

**THE HON T F BATHURST AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

**PUBLIC INTEREST SYMPOSIUM 2019**

**'DEFINING THE PUBLIC INTEREST: WHERE LAWYERS FEAR TO TREAD?'**

**TUESDAY 16 APRIL 2019**

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. We must always remember and respect the unique connection which they have with this land under their ancient laws and customs. We must ensure that this connection endures despite the adversity which they have faced and continue to face as a consequence of European settlement.
2. I have been invited to speak to you today about defining “the public interest”. Now, I was somewhat surprised by this request. Asking a judge to define any term, let alone one as protean and indeterminate as “the public interest”, is just asking for trouble. As I’m sure you all know, we judges are known for trading in ambiguity and impenetrable prose. But then, it struck me. The aim of a keynote address is not to be definitive or conclusive, but to be so vague, subtle and plausibly erudite that the audience cannot precisely be sure what point is being made. Vague, subtle and plausibly erudite are epithets which can easily describe most judges, and so the reasoning behind inviting me to speak became clear.
3. I have started this address in this slightly self-indulgent fashion because, beneath the self-deprecation, there is more than a grain of truth. The definition of “the public interest” has always been a topic where lawyers have feared to tread, or at the very least, a topic where they have learned to tread lightly, since it has generally been seen to sit at the boundary between “the law” on the one hand and “policy” on the other.

The question has usually arisen when a statute confers a power on a decision-maker within the executive government to make a decision based on their assessment of what the public interest requires to be done in the circumstances of a particular case.<sup>1</sup>

4. A member of the public who seeks judicial review of such a decision faces a significant obstacle in the reluctance of the courts to be drawn into debates about whether the decision-maker came to the correct decision about what the public interest required. Courts have been consistent in stating that the phrase “classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view’”.<sup>2</sup> Put simply, while what can be considered as part of “the public interest” is limited to some extent by the subject matter and purpose of the relevant statute, it is otherwise within the discretion of the original decision-maker to determine.
5. If this is all that there was to “the public interest”, then this would be a very short address. I could, of course, extend it slightly by talking about other areas of law which use the concept in a slightly different sense, such as the doctrine of public interest immunity in the law of evidence,<sup>3</sup> the defences based on the public interest in defamation law,<sup>4</sup> or statutes which regulate public interest disclosures.<sup>5</sup> But these areas of law are narrower in their scope, and I do not think that they really shed much

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<sup>1</sup> For the purposes of this address, I set to one side the so-called “fourth branch” of government: see Chief Justice T F Bathurst, ‘New Tricks for Old Dogs: The Limits of Judicial Review of Integrity Bodies’ (2018) 14(1) *Judicial Review* 1; *Kaldas v Barbour* [2017] NSWCA 275.

<sup>2</sup> *O’Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320, 329 [13] (French CJ, Gummow and Bell JJ).

<sup>3</sup> See J D Heydon, *Cross on Evidence* (LexisNexis, 11<sup>th</sup> ed, 2017) ch 14.

<sup>4</sup> See, eg, *Defamation Act 2005* (NSW) ss 29, 30, 31

<sup>5</sup> See, eg, *Public Interest Disclosures Act 1994* (NSW); *Public Interest Disclosure Act 2013* (Cth).

light on what “the public interest” means for the purposes of a general keynote. Ultimately, a simple, black-letter perspective can only tell us so much. We need to take an approach which goes beyond mere legal doctrine if we want to understand how to define “the public interest” and its relevance for our system of government more broadly.

6. However, this does not mean that we can escape the need to grapple with the relationship between “the public interest” and the law. To start with, our understanding of the political community which constitutes “the public” is in itself defined by the law. The existence of this community depends upon the shared belief that we are bound by the rule of law under our *Constitution* and governed by the laws and institutions which it establishes. The characteristics of this community, and thus the scope and meaning of “the public” for the purposes of defining “the public interest”, must be deduced from the nature of those laws and institutions, and not from, as unfortunately can sometimes occur, beliefs based on what can be described as, at best, short-sighted nationalism, or at worst, deplorable cultural supremacism.
7. Let us therefore take a small step back from the narrow and technical definitions of “the public interest” dictated by legal doctrine, and instead look at how the concept takes its colour from the nature of our political community defined by the law. Our *Constitution* must be the starting point, but is perhaps a bit misleading. Its text and structure can give the impression that the centre of the political community remains the Queen, which no longer represents reality. For a long time, it has been accepted that, under the *Constitution*, it is “the people” who lie at the heart of the Australian political community because it is “the people” who elect representatives to the legislature to exercise the power to make laws to define the rights and obligations of those within the community.<sup>6</sup>
8. Since “the people” are committed, under the *Constitution*, to abiding by the decisions on laws made by their representatives, it is these laws

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<sup>6</sup> See, eg, *Bisticic v Rokov* (1976) 135 CLR 552, 566 (Murphy J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ).

which we must take to be the expression of the decisions of the “the people” as a whole, and not just the whims of a majority. In this way, the law can be seen to become something more than just a means of regulating how an individual ought to behave. It becomes instead an expression of “the public will”.<sup>7</sup> In slightly more poetic language, we might also say that it becomes an expression of “the whole personality” of the community, embodying the beliefs, opinions, desires and, most importantly, the values of “the people” who have endorsed the law through their responsible representatives.<sup>8</sup>

9. I should note that nothing in this argument is inconsistent with overriding statutes such as the *Charter of Human Rights and Responsibilities Act 2006* (Vic). That particular expression of will by the legislature represents a determination that courts should have regard to the rights defined in that instrument in construing the terms of other legislation unless it engages the provisions which permit the *Charter* to be overridden.<sup>9</sup> Merely because other legislation is, to some extent, subject to the *Charter* does not mean that it is any less an expression of the public will. It merely means that the public will must be discerned by considering the two instruments as a whole.
10. A public official charged with the administration of the law, whether as a judge or a member of the executive government, cannot ignore this background. If the law as a whole is regarded as an expression of the public will, then the nature of “the public interest” must, to some extent, take its lead from that will. I cannot accept that, where that will has clearly been expressed, the public interest could be interpreted as

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<sup>7</sup> Cf *Singh v Commonwealth* (2004) 222 CLR 322, 329 [5] (Gleeson CJ). See also Chief Justice James Allsop, ‘The Foundations of Administrative Law’ (Speech, Whitmore Lecture, 4 April 2019) 2–3.

<sup>8</sup> See Chief Justice James Allsop, ‘The Law as an Expression of the Whole Personality’ (Speech, Maurice Byers Lecture, 1 November 2017), quoting Sir Maurice Byers, “From the Other Side of the Bar Table: An Advocate’s View of the Judiciary” (1987) 10 *University of New South Wales Law Journal* 179, 182.

<sup>9</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 31, 32.

possibly requiring something which is to the contrary. An expression of will by the public must be interpreted as a decision about what their interests require. In a country like Australia, where we have full and free participation in our elections, it would be arrogant for any public official involved in the administration of the law to presume otherwise. They may think the decision right or wrong, but once it has been made, it must be respected.

11. Of course, the problem with this reasoning is that an expression of will by the public through their laws is often simply not clear. Many laws confer powers with a wide discretion and little guidance on how it is to be exercised, and many others are complex and technical, requiring considerable skill and expertise to penetrate their intended meaning. In either of these circumstances, discovering what the public interest requires is no easy task. A balance has usually been struck between distinct and incommensurable interests, with a necessarily unclear outcome.<sup>10</sup> While it is possible to see generally what might have been intended by the law, it can be difficult to understand how it applies to the facts of a particular case. To that extent, then, the public interest has been left undefined.
12. Now, these kinds of difficulties will be familiar to many of you here today, whether as lawyers or those involved in public administration, as problems of statutory interpretation. It might seem to you as though, through a sleight of hand, I have mistakenly equated the process of construing the provisions of a statute with determining what the public interest requires. Far from representing a confusion of thought, this is precisely my point, and I think that it follows from what I have said earlier. If it is accepted that the laws made by the legislature are an expression of the public will and a judgment of “the people” about what the public interest requires, then it follows that any attempt to define or

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<sup>10</sup> Murray Gleeson, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (2009) 20 *Public Law Review* 26, 32–3.

understand the public interest must begin with an interpretation of the relevant laws.

13. This analysis could be thought somewhat unsatisfactory. The idea of “the public interest” has a long history in philosophy, and its meaning continues to be the subject of much debate.<sup>11</sup> It might not seem legitimate to reduce it to a question of statutory construction. And, if we are talking about how we should act in our role as members of “the people” electing our representatives to the legislature, or about how representatives should vote on legislation, then of course this is true. In this context, each of us must be and is free to come to our own understanding of what “the public interest”, or, to use a less legalistic term, “the common good”, requires and exercise our vote accordingly. In doing so, we may draw upon the many different interpretations of the concept of “the public interest” or “the common good” which have been proposed over the centuries.
14. Nevertheless, it is a different story altogether if we are talking about how we should act as public officials who have wide discretion to exercise powers conferred by law. Here, the starting point must always be the terms of the statute, no matter how wide or unconfined the discretion may appear at first glance. Our goal must always be to understand the scope of the power which has been vested in us by the expression of the public will through conventional principles of statutory interpretation. The scope of the power, and thus, the limits on what the public interest requires, must be discerned according to the text, context, and purpose of the relevant statutory provision.<sup>12</sup>

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<sup>11</sup> Chris Wheeler, ‘The Public Interest Revisited – We Know It’s Important But Do We Know What It Means?’ (2013) 72 *AIAL Forum* 34, 35. For further discussion on the philosophical aspects of “the public interest” and “the common good”, see the interesting discussion in Waheed Hussain, ‘The Common Good’, *Stanford Encyclopedia of Philosophy* (Web Page, 26 February 2018) <<https://plato.stanford.edu/entries/common-good/>>.

<sup>12</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ).

15. I am under no illusion that this process is capable of giving a single answer in every case. In some cases, it may well be that the necessary course of action is obvious, and there is no question about what the public has adjudged its interests to require. In other cases, the decision-maker may be left in doubt. The process of interpretation may reveal the different interests which are at stake and the considerations which are relevant, but not how they are to be weighed or balanced. It is left to the decision-maker to make a value judgment as a matter of human impression based on those interests and considerations revealed as relevant through the process of interpretation.<sup>13</sup> This path of reasoning leads us to the conclusion that whatever courses of action remain within this margin of appreciation fall within “the public interest”.
16. To some, this might hardly seem a satisfactory conclusion. It tells us little about what a decision-maker should do when confronted with a discretionary decision. In fact, on one view, our analysis collapses down to the definition of “the public interest” propounded by black-letter legal doctrine from which we sought to escape earlier, where there is a sharp divide between “the law” and “policy”. We have simply affirmed that a decision required to be made in the public interest is discretionary, to some extent limited and controlled by the requirements of statute. It does not seem that we have really learned anything about how we ultimately come to make this discretionary decision. Does this mean that we are forced to start again and look elsewhere to discover the meaning of “the public interest”?
17. I think not. The apparent conundrum which we have encountered arises from the rather abstract nature of the discussion so far. I have been speaking in generalities, and this means that we can sometimes miss something important. In this case, I think we have missed the fact that, no matter how wide a properly-construed statutory discretion seems to be, it will always pale in comparison to the number of ways in which a

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<sup>13</sup> Chief Justice James Allsop, ‘The Foundations of Administrative Law’ (Speech, Whitmore Lecture, 4 April 2019) 3.

discretion could be exercised in a completely arbitrary manner. By focusing on the width of the discretion which still remains after all relevant interests and considerations have been taken into account, we ignore the sheer size of the number of possible interests and considerations which have been excluded.

18. Seen in this light, I do not think that our conclusion is as unsatisfactory as it might at first seem. It just means that we cannot delineate the process of legal interpretation as separate from the process of identifying “the public interest”. Instead, interpretation forms an integral part of it. A decision-maker builds the idea of “the public interest” by a process of careful construction of the terms of the power conferred by a statute in its context, paying attention to not only what it requires to be considered, but what it implicitly excludes from consideration. Then, they must weigh and balance these matters and make a judgment about what it is that the public interest requires. The process of ascertaining “the public interest” will not always result in a single answer, but is a process which, if undertaken correctly, will render a decision legitimate and unsusceptible of legal challenge.
19. This position has the consequence that the courts do have an important, but often unrecognised, and sometimes, unwanted, role to play in defining “the public interest”. As I hope I have made clear, the law itself is an expression of the public interest and its interpretation by courts must necessarily play a part in defining what the public interest requires. Of course, a court must usually refrain from making the value judgment which ultimately determines what decision ought to be made in a particular case unless expressly authorised to do so. But this does not mean that we can remain blind to the fact that, in their role as interpreters of what must or must not be considered in the exercise of a statutory power, the courts are involved in a process of defining “the public interest”.
20. Nowhere is this more evident than in the idea that a decision can be open to challenge on the ground that it is simply “unreasonable”. While this term does have a specialised meaning within the law, recent

decisions of the High Court of Australia have possibly meant that it has a much wider scope than was perhaps previously thought. In my opinion, these developments are clear illustrations of the often covert but important role that courts can play in defining “the public interest”. In the remainder of this address, I would like to take a closer look at these decisions and show how they are consistent with the idea that courts play an integral part in the process of defining “the public interest” through statutory interpretation, and in particular, how the use of the concept of “reasonableness” could make this role much more prominent.

21. Before turning to the decisions of the High Court, it is useful to have some understanding of how “unreasonableness” developed as a ground of review. To do this, we need to go back in time to the 1940s to a rather quaint dispute between the owners of a cinema, or a “picture house”, as they were then known, and the local council for the town of Wednesbury in the United Kingdom, which is now on the outskirts of Birmingham. The dispute concerned the power of the council to impose conditions on allowing a cinema to open on a Sunday under section 1(1) of the *Sunday Entertainments Act 1932* (UK). The dispute eventually made its way to the Court of Appeal, and was resolved in the famous case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.<sup>14</sup>
22. The terms of the power of a local council under section 1(1) were almost as broad as could possibly be. The council for an area had the power to “allow places in that area licensed under [the *Cinematograph Act 1909* (UK)] to be opened and used on Sundays for the purpose of cinematograph entertainments, subject to such conditions as [the council] think fit to impose”. Prior to the passage of the *Sunday Entertainments Act 1932* (UK), cinemas were completely prohibited from opening on Sundays by the provisions of the *Sunday Observance Act 1780* (UK). The reforming legislation had been introduced after an opportunistic solicitor’s clerk had made something of a sport of

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<sup>14</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

prosecuting some cinemas who dared open on a Sunday in contravention of the earlier statute, and on one occasion, she had succeeded in having a penalty of £5000 imposed on the owners of a cinema.<sup>15</sup>

23. This context is important in understanding the nature of the power which had been conferred on councils under the *Sunday Entertainments Act 1932* (UK). It means that it is incorrect to view this power as a regressive measure. Rather, it represented a liberalisation of the religious values concerning Sundays which had been embedded in the law by the *Sunday Observance Act 1780* (UK). The change allowed individual councils to determine whether they would take the, at the time, progressive step of permitting cinemas to lawfully open on Sundays, with the additional option of prescribing conditions with which cinemas had to comply if they were going to open.
24. After the *Sunday Entertainments Act 1932* (UK) had come into effect, the Wednesbury local council had exercised its newfound power by allowing cinemas within its area to open on Sundays, but only on the condition that “[n]o children under the age of fifteen years shall be admitted to any entertainment, whether accompanied by an adult or not”.<sup>16</sup> Unfortunately, it is here that the historical record begins to get a little fuzzy. It does not appear that there has been any sustained investigation into the circumstances in which the owners of the Gaumont Cinema in Wednesbury attempted to challenge this condition, and so I regret to say that I am unable to add much colour to the facts which appear in the reported case. Nevertheless, I think it suffices to say that the owners, as reasonable businesspeople, were probably not insensitive to the commercial opportunities presented by opening their doors on Sundays to a younger clientele hungry for the novelty of motion pictures.

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<sup>15</sup> See *Orpern v Haymarket Capitol Ltd* (1931) 47 TLR 575; *Orpern v Haymarket Capitol Ltd* (1931) 145 LT 614.

<sup>16</sup> [1948] 1 KB 223, 227.

25. The owners of the Gaumont Cinema thus sought declarations from a court that the condition was beyond the power of the council to impose because it was “unreasonable”.<sup>17</sup> The primary judge found that it was not beyond the power of the council to impose that condition and dismissed the proceedings. The owners then appealed to the Court of Appeal, which unanimously affirmed the conclusion of the primary judge. The judgment of the Court was delivered by Lord Greene, the Master of the Rolls. It is important to note that his Lordship accepted that the power conferred on the council to impose conditions on Sunday openings had to be exercised “reasonably”.<sup>18</sup> The real question which the Court had to consider was what it meant for the council to be required to exercise the power “reasonably”.
26. Much of the subsequent confusion and debate surrounding this case has arisen because Lord Greene’s judgment has been interpreted as an attempt to lay down a definitive standard for what constitutes a “reasonable” exercise of power. Hence, we have the concept of “Wednesbury unreasonableness”, which is derived from his Lordship’s comment that a decision will only be “unreasonable” if it is a decision “that no reasonable body could have come to”.<sup>19</sup> I will put this concept to one side, because later cases have pointed out that it is a mistake to see this development in isolation from earlier cases or to read the words used in the judgment as if they were a statute.<sup>20</sup> I entirely agree. The ground upon which his Lordship actually resolved the principal issue in the case was quite narrow and briefly expressed, and made it unnecessary to consider the precise nature of what it meant for a decision to be “unreasonable”.

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<sup>17</sup> Ibid 224.

<sup>18</sup> Ibid 229.

<sup>19</sup> Ibid 230, 234.

<sup>20</sup> See *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30, [67]–[68] (McHugh and Gummow JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 362–5 [64]–[71] (Hayne, Kiefel and Bell JJ).

27. The crux of his Lordship’s analysis of the case is his finding that it was “clear that the matter dealt with by [the condition imposed by the Wednesbury council] was a matter which a reasonable authority would be justified in considering when they were making up their mind what condition should be attached to the grant of this licence”.<sup>21</sup> If this was accepted, it then followed, almost as a matter of logic, that the exercise of power could not be legally unreasonable. If it were otherwise, then “the ultimate arbiter of what is and is not reasonable [would have been] the court and not the local authority”, which his Lordship emphatically stated could not be correct because the decision-making function was one which the legislature had expressly entrusted to the council, and not to the courts.<sup>22</sup> On this basis, there could be no finding that the imposition of the condition was unreasonable.
28. Now, I have so far skipped over stating exactly what matter it was that Lord Greene found that the council was justified in considering in imposing the condition, and thus, which supported the finding that its decision was not unreasonable. This is not because it is unimportant, but because it is the part of the case which I think is the most interesting for our purposes. His Lordship identified the matter when he explained that “[n]obody, at this time of day, could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider”,<sup>23</sup> and later in his judgment, expressly identified this as a matter to be able to taken into account as part of “the public interest”.<sup>24</sup>
29. However, Lord Greene did not go further to identify whether this was a conclusion of law or fact, or what legal reasoning supported it. As a

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<sup>21</sup> [1948] 1 KB 223, 229–30.

<sup>22</sup> *Ibid* 230.

<sup>23</sup> *Ibid* 230.

<sup>24</sup> *Ibid* 233.

result, we can only ever speculate about how this conclusion was reached. Moreover, it is quite possible that it was regarded by him as so self-evident as to not require any reflection. However, there is nothing to stop us from going further and considering how we, as outsiders to the social and legal milieu of the time, might analyse this problem. In fact, I think that, for this reason, this case is a good demonstration of how a process of statutory interpretation and legal reasoning can help us to reach the same conclusion about what “the public interest” might require as what, to many of us, might seem perhaps a rather subjective and instinctive judgment on the part of Lord Greene.

30. The key lies in a deeper consideration of the subject-matter, context and purpose of the *Sunday Entertainments Act 1932* (UK), the importance of which I have already foreshadowed. The extremely wide language of the power conferred on the Wednesbury local council under section 1(1) must take into account the fact that it represented a liberalisation of the religious values concerning Sundays embedded in the law. I think that it is plausible to say that, to the extent that observance of these religious values forms part of the “moral health” of young children, it could be thought to be within power to impose conditions directed towards their “moral health” in exercising the power to relax those norms. Further, it must also be remembered that the power under section 1(1) was not a general one applicable to any type of business. It was a specific power directed towards cinemas. Again, I think it is therefore plausible to say that, since going to the cinema is an inherently sedentary activity, it could be thought to be within power to impose conditions directed towards the general “well-being” and “physical health” of children in exercising the power to permit this activity.
31. As I have said, this is necessarily a speculative exercise, although I think that this kind of thinking can be regarded as implicit in Lord Greene’s judgment. It will always be a difficult question as to how far such considerations can be said to form part of an objective process of statutory interpretation based on text, context and purpose without also shading into the personal values and opinions of those undertaking the

interpretation. However, I think that it is widely accepted that this ambiguity is part and parcel of any form of legal interpretation. The question might appear to us quite starkly when we confront a case in which the values and opinions held by the judges differ appreciably from our own, but this only serves to highlight my central point: courts play an integral part in the process of identifying what the public interest might require in a given case.

32. Of course, I accept that there are limits on how significant this role might be, and this case is a good example. There could be no suggestion that, since the “well-being”, “physical health” and “moral health” of children were relevant matters for the council to take into account, the council was no longer left with any discretion at all. It still remained for the council to consider whether it felt that these matters justified prohibiting cinemas from allowing children under the age of fifteen from attending on Sundays. Further, there could be no doubt that they were not the only relevant matters which the council could have considered. It still retained a significant discretion to decide what to do in those circumstances.
33. Again, I do not think it is possible to provide a schema or a rubric for ascertaining “the public interest” in such a way that will remove this residual discretion in every case. That is a chimera. However, this does not mean that the role which courts play in interpreting statutory provisions which confer administrative discretions is somehow separate from the process of defining “the public interest”. Sometimes, the process of interpretation will result in a fairly narrow discretion which will not normally give a decision-maker much latitude. Other times, as in the case we have just considered, there will still remain a fairly wide discretion within which the decision-maker has freedom to move. But, in both cases, by framing and defining what the decision-maker may or may not consider, the court plays a role in defining “the public interest” from the terms of the statute.
34. Now, I said earlier that I was putting to one side the concept of “Wednesbury unreasonableness”, largely because it seemed to me to be

peripheral to how Lord Greene dealt with the issues in the case. The notion that a decision could be invalid because it was “so unreasonable that no reasonable authority could ever have come to it”<sup>25</sup> was mentioned, but not explained or considered in any detail and, on Lord Greene’s view, could not have been called in aid by the owners of the Gaumont Cinema. Happily, it appears that their business was nevertheless successful despite its initial failure to increase its Sunday patronage, with the cinema continuing to operate until the 1970s. Unfortunately, the premises then entered a slow decline after being sold and becoming a bingo club, which eventually closed after a fire in 2013. However, there is still hope on the horizon: there are plans afoot to refurbish the building and revive the glory days of the Gaumont Cinema, at long last, free from its former restrictions on Sunday trading.<sup>26</sup>

35. The later history of the Gaumont Cinema somewhat resembles the history of the concept of “Wednesbury unreasonableness” in Australian law. For many years, it existed in a kind of limbo in the High Court; occasionally referred to, and even discussed, but never applied.<sup>27</sup> It is only in recent years that there has been something of a revival, beginning in 2013, when the High Court handed down its decision in *Minister for Immigration and Citizenship v Li*,<sup>28</sup> and continuing last year, when it handed down *Minister for Immigration and Border Protection v SZVFW*.<sup>29</sup> Both decisions directly addressed the role which “reasonableness” plays in the process of discretionary decision-making

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<sup>25</sup> Ibid 234.

<sup>26</sup> For the history of the Gaumont Cinema, see ‘Silver Cinema’, *Cinema Treasures* (Web Page) <<http://cinematreasures.org/theaters/32515>>; Richard Guttridge, ‘Historic Gaumont Cinema Turned Bingo Club To Be Brought Back To Life in Wednesbury’, *Express & Star* (online, 17 August 2017) <<https://www.expressandstar.com/news/local-hubs/sandwell/wednesbury/2017/08/17/historic-gaumont-cinema-to-be-brought-back-to-life/>>.

<sup>27</sup> See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 336 (J Gleeson SC); cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30, [67] (McHugh and Gummow JJ).

<sup>28</sup> (2013) 249 CLR 332.

<sup>29</sup> [2018] HCA 30.

in Australian law, although they perhaps fell short of the definitive guidance for which many might have hoped.

36. However, I do think that it is clear that these decisions have the capacity to bring about an important change in the relationship between courts and decision-makers by making the role which courts have in defining “the public interest” more prominent. If a decision may be reviewed based on whether it is “reasonable” or not, then this could cause courts to shift their focus away from what the terms of the relevant statutory provision objectively require and encourage them to place greater reliance on their own subjective assessment of what falls within “the public interest”. Needless to say, this poses some significant questions about the proper place of the courts within our constitutional structure.<sup>30</sup>
37. Fortunately, for the purposes of this address, I think that these concerns can be set aside. I think that it is clear that the High Court was conscious of these difficulties in *Li* and *SZVFW* and was careful to explain the concept of “reasonableness” in such a way so as to limit the extent to which courts can use it to import their own subjective judgments about what the public interest might require into their review of administrative decision-making. However, the potential remains for a wider view to be taken of what it means for a decision to be “reasonable”, as has happened or is happening in the United Kingdom and other common law jurisdictions, where it appears that it has come to include considerations of proportionality.<sup>31</sup>
38. We will still be a comfortable distance away from this position in Australia if the approach taken in *Li* and *SZVFW* is maintained. To explain that approach, it is necessary to refer to the facts and statutory context of those decisions in more detail. Both cases concerned what

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<sup>30</sup> Cf *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J).

<sup>31</sup> See *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, 1408–9 [131]–[134] (Lord Neuberger PSC). For a detailed discussion of the United Kingdom case law, see Harry Woolf et al, *De Smith's Judicial Review* (Sweet & Maxwell, 8<sup>th</sup> ed, 2018) ch 11.

might be termed the “procedural powers” of the Migration Review Tribunal and the Refugee Review Tribunal in hearing and determining applications for review of visa decisions. While this is perhaps less exciting to modern eyes than local councils imposing restrictions on Sunday trading, these decisions are a good demonstration of how the requirement that a decision be “reasonable” increases the role of courts in defining “the public interest”.

39. I will start with the decision in *Li*. A delegate of the Minister of Immigration refused Ms Li’s application for a skilled visa because her skills assessment had contained information which was false, apparently through the fault of her migration agent.<sup>32</sup> Ms Li applied to the Migration Review Tribunal for review of the decision. For the purposes of the review, Ms Li attempted to obtain a fresh skills assessment, but the process was delayed by the relevant authority.<sup>33</sup> Ms Li was therefore unable to provide the assessment to the Tribunal within the timeframe it had set. She requested an extension of time so that she would be able to obtain the skills assessment, without which it was not possible for her review application to succeed.<sup>34</sup> However, the Tribunal refused her request and dismissed her application for review.<sup>35</sup>
40. The High Court unanimously held that the decision of the Tribunal to refuse Ms Li’s request for an extension of time was unreasonable and therefore invalid. While there were some differences in the approaches of the judges who heard the case, I will focus on the majority reasoning of Justices Hayne, Kiefel and Bell. Further, while their Honours’ explanation of the history and legal nature of “Wednesbury unreasonableness” is instructive,<sup>36</sup> I want to look more closely at how

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<sup>32</sup> (2013) 249 CLR 332, 353 [34] (Hayne, Kiefel and Bell JJ).

<sup>33</sup> *Ibid* 353 [35].

<sup>34</sup> *Ibid* 354 [37]–[38].

<sup>35</sup> *Ibid* 355 [40].

<sup>36</sup> *Ibid* 362–7 [63]–[76].

they analysed the particular circumstances of the case before them.<sup>37</sup> It is here that we can best see how their Honours intended the criterion of “reasonableness” to be applied.

41. Their Honours started their analysis by examining the reasons given by the Tribunal for exercising its power to dismiss the review application. They viewed the decision as resting on the bases that “Ms Li had been provided with enough opportunities to present her case” and that “the Tribunal was not prepared to delay the matter any further”. While their Honours questioned this characterisation of the facts by the Tribunal, they stated that, even if it was accepted that the Tribunal was required to take into account “efficiency” as a consideration in determining whether to extend the time for Ms Li, it was necessary for this object to be weighed against the objects of the provisions which required the Tribunal to afford an opportunity to the applicant to “present evidence and arguments ‘relating to the issues arising in relation to the decision under review’”.<sup>38</sup>
42. Their Honours then noted some of the factual circumstances which might have been relevant for the Tribunal to take into account in determining the weight of this matter, such as the fact that the skills assessment was the only matter remaining in issue on Ms Li’s visa application and that she had indicated that a new assessment had been sought and would be provided as soon as it was available. They stated that it was “not apparent” why the Tribunal had decided to dismiss the review application, thus depriving Ms Li of the opportunity of providing a fresh skills assessment when the Tribunal knew that there was a prospect of Ms Li being able to provide a new assessment to the Tribunal in the near future.<sup>39</sup> Their Honours rejected the idea that the

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<sup>37</sup> Ibid 367–9 [77]–[85].

<sup>38</sup> Ibid 368 [80].

<sup>39</sup> Ibid 368–9 [83].

earlier false skills assessment could have been an alternative justification for taking this course.<sup>40</sup>

43. The finding that there was no reason which could explain why the Tribunal deprived Ms Li of her opportunity to provide a fresh skills assessment in the circumstances which it had before it appears to have been critical to their Honours' conclusion that Tribunal's decision was invalid. They said that "[i]n the circumstances of this case, it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute".<sup>41</sup> While they did not use the same language, this conclusion also bears obvious similarities to their Honours' statement earlier in the judgment that "[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification".<sup>42</sup>
44. It is instructive to note how this reasoning differs from the corresponding analysis undertaken by Lord Greene in *Wednesbury*. Once his Lordship was content to accept that the "well-being and the physical and moral health of children" was a relevant matter for the *Wednesbury* local council to take into account, there was no suggestion that there was any countervailing matter which the council was required to have regard by the relevant statutory provisions. By contrast, in *Li*, the majority reasoned that the Tribunal could not behave similarly and simply rely on an appeal to some generalised idea of "efficiency" or a notion that "enough is enough" to justify its decision to dismiss the review application.<sup>43</sup> The Tribunal was also required to take into account the fact that it had a duty to provide Ms Li with an opportunity to present evidence and arguments on her application.

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<sup>40</sup> Ibid 369 [84].

<sup>41</sup> Ibid 369 [85].

<sup>42</sup> Ibid 367 [76].

<sup>43</sup> Ibid 368 [80]–[81].

45. So far, this reasoning does not go beyond what would normally be expected of a court interpreting the terms of the statutory power which conferred a discretion on a decision-maker. It is the following step which is novel. Their Honours then went on to find that it was not possible, in the circumstances of the case, to properly take both of these matters into account and to make the decision which the Tribunal did, presumably because they found no “evident and intelligible justification” for the decision. In this sense, the decision was “unreasonable”.
46. Now, I do not think that it can be denied that this conclusion expands the role which courts can play in defining “the public interest”. Certain decisions which might appear open on the face of the statute can be excluded from being legitimate determinations of what the public interest requires by reason of the judgment of the court, simply because it reaches a conclusion that the reasoning of the decision-making was unjustified. But, in my opinion, it is possible to overstate the significance of this conclusion. On one view, the reasoning of Justices Hayne, Kiefel and Bell was closely tied to their interpretation of what the relevant statutory provisions required the Tribunal to consider. The simple and confined nature of the power which the Tribunal was exercising meant that it was relatively easy to see that there was no real justification for depriving Ms Li of her opportunity to present her forthcoming fresh skills assessment to the Tribunal.
47. I think that the decision in *SZVFW* highlights this point quite well. Its facts are quite similar to *Li*, and although there was perhaps some greater variation in how their reasons were expressed, all members of the Court once again agreed in the result. Relevantly, for present purposes, it concerned a decision of the Refugee Review Tribunal to dismiss a review application after receiving no response to several requests it made to the applicants to provide submissions and material to support their application and to attend a hearing before the Tribunal.<sup>44</sup> It appeared that the applicants had also failed to respond to similar

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<sup>44</sup> [2018] HCA 30, [99]–[107] (Nettle and Gordon JJ).

requests in relation to their primary visa application.<sup>45</sup> Each member of the Court found that, in these circumstances, the Tribunal was entitled to have made the decision to dismiss the review application.<sup>46</sup>

48. The relevant similarities and differences with *Li* will be readily apparent. While not all members of the Court expressed themselves in the following way, I think the significant difference lies in the presence of at least some justification for the Tribunal to make the decision which it did, so that, when viewed against the detailed requirements of the statutory scheme regulating the decision-making power of the Tribunal, there was some “evident and intelligible justification” for its actions. Importantly, I do not think that the analysis of the judges of the Court could be construed as suggesting that the conclusion which the Tribunal reached was the only one possible in those circumstances. By contrast, it was only because the situation in *Li* was exceptional that the Court had been prepared to hold that it was not possible for the Tribunal to have reached the conclusion that it did.
49. It is impossible to do justice to the nuances of this area of law in a reasonably brief address, and I have not tried to do so. Instead, I have used it as an example of how the courts play an important role in defining “the public interest” through statutory interpretation, and this is all more the case since *Li* has confirmed the continued existence of “reasonableness” as a ground of review for administrative decisions. However, it must always be remembered that this process, since it is based on the principles of statutory interpretation, is controlled by objective considerations. It does not and should not give judges a warrant to interfere with decisions based on their personal opinions and values. While the requirement that a decision be “reasonable” may result in a narrowing of the discretion remaining with the decision-maker, it is not the place of courts to wholly subsume this discretion unless expressly authorised to do so by the legislature.

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<sup>45</sup> Ibid [100]–[101].

<sup>46</sup> Ibid [14] (Kiefel CJ), [70] (Gageler J), [123] (Nettle and Gordon JJ), [140]–[141] (Edelman J).

50. However, I should note that, if we were to go further afield, there are other areas of law where courts are regularly required to make determinations about what the public interest requires, even if this label is not expressly used. One clear example is defining what constitutes “unconscionable” conduct for the purposes of trade practices legislation,<sup>47</sup> or what constitutes a “legitimate purpose” for the analysis required by the implied freedom of political communication.<sup>48</sup> There can be no doubt that the responsibility for defining what is included within these concepts and other similarly “fuzzy” concepts falls wholly on the courts, and this necessarily involves them engaging with “the public interest”. But, the principles which have been developed to govern the interpretation of these concepts are, in many respects, quite different from those which prevail within the administrative law context with which have been discussing. I refer to these examples only to point out that the role which courts have in that context is hardly unusual or unprecedented.
51. In the end, public officials, whether judges or members of the executive government, will always be faced with difficult decisions about what the public interest requires. These decisions will inevitably involve the exercise of discretion. What is essential is that the exercise of this discretion is controlled within the boundaries established by law, representing the will of “the people” acting through their elected representatives in the legislature. These boundaries themselves play an important part in defining and constructing what “the public interest” requires, and to the extent that courts are called upon to interpret these boundaries, they too participate in the process of determining the nature of that indefinable concept, “the public interest”.

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<sup>47</sup> See, eg, *Competition and Consumer Act 2010* (Cth) sch 1 s 22; *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15.

<sup>48</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. For the most recent discussion of how this “legitimate purpose” is identified, see *Club v Edwards* [2019] HCA 10.

52. Thank you for your time. I hope you find the rest of the symposium engaging and fulfilling, and perhaps less vague, subtle, and plausibly erudite than my address has perhaps been.