The following matters, including matters relating to review of fact-finding, were emphasised in *SZRKT* (noting that the High Court refused special leave to appeal):

1. Consistently with the proper limits on judicial review, fact-finding is principally a matter for the primary decision-maker, but the court is nevertheless required to consider whether the decision-maker has acted in a way which is beyond the task conferred on it by the legislation.[6]
2. Ignoring material which is relevant only to fact-finding does not of itself give rise to jurisdictional error, but the gravity of the error needs to be assessed within the relevant statutory context.
3. In considering questions of jurisdictional error in the context of decision-making under the *Migration Act 1958* (Cth), the primary focus must be on the claim which the Migration Act requires to be considered and whether or not the disregard of a relevant consideration which that legislation requires to be taken into account answers the description of jurisdictional error. This demands much more than the blind application of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[7] (*Peko-Wallsend*), which was a decision under the ADJR Act and involved a very different statutory context.[8]

More recently, in *Goundar v Minister for Immigration and Border Protection*[9] (*Goundar*), the issue was whether the Minister had fallen into jurisdictional error in deciding not to revoke an earlier decision to cancel the applicant's visa under s 501 of the *Migration Act 1958*

(Cth) (the visa holder had a substantial criminal record and did not pass the character test). The applicant had been convicted of manslaughter after he killed a man who was having an affair with his former wife. In support of his request that the Minister revoke the visa cancellation decision under s 501(3A), the applicant provided submissions and supporting material that there was a risk to his safety if he were removed to Fiji arising from threats of retribution from the families of both the deceased and the applicant's ex-wife. In declining to revoke the earlier decision, the Minister considered that it was unnecessary at that time to determine whether Australia owed the applicant non-refoulement obligations because it was open to the applicant to apply subsequently for a protection visa and the retribution risk could be considered then. This was held by Robertson J to involve jurisdictional error in circumstances where there was no basis to suggest that the applicant could or would apply for a protection visa. The relevant question was the risk to the applicant's safety as a matter of fact and not as an engagement of Australia's non-refoulement obligations. Accordingly, the Minister had misunderstood the law in deciding whether or not to revoke the cancellation decision.

His Honour then identified the next issue as whether the Minister's reasoning disclosed jurisdictional error. It was held that the error had a material effect on the Minister's decision because it was on the basis of the erroneous view that the risk of retribution was a harm which could be assessed at a later stage and need not be undertaken at the time of the consideration whether or not to exercise the power of revocation. The Minister's 'satisfaction' which enlivened the power to revoke under s 501(3A) was a state of mind which had to be formed on a correct understanding of the law. This was an implied condition of the valid exercise of the power. Because the Minister had incorrectly understood the law, there was jurisdictional error.

It is notable that Robertson J found it unnecessary to determine whether the risk of retribution was a mandatory relevant consideration in the *Peko-Wallsend* sense. *Goundar* was determined after conducting a sophisticated analysis which was directed to the issue whether the Minister's misunderstanding of the law constituted jurisdictional error in the particular statutory context and factual circumstances.

There is danger in resorting to formulas and slogans in this area. The Federal Circuit Court is at the coalface of Commonwealth judicial review, most notably in migration cases. With such a heavy workload it is tempting for some judges to look for ways to manage their court dockets. Pithy slogans and aphorisms gain in attraction as convenient shorthand expressions to cut through what are often difficult and complex issues. The point is well illustrated by the way in which some courts have resorted to aphorisms in adopting an unduly narrow view of the availability of judicial review for errors in fact-finding. Refuge is often found in Brennan J's observation in *Waterford v The Commonwealth*[10] that there 'is no error of law simply in making a wrong finding of fact'.[11] What is frequently overlooked is that this statement was made in the specific context of review on a question of law under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) and that it was accompanied by a statement that a finding by the Administrative Appeals Tribunal (AAT) on a matter of fact cannot be reviewed on appeal under s 44 'unless the finding is vitiated by an error of law'.

An inadequate appreciation of these subtleties can be productive of error in a judicial review case which raises a challenge to a finding of fact. The Full Court recently handed down a decision which contains a timely and forceful reminder that findings of fact are amenable to jurisdictional error review, including on such familiar grounds as procedural unfairness, reaching a finding without any logical or probative basis and unreasonableness in the legal sense (see *CQG15 v Minister for Immigration and Border Protection*[12] (*CQG15*)). Such review may be available even where the finding of fact relates to a person's credibility — a point which is sometimes overlooked when an overly simplistic view

is taken of what McHugh J said in *Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*,[13] when his Honour observed that a finding of credibility 'is the function of the primary decision-maker *par excellence*'. As the Full Court emphasised, findings on credibility are a function of a primary decision-maker, but that does not immunise them from judicial review for jurisdictional error.[14]

Unreasonableness and proportionality

Not unexpectedly, some advocates have viewed the High Court's decision in *Minister for Immigration and Citizenship v Li*[15] (*Li*) as removing some of the shackles which previously were thought to inhibit review for *Wednesbury* unreasonableness. This is reflected in the large number of cases which are now coming before the courts which have claims of unreasonableness and illogicality at their forefront. Few of those claims have succeeded.

In *Li*, the plurality (Hayne, Kiefel and Bell JJ) appeared to open the door to more rigorous judicial review of administrative action for unreasonableness and/or proportionality by:

(a) observing that an obviously disproportionate response by the Tribunal there in refusing adjournment applications would be one path to a conclusion of unreasonableness (even though the appeal had not relied upon proportionality);
(b) stating that the 'legal standard of reasonableness' should not be considered as limited to what is in effect an irrational, if not bizarre, decision;
(c) indicating that a conclusion of unreasonableness 'may be applied to a decision which lacks evident and intelligible justification'; and
(d) acknowledging that unreasonableness may be established not only where reasons have been provided; also, even if they have not, the court may not be able to comprehend how the decision was arrived at.

Chief Justice French and, perhaps even more so, Gageler J were both more cautious in their approaches in *Li* to the ambit of review for unreasonableness. Yet, even though proportionality was not raised directly in *Li*, French CJ stated that 'a disproportionate exercise of an administrative discretion … may be characterised as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves'.[16]

Subsequent intermediate appellate court case law has sought to tease out and define the limits of judicial review for both unreasonableness in the legal sense and disproportionality. It is convenient to deal with those grounds of review in turn while not denying the overlap.

Unreasonableness

The Full Court's decision in *Minister for Immigration and Border Protection v Singh*[17] (*Singh*) establishes the following relevant principles concerning judicial review of the exercise of a discretionary power for unreasonableness in the legal sense:

1. Legal unreasonableness 'is invariably fact dependent' and requires a careful evaluation of the evidence. The outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles rather than by way of an analysis of factual similarities or differences between individual cases.
2. There is a presumption of law that the Parliament intends an exercise of statutory power to be reasonable.
3. The concept of legal unreasonableness can be 'outcome focused' such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the characterisation of an underlying jurisdictional error.

4. Where reasons are provided, they will be the focal point for an assessment as to whether the decision is unreasonable in the legal sense, and it would be a rare case to find that the exercise of a discretionary power is legally unreasonable where the reasons demonstrated a justification.
5. Perhaps most importantly of all, the standard of legal unreasonableness applies across a wide range of statutory powers, but the indicators of legal unreasonableness are found in the scope, subject and purpose of the relevant statutory provisions, as well as being fact dependent.

Some of these matters were further developed and explained in *Minister for Immigration and Border Protection v Stretton*[18] (*Stretton*). Chief Justice Allsop made the following pertinent observations concerning jurisdictional error and legal unreasonableness:

> The proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another. Both concepts concern the lawful exercise of *power*. For that reason alone, any attempt to be comprehensive or exhaustive in defining when a decision will be sufficiently defective as to be legally unreasonable and display jurisdictional error is likely to be productive of complexity and confusion. One aspect of any such attempt can be seen in the over-categorisation of more general concepts and over-emphasis on the particular language of judicial expression of principle. Thus, it is unhelpful to approach the task by seeking to draw categorised differences between words and phrases such as arbitrary, capricious, illogical, irrational, unjust, and lacking evident or intelligent justification, as if each contained a definable body of meaning separate from the other.[19]

Moreover, the Chief Justice said:

> The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.[20]

In separate reasons for judgment in *Stretton*, I emphasised the importance of paying close attention to the particular statutory framework within which the challenged decision has been made, with particular reference to indicators in the legislation which assist in determining whether a particular exercise of discretion is one which exceeds the authority of the decision-maker and is unreasonable in the legal sense. Pointers in the *Migration Act 1958* (Cth) which informed the breadth of the nature and ambit of the Minister's authority to cancel a visa under s 501 included:

(a) the absence of an express list of considerations for the Minister to take into account;
(b) the breadth of the stated object of the legislation as regulating 'in the national interest' the movement in and out of Australia of non-citizens;
(c) the Minister's political office and personal accountability to the Parliament, as well as the absence of any right of review to the AAT if the Minister (as opposed to a delegate) makes the decision;
(d) the Minister's obligation to provide a statement of reasons from which it can be ascertained whether there is an evident and intelligible justification for the decision; and
(e) the Minister's power to either refuse to grant or to cancel a visa is a substantive

power, as opposed to being a power of a procedural nature, such as the power to adjourn a Tribunal hearing, as was the case in both *Li* and *Singh*.

Matters such as these will be viewed by some as informing the intensity of the scrutiny of judicial review for jurisdictional error and as beacons for judicial self-restraint. They might even be described as matters which are relevant to judicial deference. Perhaps nothing much turns on how the matters are described, although my personal preference is to characterise them as relevant matters to be considered in performing the judicial task of identifying whether or not there has been jurisdictional error. Naturally, the relevant surrounding facts and circumstances of a particular case are also important, but the task of identifying jurisdictional error is essentially an exercise in statutory interpretation with the object of assessing whether a particular error is beyond the power or authority conferred upon the primary decision-maker by the Parliament. Greater certainty is likely to be achieved if the Parliament and the executive devoted more time and attention to ensuring that legislation more clearly defined the function and powers of primary decision-makers.

Proportionality

It is ironic that, at a time when proportionality appears to be gaining more traction as a relevant principle in judicial review of administrative action in Australia, serious questions are being raised about its future in the United Kingdom. The current division in the Supreme Court there is shaping as another Brexit — a topic to which I will return shortly.

It has been a rocky road for proportionality in judicial review in Australia. That is perhaps unsurprising given the history of the reluctance of some judges to adopt and apply that concept in either reviewing the validity of subordinate legislation or using it as a tool of analysis in testing the constitutional validity of legislation. It is appropriate to trace some of that history because, like rowers, lawyers look backwards to move forwards.[21]

Proportionality in testing the validity of subordinate legislation

The use of proportionality to test the validity of subordinate legislation has long antecedents. It can be traced back at least to Dixon J's judgment in *Williams v Melbourne Corporation*.[22] There, in the context of reviewing a local government by-law for unreasonableness, Dixon J said that the true nature and purpose of the by-law making power had to be determined and that, even though there may appear to be a sufficient connection between the subject of the power and that of the by-law, on closer analysis it may emerge that the true character of the by-law is such that 'it could not reasonably have been adopted as a means of attaining the ends of the power'.[23]

In *Commonwealth v Tasmania*[24] (*Tasmanian Dam Case*), Deane J held that subordinate regulations had to be 'capable of being reasonably considered to be appropriate and adapted for giving effect to the [particular] Convention' which was relied upon as the source of power. His Honour asked whether the regulations 'would lack any reasonable proportionality to the purpose of discharging' an obligation created by the Convention.

In *South Australia v Tanner*,[25] the majority (Wilson, Dawson, Toohey and Gaudron JJ) described the test of validity as whether 'the regulation is capable of being considered to be reasonably proportionate to the end to be achieved',[26] whilst emphasising that it was not enough that the Court itself viewed the regulation as 'inexpedient or misguided'.[27] Rather, the regulation needed to be 'so lacking in reasonable proportionality as not to be a real exercise of the power'.[28] The issue was the validity of a planning regulation which totally prohibited the construction of a piggery, zoo or feedlot in a watershed, so as to prevent a planned development comprising shops and offices, an aviary and carparks. The majority

acknowledged that, on one view, having regard to the nature of the proposed development, enforcing the prohibition could be described as using a sledgehammer to crack a nut. Nevertheless, after noting that the Court must be cautious not to impose its own 'untutored judgment' on the legislator, the validity of the regulation was upheld.

There is a helpful discussion of 'proportionality' in reviewing the validity of delegated legislation in the Full Court's decision in *Minister for Resources v Dover Fisheries Pty Ltd*.[29] Justice Gummow traced the history of the concept of 'reasonable proportionality' as a criterion for assessment of validity in constitutional and administrative law and how it entered the common law stream in the United Kingdom from Europe. Presciently, he remarked how the concept of proportionality might be adopted as a ground of review of administrative action, perhaps as an adjunct to *Wednesbury* unreasonableness,[30] citing the House of Lords' decision in *R v Secretary of State for the Home Department; Ex parte Brind*.[31] Justice Gummow described the 'proportionality doctrine' as having taken root in Australia, including in some areas of federal constitutional law involving both purposive and non-purposive prohibitions or restrictions. His Honour said that, whatever may be the sweep of the proportionality principle in federal constitutional law, when the issue of the validity of delegated legislation arises the proportionality principle is 'differently focused'. The fundamental question there is whether the delegated legislation is within the scope of what the Parliament intended when enacting a statute which empowers a subordinate authority to make law under delegation.

Some judges are troubled by the danger that proportionality can draw a court into overstepping the legitimate limits of the judicial function. These concerns are illustrated by the decision of the New South Wales Court of Appeal in 1996 in *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd*,[32] where proportionality was raised as a ground of review of the validity of an environmental planning instrument which was a form of delegated legislation. Handley JA stated that, in his view, the High Court authorities had not yet established proportionality as an independent ground for invalidity of delegated legislation. He concluded that a state environmental planning policy could not be declared invalid for lack of proportionality. Cole JA described as 'unresolved' in Australia whether proportionality was an independent ground of invalidity of subordinate legislation, while Sheller JA said, in effect, that if it was available it attracted 'a much higher threshold'.

More recently, in *Vanstone v Clark*,[33] Weinberg J described it as being 'tolerably clear' that delegated legislation made pursuant to a purposive empowering statutory provision is liable to be held invalid if it fails the test of 'reasonable proportionality'.[34] There is a valuable discussion of the history of proportionality in that judgment. Justice Weinberg noted that instances of delegated legislation being struck down for lack of reasonable proportionality were 'very much the exception, rather than the rule' and that most challenges have failed.[35] In those circumstances, it might be thought that proportionality adds little to the broader concept of unreasonableness. The same could be said concerning the use of proportionality as an analytical tool in judicial review of administrative action.

Proportionality in constitutional review

The focus of this article is not on constitutional law; thus I will confine my comments on the use of proportionality in that area. Proportionality has been used in a variety of constitutional law contexts, including in relation to the external affairs, the defence power, the implied freedom of political communication, the corporations power, the incidental power and maintenance of the constitutionally protected system of representative government.[36]

In *McCloy v New South Wales*[37] (*McCloy*), in determining whether New South Wales legislation imposing restrictions on private funding of political candidates and parties was invalid as impermissibly infringing the implied freedom of political communication, the plurality held that, in determining whether the law was reasonably appropriate and adapted to advance a legitimate purpose, it was appropriate to apply what was described as 'proportionality testing'. The plurality described 'proportionality testing' as involving the following three stages:

- *suitable*: as having a rational connection to the purpose of the provision;
- *necessary*: in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and
- *adequate in its balance*: a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

The Hon Carmel McLure QC recently described proportionality testing as approved by the plurality in *McCloy* as reflecting a choice that only the High Court could make and that:

> It has the potential to widen the freedom and thereby reduce the scope of legislative and executive power. It also comes closer to a merits *review* of the exercise of legislative and executive powers than does the narrow proportionality test. On my reading of *McCloy*, there is no appetite for a 'deference' or 'margin of appreciation' approach which goes beyond that built into the test.[38]

I will say more below about *McCloy* in the context of judicial review of administrative action. Suffice it to say that the High Court is not unanimous in embracing proportionality testing in constitutional review. In *McCloy*, Gageler J identified the following two principal reservations concerning the content and application of the plurality's approach[39] (which is sometimes described as 'structured proportionality': see *Murphy v Electoral Commissioner*[40] (*Murphy*)):

1. The approach, which draws on jurisprudence from Europe (including the United Kingdom), Canada and New Zealand, incorporates varying degrees of latitude afforded to governmental action, and these degrees of latitude are rarely captured in generic tests of proportionality because they are embedded within the institutional arrangements and practices within which the tests are applied. In other words, the application of tests of proportionality in those jurisdictions is affected by subtle considerations of judicial self-restraint and deference.
2. The third step in proportionality testing — namely, whether there is an adequate balance between the purpose served by the restriction and the extent of the restriction on the protected freedom — may not be a fully appropriate 'criterion of validity which is sufficiently focused adequately to reflect the reasons for the implication of the constitutional freedom and adequately to capture considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed'. The adoption of 'principled balancing' only at the third and final stage of the analysis serves to highlight the first reservation.

While not rejecting proportionality as an analytical tool along the lines of that applied in *Lange v Australian Broadcasting Corporation*[41] (*Lange*), Gageler J described as 'imperative' that the entire analysis needs to be undertaken in a manner which pays due regard to the reasons for the implication of the constitutional freedom to which the *Lange* analysis applies and protects. His Honour said in *McCloy*:

> Whatever other analytical tools might usefully be employed, fidelity to the reasons for the implication is in my view best achieved by ensuring that the standard of justification, and the concomitant level or intensity of judicial scrutiny, not only is articulated at the outset but is calibrated to the degree of risk to the system of representative and responsible government established by the *Constitution* that arises from the nature and extent of the restriction on political communication that is identified at the first step in the analysis.[42]

It is unclear whether such reservations about 'structured proportionality' is what French CJ and Bell J had in mind when, in their recent joint judgment in *Murphy*, their Honours emphasised that the test of proportionality was not universal in constitutional law challenges. Using firm language, their Honours said:

> The adoption of that approach in *McCloy* did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law. It is a mode of analysis applicable to some cases involving the general proportionality criterion, but not necessarily all. For example, as Kiefel J observed in *Rowe*:
>
> > 'A test of reasonable necessity, by reference to alternative measures, may not always be available or appropriate having regard to the nature and effect of the legislative measures in question.'[43]

Proportionality in judicial review of administrative action

The availability and utility of the concept of proportionality in judicial review of administrative action in Australia has been, and remains, controversial. In *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-Stock Corporation*,[44] a case brought under the ADJR Act, Gummow J referred to Professor Margaret Allars' identification of proportionality as one of three 'paradigms' of unreasonableness. The applicant argued there that the withdrawal of its licence to export one shipment of live sheep in order to relieve the pressure for a total ban on live sheep exports was out of proportion in relation to the scope of the licensing power, which was tied to the purposes of promoting, controlling, protecting and furthering the interests of the Australian livestock industry. Justice Gummow remarked that how this task was discharged was very much 'a matter for judgment under all of the circumstances' and that, if he had had to determine the challenge based on proportionality, he would not have described the revocation of the licence as one involving 'a disproportionately arbitrary manner as to attract review on *Wednesbury* grounds'.[45]

In 1998, in another New South Wales Court of Appeal decision (see *Bruce v Cole*[46]), judicial review was sought of a decision by a statutory Conduct Division reporting on whether a Supreme Court judge should be removed from office on the ground of proven misbehaviour or incapacity. Chief Justice Spigelman accepted that a complete lack of proportion between the consequences of a decision and the conduct upon which it operates may manifest unreasonableness in the *Wednesbury* sense. But he expressly rejected the proposition that proportionality was a separate ground of review of administrative action. The Chief Justice observed that the concept was 'plainly more susceptible of permitting a court to trammel upon the merits of a decision than *Wednesbury* unreasonableness'.[47]

In *Attorney-General for the State of South Australia v Corporation of the City of Adelaide*,[48] the validity of a local government by-law which prohibited persons from preaching, canvassing, haranguing or distributing printed material on any road without permission of the local council, was challenged as:

(a) infringing the implied constitutional freedom of communication on political and governmental matters; and
(b) an unreasonable exercise of the by-law making power and was not a reasonably proportionate or proportionate exercise of that power.

The High Court rejected both grounds. The Chief Justice had the following to say about proportionality:

> The difficulties of making out a challenge to validity on the basis of unreasonableness no doubt explain the focus in the third respondent's written submissions on the ground of contention asserting lack of reasonable proportionality. *Proportionality is not a legal doctrine. In Australia it designates a class of criteria used to determine the validity or lawfulness of legislative and administrative action by reference to rational relationships between purpose and means, and the interaction of competing legal rules and principles, including qualifications of constitutional guarantees, immunities or freedoms.* Proportionality criteria have been applied to purposive and incidental law-making powers derived from the *Constitution* and from statutes. They have also been applied in determining the validity of laws affecting constitutional guarantees, immunities and freedoms, including the implied freedom of political communication which is considered later in these reasons.[49]

It is notable that these observations were directed to proportionality as a class of criteria which is used to determine the validity or lawfulness of both *legislative and administrative actions*.

This conjunction arose again in *McCloy*, which was primarily a constitutional law case. However, it is notable that on this occasion, in a joint judgment comprising the Chief Justice, Kiefel, Bell and Keane JJ, the following statements were made concerning 'proportionality' (which echo the Chief Justice's earlier observations in 2013):

> As noted, the last of the three questions involves a proportionality analysis. The term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative *or administrative acts* are within the constitutional or legislative grant of power under which they purport to be done. Some such criteria have been applied to purposive powers; to constitutional legislative powers authorising the making of laws to serve a specified purpose; to incidental powers, which must serve the purposes of the substantive powers to which they are incidental; and to powers exercised for a purpose authorised by the *Constitution* or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication. Analogous criteria have been developed in other jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools which, according to the nature of the case, may be applied in the Australian context.[50]

Different views have been expressed as to whether the plurality's observations, albeit by way of obiter, represent an acceptance of proportionality as a class of criteria which is relevant to judicial review of administrative action. In *Stretton* both the Chief Justice and I (Wigney J agreed with both of us) drew attention to this passage in *McCloy* concerning the place of proportionality in judicial review of administrative action, including the plurality's acceptance that 'unreasonableness' can accommodate a proportionality analysis by reference to the scope of the power.

In two separate single instance decisions of the Federal Court, McKerracher J has taken a cautious approach. In *Lobban v Minister for Justice*,[51] his Honour stated that disproportionality is not a recognised independent ground of jurisdictional error in Australian law,[52] citing *Bruce v Cole*.[53] But he accepted that disproportionality may be a factor to be taken into account in considering whether an administrative decision is unreasonable in the legal sense, citing French CJ's observations in *Li*.[54] There the Chief Justice described the possible characterisation of a disproportionate exercise of an administrative discretion by, for example, taking a sledgehammer to crack a nut, as irrational and also as unreasonable simply on the basis that it exceeds what on any view is necessary for the purpose it serves. Justice McKerracher then added that, under existing Australian law, disproportionality does not offer a standalone basis for establishing jurisdictional error and that nothing said in *McCloy* affects the position.[55]

Subsequently, in *Renzullo v Assistant Minister for Immigration and Border Protection*,[56] McKerracher J described *McCloy* as being 'not particularly helpful' in the context of

determining whether proportionality had a role in determining whether an administrative act is within power because that decision concerned examination of state legislation in which issues of constitutionality arose; however, his Honour appeared to accept that proportionality may be relevant to the consideration of whether or not the exercise of an administrative discretion was unreasonable in the legal sense.

It may confidently be expected that there will be further refinements in the use of proportionality as an analytical tool in administrative law, reflecting what has occurred in the constitutional law context. One aspect which I expect will receive close attention relates to the fact that the concept of proportionality operates by reference to the purpose of a statutory provision, but the search for a single purpose of a statutory provision can be elusive. The point was well made by Gleeson CJ in *Carr v Western Australia*,[57] in the context of highlighting the difficulty in some cases of applying a purposive construction to particular statutes. Both at common law and under some interpretation legislation, a construction of a provision which promotes the purpose or object underlying the Act is to be preferred to one which would not. But, as Gleeson CJ observed,[58] that general rule of interpretation may be of little assistance where a statutory provision strikes a balance between competing interests (as is so often the case). The reality also is that, in many if not most cases, there is uncertainty as to how far a particular statutory provision goes in seeking to achieve the underlying purpose or object of an Act, assuming that there is such a single purpose. His Honour highlighted the difficulty by reference to the construction of taxation legislation, the underlying purpose of which is to raise revenue for government. His Honour said:

> No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.[59]

These sorts of difficulties can also arise when proportionality is raised in challenging a decision to refuse to grant or to cancel a visa on character grounds under s 501 of the *Migration Act 1958* (Cth). It may be accepted that protecting the Australian public is one of the purposes which is served by this statutory power, but it would be wrong to view it as the only or even the most important purpose. Another is to protect family values as an important aspect of the 'national interest'. The presence of multiple purposes and the related question of how competing purposes can be reconciled add to the complexity of applying a proportionality analysis, as is demonstrated by cases such as *Stretton* and *Minister for Immigration and Border Protection v Eden*.[60]

Interestingly, Sir Anthony Mason has weighed into the debate as to the significance of the obiter observations by the plurality in *McCloy* for judicial review of administrative action. In a recent article, Sir Anthony described how the use of proportionality as a possible ground of judicial review of administrative action has been the subject of 'ongoing controversy'.[61] He noted its possible use as an adjunct to *Wednesbury* unreasonableness or as an independent but related ground, and the absurdity standard attaching to *Wednesbury* unreasonableness. Sir Anthony referred to the High Court's decision in *Li*, which he described as possibly signalling a softening in the High Court's attitude to the *Wednesbury* unreasonableness standard and as revealing a possible willingness to embrace the use of proportionality in judicial review, at least in conjunction with *Wednesbury* unreasonableness. While acknowledging that *Li* hardly gave a 'ringing endorsement of the place of proportionality in judicial review', Sir Anthony saw it as suggesting a more positive attitude to the use of proportionality in that setting.

After noting the relevant statements in both *Li* and *McCloy*, Sir Anthony concluded his paper with the following observations:

> Finally, what does the future hold for *Wednesbury* reasonableness and proportionality in the area of judicial review of administrative action, in particular where statutory limitations impinge on freedom of communication and other rights or negative limitations on legislative power arising under the *Constitution*? Consistency would seem to require a stricter standard of review than that provided by the *Wednesbury* absurdity standard. In this respect, the judgments of the UK Supreme Court in *Pham v Secretary of State of the Home Department* and *Keyu v Secretary of State for Foreign and Commonwealth Affairs* merit close attention.[62]

Turning to those and other UK cases, the current status of proportionality in UK public law appears even more uncertain. In *Kennedy v Information Commissioner (Secretary of State for Justice Intervening)*[63] (*Kennedy*), a majority of the UK Supreme Court appeared to accept that both reasonableness and proportionality were principles of judicial review, particularly where important rights were at stake. Emphasis was placed on the need to recognise that the nature of judicial review in every case depended on the context. Professor Paul Craig's view — that 'both reasonableness review and proportionality involved considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context' — was endorsed. This approach was considered to be relevant in judicial review of administrative action even where that occurred outside the scope of the *Convention for the Protection of Human Rights and Fundamental Freedoms* and EU law.

The Supreme Court's decision in March 2015 in *Pham v Secretary of State for the Home Department*[64] (*Pham*) highlighted the extent to which there are divisions in the Court regarding the use of proportionality in judicial review of administrative action. The case concerned a challenge to the Home Secretary's decision to deprive the appellant of British citizenship because he had received terrorist training in Yemen. The Court sat seven members. Lord Mance (with whom three other judges expressly agreed) referred to *Kennedy* and described proportionality as 'a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction' and that, whether or not the principle was applied under EU, Convention or common law cases, context would determine the appropriate intensity of review.

The same three judges in *Pham* who agreed with Lord Mance also expressed agreement with the separate judgment of Lord Sumption, notwithstanding that his views regarding proportionality appear more restrained. Lord Sumption acknowledged that the courts had applied a proportionality test to acts of public authorities which were said to contravene principles of EU law and/or to interfere with the rights protected by the *Convention for the Protection of Human Rights and Fundamental Freedoms* (both of which incorporate proportionality as an integral aspect of legal justification), but he stated that the courts had not adopted proportionality generally as a principle of English public law. His Lordship then added that, while not adopting the principle of proportionality generally, English courts had 'for many years stumbled towards a concept which is in significant respects similar, and over the last three decades has been influenced by European jurisprudence even in areas lying beyond the domains of EU and international human rights law'.[65]

Lord Sumption referred to the differences between proportionality at common law and the principle when applied to the Convention, namely that:

(a) a proportionality test may require the Court to form its own view of the balance which the decision-maker has struck and not just decide whether it is within the range of available rational balances;
(b) the proportionality test may require attention to be directed to the relative weight

accorded to competing interests and considerations; and

(c) even heightened scrutiny at common law is not necessarily enough to protect human rights.[66]

In a separate judgment, Lord Reed commented that it might be helpful to distinguish between proportionality as a general ground of review of administrative action, confining it to the exercise of power to means which are proportionate to the ends pursued, as opposed to proportionality as a basis for scrutinising justifications put forward for interferences with legal rights.[67]

In *Keyu v Secretary of State for Foreign and Commonwealth Affairs*,[68] a five-member UK Supreme Court bench determined an appeal against a decision by two Secretaries of State not to hold a discretionary inquiry into claims that the British Army had been responsible in 1948 for civilian deaths in Malaya. By a majority, it was held that, applying traditional principles of judicial review, the Secretaries of State in the exercise of their discretion had considered the request for an inquiry seriously and rejected it for defensible reasons which made it impossible to stigmatise their decision as unreasonable or irrational. Furthermore, it was held that, if the matter was to be considered by reference to principles of proportionality, the decision was proportionate. Three members of the Court indicated that it was not appropriate for a five-judge panel of the Supreme Court to accept the appellants' argument that the traditional rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality. Their Lordships said that:

> [A shift from rationality to proportionality] would appear to have potentially profound and far reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each interest.[69]

Most recently, in *Youssef v Foreign Secretary*,[70] Lord Carnwath flagged a desire to revisit the relationship between proportionality and rationality with a view to providing lower courts with greater guidance than is contained in 'imprecise concepts' such as 'anxious scrutiny' and 'sliding scales',[71] perhaps reflecting some of the concerns raised by Gageler J in *McCloy*.

It may be too early to seek to state definitively what role proportionality plays in judicial review of administrative action in Australia. However, it is probably safe to state that disproportionality is not a separate ground of judicial review but may inform an analysis of review for unreasonableness in the legal sense. As Katzmann J recently observed in *AMZ15 v Minister for Immigration and Border Protection*,[72] it will be a rare case indeed in which a disproportionate response will lead to a finding of jurisdictional error.

Her Honour further observed that *Stretton* well illustrates how, where a decision under review is a discretionary one, 'there are real dangers in applying a proportionality analysis to an administrative decision without sliding into merits review'.[73]

Values in judicial review, procedural unfairness and good administration

I will turn now to raise what some may view as a more contentious topic. It concerns the importance of values in public law, including judicial review of administrative action.

I referred above to Chief Justice James Allsop's paper entitled 'Values in Public Law', which was given as part of last year's Spigelman oration. It is a paper which rewards close consideration. In it, the Chief Justice discussed five values which have informed the

development and content of the law in Australia limiting the exercise of public power. The relevant values are reflected in the following extract from Professor Roscoe Pound's lectures entitled *The Development of Constitutional Guarantees of Liberty*, in which he described:

> [the] fundamental reasonable expectations involved in life in civilised society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organised society to adjust relations and order conduct, and so are able to apply the force of that society to individuals. Liberty under law implies a systematic and orderly application of that force so that it is uniform, equal, and predictable, and proceeds from reason and upon understood grounds rather than from caprice or impulse or without full and fair hearing of all affected and understanding of the facts on which official action is taken.[74]

The five public law values which were identified and analysed by Allsop CJ are:

1. public power needs to be reasonably certain, so that it can be understood, known and exercised with responsibility by those who yield it and those who are affected by its exercise;
2. the principle of legality requires that there be honesty and fidelity to the *Constitution* and to the freedoms and free society that it assumes;
3. the rejection of unfairness, unreasonableness and arbitrariness;
4. equality and the law; and
5. humanity and the dignity and autonomy of the individual, and the recognition of, and respect for, reciprocity in the human context of the exercise of the power and the necessary humanity of the process which translates in many contexts to the recognition of mercy.

The Chief Justice discussed the importance of judicial power in the context of these values and how the preservation of its independence and authority is a constitutional imperative for the guarantee of liberty. He describes how 'the organisation of power and the independence of the judicial power come to be important elements in reciprocity and consent, as part of the sovereignty of the people'.[75] His Honour is referring to the legitimacy of judicial power and the importance of its widespread acceptance as an essential part of our society and system of government within the framework of the rule of law.

The notorious difficulties of maintaining an appropriate balance between public power and judicial power is illustrated by the principles of procedural fairness. While describing the subject as one which has 'a coherent organised structure based on developed rules and precedents', Allsop CJ said that at its core 'is the abiding informing principles of "fairness"'. He added:

> What is unfair will often be a matter of debate; it will often be affected by the terms of the statute or the content of a precedent; but in essence, it is an enduring human response rooted in democratic society's expectations of equal and fair treatment of individuals by organs of power. Syllogistic reasoning expressed in language seeking to define an operative rule is often inadequate to express why an exercise of power is unfair. That is sometimes a product of an infelicity or inadequacy of language. More often, the difficulty arises from the fact that the exercise of power must be assessed in its human dimension taking into account evaluative assessment of, sometimes indefinable, characteristics and nuances of the human condition. Put bluntly, essential in many analytical reviews of the exercise of governmental power is the partly legal and partly human response to the facts: Is this how people should be subjected to the power of the state?[76]

There is scope for legitimate debate as to what is unfair or not in a particular set of circumstances. The point is well illustrated by the fact that, in recent litigation relating to the accidental disclosure of sensitive personal information by the Department of Immigration and Border Protection, three members of the Full Court found procedural unfairness while, on appeal, seven members of the High Court held that there was no procedural unfairness.

The explanation for these polarised outcomes lies not so much in a disagreement as to the relevant principles but, rather, in the application of those principles and the characterisation of the conduct which is said to be procedurally unfair.

Before proceeding to discuss the High Court's decision in *Minister for Immigration and Border Protection v SZSSJ*[77] (*SZSSJ*), I should at the outset acknowledge and embrace what Sir Anthony Mason described, when reflecting upon his time on the New South Wales Court of Appeal and being reversed on appeal by the High Court, as a 'purifying experience'. Nothing said below is intended to be disrespectful of the High Court.

In early 2014, the Department of Immigration and Border Protection published a report on its website which inadvertently disclosed the personal details of more than 9000 people who were held in immigration detention, some of whom (including the two appellants in *SZSSJ*) were unsuccessful applicants for protection visas.[78] The disclosure was contrary to a provision in the *Migration Act 1958* (Cth) which prohibited the unauthorised disclosure of information on the identity of asylum seekers. KPMG was engaged by the department to do a report on the incident. Both an abridged and unabridged version of the report was provided to the department.

The department contacted people affected by the data breach and said that any implications for them individually would be assessed as part of the department's 'normal processes'. SZSSJ requested further information to enable him to make informed submissions. He was told that the department had commenced an International Treaties Obligations Assessment (ITOA) to assess whether Australia owed him non-refoulement obligations following the data breach. He was not provided any further details about the data breach or how the ITOA was to be conducted. SZSSJ repeated his request for further information about those matters, as well as access to the unabridged version of KPMG's report. These requests were not answered and no further information was provided.

SZSSJ complained of procedural unfairness. His complaint was rejected by the Federal Circuit Court but was upheld on appeal to the Full Court.[79] The Full Court found procedural unfairness because:

(a) where a decision-maker invites a person to make submissions about what should happen in consequence of the decision-maker's own failure to adhere to statutory safeguards of confidentiality, the decision-maker is required to disclose all information relevant to assessment of the claim (subject to proper considerations of confidentiality) and not merely disclose information which is adverse to the person;
(b) the opportunity provided to make submissions in relation to the ITOA was deficient because the individuals could not make meaningful submissions about Australia's non-refoulement obligations arising from disclosure of their personal information without knowing to whom it had been disclosed; and
(c) prior to the appeal to the Full Court, when for the first time the details of the decision-making process were revealed, the appellants were denied information concerning the identity of the decision-maker, the personal nature of the decision-making power, with the consequence that the persons could not sensibly have understood what they were making submissions about, nor did they know the ultimate criteria by which decisions would be made in their individual cases.

The abridged version of KPMG's report found that 104 separate IP addresses had accessed the information, some more than once, and that the entities included media organisations, internet proxies and web crawlers, but the identities of other persons who

had accessed the information was withheld. Significantly, the abridged report acknowledged that there was 'further information' which was not being disclosed publicly because 'it is not in the interests of detainees affected by this incident to disclose further information in respect of entities to have accessed the Document'.

The Full Court considered that in a 'rare' case such as this, where a decision-maker invites submissions in consequence of a failure by the decision-maker personally to adhere to statutory safeguards of confidentiality, the decision-maker must show its full hand (subject to any proper considerations of confidentiality). After acknowledging that no submission had been made that the department was precluded by considerations of bias from addressing the issue, the Full Court observed that it would undermine fairness in this unusual situation if the department did not have to reveal the full circumstances of the data breach. The Minister's argument that there was no procedural unfairness because departmental officials conducting the ITOA process would themselves only have access to the abridged version of the report was not accepted.

The High Court held that the Full Court erred in finding that there was procedural unfairness. In reaching that conclusion the High Court applied what it described as 'some basic principles'. The first was that, in reviewing administrative action for jurisdictional error, a court must not exceed the legitimate ambit of its own power to declare and enforce the law which determines the limits and governs the exercise of the repository's power (citing Brennan J's oft-cited words in *Attorney-General (NSW) v Quin*[80]). The Court added that if, in properly exercising its judicial review function, a court avoids administrative injustice or error, so be it, 'but the court has no jurisdiction simply to cure administrative injustice or error'.

The second basic principle, probably established for the first time by Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,[81] is that, for there to be procedural unfairness, there must have been a 'practical injustice'.

The High Court concluded that what it described as the 'extraordinary' circumstances of the data breach did not give rise to procedural unfairness. It was sufficient that the persons affected were told that an assessment was being conducted in the form of an ITOA in accordance with procedures set out in the *Procedures Advice Manual* and that its purpose was to assess the effect of the data breach on Australia's non-refoulement obligations. Although it was not until the matter reached the Full Court that the appellants learned for the first time that there was a statutory underpinning of the ITOA, this had no effect on what was in fact to occur, and the appellants had not been deprived of an opportunity to submit evidence or make submissions bearing on the subject-matter of their respective ITOAs.

Finally, it was held that the failure to release a full copy of the report was not procedurally unfair because there was no practical injustice in circumstances where an assumption was made in the ITOA process that the appellants' personal information may have been accessed by authorities in their countries of origin. This assumption was sensible, it was held, because 'the true extent of access to the personal information of each affected applicant must in practicable terms have been unknowable'.[82] Thus, even if the appellants could prove by reference to the unabridged report that one or more of the 104 IP addresses was associated with persons or entities from whom they feared harm, the High Court considered that their cases for engagement of Australia's non-refoulement obligations would be advanced no further than the assumption which had already been made in their favour.

The High Court spoke of 'administrative injustice' as something which might be cured as a consequence of judicial review for jurisdictional error but that it was not the object of such review.

There are several points to note. First, as noted above, the essential difference between the Full Court and the High Court relates to their respective characterisations of what had occurred and whether the relevant conduct constituted procedural unfairness. There is no apparent difference in fundamental principle, but the different outcomes highlight the nuances which can arise in applying reasonably well-settled principles.

Second, there is nothing in the Full Court's reasons for judgment which indicates that 'administrative injustice' was the lodestar for its analysis of procedural unfairness.

Third, there is room for debate concerning 'good administration' as a potential value in informing principles and standards of procedural unfairness. For example, in *Kelson v Forward*[83] Finn J concluded that a public agency had engaged in conduct which was procedurally unfair in conducting an inquiry into alleged workplace harassment. His Honour made the following observations on the subject of 'good administration':

> A shared concern both of courts and of public administrators within their particular spheres is with securing 'good administration'. While the respective emphases in, and understandings of, this may differ on occasion, the concern itself is a manifestly desirable and proper one. *In the law, securing good administration can properly be said to be an organising idea for a group of principles which, in exacting procedural fairness, are designed to maintain public confidence in the integrity of administrative government:* see e.g. *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] UKPC 2; [1983] 2 AC 629; *Consolidated Press Holding Ltd v Federal Commissioner of Taxation* [1994] FCA 1367; (1995) 129 ALR 443 at 453.[84]

Fourth, it is not easy to see why it was not a relevant circumstance in determining the content of the requirements of procedural fairness to take into account the fact that the department was responsible for the data breach and needed to show its full hand as an aspect of procedural fairness (it being incontrovertible that the requirements of procedural fairness are flexible and are determined by what is fair in all the circumstances of a particular case[85]).

Fifth, noting that it is equally well established that disclosure of information is normally required if the material in question is credible, relevant and significant, even if it has not been taken into account in the ultimate decision,[86] why was it not procedurally unfair to withhold from the appellants the unabridged version of the report, especially in circumstances where the department's consultants who were responsible for producing the report advised the department that it was '*not in the interests of detainees affected by this incident* to disclose further information in respect of entities to have accessed the information'[87] beyond identifying in the most general terms who had accessed the information? Without knowing more about the redacted information (which may not have been confined to identity information), how can a proper determination be made as to whether or not that information was 'credible, relevant and significant'? And, despite the assumption referred to by the High Court, might not an analysis of Australia's non-refoulement obligations to an individual be affected by the knowledge, if it be the case, that the data had actually been accessed by some person or entity whom the individual particularly feared?

Conclusion

Some questions remain unanswered, but I consider that we are witnessing an important phase in the evolution of judicial review of administrative action in Australia which, when

fully developed, should provide a solid doctrinal foundation for that judicial power and function.

While not suggesting that the values identified by Allsop CJ are necessarily dispositive and determinative in every case, I respectfully agree that they form 'part of the legal framework against which law is construed and moulded, rather than as necessarily providing the content for hard rules of law about limits of power'. The formative role which such values can play should assist in the ongoing challenge of defining the legitimate ambit of judicial review of administrative action within the broader context of the division of power between the three branches of government.

Endnotes

1 [2010] HCA 1; 239 CLR 531
2 Chief Justice James Allsop, 'Values in public law' (2016) 13 *The Judicial Review* 53, 68.
3 [1995] HCA 58; 184 CLR 163.
4 Alan Robertson, 'Nothing Like the Curate's Egg' in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014) 191.
5 [2013] FCA 317; 212 FCR 99.
6 Ibid [97].
7 [1986] HCA 40; 162 CLR 24.
8 [2013] FCA 317; 212 FCR 99, [99].
9 [2016] FCA 1203.
10 [1987] HCA 25; 163 CLR 54.
11 Ibid 77.
12 [2016] FCAFC 146, [38] (McKerracher, Griffiths and Rangiah JJ).
13 [2000] HCA 1; 74 ALJR 405.
14 [2016] FCAFC 146, [36]–[38], [40]–[50].
15 [2013] HCA 18; 249 CLR 332.
16 (2013) 249 CLR 332, 351–2.
17 [2014] FCAFC 1; 231 FCR 437.
18 [2016] FCAFC 11; 237 FCR 1.
19 Ibid [2].
20 Ibid [11].
21 Frederick Wilmot-Smith, 'Blame Robert Maxwell', *London Review of Books*, 17 March 2016, p 33.
22 [1933] HCA 56; 49 CLR 142.
23 Ibid 155.
24 [1983] HCA 21; 158 CLR 1.
25 [1989] HCA 3; 166 CLR 161.
26 Ibid 167.
27 Ibid 168.
28 Ibid.
29 [1993] FCA 522; 43 FCR 565.
30 Ibid 575.
31 [1991] 1 AC 696, 762.
32 [1996] NSWCA 348.
33 [2005] FCAFC 189; 147 FCR 299.
34 Ibid [141].
35 Ibid [161].
36 See generally Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85; Carmel McLure, 'Proportionality — The New Wave' (paper delivered at the NSW Supreme Court Judges' Conference 2016); and Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27 *Public Law Review* 109.
37 [2015] HCA 34; 325 ALR 15.
38 McLure, above n 36.
39 [2015] HCA 34; 325 ALR 15, [141]–[152].
40 [2016] HCA 36; 90 ALJR 1027.
41 [1997] HCA 25; 189 CLR 560.
42 [2015] HCA 34; 325 ALR 15, [150].
43 [2016] HCA 36; 90 ALJR 1027, [37] (footnotes omitted).
44 [1990] FCA 181; 96 ALR 153.
45 Ibid 168.
46 [1998] NSWCA 45; 45 NSWLR 163.
47 Ibid 185.

48 [2013] HCA 3; 249 CLR 1.
49 Ibid [55] (emphasis added).
50 [2015] HCA 34; 325 ALR 15, [3] (emphasis added).
51 [2015] FCA 1361.
52 Ibid [90].
53 [1998] NSWCA 45; 45 NSWLR 163.
54 [2013] HCA 18; 249 CLR 332, [30].
55 Ibid [96].
56 [2016] FCA 412.
57 [2007] HCA 47; 232 CLR 138.
58 Ibid [5].
59 Ibid [6].
60 [2016] FCAFC 28; 240 FCR 158.
61 Mason, above n 36, 109.
62 Ibid 123.
63 [2014] UKSC 20; 2 WLR 808.
64 [2015] UKSC 19; 1 WLR 1591.
65 Ibid [105].
66 Ibid [107].
67 Ibid [113].
68 [2015] UKSC 69; 3 WLR 1665.
69 Ibid [133].
70 [2016] UKSC 3; 3 All ER 261.
71 Ibid [55].
72 [2016] FCA 1195, [77].
73 Ibid.
74 Yale University Press, New Haven, 1957.
75 Ibid 69.
76 Ibid 69–70
77 [2016] HCA 29; 90 ALJR 901.
78 See *SZWAJ v Minister for Immigration and Border Protection* [2016] FCA 1173, [33].
79 See *SZSSJ v Minister for Immigration and Border Protection (No 2)* [2015] FCAFC 125; 234 FCR 1 per Rares, Perram and Griffiths JJ.
80 [1990] HCA 21; 170 CLR 1, 36.
81 [2003] HCA 6; 214 CLR 1.
82 [2016] HCA 29; 90 ALJR 901, [90].
83 (1995) 60 FCR 39.
84 Ibid [138] (emphasis added).
85 See, for example, *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118; *National Companies and Securities Commission v News Corporation Limited* [1984] HCA 29; 156 CLR 296, 312.
86 See *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; 225 CLR 88.
87 Emphasis added.

JUDICIAL REVIEW AND PROPORTIONALITY: MAKING A FAR-REACHING DIFFERENCE TO ADMINISTRATIVE LAW IN AUSTRALIA OR A MISPLACED AND INJUDICIOUS SEARCH FOR ADMINISTRATIVE JUSTICE?

Dr Grant Hooper*

Until relatively recently it was generally accepted that proportionality had no role to play in judicial review of administrative (executive) decision-making.[1] This was despite its international popularity, ability to promote human rights and use in similar common law jurisdictions. However, in *Minister for Immigration and Citizenship v Li*[2] (*Li*), the discussion by both French CJ and the joint judgment of Hayne, Kiefel and Bell JJ raised the possibility of proportionality playing a key and important role in determining whether an ordinary administrative decision was validly made.

The impetus behind the statements of French CJ and the joint judgment in *Li* can be seen to be the perceived need in cases of clear administrative injustice for a more readily available safety net than *Wednesbury* unreasonableness. Yet, as is well known, the merits/legality divide in Australia means that the presence of administrative injustice on its own does not justify the courts setting aside an administrative decision. Further, it is not apparent how much more readily available the proportionality ground of review is or, indeed, if it is a new ground of review in its own right or only a recalibration of the unreasonableness test.

There have been suggestions that proportionality may develop into a new and independent ground of review.[3] If this were to occur, the judiciary would have added to its judicial review arsenal one of the most potent weapons available to address administrative injustice. However, it is a weapon that may come with a high price if it is to be used consistently and effectively. This is because it not only has the potential to have a dramatic impact on the target it is aimed at — decision-makers and those affected by their decisions — but it also imposes substantial obligations on the user — the judiciary. These obligations have the potential to change how administrative law is viewed in Australia. Somewhat bluntly, this change in view can be said to be from the pragmatic common law one of ensuring the legality of government action — which does not include a consideration of whether the most correct or preferable decision was reached[4] — to the more rational and systematic civil or continental view that the judiciary's role includes the balancing of private and public interests to avoid administrative injustice but in a manner that assists with the implementation of policy by rationalising governments' 'intervention into the social sphere'[5] — which involves a consideration of what is the most correct or preferable decision. This 'change in view' does not sit comfortably with the modern notion of parliamentary sovereignty[6] or the 'constitutionalisation' of judicial review which is founded firmly on the separation of judicial power from executive and legislative power.

* *Grant Hooper is a Scholarly Teaching Fellow at Sydney University Law School.* *This article is based on his presentation at 'Administrative Law — Making a Difference', AIAL National Administrative Law Conference, Canberra, 21–22 July 2016.*

To address the above theme satisfactorily, it would be necessary to write a book. This article is, of course, far more limited. Its aim is instead to raise debate and, given Australia's public law foundations, caution against the allure of proportionality.

To provide a skeleton upon which it is hoped the debate about proportionality can be fleshed out, this article will be divided into a further four parts. First, it will provide an overview of the High Court's use of the term 'proportionality' and then offer a general definition based on how proportionality has been used at an international level and more recently by a majority of the High Court. Second, it will take a step back to look at proportionality's European origins to show that, while it initially applied to what we now know as administrative decisions, it was used in a very different constitutional setting to Australia. Third, in light of the difference between the administrative settings of Europe and Australia, the article will explore a number of obstacles to proportionality's introduction here — in particular, the judiciary's reluctance to play more than an indirect role in facilitating good administration; Lord Denning's introduction into the English common law of legitimate expectations and why it was ultimately of little insignificance in Australia; and the difficulties faced by England in implementing the proportionality test in a common law system. Finally, the article will revisit the decision of *Li* and suggest that the reasonableness test in Australia can benefit by incorporating what can only be loosely referred to as a proportionality test. It is a test that is much simpler and far more constrained than the more common 'structured' proportionality test.

Overview: the Australian High Court's use of proportionality in public law

In the 2015 High Court decision of *McCloy v New South Wales*[7] (*McCloy*), the joint judgment of French CJ and Kiefel, Bell and Keane JJ (a majority of the High Court)[8] interpreted the traditional constitutional test of 'reasonably appropriate and adapted'[9] to incorporate what they referred to as 'proportionality testing'.[10] In doing so, they observed that:

> The term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or *administrative* acts are within the constitutional or legislative grant of power under which they purport to be done.[11]

Based on this statement, an international student new to Australia but with some understanding of international human rights law could be forgiven for believing that the use of a proportionality framework in Australian public law is largely uncontroversial and widespread. However, this view is, in a constitutional law setting, too simplistic and, in an administrative law setting, potentially misleading.

It is true that prior to *McCloy* the term 'proportionality' had featured in Australian constitutional interpretation.[12] However, its use was not without controversy[13] and, in any event, the role it has actually played has been limited.[14] It has been limited in particular because it is applied to legislative attempts to restrict guaranteed freedoms or protections in the *Australian Constitution* — freedoms and protections that are limited in number.[15] Further, unlike international human rights law, it has not been used to protect individuals from government action. Instead, it has been used to defend higher-level constitutional principles such as democracy and responsible government.[16]

In an administrative context, up until *Li* in 2013, it was generally accepted that the term 'proportionality' had no role to play in administrative law or, more specifically, judicial review of administrative decision-making.[17] Even after *Li*, its role remains unclear. This is because the two judgments that dealt with 'proportionality' did so in a circumspect manner. Chief Justice French raised the prospect of a proportionality analysis taking place to distinguish between what may be a rational but not a reasonable decision; however, it was not a

possibility he had to explore further, as he found the particular conduct both irrational and unreasonable.[18] The joint judgment of Hayne, Kiefel and Bell JJ raised the possibility that a disproportionate emphasis on one statutory power to the exclusion of another could lead to the conclusion that a decision was unreasonable. However, they too did not have to explore this possibility further, as they saw the decision as a clearly unreasonable one.[19] Accordingly, *Li* on its own can be interpreted as a 'softening' of the absurdly difficult to establish *Wednesbury* unreasonable ground of review[20] but not as establishing the role of proportionality in the judicial review of administrative decisions.

The most obvious reason that proportionality had not featured in Australian administrative law prior to *Li* was the belief that it had the potential to undermine the constitutionally entrenched separation of powers. The separation of powers doctrine in Australia makes it clear that the judicial role vis-a-vis the executive is to ensure that the executive decision-maker (for the purpose of this article, administrative decision-maker) acts legally, not that they make the most correct or preferable, and hence administratively just, decision on the facts. Consequently, if the decision-maker acts within the legal boundaries set by the empowering statute and common law (acts within jurisdiction), the judiciary cannot interfere even though it would have reached a different decision on the facts. In other words, the judiciary cannot substitute its decision for that of the administrative decision-maker, as it is the decision-maker's role to balance competing facts and circumstances to reach the ultimate decision under consideration. If the judiciary was to apply a test of proportionality, it may encroach upon, or even take over, this role.

The use of 'proportionality' as a tool in the judicial review of administrative decision-making is far more controversial, if not radical, than *Li* and *McCloy* suggest, but how controversial or radical is not apparent without a clear definition of proportionality. In an administrative law context, no definition of 'proportionality' has been provided by the High Court and, accordingly, any definition will be somewhat speculative.

What is proportionality?

At an international level there is no doubt that proportionality is a very important and powerful concept. It has been suggested that it leads to the 'ultimate rule of law'[21] and is 'the golden thread woven through much of the fabric of public law'.[22] Huscroft, Miller and Webber refer to proportionality as the '*jus cogens* of human rights law'[23] and state that to 'speak of human rights is to speak of proportionality' and 'that proportionality has overtaken rights as the orienting idea in contemporary human rights law and scholarship'.[24]

It is therefore readily apparent that, internationally, proportionality is intricately connected with the protection of rights. Nevertheless, despite its importance, a precise meaning remains 'either elusive or acquired through abstraction and superficiality'.[25] This is no doubt because, as Kiefel J made clear when writing extrajudicially in 2012, it is used in a variety of ways within individual legal systems and then between legal systems themselves. In this latter regard, it has 'never achieved the status of a general legal principle' in Australia, whereas, in Germany, the law of the European Union and, 'to an extent, the United Kingdom', it is assumed to apply,[26] and in countries such as Canada, New Zealand, South Africa and some European countries it is enshrined in their constitutions.

It follows that in Australia the definition and use of proportionality is in a much more embryonic state than in many other jurisdictions. Naturally, this means that Australia has the advantage of being able to borrow from these other jurisdictions. However, as then Gleeson CJ warned, it also creates the risk of importing a definition of proportionality that does not sit comfortably with Australia's constitutional structure,[27] particularly in light of, as Michael Taggart famously wrote, 'Australian Exceptionalism in Judicial Review'.[28] This

exceptionalism includes a *Constitution* in which a conscious decision was made not to include a Bill of Rights, a notable absence at a federal level of a Charter of Rights, an especially rigid separation of and protection of judicial power (with the price for this protection including judicial restraint when reviewing administrative decisions), legal formalism, the retention of the concept of jurisdictional error, the rejection of the doctrine of deference and a preference for working with doctrinal categories rather than general principles (like proportionality).

While Gleeson CJ's warning is addressed later in the article, it is necessary to start somewhere to find a definition of proportionality. Proportionality is most commonly and popularly understood to be a framework designed to provide a structured and rational means of determining whether a restriction imposed by government on a right, freedom or constitutional protection is permissible. A common formulation involves the following four steps:[29]

1. *Legitimacy*: Can government lawfully limit the right, freedom or protection? If so, does the government action actually constitute a limitation or burden?
2. *Suitability*: Is the government action rationally connected to the objectives the government is pursuing (are the means suitable for achieving the ends)?
3. *Necessity*: Is the government's action the least restrictive means of achieving the ends sought and/or 'there is no obvious and compelling alternative'[30] that will achieve the same ends while being less restrictive or burdensome?
4. *Balancing*: Do the benefits of the limitation (or the importance of the ends) outweigh the cost of infringing the right, freedom or protection? This is often said to be a value judgment seeking to balance the public interest against a private right and is often referred to as 'strict proportionality'.

This formulation will be referred to as the structured proportionality test. While it is a solid basis from which to start, it is important to keep in mind that it is not applied uniformly across jurisdictions, and its application will vary depending upon the factual situation faced. For example, for the majority in *McCloy*, the first part of step 1 did not arise, as it was accepted that the constitutional protection could be appropriately limited. Instead, the majority adopted steps 2 to 4 as a three-part test to structure how the more traditional Australian[31] 'reasonably appropriate and adapted' test should be applied.[32]

It is evident that, in the abstract, the structured proportionality test provides what appears to be a very rational and reasoned way of dealing with a legal problem. Indeed, this is one of the primary justifications for its use as championed by the internationally influential Aharon Barak, who is quoted with approval by the majority in *McCloy*.[33] The promise of rationality and reasoning is alluring, yet a promise is not always fulfilled.

Origins: German and European overview

Proportionality's origins are generally believed to be German. From Germany it spread to the European Union and then to the world.[34]

Proportionality in Germany — or Prussia, as it then was — can be traced back to the late 19th century. However, it is necessary to start a little earlier to understand exactly why it became such an important principle.

Beginning in the late 18th century, German society began to move from one governed by the decree of a 'supreme' king to one governed by a codified law. In 1794 a provision requiring police to take 'necessary measures' to ensure 'public peace' was introduced into German law.[35] The specification of a positive objective necessitated state action, but the qualification

that the action be 'necessary' (the precursor to proportional) suggested there were limits to what action could be undertaken. Understood in this way, 'the law' which had predominantly been about enforcing government action now began to serve the dual role of legitimising and limiting it. This shift meant that the government could still infringe upon individual rights but only if the infringement was authorised by a law — this is the essence of the principle in German law known today as *Rechtsstaat.*

Rechtsstaat's development as a principle has clear similarities to that of the *rule of* law in England. However, the two principles were to operate in very different constitutional settings. In England, Parliament continued to perform a legitimising role in that laws were created to support government action, but the doctrine of 'responsible government' also evolved whereby Parliament became a primary check on government action. This check did not involve the courts; it was a political check and one that was to be 'built into Australia's constitutional structure'.[36]

In contrast, the German Parliament did not develop an effective check on government. Rather, it remained a vehicle for implementing government policy. The institution that instead became the primary check on government action, and hence ensured that *Rechtsstaat* operated in practice as well as theory, was the courts. In taking on this role, the courts assumed the mantle of *vertrauensschutz* — that is, they became the protector of the people's 'trust'. Further, they were not ordinary courts like in England but a separate system of administrative courts. It was in this separate court system that the almost symbiotic relationship between *Rechtsstaat* and proportionality flourished, allowing the courts, in the absence of an express bill or charter of rights, to, for example, review police conduct, limit restrictions imposed on demonstrations, set aside bans on plays and even strike down city ordinances designed to achieve aesthetic rather than safety goals.[37] As observed by Cohen-Eliya and Porat:

> Both [*Rechtsstaat* and proportionality] provide ways to cope with a system in which there are few formal limits to [state] powers. The concept of the *Rechtsstaat* permitted the government to infringe individual rights but only when such infringement was clearly authorized by law. The principle of proportionality further limited this power, permitting the government to exercise only those measures that were necessary for achieving its legitimate goals.[38]

Proportionality remains a central constitutional principle that permeates German law. It is in turn a principle that migrated into general European Union community law.

The European Court of Justice (ECJ) utilised proportionality as early as 1956.[39] By the 1970s its application was largely uncontroversial, as it was accepted that a fundamental principle of European law was that 'the individual should not have his freedom of action limited beyond the degree necessary in the public interest'.[40] At about the same time, inspired by the German principle of *vertrauensschutz*,[41] the ECJ also developed a principle[42] akin to Lord Denning's 'legitimate expectations'.[43] Of particular significance was that it assisted the ECJ, within the framework provided by structured proportionality, to identify which individual rights justified legal protection and hence were to be balanced against the public interest.[44]

Over time, it became apparent that there were 'few areas of [European Union] Community law, if any at all, where [the principle of proportionality was] not relevant'.[45] It also became commonly accepted that a structured proportionality test was to be applied — at least the steps of suitability, necessity and balancing in the strict proportionality sense.[46]

Challenges: administrative justice and good administration

Administrative justice

What constitutes administrative justice is contestable. Based on the *Macquarie Dictionary*, it can be said to mean an administrative decision that is just in the sense that it satisfies three criteria: it is rightfully made, correct and morally right.[47] Understood in this way, it is a definition that sits far more comfortably with the role played by a European judge as opposed to an Australian one.

Europe

Although somewhat trite, it is important to re-emphasise that, in comparison to the common law, the European civil administrative law system is based on a very different view of how 'the law should respond to the exercise of administrative power'.[48] While there are differences between European countries, overall it is a system based on a separate and specialist form of administrative law implemented by specialist administrative courts to facilitate, not just control, state activity. As such, in applying the notion of proportionality to determine if there is a better way to respond, the court (and lawyer) is part of the administrative process and in turn policy implementation. There is no structural obstacle to the judge addressing and determining the merits of an administrative decision. Indeed, the European principle of legitimate expectations has been described as demonstrating 'a sense of administrative morality'.[49]

In Europe, structured proportionality, combined with the concept of legitimate expectations, provides a vehicle for the court 'to optimise the interests of individuals to the extent that achievement of the [government's] policy goal remains factually possible'.[50] In this way, the court is part of the administrative state and as such can openly seek to satisfy all three criteria in the above definition of 'administrative justice', while also actively promoting good administration.

Australia

As already indicated, the Australian constitutionalisation of judicial review is founded firmly on the separation (and protection) of judicial power from executive and legislative power. Australian courts are not, and cannot be, part of the executive government. This has meant that, while there are limits beyond which the executive and legislative cannot encroach, there are limits beyond which the judiciary cannot encroach either. Given the long line of authority, traced back to, and beyond, the iconic judgment of Brennan J in *Attorney General (NSW) v Quin*,[51] this is a position that will not change. This has resulted in the High Court consistently holding that it can only set aside an administrative decision where there is a legal error (or, more precisely, a jurisdictional error) and that, in the absence of a legal error, it is beyond its power to set aside an administrative decision because it seems unfair or, as Kirby J suggested, because there can be seen to be serious administrative injustice.[52] This separation has kept the judiciary's focus primarily upon procedural rather than substantive components of administrative decision-making. To return to the above definition of administrative injustice, this means that the judiciary can address whether a decision is rightfully made but not whether the conclusion ultimately reached is the correct or morally right one.

Given that proportionality evolved to provide a rationale and structured means for European courts to address administrative injustice in its broader sense, not addressing substantive considerations severely limits an Australian court's ability to apply the necessity and balancing steps in the structured proportionality test.

Good administration

Linked to administrative justice, through the notion that a decision should be 'rightfully made', is the concept of good administration or good decision-making. At its best, good administration represents a decision-making process that is quick, efficient, consistent, impartial, fair, rational, open and accountable. It supports the proposition that decision-makers must be able to reach a point where they can finalise their decisions,[53] although they in turn should be able and willing to remedy any oversight when necessary.[54] It recognises the value of consistency in decision-making and includes positive recognition of governmental statements 'of guidelines or of general policy, to guide administrative decision-makers'.[55] It is reflected in legislative directives that administrative tribunals carry out their objectives in a manner that is 'Fair, just, economical, informal and quick'.[56]

The principle of good administration is seen as so important in the European Union that, over and above its significance to proportionality, its citizens have a codified right to it.[57] While not receiving this level of acceptance in Australia, it has been acknowledged as 'an organizing idea for a group of principles'[58] that help determine what is necessary to provide natural justice. It has even been said that, in designing the rules of natural justice, one of the aims is to reduce both 'injustice and inefficiency' by hearing all evidence so the decision-maker is more likely to reach a 'sound conclusion', quelling 'controversies and discontents'.[59]

Nevertheless, despite good administration being a higher-level value informing the content of natural justice, it is not in itself sufficient to invalidate an administrative decision.[60] This was made clear by Gleeson CJ when he observed that the *Australian Constitution* 'does not exist for the purpose of enabling the judicial branch of government to impose its ideas of good administration'.[61] Indeed, it should be noted that the High Court prefers to use the term 'procedural fairness' in place of 'natural justice' due, in practice, to its emphasis on providing fair procedures rather than a substantive outcome.[62]

By linking good administration to procedural fairness, the High Court again limited how involved it can become with the administrative process. Good administration or good decision-making goes well beyond legal compliance[63] and, in particular, the following of fair procedures. This means that the primary responsibility for facilitating good administration remains with executive bodies such as 'tribunals, ombudsmen and internal agency mechanisms'.[64] This approach is consistent with the view expressed by Jerry Mashaw (albeit in an American context) that, while judicial review of administrative action is a necessary feature of modern democratic governance, the fact that the judiciary is not a part of the administrative state or trained in administration creates inherent institutional limitations that mean it itself cannot solve, only manage, conflicts with 'political and managerial accountability systems'. Given such institutional limitations, Australian courts have naturally gravitated to a 'state-limiting' approach to judicial review: they identify the breach of an individual right to justify interfering with state action. In doing so, they are concerned with the efficient 'pursuit of pre-determined goals' by focusing on means rather than ends.[65] This contrasts with the 'optimising' approach of the European courts, which utilise structured proportionality to balance individual interests against public interests to achieve the best end result. Indeed, it has been argued that the failure of English courts to move from this state-limiting to optimising approach has undermined their ability to use structured proportionality.[66]

Proportionality and legitimate expectations: common law and charters

English common law acceptance of legitimate expectations

As Carol Harlow has identified, in the early to mid 20th century, English judicial review of administrative decisions was characterised by restricted grounds of review combined with a strict adherence to precedent and marked judicial constraint.[67] This approach is plainly evident in the 1927 Privy Council appeal from the Australian High Court, *Laffer v Gillen*.[68] That decision was to the effect that natural justice only had to be afforded when the administrative decision was made after a judicial or quasi-judicial style enquiry.[69] For other administrative decisions, the decision-maker[70] was 'responsible to Parliament for his conduct', not to the court — responsible government was to reign supreme.[71] This was particularly significant, as natural justice had been the primary means by which the courts had supervised administrative decision-making. Now that check has almost completely gone. This great and, one may argue, almost blind faith in Parliament's ability to supervise the executive was to continue until the iconic decision of *Ridge v Baldwin*.[72] In that case, the House of Lords reintroduced the notion that administrative decision-makers more generally were required to afford natural justice.

Even after *Ridge v Baldwin*, many judges felt that precedent constrained the application of natural justice to decisions where the individual already had a recognised legal right or interest. Lord Denning sought to sweep this fixation on precedent away by holding that an individual was also entitled to natural justice if they had a 'legitimate expectation'.[73] Unimbued by precedent, 'legitimate expectation' quickly became a term of almost unlimited scope, although it was limited to protecting procedural, not substantive, rights.[74] In England this limitation was in turn unequivocally removed by the 2001 decision of *R v North and East Devon Health Authority; Ex parte Coughlan*[75] (*Coughlan*). In a judgment that did not use, but could now be seen as requiring, a structured proportionality analysis to weigh the expectation of the individual and public policy, Lord Woolf stated:

> Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that ... the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change in policy.[76]

Legitimate expectations continued to flourish in England. As Greg Weeks has observed, while there are a number of issues at play in *Coughlan*,[77] it is clear that 'a doctrine of substantive enforcement of legitimate expectations is now entrenched in English law'.[78] The growth of legitimate expectations is not without its detractors. Christopher Forsyth has suggested that its use is now so prevalent that it is not clear what it actually means and, consequently, it is a doctrine that may 'collapse into an inchoate justification for judicial intervention'.[79] This raises the question whether structured proportionality may prevent such a collapse.[80] This question will be returned to, as the current state of English law suggests it may not. But first Australia's very different approach to legitimate expectations will be examined.

Australia and legitimate expectations

The first time that legitimate expectations featured seriously in the High Court was the decision of *Salemi v Minister for Immigration & Ethnic Affairs (No 2).*[81] Justice Stephen referred to legitimate expectations as a 'fertile' concept for expanding the reach of natural justice to more administrative decisions. He then used it in this way but, in accordance with the theme that has been repeated consistently since, cautioned that the rules of natural

justice were still procedural.[82] In contrast, Barwick CJ attacked legitimate expectations as a concept that was 'eloquent' but of no real usefulness.[83] This difference in opinion was one that was to be repeated many times by different High Court justices — for example, Mason J was to find the term 'legitimate expectations' 'of some benefit',[84] while Brennan J did not.[85]

Ultimately, as I have observed elsewhere,[86] in 1985 the judgment of Mason J in *Kioa v West*[87] utilised legitimate expectation as a doctrinal rationale to ensconce natural justice as a foundational principle of judicial review of administrative decisions.[88] In *Kioa v West*, Brennan J also recognised the wide reach of natural justice but continued to warn against the use of the term 'legitimate expectations'.[89] He believed it was of little utility and perhaps dangerous in that it compromised the court's ability to adhere to the separation of powers. This was because it was the legislature's role to set the legal parameters within which an administrator would make their decision. The judicial role was to enforce the legislature's will by interpreting the statute to determine what these parameters were. This focus on the legislature meant the individual's expectations, whether they be legitimate or not, were irrelevant.[90] Nevertheless, despite the doctrinal differences in the decision, all agreed that natural justice protected procedural, not substantive, rights. This meant that 10 years later the following statement of Brennan J may have had some detractors in England but was uncontroversial in Australia:

> the notion of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the court out of review on the merits.[91]

While considerable controversy was later to be generated by the use of legitimate expectations in the decision of *Minister of State for Immigration and Ethnic Affairs v Teoh*[92] (*Teoh*), it was a controversy related to the content of natural justice rather than its procedural nature. In any event, the controversy that persisted was dispelled in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[93] (*Lam*) and has not arisen again, as it is now generally accepted that it is a term that serves little useful purpose.[94]

Lam's importance rests in its rejection of *Coughlan* and, in particular, the absolute rejection of any possibility that the principle of legitimate expectations could be used to provide a substantive remedy. In this regard, the observations of McHugh and Gummow JJ (to the following effect) could be said to apply just as equally to proportionality as legitimate expectations: in *Coughlan* the doctrine of legitimate expectation as derived from the European civilian system was being assimilated into the English common law. The European system of administrative law depended upon a 'close connection between the administrative and judicial functions'. This did not necessarily pose an obstacle for England, as its constitutional heritage did not include distinct legal principles, such as the separation of powers. However, Australia's written *Constitution* requires there to be a separation of powers, with the result that the judiciary cannot perform 'the executive function of administration', thereby presenting 'a frame of reference which differs from both the English and other European systems'.[95]

Based on *Lam*, it will be extremely difficult to resurrect legitimate expectations so that it can work with the proportionality principle as it does in Europe and to a lesser degree in England.[96]

English common law and proportionality

Although Lord Denning introduced legitimate expectations into the English common law in 1969, it was not until 1984 that the possible introduction of a European form of proportionality was first raised.[97] However, as Aronson and Groves,[98] as well as Creyke, McMillan and Smyth,[99] attest, despite generally positive academic endorsement,[100] this did

not occur. Instead, the application of a structured proportionality test had to await the *Human Rights Act 1998* (UK) (HRA). The HRA requires the courts to examine whether executive decisions contravene the *European Convention on Human Rights* (ECHR)[101] and, in doing so, look to the jurisprudence of the European Court of Human Rights. This legislative intervention gave democratic legitimacy to the introduction of structured proportionality in HRA claims.

In 2001 the House of Lords confirmed that, for claims asserting a breach of the HRA, a structured proportionality test was to be applied.[102] Strictly speaking, the Canadian test from *R v Oakes*[103] was adopted. However, as the late Michael Taggart explained, the *Oakes* test had itself been derived from European jurisprudence.[104] Michael Taggart also makes clear that the House of Lords, or at least Lord Steyn, appreciated that the test they were adopting was at the time one in which 'the intensity of review is somewhat greater' than at common law and, in particular, the *Wednesbury* unreasonableness test.[105] This was because it '*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' and '*may* require attention to be directed to the relative weight accorded to interests and considerations'.[106] Both of these 'mays' clearly indicate that the court is to become more and more involved with the administrative task of weighing the merits.[107] It was said that in applying the proportionality test it was the court's duty to undertake 'an exacting analysis of the factual case advanced'[108] and make 'a value judgment, an evaluation' of the facts.[109] The new duty was embraced so enthusiastically that Lord Hoffmann had no qualms in asserting that 'what matters in any case is the practical outcome, not the quality of the decision-making process that led to it'.[110]

Despite the English judiciary embracing the structured proportionality test in HRA matters, it is still not certain, although I would suggest more likely given recent cases to be considered, that it will be adopted as an independent ground of review in the common law.[111] Even if it is not, the English courts have thrown off the judicial restraint demanded by the *Wednesbury* unreasonableness test and headed down the path of substantive review. It has been openly declared that what they consider to be 'reasonable' will vary depending upon the underlying rights at stake.[112] This 'righting' of judicial review is a course that, once set in motion, is unlikely to change, for, as Thomas Poole observed:

> The current domestic trend towards greater judicial protection of rights (and related developments concerning proportionality) runs with the grain of global developments in public law and related fields, in which human rights seem to find more varied and ever stronger juridical footholds. And it is unlikely that British courts, now they have learned this new language, are going to be easily induced to stop using it.[113]

In contrast, the Australian High Court, in the absence of a legislative direction like the HRA, has eschewed this 'new language'. It has instead continued to emphasise jurisdictional error and the constitutionalising of judicial review based on a traditional conception of the separation of judicial powers — concepts that emphasise legal limits rather than human rights. To return to the theme discussed under administrative justice and good administration, such rhetoric does not support a cultural orientation as seen in Europe, where law is used to structure or guide 'administrative action in pursuit of collective goals'.[114]

English difficulties with HRA / European law proportionality

Despite having settled on a structured proportionality test under the HRA, notions of parliamentary sovereignty and a self-awareness by the English courts of their institutional limitations have continued to cause challenges. Indeed, the challenges seem to have become more apparent in recent years.[115] A few recent cases will briefly be looked at to

identify similar, or greater, challenges that may arise if structured proportionality testing is used to review administrative decision-making in Australia.[116]

R (Rotherham MBC) v Secretary of State for Business, Innovation & Skills[117] (*Rotherham*) was heard by Stewart J. Justice Stewart's decision was upheld by the Supreme Court, although the reasoning of their Lords varied.[118] While not an HRA matter, the decision in question involved the allocation of EU funds by the UK government to different regions within Britain. Justice Stewart was uncomfortable with using a structured proportionality test, even though it was said to apply. He instead reverted to a common law reasonableness test. He did so because he believed the proportionality test was only useful if 'there is a specific legal standard imposed on the Defendant from which the Defendant's decisions derogate'[119] and he could not find such a standard in this instance (such a standard would normally be in another piece of legislation or the HRA, or perhaps it would be a substantive legitimate expectation — as the latter two do not apply in Australia, it is arguable that this difficulty is likely to occur here more often).

On appeal in *Rotherham*, Lords Sumption[120] and Mance[121] agreed that the lack of an identifiable legal standard made it difficult to apply structured proportionality (as did Lord Kerr in a separate decision of *Keyu v Secretary of State for the Home Department*[122] (*Keyu*). Further, as the decision under review involved what Stewart J termed 'political policy and macroeconomic judgment concerning the choice between different potential methodologies of allocation', he believed it was a decision that the government (or state as opposed to courts) was more suited to make and for political reasons should make.[123] Lord Sumption agreed that institutionally and democratically it was not a decision for the court.[124] Lord Neuberger agreed with the institutional reasoning[125] but not that it was a political decision. He stressed that, just because the elected legislature assigned the making of the initial decision to the executive, it did not mean that the decision should not be 'susceptible to judicial oversight'.[126]

A concern about the appropriate roles of the unelected court and the democratically elected government arose again in *Miranda v Secretary of State for the Home Department for the Home Department*[127] (*Miranda*). However, as there was a clearly identifiable right, the issue was whether the Court could legitimately undertake the fourth step in the structured proportionality test: balancing.[128] Concerned with the Court's lack of democratic legitimacy, Laws LJ observed that the fourth step in the structured proportionality test should only be undertaken by the Court to determine whether a 'fair balance'[129] was achieved between a private right and the public interest when it was an obviously 'plain case' it had not been.[130] This was so because striking such a balance is a political decision for the elected government given that the values in issue (in this case, national security and freedom of the press) do not have a common, let alone obvious, measure or standard against which the court could make a legal comparison. The appeal from this decision was handed down in 2016, when the decision on proportionality was upheld. The appeal court's decision, although dealing with the point fairly briefly and not in as definitive a manner as Laws LJ, suggests that, at least in matters of national security (which would extend to foreign policy[131]), it will rarely find against the decision-maker based on proportionality's balancing step.[132]

While the English courts have continued to grapple with the application of structured proportionality, at common law they have become more comfortable undertaking substantive review and have committed to a variable intensity unreasonableness ground of review. This has given rise to suggestions that the two tests lead to similar, if not identical, results and that for consistency and simplicity the Supreme Court should 'authorise a general move from the traditional judicial review tests to one of proportionality'.[133] The strongest call for unification of the common law and HRA doctrine is to be found in the judgments of Lords

Mance, Sumption and Reed in *Pham v Secretary of State for the Home Department*[134] (*Pham*).

At issue in *Pham* was an administrative order stripping a person of his British citizenship for participating in terrorist activities[135] and then the notification that he would be deported. Lords Mance, Sumption and Reed considered the role of proportionality in some detail.[136] Lord Reed was the strongest advocate of structured proportionality being introduced at common law. The vehicle he used to ameliorate concerns of democratic illegitimacy was an extension of what could be loosely described as the principle of legality. In essence, where Parliament authorises the executive to interfere with 'important legal rights', it can be inferred that it wants such interference to be no greater than 'is necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality'.[137] This at face value sounded very similar to German proportionality.

The weakness in Lord Reed's justification, particularly from an Australian perspective, is that the principle of legality does not operate in the presence of 'words of necessary intendment'.[138] If the legislature gives the executive the power to revoke citizenship, for example, it appears reasonably plain that it can use the power and it is the institution that is to balance the individual and public interests. It is perhaps for this reason that, while Lord Mance stated that proportionality was both available and valuable at common law,[139] he emphasised that it did not necessarily mean that the intensity of review would be greater than that already applied by the unreasonableness test. For Lord Mance, proportionality provided a more structured means of reasoning, but the level of intensity was still dependent upon context and the level of judicial restraint exercised in applying it.[140] The difficulty this poses is that, while the steps in the structured proportionality test give the impression of a simpler formulaic reasoning, this impression may be misleading, as the court will still have to make a multitude of policy decisions depending upon the facts, circumstances and politics confronted by the court. Further, just as in *Miranda*, it means that in certain contexts the fourth step — balancing — may be given lip service but in truth it is not seriously undertaken for political reasons.

Lord Sumption's judgment in *Pham* also stressed the similarities between review at common law and proportionality. Given his judgment in the appeal in *Miranda*, where he sought to limit the Court's ability to intervene on review, this at first glance seems surprising. However, on closer examination it may be that he did so for reasons that were diametrically opposite to those of Lord Reed — Lord Sumption's reason being to restrain the application of structured proportionality under the HRA and European law rather than increase the Court's ability to intervene at common law:

> [At common law] the court must of course have regard to the fact that the Home Secretary is the statutory decision-maker, and to the executive's special institutional competence in the area of national security. But it would have to do that even when applying a classic proportionality test such as is required in cases arising under the Convention or EU law.[141]

Lord Carnwath (with whom Lord Neuberger, Lord Mance, Lord Wilson and Lord Sumption agreed) has since observed that 'in many cases, perhaps most, application of a proportionality test is unlikely to lead to a different result from [the] traditional grounds of judicial review'.[142] *Pham* suggests that this statement may be true but provides no clear doctrinal reason why. In the absence of such reasoning, it is difficult to know what level of intensity the court will apply to each step in the structured proportionality test, thereby complicating what is meant to be a straightforward and transparent process.

While there is doctrinal uncertainty, recent decisions illustrate that there is a general agreement that the courts frequently lack the institutional expertise adequately to assess the balancing being undertaken by administrative decision-makers. In Australia there is a similar,

if not greater, awareness. There is less agreement on whether democratic principles mean, in non-HRA cases, a genuine structured proportionality test can be applied and, if it can, how intensely. However, the trend seems to be that, while not preventing review, it is a substantial limit in practice. In Australia, the strict separation of judicial powers can only accentuate such limitations. England at least openly acknowledges that at common law they are willing to undertake substantive judicial review which allows them to delve into the merits thereby providing, at one level, a better fit for structured proportionality. Australian courts do not admit to any such involvement with the merits, although *Li* may suggest a small change in this regard.

Australian proportionality testing based on *Li*

As stated at the beginning of this paper, *Li* did not introduce a structured proportionality test or provide any real guidance as to how proportionality may be used in reviewing administrative decisions.

The relevant administrative decision in *Li* was a tribunal's refusal to grant an adjournment. The refusal meant the applicant's claim had to fail, as she had not passed a mandatory skills assessment. Ms Li had asked for the adjournment on the grounds that the negative skills assessment report she did have was in error and, once corrected, would become a pass. The Tribunal did not respond to Ms Li's argument other than to observe that she 'has been provided with enough opportunities to present her case and [it] is not prepared to delay any further'.[143]

Traditionally, the Tribunal's refusal to grant an adjournment would have been dealt with as a breach of natural justice. However, past attempts by the legislature to exclude natural justice in this particular area of the law saw the court deal with it under an alternative ground of review: unreasonableness.[144] As a ground of judicial review, unreasonableness was rarely successful in Australia.[145] This was because it had been governed by the particularly stringent *Wednesbury*[146] test.[147] This test was that an administrative decision would be set aside only if it was so unreasonable that no reasonable decision-maker could have made it.

After *Li*, it now seems clear that, rather than having one very high standard, the stringency of the unreasonableness test will depend upon the particular legislation under which an administrative decision is made.[148] The possibility that the High Court may decrease the stringency with which the unreasonableness test is to be applied has caused speculation that *Li* represents a step towards a more English, and hence more substantive, approach to judicial review. This in turn suggests some room for a structured proportionality test. However this speculation seems premature.

In England the strictness of the unreasonableness test depends upon the 'nature and gravity of what is at stake',[149] which places the focus firmly on the individual. This individual focus is what allowed the principle of legitimate expectations to become a substantive ground of review. In contrast, like *Lam*, the focus of the High Court in *Li* remains on what the legislature requires.[150] It was just that, in determining what was reasonable, all of the judgments considered the specific statutory power to adjourn in the context of the statute as a whole. By taking this approach, they were able to balance what at first glance seemed an unfettered discretion to grant or refuse an adjournment against the explicit legislative direction to invite the applicant to a hearing — an obligation that had been interpreted as requiring a 'real and meaningful' opportunity for an applicant to appear and present their case.[151]

Where this may be an advance on the court's previous position is that, for an administrative decision to now be valid, not only must the statutory conditions for making an executive

decision exist (the power to adjourn) but the decision-maker must also demonstrate that they have genuinely tried to exercise the other powers and obligations entrusted to them by the legislature (providing a meaningful hearing, as opposed to one where, due to the rejected adjournment, the applicant's claim had to fail).

That the focus in Australia is on what the decision-maker did, not the administrative injustice to the individual, is consistent with the Federal Court's explanations of *Li* in *Minister for Immigration and Border Protection v Singh*[152] (*Singh*) and *Minister for Immigration and Border Portection v Stretton*[153] (*Stretton*). In *Singh* it was observed that in determining reasonableness:

> [The 'intelligible justification' required of a decision-maker by the High Court in *Li*] must lie with the reasons the decision-maker gave for the exercise of power — at least, when a discretionary power is involved. That is because it is the decision-maker in whom Parliament has reposed the choice, and it is the explanation given by the decision-maker for why the choice was made as it was which should inform review by a supervising court …[154]

Similarly, in *Stretton*, Alsop CJ observed that:

> That an assessment whether the decision-maker's conclusion was legally unreasonable may involve some consideration of disproportionality does not authorise the Court to decide for itself what is necessary for the relevant purpose ... The correct question, ... is not whether the Court thinks the decision is reasonable ...; rather it is whether a decision-maker could reasonably come to the conclusion.[155]

Viewed in this light, in Australian judicial review of administrative decisions, proportionality is at present only a 'tool',[156] and a limited one at that. It is a reference to the balancing of statutory powers or procedural obligations imposed by the relevant Act in question. This means that the decision-maker needs to show that any action is undertaken after a consideration of their overall obligations. In *Li* it was the failure of the Tribunal to do just that that allowed the Court to find it was an unreasonable decision and alternatively to suggest that it was a disproportionate response. Viewed in this light, references to proportionality are not an invitation to evaluate the weight of each and every matter that a decision-maker may take into account. Overcoming the English concerns expressed in *Rotherham*, the court is only to examine what can be said to be legal standards derived from the relevant statute and then what each standard means for the other.[157]

Such an examination does not extend to the substantive consideration of the merits; rather, it is a consideration of whether the decision-maker reasonably balanced the procedural obligations placed upon them by the relevant Act and common law. In this way the legality/merits divide continues albeit the High Court has redefined the boundary — a redefinition that creates a rational foundation from which it can seek to ensure that administrators have justified their decisions in accordance with the presumed meaning of the empowering statute.[158] It is also a position that, while still not allowing the Court to directly address administrative justice, allows it to monitor the quality of the administrative decision while avoiding the doctrinal difficulties currently faced by the English courts.

Conclusion

Structured proportionality's origins, the difficulty the English courts have and continue to experience, institutional competence and 'Australian exceptionalism in judicial review', with its focus on jurisdictional error and the separation of powers, all suggest that the use in Australia of structured proportionality to review administrative decisions may create more problems than it solves.

In administrative law, the approach to be preferred to structured proportionality, and one consistent with *Li*, is to treat proportionality not as a ground of review but instead as one 'tool' that may help determine whether a decision is so unreasonable that it should be set aside.[159] Further, it is a tool that must be used in a restrained manner. This means that it is only to be applied to the balancing of the statutory powers and obligations imposed upon the decision-maker by the legislative Act under which the relevant decision is made. The focus can therefore remain on the legislature and the decision-maker themselves. This is an approach that is extremely different from that of the Europeans, who seek to achieve an optimum balance between rights and the public interest. The approach is also different from that of the English, who have undergone a fundamental — indeed, revolutionary — reorientation, with their focus being set firmly on rights.[160] In fact, Australia's approach may be so different that it is safer and less confusing in most instances to avoid the term 'proportionality' and instead follow the more traditional method of utilising but incrementally building upon the existing lexicon for the established grounds of review.

Like Christopher Forsyth's preternatural judicial figure of Minerva J, with 'unrivalled compassion rooted in her soul',[161] it is easy at a very general level to believe that 'judicial review should be 'proportionate and rational'.[162] Yet how this result is achieved is important, for, as Minerva queried, is 'the law of jurisdiction and all the learning and wisdom of the past to be set on one side with its place taken by the modern judge's estimate of what [is] "proportionate"?' It is suggested that in Australia great caution should be exercised before doing so.

Endnotes

1 See the observations of Spigelman CJ in *Bruce v Cole* (1998) 45 NSWLR 163, 185.
2 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
3 In *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [77].
4 See Justice Alan Robertson, 'What is Substantive' Judicial Review? Does It Intrude on Merits Review in Administrative Decision-Making?' (2016) 85 *AIAL Forum* 24, 30–1.
5 Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing, 2000), 16, citing G Frankenberg, 'Remarks on the Philosophy and Politics of Public Law' (1998) 18 *Legal Studies* 177, 180.
6 Albeit not the pure parliamentary sovereignty advocated by Dicey.
7 *McCloy v New South Wales* (2015) 89 ALJR 857.
8 It should be observed that the other three members of the High Court have not yet accepted the necessity or appropriateness of this approach.
9 A test used to determine whether legislative action was unconstitutional when it impinged upon an implied freedom in the *Constitution*.
10 For a comprehensive but succinct analysis, see Anne Carter, 'Case Note: McCloy v New South Wales' (2015) 26 *Public Law Review* 245.
11 *McCloy v New South Wales* (2015) 89 ALJR 857, [4] (emphasis added). The examples given of when proportionality applies ([3]) were implied constitutional guarantees, not general common law grounds of review or even principles of construction.
12 Its use in Australian constitutional interpretation cases can be traced back to Dean J's observations in *Commonwealth v Tasmania* (1983) 158 CLR 1, 259–61. See also, for example, *Leask v Commonwealth* (1996) 187 CLR 579; *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1; *Unions NSW v New South Wales* (2013) 304 ALR 266; *Monis v The Queen* (2013) 249 CLR 92.
13 See, for example, Keane J's observations in *Unions NSW v State of New South Wales* (2013) 252 CLR 530, 576 [129].
14 *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1.
15 Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 86.
16 That is, the freedoms protected have not been seen to be individual rights. See *Unions NSW v New South Wales* (2013) 88 ALJR 227, [19]; and *McCloy v New South Wales* (2015) 89 ALJR 857, [29] (French CJ, Kiefel, Bell and Keane JJ), [120] (Gageler J), [219] (Nettle J), [337] (Gordon J).
17 *Bruce v Cole* (1998) 45 NSWLR 163, 185 (Spigelman CJ); Janina Boughey, 'The Reasonableness of Proportionality In The Australian Administrative Law Context' (2015) 43 *Federal Law Review* 60, 61 and n 5.
18 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351–2. In *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 37 [55], he also observed that 'it designates a class of criteria used to determine the validity of lawfulness of legislative and administrative action by reference to

rational relationships between purpose and means'.

19 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 365–6.

20 Sir Anthony Mason, 'The Use Of Proportionality In Australian Constitutional Law' (2016) 27 *Public Law Journal* 109, 110.

21 David Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004).

22 Joseph Arvay, Sean Hern and Alison Latimer, 'Proportionality and the Public Law' (2015) 28 *Canadian Journal of Administrative Law & Practice* 23, 24.

23 Grant Huscroft, Bradley Miller and Gregoire Webber, *Proportionality and the Rule of Law* (Cambridge University Press, 2014), 3.

24 Ibid 1.

25 Martin Luteran, 'The Lost Meaning of Proportionality' in Grant Huscroft, Bradley Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press, 2014) 21, 21.

26 Kiefel, above n 15, 85–6.

27 *Roach v Electoral Commissioner* (2007) 233 CLR 162 [17] — a warning that was repeated by Gordon J in *McCloy v New South Wales* (2015) 89 ALJR 857, [339].

28 Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1.

29 These steps are primarily adopted from Alec Sweet and Jud Matthews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Columbian Journal of Transnational Law* 72, 75, but take into account the formulation by Huscroft, Miller and Webber, above n 23, 2; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012), 3; the explanation of *McCloy* provided by Mason, above n 20, 119; the Canadian Supreme Court decision of *R v Oakes* [1986] 1 SC 103; and the UK Supreme Court in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700.

30 Mason, above n 20, 119.

31 As developed from US jurisprudence.

32 The other members of the Court did not endorse this approach.

33 *McCloy v New South Wales* (2015) 89 ALJR 857, [72], [74], citing Barak, above n 29.

34 As Kiefel J observed in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 131: 'The term "proportionality" has its origins in Germany. It has been influential in many legal systems, in Europe and elsewhere'.

35 Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) *International Journal of Constitutional Law* 263, citing Article 10(2) of the Allgemeines Landrecht of 1794.

36 Matthew Groves and Janina Boughey, 'Administrative Law in the Australian Environment' in Matthew Groves (ed), *Modern Administrative Law in Australia* (Cambridge University Press 2014), 6.

37 Cohen-Eliya and Porat, above n 35, 273.

38 Ibid 272.

39 *Federation Charbonniere Belgique v High Authority* [1954–56] ECR 292.

40 *Internationale Handelsgesellschaft v Einfuhur-und Vorratsstelle Getreide* [1970] ECR 11125, 1147 (Durtheillet de Lamothe AG).

41 Thomas, above n 5, 42.

42 *August Topfer & Co GmbH v Commission* [1978] ECR 1019, [19].

43 It is arguable that the principle in European law can be traced to an earlier 1966 decision of *Chatillon*, but it was not then called by the term legitimate expectations: see Greg Weeks, 'Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law' in Matthew Groves (ed), *Mondern Administrative Law in Australia Concepts and Context* (Cambridge University Press, 2014) 224, 226–7.

44 As observed in Thomas, above n 5, 42, in 1973 in the decision of *Westzucker GmbH v Einfuhr- und Vorratsstelle fur Zucker* [1973] ECR 723 [6], the Advocate General of the ECJ stated that the Court would only sanction state interference with a person's legitimate expectations if 'public interests predominate'.

45 See *Commission v Greece (FYROM Case)* [1996] ECR 1513, 1533, as cited in Takis Tridimas, 'Proportionality in Community Law: Searching For the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999), 65, 66.

46 *R v Ministry of Agriculture, Fisheries and Food, ex parte Fedesa* [1990] ECR I, 4023.

47 *Macquarie Dictionary*, 2nd Rev (The Macquarie Library, 1987). Speaking extrajudicially in 2012, French CJ listed the elements of administrative justice as, at least, lawfulness, rationality, consistency and fairness: Chief Justice French AC, 'The Rule of Law as a Many Coloured Dream Coat' (speech delivered at Singapore Academy of Law, 20th Annual Lecture, Singapore, 18 September 2013). With the possible exception of 'rationality', the conduct that was being described was of a procedural not substantive nature.

48 Thomas, above n 5, xv.

49 JDB Mitchell, 'Law, Democracy and Political Instiutions' in M Cappelletti (ed), *New Perspectives for a Common Law of Europe* (Leyden, 1978), 361, as cited in Thomas, above n 5, 75.

50 Thomas, above n 5, 84.

51 *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1.

52 *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 77 ALJR 1165, [170].

53 *Chapman v Luminis Pty Ltd* (2001) 123 FCR 62, 256.

54 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 — in particular, 603 (Gleeson CJ), 628 (Kirby J).

55 *Stuart v Chief of the Army* (1999) 94 FCR 445, 454–5 citing Brennan J in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 640.

56 From 1992 to 1 July 2015, see, for example, ss 353 and 397(2) of the *Migration Act 1958* (Cth) in relation to the Migration Review Tribunal and ss 420 and 460 of the *Migration Act 1958* (Cth) in relation to the Refugee Review Tribunal. After 1 July 2015 (when the Refugee Review Tribunal and Migration Review Tribunal were amalgamated as separate divisions of the Administrative Appeals Tribunal), see s 2A(b) of the *Administrative Appeals Tribunal Act 1975* (Cth).
57 Article 41 of the *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/02: see Leah Grolman, *Life Beyond Legality: Lessons from the EU and UK for an Australian Charter or Principle of Good Administration* (1 June 2014) <http://ssrn.com/abstract=2568293>.
58 *Kelson v Forward* (1995) 60 FCR 39, 66 (Finn J).
59 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 380.
60 An exception being Mason CJ in *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1, 20 (citing in support *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629, 638; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 401; *In re HK (An Infant)* [1967] 2 QB 617, 630; and *Hamilton v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 48 FCR 20, 36). Here Mason CJ suggested that a 'duty to accord procedural fairness in connection with a claimant's legitimate expectation' may give rise to a 'broader duty' of good administration. However, with the effective abandonment of legitimate expectations in Australian law, as discussed below, the only practical way of treating 'good administration' now is as a value underpinning procedural fairness. In England, administrative justice has been used as a free-standing ground of review: *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59.
61 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 12; similarly, Dawson J in *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1, 56 warned: 'Good administration cannot of itself offer a sufficient reason for the imposition of a duty to observe fair procedures and the justification must ultimately rest upon fairness itself in all the circumstances.' However, this does not mean that the value of good administration cannot be used in determining what is or is not fair.
62 *Kioa v West* (1985) 159 CLR 550, 585 (Mason CJ).
63 In *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 320, Kirby J, when considering 'Discretionary decisions and policy', observed that:
'The essence of lawful public administration in the exercise of a discretion (as of good decision-making generally) is to keep an open mind concerning the justice, reasonableness and lawfulness in the particular case, even if this sometimes involves a departure from a general policy.'
Kirby J was not suggesting that these were the only criteria to take into account, although it may be suggested that, by giving them priority (ie they were the essence of good decision-making, not just lawful decision-making) over values that he does not mention (such as efficiency and cost-effectiveness), his legal bias was evident.
64 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action Text, Cases & Commentary* (LexisNexis Butterworths, 2015) 1002.
65 For a discussion of the difference between state-limiting and goal-orientated approaches to proportionality, see Luteran, above n 25.
66 Ibid 23.
67 Carol Harlow, 'A Special Relationship? American Influences on Judicial Review in England' in I Loveland (ed), *A Special Relationship? American Influneces on Public Law in the UK* (Clarendon Press, 1995) 79, 83.
68 *Laffer v Gillen* (1927) 40 CLR 86.
69 Ibid 95, citing Higgins J, *Gillen v Laffer* (1925) 37 CLR 210. A requirement for a judicial or quasi-judicial inquiry was driven home by Lord Hewart in *R v Legislative Committee of the Church Assembly* [1928] 1 KB 411, 415.
70 Who was in that instance a Minister.
71 *Laffer v Gillen* (1927) 40 CLR 86, 94.
72 *Ridge v Baldwin* [1964] AC 40.
73 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170.
74 See, for example, the analysis of Laws J in *R v Secretary of State for Transport, Ex parte Richmond upon Thames London Borough Council* [1994] 1 All ER 557.
75 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
76 Ibid 242.
77 Weeks, above n 43.
78 Ibid 238.
79 Christopher Forsyth, 'Legitimate Expectations Revisited' (2011) 16 *Judicial Review* 429, 429.
80 Christopher Forsyth would suggest it may advance the collapse: Christopher Forsyth, '"Blasphemy Against Basics": Doctrine, Conceptual Reasoning and Certain Decisions of the UK Supreme Court' in John Bell et al (eds), *Public Law Adjudication In Common Law Systems* (Hart Publishing, 2016) 145.
81 *Salemi v Minister for Immigration & Ethnic Affairs (No 2)* (1977) 137 CLR 396.
82 Ibid 442.
83 Ibid 404.
84 *R v Mackellar: Exp Parte Ratu* (1977) 137 CLR 461, 476.
85 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 413
86 Grant Hooper, 'The Rise of Judicial Power in Australia: Is There Now a Culture of Justification?' (2015) 41 *Monash University Law Review* 102, 119–20.

87 *Kioa v West* (1985) 159 CLR 550, 563.
88 See Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate, UK, 2002) 163–4.
89 *Kioa v West* (1985) 159 CLR 550, 617.
90 Ibid.
91 *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1, 40.
92 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
93 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
94 For example, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 633 (Gummow, Hayne, Crennan and Bell JJ), although French CJ and Kiefel J (who given their roles in both *McCloy* and *Li* may be thought of as the High Court's stronger advocates of structured proportionality) continue to use the term without feeling the need to comment upon it.
95 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 24–5.
96 Canada did not follow *Coughlin* either, although it left open the possibility of judicial intervention if the executive balancing of a substantive legitimate expectation against the public interest was unreasonable: Weeks, above n 43, 238–40.
97 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
98 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook Co, 2013) 373.
99 Creyke, McMillan and Smyth, above n 64, 944–5.
100 And further judicial suggestions that the time was right for it.
101 *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).
102 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.
103 *R v Oakes* [1986] 1 SCR 103.
104 Michael Taggart, 'Proportionality, Deference, Wednesbury' (2008) *New Zealand Law Review* 423.
105 This is not the case now. As will be seen, the outcome of applying the two tests in England today is often said to be the same.
106 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, [27] (emphasis added).
107 Taggart, above n 104, 438.
108 *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 [20] (Lord Sumption).
109 *R (Begum) v Governors of Denbigh High School* [2007] 1 AC 100 [20].
110 *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 116; although note a possible retreat in *R (Osborn) v Parole Board* [2014] AC 1115.
111 Jason Varuhas, 'Against Unification' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015). Varuhas argues against proportionality being introduced into the common law in England.
112 See Aronson and Groves, above n 98, 365–6; *R v Secretary of State for the Home Department; Ex parte Bugdaycay* [1987] AC 514, 531; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130; and *R v Secretary of State for the Home Department* [2001] 2 AC 532 — in particular, Lord Cooke and Lord Steyn in their discussion of the *Wednesbury* test and proportionality.
113 Thomas Poole, 'The Reformation of English Administrative Law' (2009) 68(1) *Cambridge Law Journal* 142, 145.
114 Thomas, above n 5, 93.
115 For example, talk of repealing the HRA and now the British exit from the EU.
116 In helping me to decide what cases to choose, I am indebted to the posts by Mark Elliott on his web site: *Public Law for Everyone* <https://publiclawforeveryone.com>.
117 *R (Rotherham MBC) v Secretary of State for Business, Innovation & Skills* [2014] EWHC 232 (Admin).
118 *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation & Skills* [2015] UKSC 6.
119 *R (Rotherham MBC) v Secretary of State for Business, Innovation & Skills* [2014] EWHC 232 (Admin) [62].
120 *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation & Skills* [2015] UKSC 6 [47].
121 Ibid [141].
122 *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69. In this case review was sought of a decision *not* to hold a public inquiry into events in 1948 when English troops killed 23 civilians in Malaysia.
123 This difficulty is sometimes described as proportionality requiring a 'rights anchor' to be effective: See Tom Hickman, 'Problems for Proportionality' (2010) *New Zealand Law Review* 303; and Boughey, above n 17, 73–4, 87.
124 *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation & Skills* [2015] UKSC 6 [23].
125 Ibid [62].
126 Ibid [64]–[65].
127 *Miranda v Secretary of State for the Home Department* [2014] EWHC 255 (Admin).

128 The case arose out of the detention of David Miranda under the *Terrorism Act 2000* (UK) while he was being investigated to determine whether he held any United States security documents supplied by Edward Snowden.
129 See *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 [20].
130 *Miranda v Secretary of State for the Home Department* [2014] EWHC 255 (Admin) [40].
131 See, for example, the earlier decision of *Kennedy v The Charity Commission* [2014] UKSC 20.
132 *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6 [79].
133 *R (Carlile) v Home Secretary of State for the Home Department* [2014] UKSC 60.
134 *Pham (Appellant) v Secretary of State for the Home Department* [2015] UKSC 19.
135 He was said to be a dual citizen.
136 Lord Carnwarth did not consider the theoretical benefits or disadvantages. However, he saw little difference between proportionality and the common law ground of unreasonableness when rights as fundamentally important as citizenship were under consideration: *Pham (Appellant) v Secretary of State for the Home Department* [2015] UKSC 19 [60].
137 Ibid [119].
138 *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395; *Plaintiff M61/2010E v The Commonwealth of Australia* (2010) 243 CLR 319, 352.
139 *Pham (Appellant) v Secretary of State for the Home Department* [2015] UKSC 19 [98].
140 Ibid [94]–[96].
141 Ibid [108].
142 *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 [57].
143 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 339.
144 See Grant Hooper, 'From the Magna Carta to Bentham to Modern Australian Judicial Review' (2016) 84 *AIAL Forum* 22, 36.
145 Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *Public Law Review* 117, 117.
146 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (*Wednesbury*).
147 Matthew Groves and Greg Weeks, 'Substantive (Procedural) Review in Australia' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 133, 140, point out that prior to *Wednesbury* the High Court in *R v Connell, ex p Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 had also taken a very 'conservative' approach to the reasonableness ground of review.
148 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364 (Hayne, Kiefel and Bell JJ).
149 *R (on the application of Begbie) v Department of Education & Employment* [2000] 1 WLR 1115, 235, [78].
150 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351 (French CJ), 370 (Gageler J), 362 (Hayne, Kiefel and Bell JJ).
151 *Minister for Immigration and Multicultural and Indigenous Affairs v Scar* (2003) 128 FLR 553, 561.
152 *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280.
153 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1.
154 *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280 [47]. The court did, however, treat proportionality as an independent ground of review, which it is suggested it should not have. However, having already found that the decision-maker's decision was unreasonable, it did so in only one short paragraph indicating it was only addressed for completeness.
155 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 [21].
156 The term 'tool' is taken from *McCloy v New South Wales* (2015) 89 ALJR 857, [4]. The High Court stated that it sees proportionality as a tool to test whether 'legislative or administrative acts are within the constitutional or legislative power under which they purport to be done'. However, the examples to which proportionality is said to apply ([3]) are implied constitutional guarantees, not general common law grounds of review or even principles of construction.
157 Even in Charter of Rights cases where human rights proportionality is at issue, English cases have grappled with how to frame their analysis so as not to unduly trespass into questions of policy better suited to the executive and legislature: see, for example, *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665.
158 It is suggested that the emphasis on 'disproportionate' in the judgments should be maintained, as it does not carry with it the additional baggage of 'proportionality'.
159 The terminology in parenthesis is taken from *McCloy v New South Wales* (2015) 89 ALJR 857, [4]. In that decision the High Court stated that it sees proportionality as a tool to test whether 'legislative or administrative acts are within the constitutional or legislative power under which they purport to be done'. However, the examples to which proportionality is said to apply ([3]) are implied constitutional guarantees, not general common law grounds of review or even principles of construction.
160 Michael Taggart, 'Reinventing Administrative Law' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (eBook Collection (EBSCOhost), EBSCO Publishing, 2003) 311, 329.
161 Forsyth, above n 80, 146.
162 Ibid 155.

THE ROLE OF THE OMBUDSMAN IN REVIEWING CHILD DEATHS AND FAMILY AND DOMESTIC VIOLENCE FATALITIES

Chris Field*

Over the last 200 years, the institution of the Ombudsman has evolved from undertaking investigations of maladministration, principally enlivened by citizen complaints, to undertaking a wide range of investigatory, review and inspectorate functions. In doing so, there is no role more important that Ombudsmen have been asked to undertake than the review of child deaths and family and domestic violence fatalities.

This article examines this role — its background, its scope, the critical information regarding the circumstances in which child deaths and family and domestic violence fatalities occur and why they occur that is revealed through reviews. The article also discusses the findings made regarding the administration of the legislative responsibilities of state government agencies that arises from undertaking reviews and explores the recommendations made to prevent or reduce child deaths and domestic and family violence fatalities. The article further explores the role of the Ombudsman in undertaking major investigations with the powers of a Standing Royal Commission as well as the relationship of the work of the Ombudsman with other critical stakeholders.

The article first outlines the background to the role of the office of Ombudsman in relation to child death reviews and family and domestic violence fatality reviews. It then provides an overview of these roles. It examines certain demographic characteristics that can be identified by the undertaking of reviews and then considers, arising from reviews, findings that we make regarding the administration of the legislative responsibilities of state government agencies. The article then explores the recommendations that the office will make arising from these findings, considers the role of the Ombudsman in undertaking major own-motion investigations and the relationship of our work with other critical stakeholders before offering some concluding observations.

Background

In relation to our role to review child deaths, in November 2001, prompted by the coronial inquest into the death of a 15-year-old Aboriginal girl at the Swan Valley Noongar community, the Government announced a special inquiry into the response by government agencies.

---

* *Chris Field is the Western Australian Ombudsman. He is also the 2nd Vice President of the International Ombudsman Institute and an Adjunct Professor in the School of Law at the University of Western Australia. He is a past President of the Australasian and Pacific Ombudsman Region of the International Ombudsman Institute and, more recently, was an Executive Member of the World Board of the Institute.* *This article is an edited version of a paper delivered to* Pathways to Prevention*, 2016 Asia Pacific Coroners Society Conference, Perth, 8–11 November 2016, and draws upon material from the Ombudsman Western Australia Annual Report 2015–16. I sincerely appreciate the assistance of Matthew Rowe, Senior Project and Executive Services Officer, Western Australian Ombudsman, in the preparation of this article.*

The resultant 2002 report recommended that a Child Death Review Team be formed to review the deaths of children in Western Australia.

In response to the report, the Government established the Child Death Review Committee (CDRC). The CDRC's first meeting was held in January 2003. The function of the CDRC was to review the operation of relevant policies, procedures and organisational systems of the Department for Community Development in circumstances where a child had contact with the department.

In August 2006, the Government announced a functional review of the department. Ms Prudence Ford was appointed the independent reviewer, and she presented her report to the Premier in January 2007.

In considering the need for an independent, inter-agency child death review model, the Ford Review recommended that 'The CDRC together with its current resources be relocated to the Ombudsman' and 'A small, specialist investigative unit be established in the Office to facilitate the independent investigation of complaints and enable the further examination, at the discretion of the Ombudsman, of child death review cases where the child was known to a number of agencies'.[1]

Subsequently, the Ombudsman's legislation, the *Parliamentary Commissioner Act 1971* (WA), was amended to enable the Ombudsman to undertake child death reviews. On 30 June 2009 the child death review function in my office commenced operation.

In relation to our role to review family and domestic violence fatalities, the Annual Action Plan associated with the *WA Strategic Plan for Family and Domestic Violence 2009–2013* and *Western Australia's Family and Domestic Violence Prevention Strategy to 2022: Creating safer communities* identified a range of strategies, including a 'capacity to systematically review family and domestic violence deaths and improve the response system as a result'.[2] The Annual Action Plan set out 10 key actions to progress the development and implementation of an integrated response, including the need to '[r]esearch models of operation for family and domestic violence fatality review committees to determine an appropriate model for Western Australia'.[3]

Following a working group process examining models for a family and domestic violence fatality review process, the Government requested that the Ombudsman take responsibility for the establishment of a family and domestic violence fatality review function.

On 1 July 2012, my office commenced its family and domestic violence fatality review function.

Overview of roles

Put simply, our role is to review the circumstances in which child deaths and family and domestic violence fatalities occur and why they occur, to identify patterns and trends arising from reviews and to make recommendations about ways to prevent or reduce deaths and fatalities.

To do this in relation to child death reviews, the Western Australian Department for Child Protection and Family Support receives information from the Coroner on reportable deaths of children and notifies my office of these deaths. The notification provides my office with a copy of the information provided to the department by the Coroner about the circumstances of the child's death together with a summary outlining the past involvement of the department with the child.

My office assesses all child death notifications received to determine if the death is, or is not, an investigable death. An investigable death is defined in our legislation and largely relates to the fact that a child, or a relative of the child, was known to the department. If the death is an investigable death, it must be reviewed. If the death is a non-investigable death, it can be reviewed (using my powers to investigate any matter of my own motion).

In relation to family and domestic violence fatalities, Western Australia Police informs my office of all family and domestic violence fatalities and provides information about the circumstances of the death together with any relevant information of prior police contact with the person who died and the suspected perpetrator. A family and domestic violence fatality involves persons apparently in a 'family and domestic relationship' as defined by s 4 of the *Restraining Orders Act 1997* (WA).

The extent of reviews depends on a number of factors, including the circumstances surrounding the death or fatality and the level of involvement of state government departments and other public authorities.

Ultimately, review processes are intended to identify key learnings that will positively contribute to ways to prevent or reduce deaths and fatalities. Extensive reporting of de-identified information arising from reviews is undertaken by my office — indeed, the reviews chapters are by far the largest sections of our annual report.

Reviews do not set out to establish the cause of a death or fatality — this is the role of the Coroner. Nor does the office review family and domestic violence fatalities to determine whether a suspected perpetrator has committed a criminal offence. This is only a role for a relevant court. Confidentiality of all parties involved with a review is strictly observed, and any document that is sent to, or by, my office in the course of, or for the purposes of, an investigation under the *Parliamentary Commissioner Act 1971* (WA) and was prepared specifically for the purposes of the investigation is privileged and is not admissible in evidence in any proceedings (with the exception of proceedings for perjury or any offence under the *Royal Commissions Act 1968* (WA)) — effectively akin to a public interest immunity.

Our review methodology includes reviewing individual deaths and fatalities referred to the office, as well as undertaking major investigations of our own motion, the latter of which I will return to in detail later. The undertaking of reviews is done as if they are investigations under the *Parliamentary Commissioner Act 1971* (WA). This means that, in undertaking reviews, we have all the powers of a Standing Royal Commission and the particular powers provided under the Act.

The office operates on the basis of a 'no surprises' approach in all of its work, including in its reviews and investigations, affording the opportunities for individual and agency engagement and response otherwise provided for in the *Parliamentary Commissioner Act 1971* (WA) and the rules of procedural fairness more generally.

The office places a strong emphasis on timely reviews. This ensures reviews contribute, in the most timely way possible, to the prevention or reduction of future deaths and fatalities. In 2015–16, nearly three-quarters of all reviews were completed within six months and 80 per cent of family and domestic violence fatality reviews were completed within 12 months.

During 2015–16, there were 41 child deaths subject to review and 22 reviewable family and domestic violence fatalities.

Demographics

Through the undertaking of reviews, demographic information is obtained on a range of characteristics including gender, Aboriginal status, age groups and residence in the metropolitan or regional areas. As I mentioned earlier, this information, properly de-identified, is extensively reported in our annual reports.

Information arising from child death reviews

Considering all seven years of data arising from child death reviews undertaken by my office, male children are over-represented compared with the population for all age groups, but particularly for children under the age of one and children aged between six and 12 years. Aboriginal children are also over-represented compared with the population and are more likely than non-Aboriginal children to be under the age of one and living in regional and remote locations.

Children in regional locations are over-represented compared with the child population as a whole, and more so for investigable deaths. Further analysis of the data shows that 83 per cent of Aboriginal children who died were living in regional or remote locations when they died.

The child death notification received by my office includes general information on the circumstances of death. This is an initial indication of how the child may have died, but it does not establish the cause of death. This can only be determined by the Coroner. The two main circumstances of death for the 621 child death notifications received in the seven years from 30 June 2009 to 30 June 2016 are sudden, unexpected deaths of infants, representing 33 per cent of the total child death notifications received; and motor vehicle accidents, representing 19 per cent of total child death notifications.

Reviews also highlight the impact of certain social or environmental factors on the circumstances leading up to the child's death. Where this occurs, these factors are recorded to enable an analysis of patterns and trends to assist in considering ways to prevent or reduce future deaths. It is important to note that the existence of these factors is associative and may be allegations as opposed to proven matters. They do not necessarily mean that the removal of this factor would have prevented the death of a child or that the existence of the factor necessarily represents a failure by a public authority. These factors include family and domestic violence, identified in 55 per cent of reviews; alcohol use, identified in 37 per cent of reviews; drug or substance use, identified in 33 per cent of reviews; homelessness, identified in 21 per cent of reviews; and parental mental health issues, identified in 20 per cent of reviews.

One of the features of deaths reviewed is the coexistence of a number of these social and environmental factors. The following observations can be made: where family and domestic violence was present, alcohol use was a coexisting factor in over half of the cases; drug or substance use was a coexisting factor in nearly half of the cases; homelessness was a coexisting factor in nearly a third of the cases; and parental mental health issues were a coexisting factor in over a quarter of the cases.

Where alcohol use was present, family and domestic violence was a coexisting factor in over three-quarters of the cases; drug or substance use was a coexisting factor in over half of the cases; and homelessness was a coexisting factor in over a third of the cases.

In examining the child death notifications by age groups, the office is able to identify patterns that appear to be linked to childhood developmental phases and associated care needs.

This age-related focus has enabled the office to identify particular characteristics and circumstances of death that have a high incidence in each age group and refine the reviews to examine areas where improvements to public administration may prevent or reduce these child deaths.

Of the 621 child death notifications received by the Ombudsman from 30 June 2009 to 30 June 2016, there were 228 related to deaths of infants, 125 related to children aged from one to five years, 69 related to children aged from six to 12 years, and 199 related to children aged from 13 to 17 years. Further analysis of the data shows that, for these deaths, there was an over-representation, compared with the child population for males, of Aboriginal children and children living in regional or remote locations.

An examination of the patterns and trends of the circumstances of infant deaths showed that, of the 228 infant deaths, 204 were categorised as sudden, unexpected deaths of an infant, and the majority of these appear to have occurred while the infant had been placed for sleep. For children aged one to five, illness or medical condition is the most common circumstance of death, followed by motor vehicle accidents and drowning. For children in the age group six to 12, motor vehicle accidents are the most common circumstance of death, followed by illness or medical condition and drowning.

Suicide is the most common circumstance of death for the 13 to 17 age group, followed by motor vehicle accidents and illness or medical condition.

Information arising from family and domestic violence fatality reviews

In relation to the characteristics of the persons who died for the 73 family and domestic violence fatalities notifications received by the office from 1 July 2012 to 30 June 2016, a number of observations can be made. Compared with the Western Australian population, of the total number of notifications, women were over-represented. In relation to the 41 women who died, 39 involved a male suspected perpetrator. Of the 32 men who died, six were apparent suicides, 15 involved a female suspected perpetrator, nine involved a male suspected perpetrator and two involved multiple suspected perpetrators of both genders.

In its work, the office is quite properly placing a focus on ways that public authorities can prevent or reduce family and domestic violence fatalities for women, including Aboriginal women. In undertaking this work, specific consideration is being given to issues relevant to regional and remote Western Australia.

Of the 73 family and domestic violence fatality notifications received by the Ombudsman from 1 July 2012 to 30 June 2016, coronial and criminal proceedings were finalised in 28 cases. Information is obtained on a range of characteristics of the perpetrator, including gender, age group and Aboriginal status.

Compared with the Western Australian population, male perpetrators of fatalities were over-represented, with nine males convicted of manslaughter and 12 males convicted of murder. Compared with the Western Australian population, perpetrators of fatalities in the 30 to 39 and 40 to 49 age groups were over-represented, and perpetrators of fatalities that occurred in regional or remote locations were over-represented.

Information provided to the office by police about family and domestic violence fatalities includes general information on the circumstances of death. This is an initial indication of how the death may have occurred but does not indicate the cause of death, which can only be determined by the Coroner. The principal circumstances of death in 2015–16 were alleged homicide by stabbing and physical assault.

The office finalised 58 family and domestic violence fatality reviews from 1 July 2012 to 30 June 2016. For 40 of the finalised reviews of family and domestic violence fatalities, the fatality occurred where the persons involved, either at the time of death or at some earlier time, had been in a married, de facto or other intimate personal relationship. For the remaining 18 of the finalised family and domestic violence fatality reviews, the fatality occurred where the relationship between persons involved was a parent and their adult child or persons otherwise related (such as siblings and extended family relationships).

Issues and recommendations

In undertaking reviews, a range of issues with the administration of state government agencies' responsibilities are identified. It is important to note that issues are not identified in every review and, when an issue has been identified, it does not necessarily mean that the issue is related to, or could have prevented, the death of a child or a family and domestic violence fatality. Examples of issues identified include not undertaking sufficient intra- and inter-agency communication and collaboration; not adequately meeting policies and procedures; missed opportunities to promote positive interventions; not meeting record-keeping requirements; not identifying family and domestic violence fatality incidents; not adequately informing staff of practice and policy requirements; not adequately implementing policies and procedures; and not adequately progressing departmental investigations in a timely manner.

In response to the issues identified, my office makes recommendations to prevent or reduce child deaths and family and domestic violence fatalities. In 2015–16, the office made 19 recommendations to prevent or reduce child deaths and eight recommendations to prevent or reduce family and domestic violence fatalities. Additionally, during reviews, public authorities may, and do, voluntarily undertake to make improvements to public administration.

My office actively monitors what steps have been taken to give effect to these recommendations. The results of this monitoring are reported in our annual reports.

Own-motion investigations

A fundamental role of the Ombudsman is to receive, investigate and resolve complaints. This is largely a reactive role. This is not to say, however, that this role is in any way unimportant. Former Commonwealth Ombudsman, and now Acting New South Wales Ombudsman, Professor John McMillan, has observed that 'the right to complain, when securely embedded in a legal system, is surely one of the most significant human rights achievements that we can strive for'.[4]

Complaint investigation and resolution also reveals patterns and trends in public administration — systemic issues that may, and do, require further consideration.

And so it is too with the work of reviews. By undertaking reviews, we are able to consider whether there is a need to undertake investigations of our volition — often referred to as own-motion investigations. These proactive investigations are undertaken with all of the powers of a Standing Royal Commission and the particular powers of the *Parliamentary Commissioner Act 1971* (Cth). The reports produced from these major investigations are tabled in Parliament and include extensive reporting of the reasons why investigations were undertaken, the methodology used in the investigation, a review of the literature considered in undertaking the investigation, the evidence we have gathered, our analysis of the evidence, our findings and our recommendations.

The office has identified a need to undertake four major own-motion investigations since commencing its child death review role.

First, the Ombudsman's examination of reviews of deaths of children aged six to 12 years has identified the critical nature of certain core health and education needs. Where these children are in the care of the Chief Executive Officer of the Department of Child Protection and Family Support, inter-agency cooperation between that department, the Department of Health and the Department of Education in care planning is necessary to ensure that the child's health and education needs are met.

Accordingly, the office identified a need to undertake an investigation of planning for children in the care of the Chief Executive Officer of the department — a particularly vulnerable group of children in our community.

This investigation involved the Department for Child Protection and Family Support, the Department of Health and the Department of Education and considered, among other things, the relevant provisions of the *Children and Community Services Act 2004* (WA), the internal policies of each of these departments and the recommendations arising from the Ford Review.

The investigation found that, in the five years following the introduction of the *Children and Community Services Act 2004* (WA), these three agencies have worked cooperatively to operationalise the requirements of the Act. In short, it found that significant and pleasing progress on improved planning for children in care had been achieved. However, there was still work to be done, particularly in relation to the timeliness of preparing care plans and ensuring that care plans fully incorporate health and education needs, other wellbeing issues and the wishes and views of children in care, and the plans are regularly reviewed.

The report made 23 recommendations designed to assist with this work to be done, all of which were agreed by the departments.

Second, given the prevalence of sleep-related infant deaths for children under one year of age, the office identified a need to investigate the number of deaths that had occurred after infants had been placed to sleep.

The investigation principally involved the Department of Health but also involved the former Department for Child Protection and the former Department for Communities. The objectives of the investigation were to analyse all sleep-related infant deaths notified to the office, consider the results of our analysis in conjunction with the relevant research and practice literature, undertake consultation with key stakeholders and, from this analysis, research and consultation, recommend ways the departments could prevent or reduce sleep-related infant deaths.

The investigation found that the Department of Health had undertaken a range of work to contribute to safe sleeping practices in Western Australia; however, there was still important work to be done. This work particularly included establishing a comprehensive statement on safe sleeping that would form the basis for safe sleeping advice to parents, including advice on modifiable risk factors, that is sensitive and appropriate to both Aboriginal and culturally and linguistically diverse communities and is consistently applied state-wide by health care professionals and non-government organisations at the antenatal, hospital-care and post-hospital stages. This statement and concomitant policies and practices were also to be adopted, as relevant, by the former Department for Child Protection and the Department for Communities.

The investigation also found that a range of risk factors were prominent in sleep-related infant deaths reported to the office. Most of these risk factors are potentially modifiable and therefore present opportunities for the departments to assist parents, grandparents and carers to modify these risk factors and reduce or prevent sleep-related infant deaths.

The report made 23 recommendations about ways to prevent or reduce sleep-related infant deaths, all of which were accepted by the agencies involved.

Third, given that, for children aged 13 to 17 years old, suicide was the most common circumstance of death, accounting for over 40 per cent of deaths and, furthermore, Aboriginal children were very significantly over-represented in the number of young people who died by suicide, my office decided to undertake a major own-motion investigation of ways that state government departments and authorities can prevent or reduce suicide by young people.

The objectives of the investigation were to analyse, in detail, deaths of young people who died by suicide that were notified to the office, comprehensively consider the results of this analysis in conjunction with the relevant research and practice literature, undertake consultation with government and non-government stakeholders and, if required, recommend ways that agencies can prevent or reduce suicide by young people.

The investigation found that state government departments and authorities had already undertaken a significant amount of work that aims to prevent and reduce suicide by young people in Western Australia; however, there was more work to be done. The office found that this work includes practical opportunities for individual agencies to enhance their provision of services to young people. Critically, as the reasons for suicide by young people are multi-factorial and cross a range of government agencies, the office found that this work includes the development of a collaborative, inter-agency approach to preventing suicide by young people.

In addition to the findings and recommendations of the investigation, the comprehensive level of data and analysis contained in the report was intended to be a valuable new resource for government departments and authorities to inform their planning and work with young people. In particular, our analysis suggested this planning and work target four groups of young people that we identified in the report.

Arising from the findings, the investigation made 22 recommendations to four government agencies about ways to prevent or reduce suicide by young people, with each agency agreeing to all recommendations.

Suicide by young people is a tragedy. Government agencies, through collaborative policy development and service provision, have a vital role to play in preventing youth suicide. Ultimately, this investigation and report are intended to enhance and improve the way that government agencies undertake this vital work.

Fourth, given the prevalence of drowning as a circumstance of death for children under one year of age and children between one and five years of age, the office identified a need to commence a major own-motion investigation into ways to prevent or reduce child deaths by drowning. In 2015–16, the office undertook significant work on this major own-motion investigation, and the report of the investigation will be tabled in Parliament in 2017.

Arising from my role to review family and domestic violence fatalities, my office identified the need to undertake a major own-motion investigation of issues associated with violence restraining orders (VROs) and their relationship with family and domestic violence fatalities.

To undertake the investigation, in addition to an extensive literature review and stakeholder engagement, my office collected and analysed a comprehensive set of de-identified state-wide data relevant to family and domestic violence and examined 30 family and domestic violence fatalities notified to my office.

My office found that a range of work had been undertaken by state government departments and authorities to administer their relevant legislative responsibilities, including their responsibilities arising from the *Restraining Orders Act 1997* (WA). My office found, however, that there is important further work that should be done. This work, detailed in the findings of the report, includes a range of important opportunities for improvement for state government departments and authorities, working individually and collectively, across all stages of the VRO process. My office also found that Aboriginal Western Australians are significantly over-represented as victims of family violence, yet they were under-represented in the use of VROs. Following from this, my office identified that a separate strategy, specifically tailored to preventing and reducing Aboriginal family violence, should be developed. This strategy should actively invite and encourage the full involvement of Aboriginal people in its development and be comprehensively informed by Aboriginal culture.

Furthermore, this investigation identified nine key principles for state government departments and authorities to apply when responding to family and domestic violence and in administering the *Restraining Orders Act 1997* (WA). Applying these principles will enable state government departments and authorities to have the greatest impact on preventing and reducing family and domestic violence and related fatalities.

Arising from the findings, the office made 54 recommendations to four government agencies about ways to prevent or reduce family and domestic violence fatalities, all of which were agreed by the agencies.

In all of our work, we do consider the potential for our recommendations to create inappropriate regulatory burden — a burden that is ultimately borne by the taxpayer. His Honour Chief Justice French has described a 'galloping growth in regulation', including a 'growth of less visible soft law' in the form of administrative guidelines.[5]

It cannot be overstated that, insofar as any oversight agency was to believe that public administration could necessarily be improved in every instance, without regard to cost, opportunity cost or unintended consequence, that belief would be mistaken.

Simply put, designing public administration with perfectly good intentions is easier than implementing those intentions perfectly, as a range of public policies from American prohibition onwards bears testament.

Ombudsmen must not just have good intentions when seeking to improve the work of public administrators. They must also have a clear series of principles and mechanisms in place that seek to ensure that the investigations they choose, how the investigations are undertaken and the recommendations for improvements that the investigations make are needed are evidence-based and ensure that the cost of implementing and undertaking the improvement is outweighed by its benefit. These principles should equally apply to the sort of 'soft law' that can be created by Ombudsman recommendations.

As a matter of some comfort, it has been my experience that Ombudsman offices are very mindful of these issues and have a range of principled and practical mechanisms in place to ensure that their work is needed, procedurally fair, evidence-based, proportionate and cost-beneficial, and that it does not suffer from overreach.

It is perhaps in part for these reasons that 100 per cent of the recommendations made by my office have been accepted by agencies over the past decade.

And, if a recommendation is worth making, it must be worth ensuring that it is implemented and its function in achieving improvements is monitored and reported. The *Parliamentary Commissioner Act 1971* (WA) provides that I may request agencies report to me on the steps that have been taken to give effect to my recommendations and the steps that are proposed to be taken to give effect to the recommendations — or, if no such steps have been or are proposed to be taken, the reasons therefor.

In doing so, we are not only able to assure Parliament that steps have been taken to give effect to recommendations we make but also, through the receiving of reports, meeting with agencies and the undertaking of fieldwork, we can identify where improvements have been made.

To this end, this month I will table in Parliament a report on giving effect to the recommendations arising from the *Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities*, tabled in Parliament 12 months ago. The report will set out the results of my monitoring activities in relation to our major own-motion investigation of ways to prevent or reduce family and domestic violence fatalities that was tabled in Parliament 12 months ago.

More generally, and as I have already noted, the monitoring of all recommendations made by my office is taken very seriously and reported on in my annual reports.

Advisory panel and consultation

When the office commenced its child death review role, a decision was made to establish a panel of expert advisors to ensure that work of the office could be as informed, evidence-based and contemporary as possible. The panel was later expanded to include members with expertise in relation to family and domestic violence.

The panel provides independent advice to the office on issues and trends that fall within the scope of its review roles; contemporary professional practice; and issues that impact on the capacity of public authorities to ensure the safety and wellbeing of children, victims and families. For example, in 2015–16, the panel provided advice to the Ombudsman regarding our major own-motion investigation in relation to family and domestic violence fatalities.

Panel members are principally drawn from academia and non-government organisations, and a range of government agencies are offered observer status on the panel. Last year, observers from Western Australia Police, the Department for Child Protection and Family Support, the Department of Health, the Department of Education, the Department of Corrective Services, the Department of the Attorney General, the Mental Health Commission and the Department of Aboriginal Affairs attended meetings.

The panel, which met four times in 2015–16, is chaired by my Assistant Ombudsman, Reviews, Natarlie De Cinque.

In addition to the valued and important work of the panel, the work of the office in undertaking reviews is informed by extensive liaison and, where appropriate within the Ombudsman's legislation, information sharing with the office of the Coroner; a wide range of relevant state government agencies; accountability and similar agencies such as the office of the Auditor General and Commissioner for Children and Young People; non-government

organisations such as the Women's Council for Domestic and Family Violence Services; and research institutions, including universities.

Given the over-representation of Aboriginal Western Australians in deaths and fatalities, it is particularly critical that our work is informed by listening to, and working with, Aboriginal people and communities. In that regard, in 2016, my office appointed a Principal Aboriginal Liaison Officer — Alison Gibson — and will shortly appoint an Aboriginal Liaison Officer that will report to Ms Gibson. The Principal Aboriginal Liaison Officer provides high-level advice, assistance and support to the office's Corporate Executive and to staff conducting reviews and investigations of the deaths of children and family and domestic violence fatalities in Western Australia, complaint investigation and resolution involving Aboriginal people as well as own-motion investigations. The position also assists to raise awareness of, and accessibility to, my office for Aboriginal communities and support cross-cultural communication between my staff and Aboriginal people. This work builds on the regional awareness and accessibility program that my office commenced in 2007, as part of which we have visited every region of our vast state, including rural and remote Aboriginal communities, over the last decade.

Conclusion

Since its beginnings in Sweden over 200 years ago, the institution of the Ombudsman has undertaken a significant evolution. Ombudsmen are now woven into the governance fabric of nearly 100 countries around the world, helping to protect and promote human rights, democracy and the rule of law. Moreover, the Ombudsman is a significant pathway to access to justice. For example, in Australia, Ombudsmen deal with a similar number of complaints to courts and tribunals, and they do so in a timely and cost-effective way.

At the same time that the institution of Ombudsman has spread throughout the world, its expansion has not been one of just scale but also scope. Ombudsmen now undertake a much wider range of activities than was the case traditionally. To use my office as an example, in addition to the 'classical' Ombudsman functions, we undertake inspections of telecommunications intercepts, investigation of public interest disclosures (more popularly referred to as 'whistleblower' complaints), investigation of complaints from overseas students, monitoring of the control of criminal organisations, monitoring of criminal code infringement notices and the role of Energy and Water Ombudsman. This expansion of functions can be observed in Ombudsman offices around the world.

But there can be no role more important that Ombudsmen have been asked to undertake than the review of child deaths and family and domestic violence fatalities — it is a role to be undertaken with the utmost of humility and respect and a singular commitment to evidence-based change.

In undertaking our role, I acknowledge the employees of state government departments and authorities, including police officers and child protection workers, as well as non-government organisations, which, on a day-to-day basis, undertake the most challenging of work to protect children, strengthen families, keep victims safe and hold perpetrators accountable.

I also acknowledge, and express my deepest sympathy to, the families and communities who have been affected by child deaths and family and domestic violence fatalities in Western Australia.

The reality for all of us is simple — one death is too many. From my experience, I am completely confident that Coroners, Ombudsmen and death and fatality review teams are acutely aware of the responsibility they have to examine deaths in our society and, learning

from such examinations, make recommendations to prevent and reduce the number of deaths in the future.

Endnotes

1 Prudence Ford, *Review of the Department for Community Development: Review Report* (January 2007) p 81 <http://trove.nla.gov.au/work/34429948?selectedversion=NBD51843946>.
2 Department for Child Protection, Western Australia, *WA Strategic Plan for Family and Domestic Violence 2009–2013: Annual Action Plan 2009–10*, p 2 <https://www.dcp.wa.gov.au/Resources/Documents/Policies%20and%20Frameworks/FDVU%20Annual%20Action%20Plan%202009%20to%202010.pdf>.
3 Ibid.
4 John McMillan, 'The Role of the Ombudsman in Protecting Human Rights' (address to 'Legislatures and the Protection of Human Rights' conference, University of Melbourne, Faculty of Law, 21 July 2006), p 3 <http://www.ombudsman.gov.au/__data/assets/pdf_file/0016/31093/21-July-2006-The-role-of-the-Ombudsman-in-protecting-human-rights.pdf>.
5 Chief Justice Robert French, 'Law — Complexity and Moral Clarity' (speech presented to the North West Law Association and Murray Mallee Community Legal Service, Mildura, 19 May 2013), p 7.

SOME CONSTITUTIONAL AND PUBLIC LAW DECISIONS DURING THE TIME OF CHIEF JUSTICE FRENCH

Robert Lindsay*

Late last year a series of papers was presented and an evening dinner held to mark the retirement of Chief Justice French, at which various speakers spoke of the 'French Court'. However, the Chief Justice himself said that it is a little misleading to speak of the French Court because during his time there were at least six changes in the composition of membership of that Court, and that inevitably changed the Court dynamics which influenced both the collective and individual approach. Nonetheless, French CJ's self-effacing comment does not take account of some noticeable features of the Court's decision-making during his time, which bore the stamp of his personal judicial approach noticeable from earlier days when he had been a long-serving Federal Court judge. I will refer to some of his Honour's earlier judicial views in relation to the *Migration Act 1958* (Cth) and how it seems to me they became discernible in the time when he was Chief Justice. While making due allowance for the doctrine of precedent, the imposition of statutory imperatives and a need to accommodate diversity of views within a court of seven, any individual judge's approach and reasoning is likely to be heavily influenced, in the words of Cardozo J, by the 'inarticulated major premises' which shape a judge's reasoning processes.

The evolution may be discussed under five heads: separation of powers; privative clauses and jurisdictional error; judicial review in the state courts; the status of legitimate expectations; and, finally, proportionality. These were all, of course, topics discussed by the High Court prior to the time of French CJ, but judicial scrutiny of privative clauses, analysis of jurisdictional error and the application of judicial review principles in the state courts have all had significant further development during his time. Conversely, only time will tell how far legitimate expectation and proportionality can be seen as taking root.

The 'tectonic shifts' which have occurred in public law, particularly in England, during the last 30 years have had their counterpart here, but with the significant difference that Australia's public law structure rests upon defined constitutional imperatives set out below.

The separation of powers and Chapter III

As Gummow J has said, 'the subject of administrative law cannot be understood or taught without attention to its Constitutional foundation'.

His Honour has also said that, at the federal level, public administration essentially concerns the execution and maintenance of the *Constitution* and the laws of the Commonwealth. Administrative law, or public law, is a subset of constitutional law.[1]

* *Robert Lindsay is a barrister. In the 1990s, as in-house counsel for the Legal Aid Commission of Western Australia, he conducted Federal Court migration cases which included* Chen Shi Hai v The Minister *(a 'black child' born outside China's one child policy), in which French J's primary decision was upheld by the High Court.*

Section 75(v) of the *Constitution* confers original jurisdiction on the High Court in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. So, too, s 75(iii) confers original jurisdiction on the High Court in matters in which the Commonwealth or a person suing, or being sued on behalf of the Commonwealth, is a party. As Sir Owen Dixon stated, the common law is the ultimate constitutional foundation[2] — that is to say, the provisions of the *Constitution* are framed in the language of the common law and the *Constitution* operates and is to be understood and interpreted by reference to the common law. It is accepted that the duty and the jurisdiction of the courts is, to use the words of Marshall CJ in *Marbury v Madison*,[3] 'to say what the law is'. That means the courts are to declare and enforce the law subject to such specific provisions as are made under the *Constitution* and by statute with respect to the exercise of jurisdiction, the vesting of the federal judicial power in ch III courts, and the courts' separation from the legislature and executive powers.

The consequence of the constitutional separation of powers and the concept propounded of judicial power, as set out in ch III of the *Constitution*, results in a distinction between judicial review and merits review and is a central feature of Australian administrative law. Sir Anthony Mason has pointed out that the reasoning in *R v Kirby; Ex parte Boilermakers' Society of Australia* (*Boilermakers' case*), both in the High Court and the Privy Council, is by no means compelling.[4] It was not accepted in the *Boilermakers' case* that a ch III court could perform administrative as well as judicial functions. Yet, if the dissenting judgment of Williams J had prevailed so as to allow administrative functions compatible with the courts' judicial function to be applied in the exercise of federal judicial power, this would have avoided, at least to some degree, the troublesome distinction between judicial and administrative functions. The majority approach means that judicial review, in the absence of statutory provision or manifest legal error, does not allow a court to enter upon the province of the executive decision-maker's determination of the merits. However, the majority view in the *Boilermakers' case* is now deeply embedded and has had a large part in defining the scope of judicial review and shaping the application of principle to the various subheadings which form the subject matter of this article.

During the long judicial life of French CJ, the application of the *Boilermakers'* principle has remained undisturbed, but his time as Chief Justice has been marked by a far more rigorous application of principle to avoid legislative encroachment upon the Court's conduct in exercising judicial review, as is shown in the development of the law relating to privative clauses.

Privative clauses and jurisdictional error

It is convenient to consider privative clauses in relation to Commonwealth and state legislation separately, although the decision of the French High Court in 2010 of *Kirk v Industrial Relations Commission*[5] (*Kirk*) has made this bifurcation less meaningful. Prior to the time of French CJ, the approach to privative clauses rested in part upon recognition that, although there is a defined separation of powers under the Commonwealth *Constitution*, that separation is not to be found in the various state constitutional Acts.

Commonwealth legislation: the* Hickman *case

Before the time of French CJ, the most quoted Australian authority about privative clauses was that of *R v Hickman*[6] (*Hickman*). An order nisi for a writ of prohibition under s 75(v) of the Commonwealth *Constitution* was sought by haulage contractor employers that haulage contractors, who carted coal as well as other things, were not required to grant their lorry driver employees minimum rates of wage specified under a Coal Mining Award. The board had ruled that the employers had to give their employees the minimum rates under the

award. The Commonwealth regulations provided that such regulations 'shall apply to industrial matters in relation to the coal mining industry'. Regulation 17 stated that a decision of the board 'shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any Court on any account whatever'. In ordering that the rule nisi should be made absolute, the High Court held the employees, who carried on the business of carriers, were not in any real sense part of the coal mining industry; therefore, the prescribed minimum wage rates under the award did not apply, so the privative clause did not protect against the order. However, Dixon J said:

> [Decisions of the board] should not be considered invalid if they do not upon their face exceed the board's authority and if they do amount to a bona fide attempt to exercise the powers of the board and relate to the subject matter of the regulations.[7]

The migration legislation

In 2002, a Federal Full Court, sitting five judges, decided in *NAAV & Others v Minister for Immigration & Multicultural & Indigenous* Affairs[8] (*NAAV*) that the privative clause introduced by the Howard government immunised, to a large degree, a tribunal decision-maker's legal errors against review. Justice French, as he then was, together with Wilcox J, dissented in *NAAV*, stating that the limited *Hickman* principles were not exhaustive as to the grounds upon which a protective clause may fail to immunise the decision-maker. Nor did French J consider that a privative clause meant that the initial decision-maker's jurisdiction was enlarged by reason of the privative clause providing protection against challenge. His Honour's approach foreshadowed not only the approach adopted in *Plaintiff S157/2002 v Commonwealth*[9] (*Plaintiff S157*) by the High Court the following year but also the approach further elaborated once he had become Chief Justice in both state and Commonwealth cases which contained privative clauses.

His Honour also said in *NAAV,* with some prescience, that narrowing grounds of review does not reduce the number of desperate people with hopeless cases who apply for review of their decisions. If instead legislation provided a requirement for leave or, in the case of prerogative writs, a grant of an order nisi, able to be determined by judges on the papers, this would go a long way toward enabling hopeless applications to be rejected at the outset[10] and thus avoid the Federal Court being overwhelmed with a tide of futile appeals.

However, this was not the approach adopted by the Howard government. In *Abebe v The Commonwealth*,[11] by four to three, the High Court had found that introduction by Parliament of constrictive grounds of review under the migration legislation would not be unconstitutional. Perhaps emboldened by this decision, as well as concerns over the flood of poorly framed applications to the Federal Court for review by failed asylum seekers, the Howard government decided to prohibit any appeals from decisions made by the Refugee Review Tribunal, Migration Review Tribunal and Administrative Appeals Tribunal to the Federal Court and the High Court. The *Migration Act 1958* (Cth) now prohibited such appeals from decisions described as 'privative clause' decisions, and *NAAV* in 2002 was the first authoritative Federal Court decision under the new prohibitory regime.

Then in 2003, in *Plaintiff S157*,[12] the High Court under Gleeson CJ rendered nugatory the privative clause and, as Gleeson CJ himself explained, a privative clause may involve a conclusion that a decision or purported decision is not a 'decision ... under this Act'.[13] The joint judgment in the same case said that a privative clause cannot protect against a failure to make a decision required by the legislature, which decision on its face exceeds jurisdiction error. In so saying, their Honours substantially adopted the dissenting approach of French and Wilcox JJ earlier indicated in *NAAV*.[14]

Judicial method of construing privative clauses

In *Plaintiff S157*, in commenting upon the Commonwealth Government's argument that, where the three *Hickman* provisos quoted by Dixon J cited above were met, the decision was protected, the High Court denied that this was so; rather, it said that any protection which the privative clause affords will be inapplicable unless those provisos are satisfied.[15] To ascertain what protection a privative clause purports to afford, it is necessary to have regard to the terms of the particular clause. It is inaccurate to describe the *Hickman* provisos as expanding or extending the powers of the decision-maker. The legal process is not one which can place a construction on the privative clause as a single provision and assert that all other provisions may be disregarded.[16] If a privative clause conflicts with another provision, pursuant to which some action has been taken or decision made, its effect will depend upon the outcome of its reconciliation with that other provision.[17] There can be no general rule as to the meaning or effect of a privative clause. A specific intention in legislation as to the duties and obligations of the decision-maker 'cannot give way to the general intention indicated by a privative clause' to prevent review of the decision.[18]

Their Honours said that the expression 'decisions ... made under this Act' must be made so as to refer to claims which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction. An administrative decision which involves jurisdictional error is 'regarded in law as no decision at all'.[19] Section 474(2) of the *Migration Act 1958* (Cth) required that the decision in question be 'made under [the] Act' and, where the decision made involved jurisdictional error, such a decision was held not to be 'made under the Act' so as to be protected against judicial review.

In *Plaintiff S157* it was said, with reference to s 75(v) of the *Constitution*, which authorised prerogative relief against a Commonwealth officer:

> First, the jurisdiction of this Court to grant relief under s 75(v) of the *Constitution* cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with chapter III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.[20]

In the following year, in *Minister for Immigration v SGLB,*[21] the Gleeson Court reaffirmed what had been said in *Plaintiff S157*, citing earlier authority that jurisdictional error negating a privative clause decision may arise where there has been a failure to discharge what has been called 'imperative duties' or to observe 'inviolable limitations or restraints' found in the *Migration Act 1958* (Cth). As Gummow and Hayne JJ said, the three *Hickman* provisos render a privative clause inapplicable unless they are satisfied, but *Plaintiff S157* also rejected the proposition that those provisos would always be sufficient, so that the satisfaction of them necessarily takes effect as 'an expansion' or 'extension' of the power of the decision-maker in question.[22]

Privative clause cases under state legislation: the* Kirk *decision

Six years before *Plaintiff S157*, in *Darling Casino Ltd v NSW Casino Control Authority*,[23] the Brennan Court had said that, provided the intention is clear, a privative clause in a valid state enactment may preclude review for errors of any kind. And, if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle.

This approach was to alter in 2010. In *Kirk*,[24] the French Court said that at federation each of the state Supreme Courts had a jurisdiction akin to that of the Court of Queen's Bench in England and, whilst statutory privative provisions had been enacted by colonial legislatures

which had sought to cut down the availability of certiorari in *Colonial Bank of Australasia v Willan,*[25] the Privy Council had said of such provisions:

> It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, *except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it*.[26]

However, prior to *Kirk*, state courts had not given the scope of 'manifest defect of jurisdiction' a particularly generous construction.

The Industrial Relations Act (NSW)

Under s 179(1) of the *Industrial Relations Act 1996* (NSW) a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called in question by any Court of Tribunal'. The High Court said, 'more particularly, although a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decision of an inferior court or tribunal from judicial review, yet remain consistent with the constitutional framework for the Australian Judicial System'.[27] Mr Kirk had been charged with offences that inadequately particularised the nature of the offence alleged under the *Occupational Health and Safety Act 1983* (NSW), and this failure was found to constitute jurisdictional error against which the privative clause afforded no protection.

Where a privative clause is found, the question also arises whether there is 'jurisdictional error' of such a kind that the privative clause will not protect against a superior court intervening to review the findings of the decision-maker. As the French Court said in *Kirk*, 'the principles of jurisdictional error (and its related concept of jurisdictional fact) are used in connection with the control of tribunals of limited jurisdiction on the basis that a tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction'.[28]

In *Kirk* the Court referred to *Craig v South Australia*,[29] decided 15 years earlier, where it had been said:

> if … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material, or at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[30]

It was reiterated again in *Kirk* that the above reasoning was not to be 'a rigid taxonomy of jurisdictional error'.[31] For example, it has been recognised in some cases failure to give reasons may constitute a failure to exercise jurisdiction,[32] where there has been procedural unfairness, fraud, bad faith, mistaken denial of jurisdiction, failure to discharge a statutory duty, improper purpose, failing to address the claim made, absence of any evidence to support a finding, acting under dictation, unreasonableness, irrationality or illogicality may all give rise to jurisdictional error.[33]

The crimes legislation in New South Wales

The approach in *Kirk* was followed in *Wainohu v New South Wales*[34] (*Wainohu*), where the *Crimes (Criminal Organisations Control) Act 2009* (NSW) provided that the Attorney-General may, with the consent of a judge, declare a judge of the Supreme Court to be an 'eligible judge', for the purposes of the Act. The Commissioner of Police may apply to an 'eligible judge' for a declaration that a particular organisation is a 'declared organisation', and the judge may make a declaration that this is so if satisfied members of a particular organisation are engaged in serious criminal activity and that the organisation 'represents a risk to public safety and order'. The Act said that the eligible judge is not required to provide any grounds or reasons for making a declaration and, once a declaration is made, the Supreme Court may on the application of the Commissioner of Police make a control order against individual members of the organisation. The French Court held the Act to be unconstitutional in that it impaired the institutional integrity of the Supreme Court.

Mr Wainohu was a member of the Hells Angels Motorcycle Club. Under the Act there was no appeal from the Judge's decision, and a broadly expressed privative clause purported to prevent a decision by an eligible judge from being challenged in any proceedings, although it was acknowledged by counsel that this would not protect the decision against jurisdictional error in light of the earlier *Kirk* decision.[35] Chief Justice French and Kiefel J said:

> A state legislature cannot, consistent with Ch III, enact a law which purports to abolish the Supreme Court of a State or which excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State.[36]

Justices Gummow, Hayne, Crennan and Bell adopted what Gaudron J had earlier said — that confidence reposed in judicial officers 'depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matters in issue'.[37]

It can be seen, therefore, that the French Court looks at the exercise of judicial power with emphasis upon the need for procedural fairness, manifested in an obligation to provide a fair hearing to a party, and observance of a requirement for reasons to be given, and that failure in this regard may manifest jurisdictional error against which a privative clause would not afford protection.

State building and construction legislation

The decisions of the French Court in *Kirk* and *Wainohu* have facilitated review in many areas apart from migration — for example, in building and construction adjudication. In *Chase Oyster Bar v Hamo Industries*[38] the New South Wales Court of Appeal said:

> to the extent that the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport*[39] decided that the Supreme Court of NSW was not required to consider and determine the existence of jurisdictional error by an adjudicator making a determination under the Building and Construction Industry Security of Payment Act, that an order in the nature of certiorari was available to quash or set aside a decision of an adjudicator, and that their legislation expressly or implied a limit to the Court's power to deal with jurisdictional error, it was in error …[40]

It seems likely that there is now scope for a similar argument that a determination under s 41 of the *Construction Contracts Act 2004* (WA) is not final if jurisdictional error is discovered. If on the adjudication of a payment dispute the appointed adjudicator makes a determination:

(a) the adjudicator cannot subsequently amend or cancel the determination; and
(b) a party to the dispute may not apply subsequently for adjournment of the dispute.

The outcome of *Kirk* has influenced another case decided by Edelman J, who has now filled the seventh seat on the High Court vacated by French CJ. In *Seddon v Medical Assessment Panel*,[41] Mr Seddon applied for an order nisi for a writ of certiorari and writ of mandamus arising out of an injury received in 2001 at work. He subsequently lodged with the dispute resolution directorate a claim that his injuries were not less than the 30 per cent threshold for the purposes of a common law claim. The matter was referred to a Medical Assessment Panel by the directorate, as the employer contended that the permanent disability was less than 30 per cent. In September 2010 the panel determined that the permanent disability was 27 per cent and, in doing so, gave Mr Seddon a nil percentage permanent degree of loss of use of the right arm. The panel indicated that, although there were right shoulder symptoms, this injury was unrelated to the accident. The solicitors for Mr Seddon requested that the panel reconsider this question because the panel's jurisdiction under the relevant Act was limited to assessing the degree of disability and not how the degree of disability arose. Nonetheless, in December 2010 the panel reaffirmed its determination that there was a nil loss of permanent function in relation to the right shoulder.

Prior to November 2005, the *Workers' Compensation and Injury Management Act 1981* (WA) said that determinations of the Medical Assessment Panel were 'final and binding' but did not exclude judicial review.[42] However, in November 2005 a privative clause was introduced by the *Workers' Compensation Reform Act 2004* (WA), which said, 'a decision of a Medical Assessment Panel or anything done under this Act in the process of coming to a decision of a Medical Assessment Panel is not amenable to judicial review'.

Justice Edelman said that, in seeking certiorari and mandamus, Mr Seddon argued: first, that the privative clause does not apply since it was only introduced in November 2005 and the injury had occurred in 2001; and, second, if it did apply and notwithstanding that the provisions of the Act also said that a determination of a panel is 'final and binding', these provisions did not exclude judicial review where there has been jurisdictional error. A 'decision' should be read as meaning 'a decision within jurisdiction' and not a decision made without jurisdiction. Furthermore, the words 'anything done under this Act' should be read to mean anything validly done under this Act; and the words 'not amenable to judicial review' should be read as 'not amenable to judicial review for non-jurisdictional error'. Finally, it was argued that, if the Court considered that the privative clause excluded judicial review for jurisdictional error in the light of the obiter dictum in *Kirk* (that is, 'legislation which would take from the Supreme Court power to grant relief on account of jurisdictional error is beyond State Legislative power'), it would mean that the privative clause was unconstitutional.[43]

It was argued that for three reasons there had been jurisdictional error. First, the panel had not analysed the various conflicting medical reports and thus had failed to take into consideration jurisdictional facts necessary to their decision. Second, on both occasions that the panel had made a determination, it had regard to whether it considered the injuries were work related. In doing so, it had stepped outside its jurisdiction. Third, the determination did not properly disclose the underlying reasoning process upon which the finding of nil loss of use of the right arm had been made.

In 2015, a differently constituted Medical Assessment Panel repeated many of the errors of its predecessor, whose determination had been quashed for jurisdictional error. Justice Mitchell agreed that the privative clause would not protect against jurisdictional error and that the panel had misconceived the boundaries of its jurisdiction. However, his Honour did not find, as Edelman J was inclined to do, that under the Act a failure to give adequate reasons would amount to jurisdictional error.[44]

Judicial review in the state jurisdiction

Justice Basten of the New South Wales Appeal Court, who appeared as counsel in many Commonwealth migration cases, said when he first studied administrative law there was no Australian text book on the subject. In Australia, the development of administrative law took shape in the Federal Court, and most practitioners who were at home in the Federal Court rarely appeared in the state courts.[45]

That, indeed, was very much the experience here in Western Australia as well. The flood of Sino-Vietnamese boat arrivals off Ashmore Reef in the early 1990s resulted in much asylum seeker adjudication in the West by French J and his three brother judges. Tribunals, Federal Circuit Courts and even people smugglers came later. There was little case law authority to assist counsel and the courts, and one was heavily reliant for authority on the textbooks of Professor Hathaway, Goodwin Gill and Grahl Madsen,[46] for at that time there were few Australian academics in this field. However, opening a textbook of Professor Hathaway today, which is co-authored with Professor Foster,[47] shows how extensive the jurisprudence on every aspect of asylum law has now become, not only in Australia but also in Canada, the United States and Britain.

Indeed, Martin CJ of the Supreme Court of Western Australia candidly acknowledged he was put off from studying administrative law as a student when he read the English Professor de Smith's book on the subject of administrative law, as it described judicial review as 'inevitably sporadic and peripheral'.[48] However, by the 1990s it had become far from peripheral in the Federal Court. Professor de Smith's contribution to constitution building is to be found in his *New Commonwealth and its Constitutions*.[49] The advice he gave has been heavily influential, not only in developing judicial review but also in defining the governmental power relationships in new Commonwealth constitutions, and he advised some of those countries on how to formulate the constitutional pillars of democracy necessary to withstand executive or other incursions. There could hardly have been a more vital responsibility for any jurist.[50]

The numerous and frequent amendments to the migration legislation make any academic analysis by judges or writers today short-lived here in Australia. But in the 1990s French J, together with other Federal Court judges, did much to develop migration law as Sino-Vietnamese, Burmese and other boat arrivals were boarded off Ashmore Reef.

Legitimate expectation

In *Attorney General (NSW) v Quin*,[51] Brennan J said that expectation is seen merely as indicating 'the factors and kind of factors which are relevant to any consideration of what are the things which must be done or afforded' to accord procedural fairness to an applicant for the exercise of administrative power, but for a time under the Mason Court legitimate expectation implied a more prominent status.

In *Teoh v Minister for Immigration and Ethnic Affairs*[52] (*Teoh*), French J, sitting as a single judge, had affirmed a deportation order in regard to a drug offender who had children born in Australia to an Australian mother. The Full Court and the High Court, by a bare majority, stayed the deportation order. The legitimate expectation was of a controversial nature. The majority in the High Court held that the best interests of the children would be a primary consideration in decisions affecting children, based upon wording of an article in the *Convention on the Rights of the Child*, to which Australia is a signatory. In stating that a Convention could assist in the proper construction of a statute in which the language is ambiguous, the majority was merely adopting what had previously been said in *Lim v Minister of Immigration*,[53] but Mason CJ and Deane J said such a Convention could also

guide the development of the common law, even though a legitimate expectation does not bind the decision-maker. Chief Justice Mason and Deane J stated that:

> Legitimate expectations are not to be equated with the rules or principles of law … the existence of legitimate expectation does not control the decision maker to act in a particular way. That is the difference between a legitimate expectation and a binding rule of law.[54]

Nonetheless, their Honours said that an unincorporated treaty or convention was 'not to be dismissed as any platitudinous or ineffectual act',[55] and procedural fairness required that such a legitimate expectation should be considered by the decision-maker. This had not been the view of the primary judge, French J or McHugh J, who dissented in *Teoh*.

Eight years later, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[56] (*Lam*), the Gleeson High Court granted leave, by which time McHugh J was the only surviving sitting member of the High Court judges who had heard *Teoh*. *Lam* may be seen as standing for three principal propositions:[57]

1. Legitimate expectation is not a freestanding administrative doctrine but simply an aspect of procedural fairness. McHugh and Gummow JJ said, 'the notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in a particular case'.[58]
2. There is a requirement for an expectation or, at least, there is a basis for a reasonable inference that an expectation is being created. Mr Teoh himself would have had no expectation. Prior to *Teoh*, no-one had reason to suppose a general ratification of an incorporated treaty would give rise to an expectation. On the other hand, it was conceded that it was not merely those expectations for which there was a natural conscious appreciation that a benefit or privilege was to be conferred, and that the applicant had turned his mind to the matter, that would be considered.[59] Contrary to the majority view in *Teoh*, McHugh and Gummow JJ did not see ratification of any Convention as a 'positive statement' made to 'the Australian people' requiring an executive government to act in accordance with the convention.[60]
3. *Lam* reiterated previous Australian case law which held that the concept of legitimate expectations is directed to procedure and not the outcome. To put it another way, expectation is with the decision-making process and not the decision itself.[61] Legitimate expectation, as a facet of procedural fairness, is precisely that: procedural fairness and not a source of substantive rights.

In *Lam*, the department had advised the applicant that his visa was liable to cancellation and that he would have an opportunity to comment. The applicant was told that the matters to be taken into account would include 'the best interests of any children' with whom he might have an involvement. A departmental officer later wrote to the applicant requesting contact details of his children's carers and advised that they wished to contact the carers to assess the applicant's relationship with the children. Although contact details were provided, no further steps were taken to contact the children. Justices McHugh and Gummow found that, although an expectation arose from the conduct of the person proposing to make recommendations to the Minister, the failure to meet that expectation did not reasonably found a case of denial of natural justice; that the applicant had no vested right to oblige the department to act as it indicated it would; and that it did not result in the applicant failing to put to the department any material that he might have otherwise urged upon it. Also, the carers would not have supplemented in any significant way what had been supplied by the applicant.

One cannot help but suspect that special leave was granted in *Lam* to enable review of *Teoh* following the departure of the three members of the High Court who formed the majority in

Teoh. Mr Lam's argument for special leave was hardly a strong one. Justices McHugh and Gummow stated that the law of Australia should be as expressed by McHugh J in his dissenting *Teoh* judgment, at least in so far as there is no need for any distinct doctrine of legitimate expectation.[62] It is only where natural justice conditions the exercise of legitimate expectation that it has any role to play.

In an address last year at Cambridge University, French CJ explained that Australian courts since *Lam* have not accepted that the concept of legitimate expectation can underpin substantive entitlements, as distinct from informing the content of procedural fairness, which, indeed, was the view upon which he had proceeded as a single judge in *Teoh*.[63]

Procedural fairness as against substantive protection: the English position

Unsurprisingly, the view that prevails in *Lam* in respect of legitimate expectations has not been altered in any way by the French Court and no substantive protection is discernible. The formal and defined constitutional separation of powers and, most notably, *Lam*, militate against a development towards substantive protection. This approach may also have implications for likely development of public law estoppel, abuse of power and proportionality as doctrines likely to be accepted in Australia.

In *Lam*, McHugh and Gummow JJ (with whom Callinan J agreed) emphatically affirmed earlier decisions of the High Court that there should be nothing 'to disturb [substantive protection] by adoption of recent developments in English law with respect to substantive benefits or outcomes'.[64] In contrast to the Australian position, in *R v North and East Devon Health Authority*; *Ex parte Coughlan*[65] (*Coughlan*) the English Court of Appeal has held that legitimate expectations can be enforced as substantive rights. In that case, the relevant decision-maker had promised a disabled person that premises to which she was being shifted would be her 'own for life'. Later it was decided to close those premises. It was held that the disabled person should have been afforded a fair hearing before that decision was taken. However, the Court of Appeal went further: it held that a legitimate expectation could be the source of substantive rights. It based this upon the view that the failure of the decision-maker to meet the expectation would involve an 'abuse of power'. Lord Woolf MR also referred to an earlier decision of the English Court of Appeal in which it had been said that, in its application to substantive benefits, the doctrine of legitimate expectations is 'akin to an estoppel'.

In *R v Inland Revenue Commissioners; Ex parte Preston*,[66] Lord Templeman had placed 'abuse of power' in conjunction with breach of the rules of natural justice as remedies for judicial review. In *R v Secretary of State for Education and Employment; Ex parte Begbie*[67] Laws LJ had spoken of 'abuse of power' as the rationale for the general principles of public law.

Private law estoppel

In *R v East Sussex County Council; Ex parte Reprotech (Pebshan) Ltd*[68] Lord Hoffman, in a speech concurred in by the other Law Lords, approved *Coughlan* and said:

> There is, of course, an analogy between a private law estoppel and the public law concept of the legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote … it seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.[69]

As Sir Anthony Mason points out, these remarks indicate how the substantive protection of legitimate expectations has occupied the space in public law which is occupied in private law by estoppel.[70]

In England, the common law requires that a legitimate expectation be considered by the decision-maker; that effect should be given to the expectation unless there are legal reasons for not doing so; and that, if effect is not given to the expectation, fairness requires the decision-maker to give reasons for the conclusion. If there are policy considerations which militate against giving effect to the expectation, the decision-maker must make the decision in the light of the legitimate expectation, and failure to do so will vitiate the decision. In *R v London Borough of Newham and Bibi*[71] the Housing Authority made a promise to the applicants that it would provide legally secure housing accommodation within 18 months. The Authority did not honour its promise. The English Court of Appeal held that, in coming to its decision, the Authority failed to take account of the legitimate expectation and that therefore the decision was vitiated. The Court declined to make the decision itself, but it was for the Authority to consider the matter afresh. The Court made a declaration that the Authority was under a duty to consider the applications for suitable housing on the basis that the applicants had a legitimate expectation that the Authority would provide them with suitable accommodation in a secure tenancy.

Proportionality in Australia

Although the French Court has given no support to a legitimate expectation as a substantive right, French CJ has emphasised the importance of the common law doctrine of legality, which is a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language.[72]

However, thus far the High Court has given no endorsement to proportionality — at least not in the sense of recognising it as a potential form of jurisdictional error. It has been characterised as a European import to the English system which would have no application in the context of the separation of powers under the Australian constitutional arrangements. Some commentators view it as bordering on merits review. It was discussed by Kiefel J in *Rowe v Electoral Commission*.[73] Her Honour said that, in the Australian constitutional context, proportionality is said to involve considerations of the relationship between legislative means and constitutionally legitimate ends. It was also discussed by Crennan and Kiefel JJ in *Momcilovic v The Queen*[74] (*Momcilovic*) and more recently still in *McCloy v NSW*.[75] Save for *Momcilovic*, which involved the interaction of Victorian human rights legislation and suitable directions to be given in a criminal trial, these cases involved only constitutional arrangements.

Proportionality has had some distinguished academic support in Australia. Sir Anthony Mason has described proportionality as the concept which is particularly helpful in dealing with cases in which it is alleged that a decision results in an unacceptable violation of, or interference with, fundamental rights. Proportionality poses the question whether that result is disproportionate to the need to protect the legitimate interest which the decision-maker has sought to protect.[76]

Sir Anthony Mason sees the concept of proportionality as having a potential application where there is detriment to the individual by the application of policy grossly disproportionate to the risk of compromising the policy if the decision went the other way. He does not see proportionality as confined to the area of fundamental rights of freedom, although it has been accepted in England that, the more substantial the interference with fundamental rights, the more the court will require by way of justification before it can be satisfied the interference is reasonable.

However, there is perhaps a hint of interest on the part of French CJ in *Minister for Immigration and Citizenship v Li*[77] (*Li*), where his Honour said:

> A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable. It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts. Be that as it may, a disproportionate exercise of administrative discretion, taking a sledge hammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves. That approach is an application of the principles discussed above and within the limitation they would impose on curial review of administrative discretion.[78]

Li concerned the refusal of an adjournment by a Tribunal member where the applicant sought adjournment in order to get a skills assessment to secure a visa. The Court found there was a lack of evident and intelligible justification in the reasons advanced for refusing the adjournment. The comment by French CJ indicates possible scope for proportionality as a species of unreasonableness or irrationality that could one day constitute a basis for jurisdictional error.[79]

Proportionality in England

Proportionality has been largely accepted in England. Recently, in *Bank Mellat v Her Majesty's Treasury (No 2)*,[80] the *Counter Terrorism Act 2008* (UK) allowed the Treasury, where it reasonably believed that entities operating in the financial sector were aiding the development of nuclear proliferation, to be excluded by order from access to the UK banking market. The legislation also provided that the requirements imposed by Treasury order must be proportionate to the risks referred to, being nuclear proliferation. The purpose of the Treasury direction was to shut Bank Mellat out of the UK financial sector when much of the bank's international trade finance was transacted through London. In March 2009, the bank issued letters of credit with an aggregate value of about US$11 billion and the bank's own estimate of its revenue loss was about US$25 million per year. Important banking relations had been lost to the bank.

Bank Mellat brought an action that the decision of the Treasury was irrational, disproportionate and discriminatory. The Treasury said the fundamental justification was that Bank Mellat, by reason of its international reach, was well placed to assist entities to facilitate the development of nuclear weapons by providing them with banking facilities and, in particular, with trade finance. Bank Mellat had provided banking services to two entities which were involved in the Iranian nuclear weapons missile program, but this had happened without their knowledge and despite operating procedure directed to avoid this. Conversely, Bank Mellat accepted that the statutory prerequisites for making the order were satisfied in that the Treasury reasonably believed that Iran's nuclear missile's program posed a significant risk to the national interests of the United Kingdom. However, the order was not intended to be part of a sanctioned regime but was essentially preventative and remedial rather than punitive or deterrent.

The essential question was whether the interruption of commercial dealings with Bank Mellat in the financial markets in Britain bore some rational and proportionate relationship to the statutory purpose of hindering Iran's pursuit of its weapons program. The fourfold proportionality test to be applied was whether the objective was sufficiently important to justify the limitation of a fundamental right; whether it was rationally connected to the objective; whether a less intrusive measure could have been used; and whether, having regard to these matters and to the severity of the consequences, a fair balance had been struck between the rights of the individual and the interests of the community.[81]

The Court allowed that the nature of the issue required the Treasury to be allowed a large measure of judgment, especially as it is difficult to think of a public interest as important as nuclear non-proliferation.

However, Bank Mellat had been singled out from other banks despite it being a general risk, and Lord Sumption, speaking for the majority, said that a measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of it being discriminatory in some respect that is incapable of objective justification.[82]

The majority accepted that there was a rational connection between the order made and the objective of frustrating, as far as possible, the weapons program, but the distinction made between Bank Mellat and other Iranian banks, which was part of the Treasury case put to Parliament by Ministers, 'was an arbitrary and irrational distinction and that the measure was as a whole disproportionate'.[83] The majority also considered that the Treasury had a duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory notice was to be exercised, and the majority considered that Bank Mellat should have been given an opportunity to make representations before the direction was made.[84]

Lord Reed, who dissented, traced the history of proportionality as an aspect of justice to St Thomas Aquinas. He cited *Commentaries on the Laws of England*[85] that the concept of civil liberty comprises 'natural liberties so far restrained by human laws (and not further) as is necessary and expedient for the general advantage of the public'. That the State should limit natural rights only to the minimum extent necessary was developed in Germany into a public law standard of proportionality. It migrated to the case law of the European Court of Justice and then to Canada and then to common law jurisdictions.[86]

Summary of Chief Justice French's legacy

One can therefore say that, during the term of French CJ, the Court has strengthened the constitutional power relationships.

First, there has been a readiness to assert the role of the judiciary by striking down privative clauses which seek to immunise executive decision-makers against appeal and, in doing so, developed what had been adumbrated in his *NAAV* dissent as a Federal Court judge. Chief Justice French's approach — to confine the operation of privative clauses — was largely followed in *Plaintiff S157* by the Gleeson Court and then by the High Court, over which he himself presided in the privative clause cases such as *Kirk* and *Wainohu* thereafter.

Second, in *Kirk* and *Wainohu,* the French Court adopted a logical progression in that state legislatures were required now to respect the existence of jurisdictional error as a constitutionally protected form of judicial review, notwithstanding the absence of a recognised separation of powers under state Constitution Acts. State legislature cannot now impose upon state Supreme Courts functions incompatible with their essential characteristics as courts or subject their judicial decision-making to executive direction.[87] Prior to French CJ, the principle of the need for legislation to respect the institutional integrity of state courts had only been enunciated once in *Kable v DPP*,[88] which many predicted would be 'a dog that barks but once'.

Third, there was further affirmation of the more exacting and rigorous separation of judicial power from executive power, which meant that the role of legitimate expectation would continue to have no freestanding status and would at most be a facet to consider in determining what is fair. Indeed, legitimate expectation is a term which French CJ said in his Cambridge lecture that some would describe as a 'zombie principle'.[89] Those words

therefore afford no present scope to underpin substantive entitlements in the way that they may do in England.

Fourth, proportionality is yet to be recognised as a form of jurisdictional error, although there is a hint in *Li* that his Honour considers it may one day have a role, either as a form of unreasonableness giving rise to possible jurisdictional error or perhaps as a distinctive basis for jurisdictional error.[90] In his Cambridge lecture, having alluded to its relevance in constitutional arrangements, he said, 'whether proportionality reasoning finds a place as an aspect of judicial review relating to the reasonableness and rationality of administrative decisions remains to be seen'.[91]

In these and other important respects, the High Court under French CJ has done much to develop, assert and uphold the central role of the judiciary in strengthening the vital power relationships which underpin the foundations of the federal *Constitution*.

Endnotes

1 Justice William Gummow AC, 'A Fourth Branch of Government?' (2012) *AIAL Forum* 70, 19.
2 Severin Woinarski (ed), *Jesting Pilate and other papers and addresses by Sir Owen Dixon* (WS Hein & Co, New York, 1965) 203.
3 (1803) 5 US 187, 111.
4 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; Sir Anthony Mason, 'The Foundations and the Limitations of Judicial Review' (2001) *AIAL Forum* 31, 13.
5 *Kirk v Industrial Relations Commission* (2010) HCA 1; (2010) 239 CLR 531.
6 (1945) 70 CLR 598.
7 Ibid 617.
8 [2002] FCAFC 228; 123 FCR 298.
9 (2003) 211 CLR 476.
10 (2002) FCAFC 228, [499], [500], [537].
11 (1999) 197 CLR 510.
12 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.
13 Ibid [19] (Gleeson CJ).
14 Ibid [57] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
15 Ibid [64].
16 Ibid [65].
17 Ibid [60].
18 Ibid [65].
19 Ibid [76]; see also *Cashman v Brown* (2011) HCA 22, where a privative clause making a determination of a Medical Panel in Victoria 'final and conclusive' was held not to exclude judicial review in respect of a common law claim since the claim was not brought under the *Accident Compensation Act 1985* (Vic).
20 (2003) 211 CLR 476, [98].
21 2004 ALR 12; 2004 78 ALJR 992.
22 Ibid [57].
23 1997 HCA 11; 1997 191 CLR 602.
24 (2010) HCA 1; (2010) 239 CLR 531.
25 (1874) LR 5PC 417.
26 (1874) LR 5PC 417, 442 (emphasis added).
27 (2010) HCA 1; (2010) 239 CLR 531, [93].
28 Ibid [64] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).
29 *Craig v South Australia* (1995) 184 CLR 163.
30 1995 184 CLR 163, 179.
31 (2010) HCA 1; (2010) 239 CLR 531, [73].
32 Ibid [83].
33 Ibid. See also Kristen Walker QC, 'Jurisdictional Errors since Craig' (2012) 86 *AIAL Forum* 35, 38, which refers to some of the above grounds of jurisdictional error.
34 (2011) HCA 24.
35 Ibid [15] (French CJ and Kiefel J).
36 Ibid [46] (French CJ and Kiefel J).
37 Ibid [94] (Gummow, Hayne, Crennan and Bell JJ).
38 (2010) NSCWA 190.
39 (2004) NSWLR 421.
40 Ibid [108] (Basten JA; Spigelman CJ agreeing at [56]; McDougall J at [287]).
41 (2011) WASCA 237.

42 At [37] (Edelman J).
43 *Seddon v Medical Assessment Panel (No 1)* (2011) WASC 237 at [35]–[49]; *Seddon v Medical Assessment Panel (No 2)* (2012) WASC 1.
44 *Seddon v Medical Assessment Panel* (2015) WASC 386, [107].
45 Justice John Basten, 'Judicial Review in State Jurisdiction' (2016) 84 *AIAL Forum* 10.
46 For example, J Hathaway, Goodwin Gill and Grahl Madsen, *Using International Law in Domestic Courts* (Bloomsbury Publishing, 2005).
47 J Hathaway and M Foster, *The Law of Refugee Status* (2nd ed, Cambridge University Press, 2014).
48 The Hon Wayne Martin SC, 'National Lecture on Administrative Law: 2014 National Administrative Law Conference' (2014) 78 *AIAL Forum* 2.
49 SA de Smith, *The New Commonwealth and its Constitutions* (Stevens & Sons, 1964).
50 Professor de Smith lectured at the London School of Economics and then Cambridge. His LLB was 'Constitutional Laws of the Commonwealth' (framed on Australia, Canada, India and Pakistan). His book, *The New Commonwealth and its Constitution* (Stevens & Sons, 1964) devoted attention to the constitutions of Ghana, Malaysia, Nigeria, West Indian Federation, Singapore, Uganda, and Kenya (amongst many others). He was described as 'a scholar and a gentleman': 'Professor SA de Smith' (obituary) (1974) 37 *Modern Law Review* 241.
51 (1990) 170 CLR 1.
52 (1995) 183 CLR 273.
53 (1992) 176 CLR 1, [38].
54 Ibid [36].
55 Ibid [34].
56 (2002) 195 ALR 502.
57 See Henry Burmester AO QC, 'Teoh Revisited after *Lam*' (2004) 40 *AIAL Forum* 33. Henry Burmester represented the Minister in the High Court.
58 (2002) 195 ALR 502, [105] (McHugh and Gummow JJ).
59 Ibid [91].
60 Ibid [99].
61 Ibid [105].
62 Ibid [83] (McHugh & Gummow JJ).
63 Chief Justice French, 'The Globalisation of Public Law — A Quilting of Legalities' (speech given to the Cambridge Public Law Conference, Cambridge, UK, 12 September 2016) 3.
64 (2002) 195 ALR 502, 148 (Callinan J).
65 (2001) QB 213.
66 (1985) AC 835, 862.
67 (2000) IWLR 1115, 129.
68 (2002) UKHL 8.
69 Ibid [34].
70 Sir Anthony Mason, 'The Scope of Judicial Review' (2001) 31 *AIAL Forum* 40.
71 (2001) EWCA Civ 607; reversed on appeal (2002) UKHL 3.
72 (2011) HCA 34, [43].
73 (2010) HCA 46, [424]–[480].
74 (2011) HCA 34.
75 (2015) HCA 34, [69]–[93].
76 Mason, above n 70, 37.
77 *MIC v Li* (2013) HCA 18, [30].
78 Ibid [30].
79 In *R (on the application of Lumsdon and others) v Legal Services Board* (2015) UK SC 41, Lord Reed and Lord Toulson explained (at [23]) that proportionality has been applied in different contexts, as had been said in *Pham v Secretary of State for the Home Department* (2015) UK SC 19, [107]. The differences between proportionality at common law and the principle applied under the Convention were discussed in *R (Daly) v Secretary of State for the Home Department* (2001) 2 AC 532 at [27]–[29].
80 (2013) UKSC 39.
81 Ibid [20] (Lord Sumption), [74] (Lord Reed).
82 Ibid [25] (Lord Sumption), referring to *A v Secretary of State for the Home Department* (2005) 2 AC 68, where the issue was a derogation from the convention permitting the detention of non-nationals whose presence in the UK was considered by the Home Secretary to be a risk to national security and who could not be deported. It was held that this was not a proportionate response to the terrorist risk threat which provoked it. It was held disproportionate because liberty was a fundamental right and discriminatory because detention was confined to non-nationals.
83 Ibid [27] (Lord Sumption).
84 Ibid [32] (Lord Sumption).
85 Sir William Blackstone, *Commentaries on the Laws of England* (9th ed, Callaghan, 1915) Vol 1, 125.
86 (2013) UKSC 39, [68] (Lord Reed).
87 (2011) 243 CLR 181; *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319, where French CJ was in a 4:3 majority striking down an executive direction.
88 (NSW) 1996 HCA 24; (1996) 189 CLR 51.

89 French, above n 63, 3.

90 Justice Griffiths, 'Keynote: Developments in Judicial Review Affecting Migration' (speech delivered at the Law Council of Australia CPD Immigration Law Conference, Sydney, 24 February 2017) 12–15 discusses proportionality in judicial review of administrative action. His Honour refers to Professor Allars' identification of proportionality as one of three 'paradigms' of unreasonableness. However, he also cites French CJ as stating, in *Attorney General re the State of South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, [55], that proportionality is not a legal doctrine.

91 French, above n 63, 10.

JUDICIAL REVIEW OF THE EXERCISE OF DISCRETIONARY PUBLIC POWER

Justice Andrew Greenwood*

This article is concerned with two topics. Part 1 concerns the constitutional implications of the phrases 'the Supreme Court of any State' and 'or of any other court of any State' as those terms are used in s 73 of ch III of the *Constitution* and the limitations upon state executive and legislative power according to the *Kable*[1] and *Kirk*[2] principles. Part 2 concerns the notion of 'unreasonableness' and the implications of the High Court decision in *Minister for Immigration and Citizenship v Li*[3] (*Li*) in the review of the exercise of discretionary power and whether the decision-maker has exceeded the limits of the power.

Implications of s 73 of the *Constitution* and relevant cases

The impressive London statue of Sir Winston Churchill by Ivor Roberts-Jones has Churchill looking across to the Westminster Parliament and particularly the House of Commons to where the statue of Oliver Cromwell stands outside the House. That gaze seems appropriate because Churchill looked upon and described Cromwell as 'our greatest man',[4] bound up in the assertion of the 'supremacy of Parliament' which would, over time, ultimately be regarded as the expression of the will of a sovereign people. The point of Churchill's observation really is that the great English constitutional struggles which took many forms were concerned with the *supremacy of Parliament* and not with any notion of the *separation of powers*.

The colonial legislatures reflected that Westminster model. As French CJ observed in *South Australia v Totani*[5] (*Totani*), there was, at federation, no doctrine of separation of powers entrenched in the constitutions of the states, although unsuccessful attempts were made in New South Wales, Western Australia and South Australia in the 1960s and 1970s and in Victoria in 1993 to persuade courts of the existence of such a doctrine.[6] The Commonwealth *Constitution*, of course, provides for a distribution of Commonwealth executive, legislative and judicial power. Of present relevance to the supervisory jurisdiction of administrative decision-making at the federal and state level is ch III of the *Constitution* and the way in which it vests the judicial power of the Commonwealth by s 71 of the *Constitution*. This is discussed later because of its centrality to the constitutionalisation of the supervisory jurisdiction, exercised by the state Supreme Courts, of administrative decision-making. One of the limitations on Commonwealth legislative power, of course, is the well-known *Boilermakers'* doctrine.[7]

The *Constitution* also reflects at least three other features of present importance. The first feature is the conception on which the *Constitution* is framed, which has come to be known as the *Melbourne Corporation* principle, put this way by Sir Owen Dixon in 1947:

* *Justice Greenwood is a Judge of the Federal Court of Australia. This is an edited version of an address given to the Queensland Chapter of the Australian Institute of Administrative Law, 27 April 2017.*

> The foundation of the *Constitution* is the conception of a central government and a number of state governments separately organised. The *Constitution* predicates their continued existence as independent entities. Among them it distributes powers of governing the country. The framers of the *Constitution* do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the states as bodies politic whose existence and nature are independent of the powers allocated to them. The *Constitution* on this footing proceeds to distribute the power between state and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss 51, 52, 107, 108 and 109.[8]

The second feature is the notion discussed by Mason CJ in 1992 in *Australian Capital Television Pty Ltd v The Commonwealth*[9] that the *very concept* of representative government and representative democracy signifies government by the people through their representatives and, translated into constitutional terms, the *Constitution* brought into existence a system of representative government in Australia in which elected representatives exercise sovereign power on behalf of the Australian people.[10] Thus, in 1997, in *Lange v Australian Broadcasting Corporation*,[11] the High Court held that the *Constitution* provides for an 'implied freedom' of political communication as 'an indispensable incident of that [constitutional] system of representative government'.[12] The freedom is not absolute. As Gummow and Hayne JJ observe in *Mulholland v Australian Electoral Commission*,[13] the High Court, put anecdotally, had had enough of the 'great difficulties' created by the phrase 'absolutely free' in s 92, to give rise to another 'incompletely stated "freedom" … discerned in the *Constitution*'.[14] Thus the freedom is limited. It gives rise to invalidity in the exercise of legislative or executive power which burdens the freedom in a way which is 'not reasonably appropriate and adapted' to secure a legitimate end compatible with the constitutionally prescribed system of government. This matter of the implied freedom is due to its potential role of invalidating exercises of legislative and executive power as the source of a discretion.

If a federal or state Act confers a power upon a decision-maker, a question might arise whether, first, the terms of the conferral burden the freedom and, second, if they do, whether the burden is 'reasonably adapted' as described. The terms of the Act might, however, confer a discretionary power in terms which do not burden the freedom as a matter of construction of the Act, yet the exercise of the discretion conferred in *unconfined* terms may *operate* in a way that burdens the freedom. The discretion might be exercised consistent with the constitutional limitation or it might not.

A number of modern statutes confer broad discretionary powers which might, when exercised by the repository of the power, impose conditions on a citizen that burden the freedom. That was the unsuccessful contention in 2012 in *Wotton v State of Queensland*[15] (*Wotton*) concerning the exercise of powers by the Parole Board to impose particular conditions on Wotton's release on parole. As to the relationship between the statute and the exercise of the discretionary powers conferred by it, the majority[16] accepted these propositions:

> (i) where a putative burden on political communication has its *source* in *statute*, the issue presented is one of a limitation upon legislative power; (ii) whether *a particular application* of the statute, by the exercise or refusal to exercise *a power* or *discretion* conferred by the statute, is valid is not a question of constitutional law; (iii) rather, the question is whether the repository of the power has complied with the statutory limits; (iv) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the *exercise of power* thereunder in a given case, such as that in this litigation concerning the conditions attaching to the Parole Order, does not raise a constitutional question, as distinct from a *question* of the *exercise of the statutory power*.[17]

There is a continuing debate about the constitutionality of the exercise of such a discretion and about aspects of these observations in *Wotton* literature,[18] which will not be examined further here.

The third feature is that s 106 of the *Constitution* preserves and continues the Constitution of each state, subject to the Commonwealth *Constitution*.

Section 71 *vests* the judicial power of the Commonwealth in the High Court and in such other federal courts as the Parliament creates and in such other courts as it *invests* with federal jurisdiction.

Section 73 places the High Court at the appellate apex of the Australian courts system conferring jurisdiction to hear appeals from all judgments, decrees, orders and sentences of any federal court or court exercising federal jurisdiction or of 'the Supreme Court of any State' or of 'any other court of any State' (apart from any Justices of the High Court exercising original jurisdiction).

Section 75(iii) provides that the High Court has original jurisdiction in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

Critically, s 75(v) provides that the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Section 76 provides for the conferral, by Parliament, upon the High Court of original jurisdiction in any 'matter' arising under the *Constitution* or involving its interpretation (s 76(i)); or arising under any laws made by the Parliament (s 76(ii)); and otherwise by s 76(iii) and s 76(iv).

Section 77 provides that, with respect to any of the matters mentioned in ss 75 or 76, the Parliament may make laws defining the jurisdiction of any federal court; defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to 'or is invested in the courts of the States'; and *investing* any 'court of a State' with federal jurisdiction.

Certiorari is not referred to in ch III but lies as ancillary to the effective exercise of the jurisdiction conferred by s 75(v).[19]

Although the term 'prohibition' was thought to import the law relating to the grant of prohibition by the Court of King's Bench,[20] the terms 'prohibition' and 'jurisdiction' are regarded as 'constitutional expressions'. Thus prohibition lies in circumstances not contemplated by the Court of King's Bench, including conduct undertaken under an invalid law of the Parliament or conduct beyond the executive power of the Commonwealth. Importantly, the prohibition will go under s 75(v) in respect of a *denial of procedural fairness* by an officer of the Commonwealth resulting in a decision made in *excess* of jurisdiction.[21] In other words, such a decision engages 'jurisdictional error'.

The underlying principle here has relevance for contemporary *Wednesbury*[22] unreasonableness and the observations on that topic in *Li*.[23] The background context is this. In 1985, in *Kioa v West*,[24] Mason J observed that the law had developed to a point where it could be accepted that there is a *common law* duty to act *fairly*, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations subject only to the clear manifestation of a contrary statutory intention. Justice Brennan took a different view in the same case, regarding the *jurisdiction* of a court to review judicially, on the ground of a denial of procedural fairness, a decision made in the exercise of a statutory power, as dependent upon the 'legislature's intention' that observance of the principles of natural justice 'is a condition of the valid exercise of the power'.[25] Ultimately, it is a question of statutory construction.

Justice Brennan J said this:

> the *statute* determines whether the exercise of the power is conditioned on the observance of the principles of natural justice. The statute is construed, as all statutes are construed, against a *background* of common law notions of justice and fairness and, when the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that 'the justice of the common law will supply the omission of the legislature' … The true intention of the legislature is thus ascertained. When the legislature creates certain powers, the courts *presume* that the legislature *intends* the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention.[26]

Justice Brennan put the matter in more emphatic terms in this way:

> Observance of the principles of natural justice is *a condition* attached to the power whose exercise it governs. There is *no free-standing common law right* to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power.[27]

The *content* of the principles to be applied may be another matter, as a question of statutory construction. Justice Brennan put the dynamic in this way:

> [T]he intention to be implied when the statute is silent is that observance of the principles of natural justice *conditions* the exercise of the power although in some circumstances the *content* of those principles may be diminished (even to nothingness) to avoid frustrating the purpose for which the power was conferred. Accepting that the content of the principles of natural justice can be reduced to nothingness by the circumstances in which a power is exercised, a presumption that observance of those principles conditions the exercise of the power is not necessarily excluded at least where, in the generality of cases in which the power is to be exercised, those principles would have a substantial content.[28]

In *Saeed v Minister for Immigration and Citizenship*[29] (*Saeed*), the majority[30] reshaped the basis of the principle distilled by Mason CJ, Deane and McHugh JJ in *Annetts v McCann*[31] (*Annetts*). In *Annetts*, their Honours said that it could be treated as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice *regulate* the *exercise* of that power unless those principles are excluded by plain words of necessary intendment. The support cited and quoted for that view included Mason J's observations in *Kioa v West*.[32] In *Saeed*[33] the statement of principle is adopted but firmly anchored to the views of Brennan J. A failure to fulfil the condition governing the exercise of the power means that the decision is not 'authorised' by the statute and is thus invalid[34] as an *excess* of power.

In 1997, in *Kruger v The Commonwealth*[35] (*Kruger*), Brennan CJ continued this theme of searching, as a matter of construction of the statute, for the legislature's intention and added, in the context of a discretionary power conferred by statute:

> Moreover, 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.[36]

Associated Provincial Picture Houses Ltd v Wednesbury Corporation[37] (*Wednesbury*) was cited as authority for that proposition. Justice Gummow adopted that view in *Minister for Immigration and Multicultural Affairs v Eshetu*[38] (*Eshetu*).

The reasoning in *Kruger* was expressly relied upon by Gaudron and Gummow JJ in *Re Refugee Review Tribunal; Ex parte Aala*[39] (*Aala*) to support the reach of *prohibition* on the footing that a failure to accord procedural fairness where the statute has not 'relevantly (and validly) limited or extinguished any obligation to accord procedural fairness' results in an *excess* of jurisdiction.

Apart from statute, where an officer of the Commonwealth exercises executive power, a question will arise as to whether the relevant aspect of Commonwealth executive power in ch III includes a requirement of procedural fairness.

The provisions of ch III, and particularly ss 71, 73, 75(iii), 75(v) and 77(ii) and 77(iii), contain very significant implications for the supervisory review jurisdiction of the Supreme Court of each state.

The federal Parliament may not by legislation deny the High Court its entrenched original jurisdiction in s 75(v). The constitutional writs of mandamus and prohibition go for jurisdictional error and so too certiorari as *ancillary* to that relief. Certiorari, however, is not confined to the review of administrative action for jurisdictional error.[40] It may lie, subject to the existence of a 'matter', in the exercise of jurisdiction under s 75(iii)[41] or s 76(i)[42] and, because no constitutional provision confers jurisdiction with respect to certiorari, it is open to the Parliament to legislate to prevent the grant of such relief (except as ancillary to prohibition and mandamus).[43] Thus certiorari might validly be removed for non-jurisdictional error of law on the face of the record.

It is uncontroversial that, since the decision in 2003 in *Plaintiff S157/2002 v The Commonwealth*,[44] federal legislation that purports, by privative clause or otherwise, to remove the High Court's supervisory jurisdiction of ensuring that Commonwealth officers stay within the limits of legislative and executive authority (that is, review for jurisdictional error) cannot be removed. An administrative decision which involves jurisdictional error is regarded, in law, as no decision at all.[45]

As to state decision-makers, the prevailing view for a long time was that a privative clause appropriately framed in state legislation could remove, from the Supreme Court of a state, review for errors of any kind whether amounting to jurisdictional errors or non-jurisdictional errors.[46] That seemed to be consistent with the views of Gaudron and Gummow JJ in *Darling Casino Ltd v NSW Casino Control Authority*[47] (*Darling Casino*) in 1997.

In 2010, in *Kirk v Industrial Court (NSW)*[48] (*Kirk*), the Court recognised that, since the important decision in *Kable v Director of Public Prosecutions (NSW)*[49] (*Kable*) in 1996, the term 'the Supreme Court of any State' in s 73 is a 'constitutional term' and thus there must be, as Gummow, Hayne and Crennan JJ said in *Forge v Australian Securities and Investments Commission*[50] (*Forge*), 'a body fitting [that] description', with the result that it is beyond the legislative power of a state to alter the character or constitution of its Supreme Court such that it ceases to meet the constitutional description.

In *Forge*, Gummow, Hayne and Crennan JJ explained the principle in this way:

> The legislation under consideration in *Kable* was found to be repugnant to, or incompatible with, 'that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system'. The legislation in *Kable* was held to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court of New South Wales because of the nature of the task the relevant legislation required the Court to perform. *At the risk of undue abbreviation, and consequent inaccuracy*, the task given to the Supreme Court was identified as a task where the Court acted as *an instrument of the Executive*. The consequence was that the Court, if required to perform the task, would not be an appropriate recipient of invested federal jurisdiction. But as is recognised in *Kable, Fardon v Attorney-General (Qld)* [(2004) 223 CLR 575] and *North Australian Aboriginal Legal Aid Service Inc v Bradley* [(2004) 218 CLR 146, 164 [32]], the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a state Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

> It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. …[51]

In *Kirk*, the majority[52] also accepted that, at federation, the Supreme Court of each state had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England and the jurisdiction included, having regard to the Privy Council decision in *Colonial Bank of Australasia v Willan*[53] in 1874, jurisdiction to grant certiorari for jurisdictional error *notwithstanding* a privative clause in a statute.[54] It followed that the supervisory jurisdiction of each state Supreme Court was, at federation, and remains, the 'mechanism' for the determination and enforcement of the *limits* of the exercise of state executive and judicial power by persons and bodies other than the Supreme Court. It is the path to legality. The majority put the principles in these terms:

> The] supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. And because, 'with such exceptions and subject to such regulations as the Parliament prescribes', s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of *that* supervisory jurisdiction is ultimately subject to the superintendence of *this* Court … in which s 71 of the *Constitution* vests the judicial power of the Commonwealth.
>
> … [Thus] the supervisory jurisdiction exercised by the state Supreme Courts is exercised according to principles that in the end are *set* by this Court. To deprive a state Supreme Court of its supervisory jurisdiction enforcing the limits of the exercise of state executive and judicial power by persons and bodies other than that Court would be to create *islands of power* immune from supervision and restraint. It would permit what *Jaffe* described as the development of 'distorted positions'. And as already demonstrated, it would remove from the relevant state Supreme Court *one* of its defining characteristics.
>
> [That] is not to say that there can be no legislation affecting the availability of judicial review in the state Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the state Supreme Courts point to the *continued need* for, and *utility* of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on state legislative power. Legislation which would take from a state Supreme Court power to grant relief on account of jurisdictional error is *beyond* state legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is *not beyond power*.[55]

The above reference to Jaffe is a reference to the writings of Professor Jaffe of Harvard University, who was writing on the role of judicial review of administrative action throughout much of the same period as Professor Davis of Chicago University. Both of these authors were very influential upon United States jurisprudence in this area and also influential in Australia.[56]

In the later High Court decision in 2013 of *New South Wales v Kable*,[57] when Mr Kable, who had been imprisoned under the impugned order, unsuccessfully sued the state for damages, the Court explained that the New South Wales Act was beyond the legislative power of the New South Wales Parliament because its enactment was contrary to the requirements of ch III. That was so because the exercise of jurisdiction which the Act purported to give to the Supreme Court was held to be incompatible with the institutional integrity of that Court[58] as a suitable repository for the exercise of federal jurisdiction as contemplated by s 77(iii) of the *Constitution* because it rendered the Court an *instrument* of the *executive*.

Mr Stephen McLeish SC, writing as the Solicitor-General for Victoria,[59] has expressed concern that the *Kable* doctrine may have lost its constitutional moorings because the emphasis now seems to be upon whether the jurisdiction, purportedly conferred upon the relevant state court, is incompatible with the institutional integrity of that court *without*

measuring that incompatibility against the notion of whether it remains 'a suitable repository for the exercise of federal jurisdiction'. The state legislation, he contends, is only invalid to the *extent* that it confers a jurisdiction which *exceeds* the boundaries of compatibility with the institutional integrity of the state court having regard to whether or not it is or remains a 'suitable repository for the exercise of federal jurisdiction'. For my own part, I am not so sure that, in the more recent authorities, the ship of principle has lost its moorings.

The 1996 *Kable* decision was almost a perfect vehicle for the development of the principle, fundamentally developed, it seems to me, by Gaudron J and particularly Gummow J in their respective judgments. The legislation involved was the *Community Protection Act 1994* (NSW). It was an Act exclusively directed at Mr Gregory Wayne Kable, who had been convicted of the manslaughter of his wife and other offences. He had been sentenced to imprisonment for a minimum term of four years with an additional term of one year and four months. The Act authorised the making of an order by the Supreme Court for the continued detention of Mr Kable beyond the period of what would otherwise have been the date of his release. The legislation operated to bring about the imprisonment of Mr Kable not consequent upon any 'adjudgment by the Court of criminal guilt'.

In *Kable*, Gummow J said this:

> Plainly, in my view, such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction. Moreover, not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a *fundamental degree*.[60]

The function to be fulfilled was not *judicial*. Nor was the power properly characterised as a *judicial function*. Justice Gummow described it in *Fardon v Attorney General (Qld)*[61] as engaging a 'legislative plan' to conscript the New South Wales Supreme Court.

The *Kable* principle was applied by the High Court in 2009 in *International Finance Trust Co Ltd v NSW Crime Commission*[62] to invalidate s 10 of the *Criminal Assets Recovery Act 1990* (NSW), which enabled a law enforcement authority to seek, ex parte, from the New South Wales Supreme Court an order preventing any dealing with specified property. Section 10 required the making of the order if the law enforcement officer *suspected* the relevant person had committed any of a broad range of crimes or the officer *suspected* that the property was derived from criminal activity and the Court considered that there were reasonable grounds for the suspicion. The majority construed s 10 as excluding any power in the Supreme Court to review and reconsider the continuation of the ex parte order which amounted to, in effect, sequestration of the property upon 'suspicion of wrongdoing' for an indefinite period with no effective curial enforcement of the duty of full disclosure on an ex parte application *where* the only possibility of release from sequestration was upon proof of a 'complex of negative propositions'.

Kable was also applied in *Totani*[63] in 2009 to invalidate s 14(1) of the *Serious and Organised Crime Control Act 2008* (SA). The Act's aim was to disrupt and restrict the activities of organisations involved in serious crime, and it conferred powers on the Attorney-General, on the application of the Commissioner of Police, to make a declaration in relation to an organisation if satisfied that members of it associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity. Section 14(1) required the Magistrates Court to make a 'control order' against a person if satisfied that the person is a member of a declared organisation. Whether and why an organisation should be declared was entirely a matter for the executive. The only question left to the Court was whether a person was a member of a declared organisation. Section 14(1) was invalid because it authorised the executive to enlist the Court to implement the decisions of the

executive in a manner repugnant to, or incompatible with, its institutional integrity — or, put another way, it had the effect of reducing the Court to 'an instrument of the Executive'.[64]

The decision in *Kable* was also applied in *Wainohu v New South Wales*[65] (*Wainohu*) to invalidate the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The Act recited that it was enacted to provide for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations and their members. It made provision for judges of the Supreme Court of New South Wales to give their consent to be declared 'eligible judges' for the purposes of pt 2 of the Act. It empowered the Commissioner of Police to apply to an eligible judge for an order declaring an organisation to be a 'declared organisation' for the purposes of the Act. A majority held the Act invalid because it exempted eligible judges from any duty to give reasons in connection with the making or revocation of a declaration of an organisation as a declared organisation. This feature of the Act was critical to the conclusion that the Act was repugnant to or incompatible with the continued institutional integrity of the Supreme Court of New South Wales. The question was not whether the task to be performed by an eligible judge would be performed as *persona designata* or whether the task of the eligible judge was to be characterised as judicial or administrative. The critical matter was the exemption from an obligation to give reasons for the making of a declaration or the revocation of a declaration order.

As to examples of statutory instruments which were held to be valid, see *K-Generation Pty Ltd v Liquor Licensing Court*,[66] in which s 28A of the *Liquor Licensing Act 1997* (SA) was held not repugnant to or incompatible with the continued institutional integrity of the relevant South Australian state courts because those courts could determine 'for themselves' both whether the relevant information (classified by the Commissioner of Police as criminal intelligence) met the definition of criminal intelligence in the Act and left those courts free to determine what steps were to be taken to maintain the confidentiality of the information.

In *Condon v Pompano Pty Ltd*,[67] Gageler J upheld the validity of the relevant sections of the *Criminal Organisation Act 2009* (Qld) valid on the footing that, although the use by the Commissioner of the Police Service of declared criminal intelligence could, in some circumstances, amount to an abuse of process, there was a procedural solution to that problem. The solution lay in the capacity of the Supreme Court of Queensland to stay a substantive application made by the Commissioner (for a declaration that a particular organisation was a 'criminal organisation') in the exercise of its *inherent jurisdiction* in any case in which practical unfairness to a respondent became manifest. Thus, the criminal intelligence provisions of the Act were saved from incompatibility with ch III of the *Constitution but only* by reason of the preservation of 'that capacity'.[68] The majority[69] held that, although the procedure might be novel and thus said to amount to a denial of procedural fairness, 'attention must be directed to questions of fairness and impartiality'.[70] The majority also said this: 'Observing that the Supreme Court can and will be expected to act fairly and impartially, points firmly against invalidity.'[71] Thus the provisions were not repugnant to or inconsistent with the institutional integrity of the Supreme Court.

In *Kable*, Gaudron J observed[72] that a matter of significance emerging from a consideration of the provisions of ch III is that the *Constitution* does not permit of *different grades or qualities of justice* depending upon whether judicial power is exercised by state courts or federal courts created by the Parliament. That being so, state courts have a role and existence *transcending* their status as state courts, which directs the conclusion that ch III requires that the parliaments of the states cannot legislate to confer powers on state courts which are repugnant to or incompatible with 'their exercise of the judicial power of the Commonwealth'.[73]

Justice Gaudron also observed that the prohibition on state legislative power which derives from ch III is *not at all* comparable with the limitation on the legislative power of the Commonwealth derived from the *Boilermakers'* doctrine. That follows because the ch III limitation on state legislative power is 'more closely confined' and relates to 'powers or functions imposed on a State court' which are 'repugnant to or incompatible with the exercise of the judicial power of the Commonwealth'.

Mr McLeish SC, for example, contends that *Wainohu* is an emblematic example of the *Kable* principle being reformulated based upon 'impairment of institutional integrity' *unconditioned* by any consideration of whether the power conferred under the state Act renders the state court unfit as a repository for the vesting of federal jurisdiction. That is said to follow because the majority in *Wainohu* regarded the 'touchstone' of the 'constitutional principle' to be protection against 'legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State'[74] without any reference to the relationship between such intrusion and the capacity of the relevant court to be or remain a fit repository for the vesting of federal jurisdiction.

Although it is true that the various formulations of the *Kable* principle in later decisions of the High Court do not necessarily expressly capture the precise language of the principle as formulated in *Kable*, it seems to me that two things remain. First, there can be little doubt that the fundamental principle articulated in *Kable* remains constant throughout. Second, some later reformulations expressly recognise a synthesis of the principle whilst guarding against inaccuracy.

A question remains of whether invalidity by reason of ch III gives rise to something in the nature of a *separation of powers* as if that doctrine had been adopted in the Constitution of each state. It is true that in *Kable*, McHugh J observed that 'in some situations the effect of Ch III of the *Constitution* may lead to the same result as if the State had an enforceable doctrine of separation of powers'.[75] Justice Gaudron thought not. Justice Williams, however, in 2004, put the matter in reasonably plain terms in *Re Criminal Proceeds Act 2002*[76] in this way:

> The principle derived from the majority judgments in *Kable* can be stated in the following terms – a State Supreme Court as one of the judicial institutions invested with federal jurisdiction may not act in a manner inconsistent with the requirements of Ch III of the *Constitution*.[77]

It seems to me, however, that the principle really is this: a state Act, or provisions of a state Act, which intrude or provide for executive intrusion upon the institutional integrity of the courts of a state such that the court is rendered unfit as a repository for the vesting of the judicial power of the Commonwealth is, to that extent, invalid. To the degree to which ch III invalidity approximates a separation of powers within the boundaries of such a principle, that description is an appropriate one within the *limitations* of the principle.

Unreasonableness

As already mentioned, Brennan CJ in *Kruger* observed[78] that, when a discretionary power is statutorily conferred on a repository, the power *must* be exercised *reasonably* because the *legislature* is *taken* to *intend* that the discretion be *so exercised*. Thus the power must, as a matter of construction of the statute conferring the power, be exercised reasonably (unless the plain words of the statute clearly and necessarily convey a different intention).

Normally, the likelihood is that exercise of the power will be *conditioned* by an obligation of reasonableness, as a presumption of law in the construction of the Act conferring the power on the repository. This is unsurprising, as it accords with the approach to determining

whether the exercise of a power statutorily conferred is conditioned on the observance of the principles of natural justice, as earlier mentioned.[79]

In *Abebe v The Commonwealth*,[80] Gaudron J put the matter more emphatically by saying that it was difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, the statute should not be construed so that it is an 'essential condition' of the exercise of the power that it be exercised reasonably — adding, however, the qualification 'at least in the sense that it not be exercised in a way that no reasonable person could exercise it'.[81] That qualification is not (and is less demanding than) the language of *Wednesbury* unreasonableness, but it raises the dilemma of an emphatically expressed statutory *condition* of the *exercise* of the power on the one hand and how conduct falling short of the condition, legal unreasonableness, might be *measured*, on the other hand.

In 1990, in *Attorney-General (NSW) v Quin*[82] (*Quin*), Brennan J also accepted that the legislature is taken, impliedly (unless the Act expressly provides for the matter) to intend that a power be exercised *reasonably* by the repository of the power. That was the view of Hayne, Kiefel and Bell JJ in *Li*.[83] In *Quin*, Brennan J expressed observations which have been described by Gageler J as *canonical* about the true nature of the Court's 'duty and jurisdiction' in reviewing administrative action (informed by the well-known observations in 1803 of Marshall CJ in *Marbury v Madison*[84]). Brennan J said this:

> 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 consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.[85]

If the exercise of the power, as a matter of law, is conditioned on its exercise 'reasonably', it might be thought that a failure to exercise the power 'reasonably' gives rise to an *error of law* and causes the repository of the power to exceed the limits of the power.

However, canonical orthodoxy dictates that, because the court's duty and jurisdiction do not engage judicial scrutiny of the merits of administrative action (although Brennan J's qualification quoted above should be carefully noted 'to the extent that they can be distinguished from legality') and an examination of the reasonableness of a decision 'may appear to open the gate'[86] to 'merits review' of an action taken 'within power',[87] the *Wednesbury* incarnation of 'unreasonableness' was calculated to leave the merits of a decision unaffected *unless* the decision or action was such as to amount to an *abuse of power* and thus go to *legality* and thus an *excess of jurisdiction*.

The balance was this: *even though* the court acts on an implied intention of the legislature that a power be exercised reasonably, the measure of invalidity is that the court will hold invalid a purported exercise of the power if it is 'so unreasonable' that 'no reasonable repository of the power could have taken the impugned decision or action'.[88] Taxonomically, this was understood as 'an abuse of power'. The limitation on the exercise of the power, however, was said by Brennan J to be 'extremely confined'.[89] In other words, the exercise of

the discretion would need to travel well beyond the zone or orbit of reasonableness to ensure that the court's supervisory role was not ensnared in de facto merits review.

However, it should not be thought that there is some sort of absolute *binary divide* between the merits of decision-making and the legality of a decision. For example, it may well be that the manner or method of fact-finding falls so short of a proper deliberative process that the power of review or source of authority conferred by an Act has not properly been exercised. Examining that question will involve a comprehensive understanding of the materials and the factual context not with a view to substituting a merits finding for that of the decision-maker but, rather, to understand the process of fact-finding adopted and whether it was fair and proper. The question of whether inferences properly arise from primary facts found is itself a question of law which necessarily requires an understanding of the materials before the decision-maker and whether the facts found support the contended inferences. There are other examples.

In 1986, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[90] (*Peko-Wallsend Ltd*), Mason J also expressed observations (also described as canonical) about the court's limited role in reviewing the exercise of an administrative discretion and the role of *Wednesbury* unreasonableness in that context. Mason J said this:

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned: *Wednesbury Corporation*.
>
> 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*'. This ground of review was considered by Lord Greene M.R. in *Wednesbury Corporation*, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it. … The test has been embraced in both Australia and England.[91]

For present purposes, two things should be noted about these observations. First, the *Wednesbury* formulation translates into a notion that the decision is 'manifestly unreasonable'. Second, failures to give adequate weight to a relevant factor of great importance or attributing excessive weight to a relevant factor of no great importance is ultimately reduced to a question of whether the decision is manifestly unreasonable rather than one of whether there is an evident failure to take into account relevant considerations or the taking into account of irrelevant considerations.

In 1995, Brennan, Deane, Toohey, Gaudron and McHugh JJ said in *Craig v South Australia*[92] (*Craig*) that 'if an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely upon irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers'.[93] Such an error of law amounts to jurisdictional error invalidating any order or decision of the tribunal which reflects it. That position was affirmed in *Minister for Immigration and Multicultural Affairs v Yusuf*[94] (*Yusef*). Importantly, McHugh, Gummow and Hayne JJ observed in *Yusuf* that jurisdictional error in accordance with the *Craig* formulation embraces 'a number of different *kinds of errors*',[95] and

the list of errors in *Craig* is 'not exhaustive' and the 'different kinds of error may well *overlap*'.[96] Moreover, their Honours said this:

> The circumstances of a particular case may permit *more than one characterisation* of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of the power is to make *an error of law*. Further, doing so results in the decision-maker *exceeding* the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did *not have authority* to make the decision that was made; he or she did not have *jurisdiction* to make it. Nothing in the Act suggests that the Tribunal [Refugee Review Tribunal] is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.[97]

Importantly, the High Court's approach to jurisdictional error in the context of *Craig* is the subject of significant discussion by the majority in *Kirk*.[98]

What is the true scope of unreasonableness? In *Li*,[99] Hayne, Kiefel and Bell JJ observed that 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'.[100] Moreover, Lord Greene MR should not 'be taken to have limited unreasonableness in this way' in *Wednesbury*.[101] Lord Greene's formulation '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'.[102]

That notion conforms with the principles about which Dixon J spoke in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[103] concerning a decision of the Federal Commissioner of Taxation:

> [T]he fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some misconception. If the result *appears to be unreasonable* on the *supposition* that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a *proper inference* that it is a *false supposition*. It is not necessary that you should be *sure* of the precise particular in which he has *gone wrong*. It is *enough* that you can see that in some way he *must* have failed in the discharge of his *exact function according to law*.[104]

Chief Justice French, in *Li*,[105] took the view that Lord Greene's formulation enabled the Court to intervene due to the 'framework of rationality imposed by the statute',[106] and the formulation 'so unreasonable that no reasonable authority could ever have come to it' 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. The Chief Justice observed that '[a]fter 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 [which seems to be a reference to a decision-maker not falling into errors of the kind described in *Craig* and *Yusuf*], there is generally *an area of decisional freedom*'. That area of decisional freedom, however, cannot be construed 'as attracting a legislative sanction to be *arbitrary* or *capricious* or to *abandon common sense*'.[107]

That formulation goes beyond the formulation adopted by Hayne, Kiefel and Bell JJ. Moreover, their Honours sought to adopt a *unifying* underlying rationale in relation to the 'more specific errors' in decision-making encompassed by unreasonableness. The views of Hayne, Kiefel and Bell JJ are reminiscent of the observations of Mason J in *Peko-Wallsend Ltd* and the majority in *Yusuf*. In *Li*, Hayne, Kiefel and Bell JJ said this:

> The more specific errors in decision-making, to which the courts often refer may *also be seen* as encompassed by unreasonableness. This may be consistent with the observations of Lord Greene MR, that some decisions may be considered unreasonable in more than one sense and that 'all these things run into one another'.[108] Further, in [*Peko-Wallsend Ltd*] Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is 'manifestly unreasonable'. Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed *a particular error in reasoning*, given *disproportionate weight* to some factor or *reasoned illogically* or *irrationally*, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.[109]

As to the question of when inferences might be drawn of legal unreasonableness, Hayne, Kiefel and Bell JJ saw a close analogy with the way in which inferences may be drawn by an appellate court when reviewing the exercise of a discretion by the primary judge identified in the well-understood passages in *House v The King*.[110] Their Honours put the matter this way:

> As to the inferences that may be drawn by an appellate court, it was said in *House v The King* that an appellate court may infer that in some way there has been a failure properly to exercise the discretion 'if upon the facts [the result] is unreasonable or plainly unjust'. 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*.[111]

Two matters are worthy of note. The first is that, where errors in decision-making are identified of the kind described in *Craig* and *Yusuf*, those errors, plainly enough, give rise to jurisdictional error on the footing that the decision-maker has exceeded the limits of the statutory power. The second is that it seems inevitable (although the matter remains open to debate) that, in circumstances where a *conclusion* of unreasonableness arises in the exercise of the discretionary decision-making power, because a decision 'lacks an evident and intelligible justification' the decision-maker also falls into jurisdictional error, and that is so because exercising the power in a way which fails to conform to the 'legal standard of reasonableness',[112] recognising that the statute imposes an obligation to exercise the power reasonably, involves an *excess* of jurisdiction.

It may be that more is needed in the sense that unreasonableness in the exercise of the decision-making power in question gives rise to a broader failure to discharge a statutory duty, in the course or performance of which the decision-making power was exercised.

For example, in *Li*, the decision in question was an exercise of a power of adjournment exercised adversely to Ms Li, which carried with it the consequence that the Migration Review Tribunal had failed to discharge its 'core statutory function' of reviewing, on the merits, the decision of the Minister's delegate to refuse Ms Li the relevant class of visa,[113] as the decision to refuse the adjournment prevented Ms Li from placing a critical document before the Tribunal which the Tribunal knew Ms Li was seeking to obtain and was required as a matter of *fairness* in the discharge and performance of the critical review power.

As to the two streams of unreasonableness made up of unreasonableness inherent in a 'conclusion' that a decision lacks an 'evident and intelligible justification', and unreasonableness as an underlying rationale for 'the more specific errors in decision-making to which courts often refer', see also the discussion in the Full Court of the Federal Court in *Minister for Immigration and Border Protection v Singh*[114] (*Singh*).

As to the test for unreasonableness, Gageler J said[115] that the label '*Wednesbury* unreasonableness' indicates the *special standard* of unreasonableness which has become

the criterion for judicial review of administrative discretion, on this ground. Gageler J observed that expression of the *Wednesbury* unreasonableness *standard* in terms of an action or decision that 'no reasonable repository of the power could have taken attempts', albeit imperfectly, to convey the point that judges should not lightly interfere with official decisions on this ground. In judging unreasonableness, Gageler J put the matter this way in *Li*:

> Review 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' [*Dunsmuir v New Brunswick*].[116]

Thus the decision for Gageler J is a question of whether the decision falls within the range of acceptable possible 'outcomes' which are defensible in respect of the facts and law having regard to the notion that judges should not lightly interfere with administrative decision-making on this ground.

A number of other matters should be noted. First, where no reasons are given for the exercise of a discretionary power, all a supervisory court can do is focus on the outcome of the exercise of the power, in the factual context presented, and assess for itself whether there is an evident and intelligible justification for the exercise of the power, keeping in mind, of course, that it is for the repository of the power, and the repository alone, to exercise the power. The repository of the power must do so, however, according to law.[117] Second, where reasons are given for the exercise of the discretionary power, the court will look to the reasoning process of the decision-maker to identify the factors in the reasoning said to make the decision legally unreasonable. In doing so, the court is confined to the reasons given by the decision-maker. The decision cannot be supported on review by the court on the basis of an hypothesis (living outside the actual reasons for decision) about the things that may otherwise accord reasonableness to the decision.

Third, where the exercise of the power is said to be unreasonable on the footing that the decision-maker has fallen into 'the more specific errors in decision-making to which courts often refer' (such as the *Craig* and *Yusuf* formulations, recognising, of course, that those formulations are not 'exhaustive'), which may well 'overlap', the reasonableness review will concentrate on an examination of the reasoning process reflected in the reasons given by the decision-maker. Where the challenge to the reasonableness of the exercise of the power is based upon the notion that a conclusion arises[118] that the decision lacks an evident and intelligible justification, the court will examine the reasons, however brief, and determine, in light of those reasons, *and* the facts and matters falling for consideration in the exercise of the statutory power, whether an evident and intelligible justification is lacking.

Fourth, although reference is made to the analogue of *House v The King*,[119] it must be remembered that, on an appeal from the exercise of the discretion by a primary judge, the *court* re-exercises the discretion once it has demonstrated that the exercise of the discretion has miscarried. That is not the role of the supervising court in reviewing an exercise of discretionary power by an administrative decision-maker so as to determine the legality of the exercise of the power.

Fifth, the standard of legal reasonableness determined in accordance with these principles will apply to a range of statutory powers conferred upon decision-makers, 'but the indicia of *legal unreasonableness* will need to be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case'.[120]

Sixth, in reviewing a decision on the ground of legal unreasonableness, the supervising court will be required, inevitably, to closely examine the facts upon which the exercise of the power was dependent. This is done not for the purpose of enabling the court to substitute its own view of the exercise of the discretionary power for that of the decision-maker. The point of the exercise is to recognise that any analysis which engages a question of *whether* there is an *evident* and *intelligible* justification for the exercise of the power will involve 'scrutiny of the factual circumstances in which the power comes to be exercised'.[121]

Seventh, it is important to recognise the implications of the observations of McHugh, Gummow and Hayne JJ in *Yusuf*[122] that 'different kinds of error may well overlap'. In examining the exercise of the power and determining whether it is legally unreasonable, there may well be an interaction between the obligations of procedural fairness in the exercise of the power and the standard of legal reasonableness in the exercise of the power. Thus, in some circumstances, 'an exercise of power which is said to be legally unreasonable may overlap with alleged denial of procedural fairness *because* the result of the exercise of the power may affect the *fairness* of the decision-making process'.[123]

Eighth, as to examples of the application of these principles and the true nature of a factual inquiry which would not engage merits review, see *Singh*,[124] *Minister for Immigration & Citizenship v SZRKT*[125] and *Goodwin v Commissioner of Police (NSW)*.[126]

Ninth, in making these observations, two further things should be mentioned. First, obviously enough, I have not had regard to any of the state judicial review legislation or the application of the *Administrative Decisions (Judicial Review) Act 1997* (Cth), as any of those Acts can from time to time be rendered inapplicable to particular legislation conferring decision-making powers. Second, in *Li*, Hayne, Kiefel and Bell JJ observe[127] that the duty cast on the Tribunal to invite an applicant for review to appear before it is *central* to the conduct of the review and that the statutory purpose is one of providing the applicant with an opportunity to present evidence and argument relating to the issues addressed in the review as an essential element of the statutory review function. Thus, in exercising the discretionary power to adjourn (or not) a review proceeding before it:

> consideration could be given to whether the Tribunal gave excessive weight — more than was reasonably necessary — to the fact that Ms Li had had an opportunity to present her case.[128] So understood, *an obviously disproportionate response* is *one path* by which a *conclusion* of unreasonableness may be reached. However, the submissions in this case do not draw upon such an analysis.

These observations of the majority raise the spectre of whether a conclusion of unreasonableness might arise in the exercise of a discretion having regard to the law relating to *proportionality analysis*. That topic, however, is a topic for an entirely separate address both as to the content of such an analysis and the jurisprudence relating to it and its application in the context of the questions I have discussed here.

Endnotes

1 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
2 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
3 (2013) 249 CLR 332. As to a brief outline of the context of the discretionary decision of the Tribunal under challenge in *Li*, see n 128.
4 This is a remark made by Churchill in a BBC interview with Malcolm Muggeridge. The source of the title of Antonia Fraser's biography of Cromwell, *Cromwell, Our Chief of Men* (1973), may have been influenced by this remark but the title seems, clearly enough, to be drawn from John Milton's Sonnet 16: 'Cromwell, our chief of men, who through a cloud …'.
5 *South Australia v Totani* (2010) 242 CLR 1, [66] (French CJ).
6 Ibid [66] (nn 223 to 227); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [22] (French CJ).

7 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. The *Boilermakers'* doctrine prevents the Commonwealth Parliament from conferring judicial power on bodies other than courts and prevents it from conferring any power that is not judicial power (or power incidental to judicial power) on courts specified in s 71 of the *Constitution*.
8 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 82 (emphasis added).
9 (1992) 177 CLR 106, 137, 138.
10 Ibid 138.
11 (1997) 189 CLR 520.
12 Ibid 559.
13 (2004) 220 CLR 181, [179].
14 Ibid [179].
15 (2012) 246 CLR 1.
16 I prefer to use the term 'majority' rather than 'plurality'; French CJ, Gummow, Hayne, Crennan and Bell JJ.
17 *Wotton v State of Queensland* (2012) 246 CLR 1, [22], submissions put by SJ Gageler SC, Solicitor-General for the Commonwealth (emphasis added).
18 Professor James Stellios, 'Marbury v Madison: Constitutional Limitations and Statutory Discretions' (2016) 42 *Australian Bar Review* 324.
19 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [14] (Gaudron and Gummow JJ).
20 *R v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (Incorporated)* (1979) 143 CLR 190, 201 (Barwick CJ).
21 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [14] (Gaudron and Gummow JJ).
22 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
23 *Minister for Immigration v Li* (2013) 249 CLR 332.
24 (1985) 159 CLR 550, 584.
25 Ibid 609.
26 Ibid (emphasis added).
27 Ibid 610 (emphasis added).
28 Ibid 615, 616 (emphasis added).
29 (2010) 241 CLR 252.
30 French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
31 (1990) 170 CLR 596, 598.
32 (1985) 159 CLR 550, 584.
33 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, the majority at [13]; see also *Annetts v McCann* (1990) 170 CLR 596, 604-605 (Brennan J).
34 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [13].
35 (1997) 190 CLR 1.
36 Ibid [36] (emphasis added).
37 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
38 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, [126].
39 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [40]–[42].
40 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.
41 All matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.
42 In any matter arising under the *Constitution* or involving its interpretation.
43 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, [80], [81] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
44 (2003) 211 CLR 476.
45 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
46 Provided that the principles described in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 are satisfied.
47 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ*).*
48 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
49 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
50 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [63].
51 Ibid [63], [64] (emphasis added).
52 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
53 (1874) LR 5 PC 417, 422.
54 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [97].
55 Ibid [98]–[100] (emphasis added).
56 As to that, see the observations of the Hon Justice Stephen Gageler in 2015: The Hon Justice Stephen Gageler, 'Whitmore and the Americans: Some American Influences on the Development of Australian Administrative Law' 38(4) *University of New South Wales Law Journal* 1316.
57 (2013) 252 CLR 118.
58 Ibid [15]–[17].
59 Stephen McLeish SC, 'The Nationalisation of the State Court System' (2013) 24 *Public Law Review* 252. Mr McLeish is now a Judge of Appeal, Court of Appeal, Victoria.

60 *Kable v Director of Public Prosecutions (NSW)* at (1996) 189 CLR 51, 132 (original emphasis).
61 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [100].
62 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319.
63 *Totani v South Australia* (2010) 242 CLR 1.
64 Ibid [436] (Crennan and Bell JJ).
65 *Wainohu v New South Wales* (2011) 243 CLR 181.
66 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.
67 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38.
68 Ibid [212] (Gageler J).
69 Hayne, Crennan, Kiefel and Bell JJ.
70 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [169].
71 Ibid [169] (emphasis added).
72 (1996) 189 CLR 51, 103.
73 Ibid 103.
74 *Wainohu v New South Wales* (2011) 243 CLR 181, [105].
75 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 118.
76 *Re Criminal Proceeds Act 2002* [2004] 1 Qd R 40.
77 Ibid 44.
78 (1997) 190 CLR 1, 36.
79 See the discussion related to nn 22 to 39.
80 *Abebe v The Commonwealth* (1999) 197 CLR 510, [116].
81 Ibid [116].
82 (1990) 170 CLR 1, 36.
83 *Minister for Immigration v Li* (2013) 249 CLR 332, [63].
84 (1803) 1 Cranch 137, 177 [5 US 87, 111]; 'It is, emphatically, the province and duty of the judicial branch to say what the law is'.
85 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35, 36 (emphasis added).
86 Ibid 36.
87 Ibid.
88 Ibid.
89 Ibid.
90 (1986) 162 CLR 24.
91 Ibid 40, 41 (emphasis added).
92 *Craig v South Australia* (1995) 184 CLR 163.
93 Ibid 179.
94 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [82].
95 Ibid (emphasis added).
96 Ibid (emphasis added).
97 Ibid (emphasis added).
98 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, [60]–[77] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
99 (2013) 249 CLR 332.
100 Ibid [68].
101 Ibid.
102 Ibid.
103 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353.
104 Ibid 360 (emphasis added).
105 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [28] (French CJ).
106 Ibid.
107 Ibid.
108 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229.
109 Ibid [72] (emphasis added).
110 (1936) 55 CLR 499, 505.
111 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [76] (emphasis added).
112 Ibid [68] (Hayne, Kiefel and Bell JJ).
113 The visa in question was a Skilled-Independent Overseas Student (Residence) (Class DD) visa pursuant to the provisions of the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth).
114 (2014) 308 ALR 280, [44], [440–[52] (Allsop CJ, Robertson and Mortimer JJ).
115 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [106] (Gageler J).
116 Ibid [105] (Gageler J).
117 *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280, [45].
118 A conclusion of the kind described in *Li* by Hayne, Kiefel and Bell JJ at [76].
119 (1936) 55 CLR 499, 505.
120 *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280, [48].
121 Ibid.
122 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [82].
123 *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280, [50].

124 Ibid [53]–[77].
125 *Minister for Immigration & Citizenship v SZRKT* (2013) 212 FCR 99, [77].
126 *Goodwin v Commissioner of Police (NSW)* [2012] NSWCA 379.
127 (2013) 249 CLR 332, [60], [74] (emphasis added).
128 Ms Li, a Chinese national, had applied for a Skilled-Independent Overseas Student (Residence) (Class DD) visa under the provisions of the *Migration Act 1958* (Cth). A criterion for the grant of the visa under the *Migration Regulations 1994* (Cth) was that Ms Li, at the time of the visa decision (by the Migration Review Tribunal, relevantly, at the time of the review decision) hold a favourable 'skills assessment' from a relevant 'assessing authority'. Ms Li had, in fact, obtained an unfavourable assessment (which was her second assessment) from an assessing authority called Trades Recognition Australia (TRA) and had applied to TRA for a review of that assessment. Ms Li's migration agent had requested the Tribunal not to make a decision on Ms Li's pending review application until the TRA's review of the assessment had been completed and the assessment itself completed. The Tribunal refused to do so and affirmed the decision of the delegate which was adverse to Ms Li. To the extent that the Tribunal gave 'reasons' for refusing to withhold consideration of the review decision until the TRA had completed its exercises, the Tribunal said that Ms Li had 'had enough time'.