The new judicial review – legal unreasonableness

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Abstract

The doctrine of proportionality may offer a principled approach to the exercise of the enlarged jurisdiction of Australian courts to inquire into the substance of administrative decisions.

Introduction

The High Court’s decision in Minister for Immigration & Citizenship v Xiujian Li (2013) 249 CLR 332 significantly extended the capacity of a court, in reviewing an administrative decision, to consider whether it was legally reasonable or not. Released from the “absurdity” standard of outcome articulated in Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223, an Australian court now has a broader jurisdiction to determine whether the outcome of an exercise of discretion has an evident and intelligible justification by reference to the terms, scope and purpose of the statute conferring the power. However, the point at which the outcome

1 I gratefully acknowledge the assistance I have derived from the following published and unpublished papers:


Basten, the Hon J, Judicial Review of Action, Tiers of Scrutiny or Tears of Frustration? paper presented to Constitutional Administrative Law Section of the New South Wales Bar Association, 14 May 2013

Bathurst, the Hon TF 25 March 2017 On to Strasbourg or Back to the Temple? The Future of European Law in Australia Post Brexit,


Greenwood, the Hon Justice A, given 27 April 2017 Judicial Review of the Exercise of Discretionary Public Power

Mason, the Hon Sir A, The Pursuit of Excellence in Tribunal Decision-Making in Australia, United Kingdom and Canada. Paper delivered to the Canadian Administrative Tribunal on May 30, 2016

Naylor A, Paper of 19 November 2013
of a discretionary decision cannot be said to be justified by reference to the statute conferring the power remains a matter of impression. This paper suggests that the doctrine of proportionality may supply a principled approach to determining whether a discretionary administrative decision is justified.

The rationality grounds of review

Australian courts are constrained from considering the merits of administrative decision making because of the constitutional separation of judicial from legislative and executive power: Re Minister for Immigration & Multicultural Affairs; Ex Part Lan (2003) 214 CLR 1 per McHugh and Gummow JJ at [76]. The exception to this generalisation has been the ground of unreasonableness articulated in Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223, which focusses on the outcome, rather than the procedure, of the decision.

In England and Wales, the test of Wednesbury unreasonableness has been stated as a decision: “objectively [so] devoid of any plausible justification that no reasonable body of persons could have reached [it]: Bromley London Borough Council v Greater London Council [1983] 1 AC 768 at 821, and “verging on absurdity”: Puhlhofer v Hillingdon London Borough Council [1986] 1 AC 484. In Australia, Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24 per Mason J at 41 is authority for the proposition that an administrative decision which fails to give proper weight to a relevant factor may be challenged as being Wednesbury unreasonable. However, the plea has generally been one of last resort as courts have been reluctant to embark on an exercise which comes close to reviewing a decision on its merits. Gaegler J in MIAC v Li at [113] remarked that judicial determinations of Wednesbury unreasonableness have been “rare”.

The illogical and irrational ground was also initially treated with suspicion by Australian courts. In Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 at [40], the plurality suggested that the plea may be no more than an emphatic way of expressing disagreement with the
decision. However, in *Re Minister for Immigration & Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 198 ALR 59, in circumstances where the *Migration Act* 1958 forbade reliance on *Wednesbury* unreasonableness to challenge a migration decision, the High Court accepted illogicality and irrationality as an independent ground of review, although the ground was not made out on the facts. In *Minister for Immigration & Multicultural Affairs v SLGB* (2004) 207 ALR 12 per Gummow and Hayne JJ at [37]-[38], in which an appellant was successful, the court extended the ground to a decision maker’s satisfaction as to the existence of a jurisdictional fact. Lee J in *WAHP v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 87, although dissenting as to the result, stated the principle of illogicality and irrationality:

[7] A determination that is based on illogical or irrational findings or inferences of fact may be shown to have no better foundation than an arbitrary decision and accordingly the review process will be unfair and will not have been conducted according to law... Illogical or irrational findings or inferences of fact upon which a determination is based become examinable as part of the matter that is subject to judicial review pursuant to the application for a prerogative or constitutional writ.

At this point, a principled difference between *Wednesbury* unreasonableness on the one hand, and illogicality and irrationality on the other, appeared to remain. In the former, the court exercised supervision of the quality of the discretionary outcomes of the decision-maker, whereas in the latter the court supervised the quality of the procedure.2

However, in *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611, the High Court again considered the ground of illogicality and irrationality in respect of a jurisdictional fact, but split on the question of whether a remedy sounded for procedural irrationality and illogicality, or irrationality and illogicality of outcome. The view of Heydon J at [78] and the joint judgment of Crennan and Bell JJ at [130] was that a remedy should not be given unless there was serious irrationality in procedure, regardless of the outcome. However, the view of Gummow ACJ and Kiefel J

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(as her Honour then was) at [38], seems to leave open the possibility of a remedy if the outcome was unreasonable. The significance of the decision was that, despite the effort of Gummow ACJ and Kiefel J at [39] to draw a careful distinction between fact review and review of jurisdictional facts, they appeared to suggest that a remedy for an illogical and irrational decision may not depend solely on irrationality of procedure.

**The legal unreasonableness ground of review**

The High Court has long held that a decision-maker must exercise a discretionary power reasonably, either because the legislature is taken to intend that the discretion be exercised reasonably: *Kruger anor v Commonwealth of Australia* (1997) 190 CLR 1; *Attorney-General (New South Wales) v Quin* (1990) 170 CLR 1, or because of the necessary construction of the statute giving the discretionary power: *Abibi v The Commonwealth* (1999) 197 CLR 510.

In *MIAC v Li*, the applicant’s entitlement to a visa turned on the assessment of her skills as a cook. The applicant had two assessments made of her ability. The second assessment was unfavourable and the applicant challenged the assessment. The Migration Review Tribunal decided that the applicant had had enough time to demonstrate compliance with the conditions of the visa and rejected her application, relying on the second unfavourable assessment before the challenge to it had been determined.

The plurality, considering the failure of the MRT to grant the applicant an adjournment, held at [63], [68] that in the case of a discretionary decision there is a presumption of law that the discretionary power will be exercised reasonably and that the legal standard of unreasonableness was not limited to *Wednesbury* unreasonableness. Even where reasons have been provided, they may lead to a conclusion that a decision lacks an inevitable and intelligible justification. The plurality also held, agreeing with Mason J in *Peko Wallsend* at 41-42, that there was a close analogy between judicial review of administrative action and appellate review of judicial discretion:
It was said in *House v The King* that an appellate court may infer that in some way there has been a failure to properly exercise the discretion ‘if upon the facts the result is unreasonable and 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.”

Gageler J agreed:

Review by a court of the reasonableness of 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 weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law.

French CJ at [19] and[28] held that the decision of the tribunal was infected by jurisdictional error because, despite the Migration Act codifying the requirements of procedural fairness applying to decisions made under the Act, the tribunal failed to afford procedural fairness at common law by not giving an adjournment, and the decision was also *Wednesbury* unreasonable because the statutory grant of “decisional freedom” could not be construed as sanctioning a decision that was arbitrary or capricious or lacked common sense.3

The decision in *MIAC v Li* has been explained and followed in two decisions of the Full Court of the Federal Court. In *Minister for Immigration and Border Protection v Singh & Anor* (2014) 231 FCR 437 the court held that legal unreasonableness is invariably fact dependent and it can attach to the unreasonableness of the process or the unreasonableness of the result. The court explained this last conclusion, which appears to reconcile the views expressed in *SZMDS*, by considering the administrative reality that some decisions are supported by reasons, and some are not.

... legal unreasonableness can be a conclusion reached by supervising court after the identification of an underlying jurisdictional error in the decision-making process... However legal unreasonableness can also be outcome focused, without necessarily identifying another underlying jurisdictional error. ...[45] In circumstances where no reasons for the exercise of power, or for a decision, are produced, all a supervising court can do is focus on the outcome of the exercise of power in the factual context presented, and assess, for itself, its justification or intelligibility....Where there are reasons, and especially where a discretion is being reviewed, the

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3 Andrew Naylor Paper of 19 November 2013 at [53]
court is able to follow the reasoning process of the decision-maker through and identify the divergence, or the factors, in the reasons said to make the decision legally unreasonable... [47]... Although it is not necessary for the purposes of this appeal to resolve the question whether those should be seen as two different kinds of review and what might flow from that, we are inclined to the opinion that, where there are reasons for the exercise of a power, it is those reasons to which a supervising court should look in order to understand why the power was exercised as it was... [48]... unlike some other grounds for review of the exercise of power, the reasoning process in review for legal unreasonableness will inevitably be fact dependent... any analysis which involves concepts such as ‘intelligible justification’ must involve scrutiny of the factual circumstances in which the power comes to be exercised....

In *Minister for Immigration and Border Protection v Stratton* [2016] FCAFC 11, the Full Court summarised the principles of *Singh* and rejected the view that the ground of legal unreasonableness is unprincipled:

[92] ... the Court’s role [remains] strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision ...or if the decision is within the ‘area of decisional freedom’ of the decision-maker, it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently.

However, despite the Full Court’s insistence that there is a principled basis on which the outcome of a decision may be characterised as reasonable or not, the point at which the outcome of a discretionary decision cannot be said to be justified by reference to the statute conferring the power remains a matter of impression.

*Proportionality*

In *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532 and *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC 700 the House of Lords articulated a four stage test of proportionality. The first is whether the impugned decision is in pursuit of a legitimate object; the second is whether the means for pursuing the legitimate object are rational, fair and not arbitrary; third whether alternative strategies could and should
have been chosen which would intrude less on the affected individuals' rights; and fourth whether even a minimally intrusive limitation is permissible in pursuit of the legitimate end.  

Proportionality is a more intrusive general standard than the currently available common law grounds of review impugning the outcome of a decision. In the United Kingdom in *R v Ministry of Defence; Ex Parte Smith*, for example, Smith challenged her dismissal from the Royal Air Force on the basis of her sexuality. Smith failed at common law on a plea of irrationality but succeeded in the European Court of Human Rights, which allowed her appeal on a test of proportionality under the human rights legislation.

Proportionality review is now established in the United Kingdom to the extent that administrative decisions are challenged for breach of the *Human Rights Act*. In Australia, proportionality analysis has been confined to questions of constitutional law: *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 131 per Kiefel J at [458]. It is applied to gauge the sufficiency of connection between the purpose of a head of constitutional power and a law, not the extent to which a law may affect individual rights, although the High Court has left open the possibility that proportionality analysis in Australia may extend to human rights: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 per Gleeson CJ at 198.

The doctrine of proportionality remains “at the boundaries of accepted administrative law”: *Bruce v Cole* (1998) 45 NSWLR 163 per Spigelman CJ at 185, but a number of decisions over the years have left open the possibility that proportionality may play a greater role in the determination of administrative law decisions. In *Fares Rural Meat & Livestock Pty Ltd v Australian Meat & Livestock Corporation* (1990) 96 ALR 153, Gummow J

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5 Bathurst, the Hon TF *On to Strasbourg or Back to the Temple? The Future of European Law in Australia Post Brexit*, 25 March 2017 at [21], [22]
sitting as a Federal Court judge, suggested that one of the three ‘paradigms’ of Wednesbury unreasonableness was that the exercise of the power was out of proportion in relation to the scope of power. In New South Wales v Macquarie Bank Ltd (1992) 30 NSWLR 307 at 321-325, Kirby P held a regulation invalid for not being proportional to the object of the enabling Act, although his Honour’s view was not part of the ratio of the decision.

In MIAC v Li French CJ referred to proportionality in the context of the decision maker’s area of “decisional freedom”:

[28] ... not every rational reason is reasonable. There may be scope for proportionality analysis to bridge the gap between the two concepts.

and the plurality also referred to Fares Rural Meat, observing that the application of a proportionality analysis by reference to the scope of the power was the type of unreasonableness under consideration in MIAC v Li:

[74]: An obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached.

Further, in Singh, the Full Court held obiter:

[77] If a proportionality analysis were undertaken ... it could be said that the exercise of power to refuse a short adjournment in these circumstances was disproportionate to the Tribunal’s conduct of the review to that point, to what was at stake for the first respondent, and what he might reasonably have hoped to secure through a re-mark.

Proportionality is a civil law doctrine. Writing extra-judicially, Bathurst CJ summed up the tension involved in incorporating a civil law doctrine into the common law:

Civil law principles are thought to derive from natural law and in that sense to be static and inflexible, while common law principles have been described as working hypotheses and kaleidoscopic, in the sense that they are in a constant state of change in minute particulars. The concern associated with foreign intrusions of principle has been aptly summarised by Justice Douglas of the Queensland Supreme Court ‘is the genius of the common law expressed in its propensity for bottom-up reasoning in danger of being replaced by a form of procrustean top-down reasoning?6

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6 Bathurst, the Hon TF On to Strasbourg or Back to the Temple? The Future of European Law in Australia Post Brexit, 25 March 2017 at [12]
Further, Boughey makes the point that the application of proportionality in common law jurisdictions is best adapted to resolving questions of whether individual rights have been infringed by reference to written Bills of Rights, and that it is only subsequent to Human Rights Act in the UK, which required courts to have regard to Strasbourg jurisprudence when a Convention right was engaged, and human rights legislation in Canada and New Zealand, that courts in these jurisdictions have begun engaging in proportionality review. Australia, lacking a bill of rights against which administrative action can be measured provides infertile ground for the application of the doctrine of proportionality.

Proportionality is making inroads into Australian legal thinking:

Where proportionality analysis is applied in one area of public law it is prone to leaking into other areas in order to maintain consistency in legal reasoning. In the Australian context, the question of consistently applying structured proportionality analysis arises right at the intersection of constitutional and administrative law, namely: when legislation confers a wide discretion on an administrator, which is not itself necessarily inconsistent with the constitutional limitation, but can be exercised in a way which is inconsistent.

However, it would be wrong to suggest that proportionality analysis is an accepted tool of Australian administrative law jurisprudence. In Gaynor v Chief of the Defence Force (No 3) (2015) 237 FCR 188, for instance, r 85 of the Defence (Personnel) Regulations, 2002 (Cth) provided that an army officer’s service could be terminated if the relevant commanding officer was satisfied that the retention of the officer was not in the interests of the Defence Force or the Service. The Chief of Defence terminated Gaynor’s service because he had published statements concerning his private views about political matters. Buchanan J at first instance held that where the exercise of discretion was not reasonably and appropriately adapted to it was an exercise of discretion in excess of the statutory grant of power. However, on appeal, the Full Court held that Buchanan J’s analysis had

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8 Bathurst, the Hon TF On to Strasbourg or Back to the Temple? The Future of European Law in Australia Post Brexit, 25 March 2017 at [63]
impermissibly converted the limitation on legislative power to an individual right. If the implied freedom was to be protected at the administrative review level, it could only be through the traditional grounds, for instance, by characterising the implied freedom as a relevant consideration that the decision-maker had failed to take into account.

**Conclusion**

Australian courts have long confined themselves to identifying jurisdictional errors arising out of an examination of the procedure by which administrative decisions are made, not their substance. But the High Court’s decision in *Li* confirmed the jurisdiction of Australian courts to infer jurisdictional errors from an inquiry into the substance of administrative decisions. The courts, in conformity with their constitutional limits, exercise this jurisdiction according to principle. However, despite the Full Court’s insistence that there is a principled basis on which the outcome of a decision may be characterised as reasonable or not, the point at which the outcome of a discretionary decision cannot be said to be justified by reference to the statute conferring the power remains a matter of impression. In *MIAC v Li*, French CJ stated at [30] that “not every rational reason is reasonable”, and hinted that proportionality may be an appropriate test of legal reasonableness. The plurality seemed to agree at [74], stating that a disproportionate response was “one path” by which a conclusion of unreasonableness could be reached. Further, in *Singh*, the Full Court at [77] held obiter that a proportionality analysis would have yielded a satisfactory result.

Proportionality analysis is not an accepted part of Australian administrative law. However it should be no objection that proportionality is a civil law concept. The common law has always adapted civil law doctrines to supply common law deficiencies. The development of the law of frustrated contract is just one example. It should also be no real objection that Australia, unlike other common law jurisdictions, has not legislated for human rights. While it may be true to say that proportionality analysis arose in the UK,
Canada and New Zealand because of the introduction of human rights legislation in these jurisdictions, it is not true to say that the introduction of human rights legislation is a necessary condition of proportionality in administrative law. The High Court in *MIAC v Li*, as well as Kirby P in *Macquarie Bank* and the Full Court of the Federal Court in *Singh*, all contemplate the application of the principle of proportionality to facts not giving rise to questions of human rights.