The new judicial review – legal unreasonableness

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Abstract

The doctrine of proportionality might offer a principled approach to the exercise of the enlarged jurisdiction of Australian superior courts to inquire into the substance of administrative decisions in the exercise of their supervisory jurisdiction.

Introduction

The High Court's decision in *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332 significantly extended the capacity of superior courts in Australia to review an administrative decision and to determine whether it was legally "reasonable" or not.

Finally released from the "absurdity" standard of outcome articulated in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, Australian courts now have 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 of a discretionary decision cannot be said to be justified by reference to the statute conferring the power can sometimes be no more than a matter of impression.

Our paper suggests that in this particular context the doctrine of proportionality might well provide a principled approach to a court in determining whether a discretionary administrative decision is justified and lawful.

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 Lam* (2003) 214 CLR 1(per McHugh and Gummow JJ at [76]). One exception to this constraint has been the ground of judicial review styled as "unreasonableness" first articulated in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, which focussed on the outcome of the decision, rather than on the process or procedure of making the decision.

In England and Wales, the test of *Wednesbury* unreasonableness has been stated as that the impugned decision must be: "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 the impugned decision had to be "verging on absurdity" in order for it to be vitiated: *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

This stringent test has been applied in Australia. In *Prasad v Minister for Immigration* (1985) 6 FCR 155, the Federal Court of Australia considered the ground, now codified in section s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act* (1977) (Cth). The Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached (at 167) and to prove such a case required "something overwhelming" (at 168). It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt (page 168.3), and when "looked at objectively… so devoid of any plausible justification that no reasonable body of persons could have reached them" (at 168).

A decision which fails to give proper weight to a relevant factor may also be challenged as being unreasonable: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 per Mason J (at 41). But the ground of judicial review is generally considered one of last resort, as courts are reluctant to embark on an exercise which could seem to come close to reviewing a decision on its merits. In *Li*, Gaegler J said (at [113]) that judicial determinations of *Wednesbury* unreasonableness have been "rare", although statistically, the *Wednesbury* unreasonableness ground has been taken in Australia fairly frequently (in 19% of cases – (*Douglas and Jones's Administrative Law*, 5th edn, Roger Douglas, Federation Press page at 470)). However, almost all the cases were determined on another ground of judicial review.

The "illogical and irrational ground" of judicial review 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 ground might 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) 77 ALJR 1165 in circumstances where the bifurcated *Migration Act 1958* (Cth) (temporarily) expressly forbade reliance on *Wednesbury* unreasonableness as a ground of judicial review to challenge a migration decision, the High Court accepted a plea of illogicality and irrationality

as constituting an independent ground of judicial review, although it found the ground was not made out on the facts. *Minister for Immigration & Multicultural Affairs v SLGB* (2004) 78 ALJR 992 per Gummow and Hayne JJ (at [37]-[38]), in which the appellant was successful, extended application of that ground to a decision maker's satisfaction as to the existence of a jurisdictional fact. In *WAHP v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 87, although dissenting as to the result, Lee J stated the principle in these terms (at [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 that in the former, the Court exercised supervision of the quality of the discretionary outcome of the decision maker, whereas in the latter the Court supervised the quality of the procedure.[1]

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 it 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 and the joint judgment of Crennan and Bell JJ (at [131]) was that a remedy should be given for serious irrationality in procedure, regardless of the outcome. However, the view of Gummow ACJ and Kiefel J (as her Honour then was), was that whether or not there was irrationality in the procedure, no remedy sounded if the outcome was reasonable (at [27])**.** The significance of the decision was that despite the effort of Gummow ACJ and Kiefel J to fashion 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 also be conditioned only by its outcome.

[1] Aronson, M Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomas Reuters (Professional) Australia Limited, 6th ed, 2017) 264 [4.710].

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 must be exercised reasonably: *Kruger* (1997) 190 CLR 1 (per Brennan CJ at [36]); *Attorney-General (New South Wales) v Quinn* (1990) 170 CLR 1 (per Brennan J at [36]), or because of the necessary construction of the statute giving the discretionary power: *Abibi v The Commonwealth* (1999) 197 CLR 510 (per Gaudron J at [116]).

In *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332, the applicant's entitlement to an Australian visa turned on the assessment of her skills as a cook. The applicant had undertaken two assessments of her ability. The second assessment was unfavourable and the applicant challenged the assessment for error. The Migration Review Tribunal decided that the applicant had had sufficient time to demonstrate compliance with the conditions of her visa and it refused a two week adjournment to wait for the result of the review of her skills assessment. It rejected her application for a visa, relying on the second unfavourable assessment.

The plurality confirmed in *Li's case* (at [63], [68]) that in the case of a discretionary decision there is a presumption of law that discretionary power will be exercised reasonably and added that the legal standard of unreasonableness in discretionary matters 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 said (at [76]), 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* [(1936) 55 CLR 499] 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 (at [105]):

> 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 1958* (Cth) 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 granting 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.[2]

The decision in *Li's case* 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* (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 to 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.

> [44] … 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 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….

[2] See: Naylor A, 'Recent Decisions Regarding Unreasonableness, Irrationality and Other Grounds for Judicial Review' (Paper presented at Administrative Law in Action, UNSW CBD Campus, 20 November 2013) page [53].

In *Minister for Immigration and Border Protection v Stratton* (2016) 237 FCR 1, the Full Court summarised the principles expressed in *Singh* and expressly rejected the view that the ground of legal unreasonableness was unprincipled (at [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.

Despite the Full Court's insistence that there was 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 (at least to some extent) a matter of impression.

Proportionality

In *McCloy v New South Wales* (2015) 357 CLR 178 the court considered the question of whether New South Wales legislation capping political donations, prohibiting political donations from property developers and restricting indirect campaign donations was invalid for infringing the freedom of political communication implied in the Commonwealth *Constitution*. The majority applied a proportionality test of "suitable", "necessary" and "adequate in its balance" to determine whether the impugned legislation was reasonably appropriate and adapted to advance its object. The majority's approach was cautious:

> [3] …proportionality in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative acts *or administrative acts* within the constitutional or legislative grant of power under which they purport to be done. … criteria have been applied to purposive powers; to constitutional legislative powers…to incidental powers…; 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. … [4] [But this] does not involve a general acceptance of the applicability to the Australian constitutional context of similar criteria as applied in the courts of other jurisdictions. It does not involve the acceptance of the application of proportionality analysis by other courts as methodologically correct. [our emphasis]

Nevertheless, the majority's express reference to "administrative acts" suggests a potential for the doctrine of proportionality to play a role in judicial review.

The majority in *McCloy* (at [79]) propounded "at least a three stage test" of proportionality, although it referenced decisions of the Supreme Courts of the United Kingdom and Canada - *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 and *R v Oakes* [1986] 1 SCR 103 respectively, as authority for the proposition that there might be four stage test. The test of "structured proportionality" is, first, whether the impugned decision is in pursuit of a legitimate object ("legitimacy"); second, whether the means for pursuing the legitimate object are rational, fair and not arbitrary ("suitability"); third, whether alternative strategies could and should have been chosen which would intrude less on the affected individuals rights ("necessity"); and fourth whether even a minimally intrusive limitation is permissible in pursuit of the legitimate end ("balance").[3]

Proportionality review is now well established in the United Kingdom to the extent that administrative decisions are challenged for breach of the *Human Rights Act*. It is apparent that proportionality is a more intrusive general standard than the currently available common law grounds of review impugning the outcome of a decision. This is demonstrated in the United Kingdom decision of *R v Ministry of Defence; Ex Parte Smith* [1996] QB 517, in which 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.

In Australia, as articulated by the majority in *McCloy*, proportionality analysis has so far been confined to questions of constitutional law (and even then, only to "purposive powers" in the Constitution): see also *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,[4] although the High Court has left open the possibility that proportionality analysis

[3] *McCloy v New South Wales* (2015) 357 CLR 178 at [79]-[93]; see also Aronson, Groves and Weeks, above n 1, 377 [6.510]; Boughey J, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43 *Federal Law Review* 59, [72]; Bathurst, The Hon T F 'On to Strasbourg or Back to the Temple? The Future of European Law in Australia Post Brexit' (Paper presented at Sydney CPD Conference, Sydney, 25 March 2017), 8 [20].
[4] Bathurst, above n 3, 8-9 [21]-[22].

might extend to human rights law: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 per Gleeson CJ (at [198]).

In Australia, the doctrine of proportionality remains "at the boundaries" of administrative law": *Bruce v Cole* (1998) 45 NSWLR 163 (per Spigelman CJ at 185). However, the more expansive comment made by the majority in *McCloy* recognises that a number of decisions over the years have left open the possibility that proportionality might 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 (at [50]), 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 J 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 *Li's case*, French CJ referred to proportionality in the context of the decision maker's area of "decisional freedom" and stated (at [28]) that "… not every rational reason is reasonable. There may be scope for proportionality analysis to bridge the gap between the two concepts". The plurality in *Li* (at [74]) 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: "an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached".

Further, in *Singh*, the Full Court held (*obiter* at [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 as a test of legal unreasonableness?

Proportionality is derived from the civil law. 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?'[5]

Hooper describes the difficulties English courts have experienced transitioning structured proportionality from its application to European Rights legislation to the common law more generally.[6] Hooper acknowledges that structured proportionality may appear to systematise a court's approach to determining whether the substance of an administrative decision is lawful, but suggests that when looked at closely, the stages of structured proportionality, particularly the last stage, involve the court in making a "multitude of policy decisions".[7] 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.[8] Australia, lacking a bill of rights against which administrative action can be measured provides infertile ground for the application of the doctrine of proportionality.

Conclusion

It would be wrong to suggest that proportionality analysis is, at this moment, an accepted or established tool of Australian administrative law jurisprudence. In *Gaynor v Chief of the Defence Force (No 3)* (2015) 237 FCR 188, for instance, rule 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 *serve a legitimate end***,** 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 impermissibly converted the limitation on legislative power to

[5] Ibid 5 [12].
[6] Hooper Dr G "Judicial Review and Proportionality: Making a Far Reaching Difference to Administrative Law in Australia or a Misplaced and Injudicious Search for Administrative Justice (2017) 88 *AIAL Forum* 29-47 at 38-41.
[7] Hooper, above n 6 at 40.
[8] Boughey, above n 3, [50]; Ibid 6 [16].

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.

Nevertheless, there is some evidence that 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…[9]

Australian courts have long confined themselves to reviewing the procedure of administrative decisions, not their substance. The High Court's decision in *Li's case* has significantly increased the jurisdiction of Australian courts to inquire into the substance. The courts, in conformity with their constitutional limits, should only exercise this enlarged jurisdiction according to principle. However, the question of whether the substance of an administrative decision can be justified by reference to the statute conferring the power remains in part a matter of impression.

The doctrine of proportionality offers a principled approach. It is 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 frustration of contract is just one example. It is also no objection that proportionality may involve the courts in making policy or value judgment decisions. There is a distinction between the civil doctrine of proportionality used to characterise the relationship between the state and the individual as a matter of substantial justice, and the adoption by the common law of the analytical tool of structured proportionality to aid in the determination of the reasonableness of legislation infringing on freedoms. It is also 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 <u>because</u> of the introduction of human rights legislation in these jurisdictions, it is not true to say that, as a consequence, human rights legislation is a necessary pre-condition of the emergence of

[9] Bathurst, above n 3, 22 [64].

proportionality in administrative law. French CJ, as well as Kirby P and the Full Court of the Federal Court in obiter remarks, all contemplate the application of the principle of proportionality to facts not giving rise to questions of human rights.

The true objection to structured proportionality is the absence of an overarching standard in Australia against which to test the proportionality of an impugned decision. However, this does not mean that structured proportionality cannot be used to test the proportionality of a decision where such a standard exists. Both *Li* and *Singh* were decisions in which a decision maker failed to grant an adjournment. The obvious standard against which the proportionality of the refusal could be tested was procedural fairness or fairness more generally. Kirby P in *Macquarie Bank* (1992) 30 NSWLR 307 found that the Act under which the impugned decision had been made itself provided the standard against which the proportionality of the decision could be tested. These examples indicate that structured proportionality analysis might, on a case by case basis, provide a principled and transparent approach to assessing the legal reasonableness of a decision where a standard against which the proportionality of the decision can be measured can be identified.