

## JUDICIAL REVIEW & THE SHIFTING SANDS OF LEGAL UNREASONABLENESS

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### Introduction

- 1 The great English philosopher and logician, John Stuart Mill, commenced his great work, *A System of Logic*, with a chapter concerning the necessity, in any work of logic, for the analysis of language. Of particular note is Mill's admonition as to precision of thought and language. As Mill stated:

Language is evidently, and by the admission of all philosophers, one of the principal instruments ... of thought; and any imperfection in the instrument, or in the mode of employing it, is confessedly liable, ... to confuse and impede the process, and destroy all ground of confidence in the result.<sup>1</sup>

- 2 The same sentiment applies to law and legal thinking. In law, as in life more generally, the same words may mean different things in different contexts and to different people. Lawyers, for their part, are adept at using different words to explain the same legal principle or precept. In doing so there are inevitably questions as to whether there has been a corresponding shift in principle.
- 3 For the purposes of the 10<sup>th</sup> Annual Whitmore Lecture, it is that great and venerable legal chestnut, "*reasonableness*", that I wish to explore. More specifically, and in honour of the great Harry Whitmore, it is reasonableness in its administrative law manifestation and, more particularly, its reverse image

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<sup>1</sup> John Stuart Mill, *A System Of Logic* (Harper & Brothers, 8th ed, 1882) Book I, Chapter I, § 1.

“*unreasonableness*”, that is the topic for consideration. As I seek to demonstrate, the language used in the case law to explain this important principle of administrative law is not always consistent. An examination of the case law leads inexorably to the decision in *Minister for Immigration and Citizenship v Li*, and the use of proportionality reasoning.<sup>2</sup>

- 4 The law is replete with standards of reasonableness. The great expansion of the law of negligence since the late 19th century has been centrally concerned with the abstract notion of a “*reasonable person*”. Thus, tort lawyers have reasoned by reference to the passenger on the Clapham omnibus, the Bondi tram or the London Underground – abandoning the genderisms of the initial explications. Likewise, questions of reasonableness occupy the minds of criminal lawyers. Self-defence, for example, requires not only that an accused carried out conduct in the belief that the conduct was necessary for a particular purpose, but also that the conduct was a “*reasonable response*” in the circumstances as the accused perceived them.<sup>3</sup>
- 5 Notions of reasonableness, using language very similar to that found in the early judicial review cases, can also be found in early challenges to by-laws made by corporations. In the 17<sup>th</sup> century case of *The Master and Company of Framework-Knitters v Green*,<sup>4</sup> the company in question was incorporated by letters patent granted by Charles II, pursuant to which it was granted “*power to make by-laws for the benefit of the corporation*”.<sup>5</sup> The company sought to enforce a debt arising by virtue of a company by-law imposing fees on members for an annual dinner upon the Feast of St John the Baptist. The member debtor, who had not paid his contribution for the dinner, was unsuccessful in impugning the validity of the by-law. In finding for the

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<sup>2</sup> [2013] HCA 18; 249 CLR 332.

<sup>3</sup> See, eg, *Crimes Act 1900* (NSW), s 418(2).

<sup>4</sup> (1696) 1 Ld Raym 114; 91 ER 972.

<sup>5</sup> *Ibid.*

company plaintiffs, the Court of King's Bench adopted the language of reasonableness:

[M]embers of corporations are not bound to perform by-laws, unless they are reasonable, and the reasonableness of them is examinable by the Judges.<sup>6</sup>

- 6 A little over a century later, in *Eagleton v The East India Company*,<sup>7</sup> a by-law regulating the conduct of the public sales of tea by the East India Company was sought to be impugned by a buyer whose highest bid at auction had been refused. Lord Alvanley CJ, in describing the power of the East India Company to make regulations for the conduct of its public sales, stated:

[I]n matters where the Company is not restrained by Parliament they have a right to make reasonable regulations; but it will always be a question whether their regulations are reasonable or not ... [W]hatever regulations therefore they make, must be regulations not depending upon their sole will and pleasure, nor to be enforced or relaxed by that rule only; for if such regulations be allowed, they will thereby be enabled to make that which is required to be a public sale something totally different from a public sale.<sup>8</sup>

- 7 Unreasonableness as a ground for impugning administrative decision making has been expressed in terms requiring something: “*so unreasonable that no reasonable authority could ever have come to it*”, to use the words of Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.<sup>9</sup> In *Minister for Immigration and Multicultural Affairs v Eshetu* Gummow J<sup>10</sup> reminded us that “*Wednesbury* unreasonableness” developed by analogy to private law principles governing the judicial control and discretions vested in trustees and others.

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<sup>6</sup> Ibid.

<sup>7</sup> (1802) 3 B & P 56; 127 ER 32.

<sup>8</sup> Ibid 38.

<sup>9</sup> [1948] 1 KB 223.

<sup>10</sup> [1999] HCA 21; 197 CLR 611 at [124].

- 8 It is apparent that, as a matter of language, the courts have often found it easier to speak in terms of the “*unreasonableness*” of administrative action. Strictly, however, the principle is one of legal reasonableness having regard to the statutory context in which administrative action occurs.
- 9 It is a question of some curiosity how and why the epithet “*Wednesbury unreasonableness*” has so embedded itself in the legal lexicon. After all:
- The case was relatively unremarkable — it was a case about a municipal by-law and whether it was unreasonable to prohibit children under 15 from going to the movies on a Sunday (remember, this was 1948); and
  - The concept was not new — there were long-standing statements of principle, including within Australian High Court jurisprudence, recognising unreasonableness as vitiating administrative action, unattached to the usual categories of judicial review of failure to take into account relevant considerations, taking into account irrelevant considerations, or making legal error.
- 10 Having used the phrase “*unattached to the usual categories of judicial review*”, a consideration of the origins of legal reasonableness in administrative law will nonetheless make it apparent that unreasonableness is not a freestanding concept. Fundamentally, the concept of unreasonableness in administrative law has a primary and necessary attachment to the legislation under which administrative action is taken. This, I would suggest, has been apparent from the very beginning of this area of jurisprudence.
- 11 What I seek to embark upon this evening is an examination of the subtleties of usage and levels of meaning of “*unreasonableness*” in administrative law. To further that examination, this paper has a central thesis and poses a question.

- 12 The thesis is that unreasonableness in administrative law is a reflection of the intersection of the rule of law and the separation of powers. This is demonstrated in the two senses in which unreasonableness is used in administrative law: first, as a jurisdictional basis upon which judicial intervention is permitted; and secondly as a jurisprudential basis for identifying when judicial intervention is warranted. Statutory attachment is the link between the two senses in which unreasonableness is used.
- 13 Statutory attachment was the concern of *Li*, and that decision is the other avenue of exploration tonight. The question I pose is whether that decision is merely explanatory or explicatory of *Wednesbury* unreasonableness as traditionally understood, or whether, given the references to proportionality and, more particularly, disproportionality, it represents a shift in the basis upon which administrative action may be impugned in Australian law, consonant with developments in other areas of Australian public law, in particular, in constitutional law, and with developments in other jurisdictions.
- 14 I have thus far used the phrase 'administrative action' and deliberately so. The decision in *Wednesbury* was concerned with a discretionary determination of a local council made under a by-law that authorised the local council to impose conditions on the operating licence of the cinema. Discretionary decision-making, however, is only one of three forms of administrative action in respect of which questions of unreasonableness arise. Delegated legislation is another category. The third is where the exercise of administrative power is conditional on the decision maker having a particular state of satisfaction.
- 15 The case law demonstrates that the notion of unreasonableness has essentially occupied the same universe in each of these three categories, albeit with shifting emphases as attempts have been made to contain a concept which, if left at large, or stated only in the abstract, has the potential to exceed its function as a principle of judicial review.

### The earliest cases considering “*unreasonableness*”

16 I said at the commencement of this address? that *Wednesbury* unreasonableness was not new. Notions of reasonableness have a long-history in the Anglo-Australian administrative law tradition.

17 Two of the earliest reported cases in which questions of reasonableness were in issue are *Rooke’s Case*,<sup>11</sup> in 1597, and *Keighley’s Case*,<sup>12</sup> in 1609. Both cases concerned the 1531 *Statute of Sewers*, a matter of acute importance then, as now, although then “sewers” encompassed waterways much more generally – rivers, canals and the like. *Rooke’s Case*, like *Wednesbury*, involved the making of a discretionary decision. The Court of King’s Bench described the limited nature of administrative discretions in terms that continue to be cited in modern authority, including in *Li*.<sup>13</sup> In *Rooke’s Case*, the question arose as to the discretion of the Commissioners of Sewers to tax persons who did not attend to repairs of river banks on their own lands so as not to affect a neighbour’s land. The relevant words of the delegated legislation under which the commissioners acted conferred them with “*authority to do according to their discretions*”. Notwithstanding the unrestricted terms in which the power was conferred it was observed that:

... **yet their proceedings ought to be limited and bound with the rule of reason and law** ... and not to do according to their wills and private affections.<sup>14</sup> (emphasis added)

18 The case was applied some three hundred years later in the late 19<sup>th</sup> century case of *Sharp v Wakefield*.<sup>15</sup> Adopting similar language, Lord Halsbury LC described the notion of something being done within the discretion of an

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<sup>11</sup> (1597) 5 Co Rep 99b; 77 ER 209.

<sup>12</sup> (1609) 10 Co Rep 139; 77 ER 1136.

<sup>13</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [149].

<sup>14</sup> *Rooke’s Case* (1597) 5 Co Rep 99b, 100a; 77 ER 209, 210.

<sup>15</sup> [1891] AC 173.

authority as requiring that it be “*done according to the rules of reason and justice, not according to private opinion ... according to law, not humour*”.<sup>16</sup>

### Early jurisprudence on the review of municipal by-laws

- 19 The same approach was being taken with respect to challenges to delegated legislation. As early as 1888, even before *Sharp v Wakefield*, in an appeal from New South Wales to the Privy Council, Lord Hobhouse in *Slattery v Naylor*<sup>17</sup> affirmed the validity of a by-law made by Petersham Local Council prohibiting the interring of any corpse in an existing cemetery within 100 yards of a public building, road or place of worship. Lord Hobhouse, assuming that there was a jurisdiction to set aside a merely “*fantastic and capricious*” by-law, observed that it was:

...quite a different question whether a bye-law can be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of judges.<sup>18</sup>

- 20 Ten years later, in *Kruse v Johnson*,<sup>19</sup> the House of Lords appears to have accepted unreasonableness as a ground of invalidity of a by-law prohibiting music making within 50 yards of a dwelling house if there had been a request to desist. Lord Russell of Killowen CJ observed in relation to rule-making powers that the courts should “*guard against their unnecessary or unreasonable exercise to the public disadvantage*”,<sup>20</sup> and Matthew J observed that for a by-law to be valid “*it must be reasonable*”.<sup>21</sup> Lord Russell of Killowen CJ attempted to give some content to what would constitute an unreasonable exercise of rule-making power, namely, by-laws that were:

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<sup>16</sup> Ibid 179.

<sup>17</sup> (1888) 13 App Cas 446.

<sup>18</sup> Ibid 452-453.

<sup>19</sup> [1898] 2 QB 91.

<sup>20</sup> Ibid 99.

<sup>21</sup> Ibid 108.

... partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men ...<sup>22</sup>

- 21 Allegedly ‘unreasonable’ municipal by-laws were before the High Court of Australia soon after federation. In *Widgee Shire Council v Bonney*,<sup>23</sup> for example, Griffith CJ appears to have accepted the possibility of invalidity of by-laws on the basis of unreasonableness, citing *Slattery v Naylor* and *Kruse v Johnson*. His Honour observed, however, that “*it is very difficult to make a successful attack ... on this ground*”.<sup>24</sup> Griffith CJ stressed that questions of expediency are not the proper province of the courts, particularly where rule-making power has been delegated to local authorities familiar with local conditions.<sup>25</sup> His Honour, in language almost identical to that later employed in *Wednesbury*, accepted that there was a residual scope for reasonableness review:

[I]f a by-law is such that no reasonable man, exercising in good faith the powers conferred by the Statute, could under any circumstances pass such a by-law, it might be held invalid on that ground as being an abuse of power, and therefore not within it.<sup>26</sup>

- 22 Isaacs and Higgins JJ expressed views similarly rejecting reliance on abstract notions of reasonableness or unreasonableness as a basis of invalidity, insofar as that would involve the court forming its own opinion as to the expediency of the by-law. Isaacs J described the latter proposition as “*erroneous*”.<sup>27</sup> His Honour stressed that the test of validity is always whether the impugned by-law is within the scope of the authority that has been

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<sup>22</sup> *Ibid* 99-100.

<sup>23</sup> [1907] HCA 11; 4 CLR 977.

<sup>24</sup> *Ibid* 982.

<sup>25</sup> *Ibid* 982-983.

<sup>26</sup> *Ibid* 983.

<sup>27</sup> *Ibid* 984.



delegated, but acknowledged that a truly arbitrary or capricious by-law, such as reasonable persons could not make in good faith, “*could not in any proper sense be regarded as covered by the powers conferred*”.<sup>28</sup> Higgins J succinctly, and lucidly, explained the relevant point as follows:

Questions as to the validity of by-laws really come under the ordinary principles applicable to powers and when it is said that a by-law is unreasonable, and therefore invalid, what is really meant is that the provisions in the by-law cannot reasonably be regarded as being within the scope or ambit or purpose of the power.<sup>29</sup>

### Refining the inquiry in the review of delegated legislation

- 23 The decision of *Williams v City of Melbourne*<sup>30</sup> is of particular importance. A by-law prohibiting the driving of cattle through the City of Melbourne, except in specified circumstances, was challenged as unreasonable. There are echoes in *Williams v City of Melbourne* of the approach taken in *Widgee Shire Council* to the challenge of delegated legislation on the basis of unreasonableness. For example, Starke J observed that “*a merely fantastic and capricious by-law, such as reasonable men could not make in good faith*” would be invalid.<sup>31</sup>
- 24 Dixon J stressed that bare “*unreasonableness*” is no basis for the invalidity of an exercise of rule-making power in Australia.<sup>32</sup> As his Honour explained, the ultimate question is always one of construction, with a view to ascertaining the proper scope of the rule-making power that has been conferred:

To determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. **The true nature and**

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<sup>28</sup> Ibid 986.

<sup>29</sup> Ibid 989.

<sup>30</sup> [1933] HCA 56; 49 CLR 142.

<sup>31</sup> Ibid 150.

<sup>32</sup> Ibid 154.

**purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply.** Notwithstanding that ex facie there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power.<sup>33</sup> (emphasis added)

25 His Honour's analysis placed particular emphasis on ascertaining the purpose of the relevant by-law making power, an approach which has been described as an early incarnation of proportionality analysis.<sup>34</sup>

26 Subsequently, in *King-Gee Clothing Company Pty Ltd v Commonwealth*,<sup>35</sup> Dixon J traced the history in other common law jurisdictions of the notion that a delegated power of rule-making is only a power to make reasonable by-laws. However, his Honour reiterated that in Australia the proper question is always one of the scope of the power in question.<sup>36</sup> Accordingly, Dixon J observed that:

I am unaware of any principle of law or of interpretation which places upon a power of subordinate legislation ... a limitation or condition making either reasonableness or certainty indispensable to its valid exercise.<sup>37</sup>

### **Reasonableness in states of satisfaction**

27 The third area where reasonableness operates is where the exercise of an administrative power is conditioned on the existence of an opinion or state of satisfaction. The possession of the relevant state of satisfaction is a condition

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<sup>33</sup> Ibid 155.

<sup>34</sup> See, eg, *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; 249 CLR 1, 84 [201] (Crennan and Kiefel JJ).

<sup>35</sup> [1945] HCA 23; 71 CLR 184.

<sup>36</sup> Ibid 194-195.

<sup>37</sup> Ibid 195.

of jurisdiction, as was made clear in *R v Connell; Ex parte The Hetton Bird Collieries Ltd.*<sup>38</sup> Reasonableness in this context is assessed by reference to a reasonable person who correctly understands the meaning of the law under which he or she acts.<sup>39</sup> Again, the relevant reference point is the statute. As Latham CJ said, “A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power”.<sup>40</sup> In such a case, it is said that the basis for the exercise of the power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.<sup>41</sup>

### **The decision in *Wednesbury***

28 At the time that *Wednesbury* was decided, it can thus be seen there was a relatively similar approach in each category of administrative action the subject of judicial review:

- (1) A discretion conferred in general terms had to be exercised in accordance with reason and law.
- (2) A by-law, to be valid, had to be within the ambit or scope of the power under which it was made. A capricious or arbitrary by-law would not answer that description. Review in this regard required consideration of the true nature and purpose of the power in question.
- (3) A state of satisfaction as a condition of jurisdiction was treated as requiring a state of satisfaction that could be formed by a reasonable person who correctly understood the law under which the opinion had

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<sup>38</sup> [1944] HCA 42; 69 CLR 407, 429-430.

<sup>39</sup> *Ibid* 430.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid* 432.

to be formed. A capricious or arbitrary opinion would not answer that description.

29 In each of the three categories, there were two common underlying principles: first, a requirement of statutory attachment; and secondly, the need for caution to be exercised by the court in intervening in executive or administrative action.

30 That said, it is the analysis of Lord Greene MR in *Wednesbury* that has undoubtedly commanded the attention of administrative law judges and academics for over half a century. Lord Greene MR's reasoning commenced with an identification of the fundamental basis of judicial review in terms of the courts upholding the law. As Lord Greene MR observed, the courts "*can only interfere with an act of executive authority if it be shown that the authority has contravened the law*".<sup>42</sup> At the outset, therefore, his Lordship set the context in which judicial review occurs, namely, within the construct of the distinct institutional functions of the courts and administrative decision makers. The lens through which Lord Greene MR viewed the judicial task is familiar to us, but is well worth a reminder:

... the task of the court is not to decide what it thinks is reasonable, **but to decide whether what is prima facie within the power of the local authority** is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose.<sup>43</sup> (emphasis added)

31 This is an unexceptionable statement having regard to what had gone before.

32 Lord Greene MR's initial references to "unreasonableness" were made in a compendious sense, "*as a general description of the things that must not be*

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<sup>42</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228.

<sup>43</sup> *Ibid* 233.

done”.<sup>44</sup> Indeed, Lord Greene MR instanced a range of well-established grounds of review as warranting the epithet of unreasonableness:

For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’.<sup>45</sup>

His Lordship added, however:

Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.<sup>46</sup>

33 That language is redolent of the language of capriciousness or arbitrariness used in some of the earlier Australian cases considered above, such as *Widgee Shire Council* and *Ex parte The Hetton Bird Collieries*.

34 It was Lord Greene MR’s consideration of whether judicial intervention was actually warranted on the facts in question that sowed the seeds of what became “*Wednesbury* unreasonableness”. Lord Greene MR reasoned that:

**It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.** That, I think, is quite right; but to prove a case of that kind would require something overwhelming ... (emphasis added)<sup>47</sup>

35 The reference to unreasonableness in this sense was premised on the rejection of any argument that the local authority had taken into account an irrelevant consideration. What Lord Greene MR appears to have been envisaging is the availability of a residual ground of judicial review for unreasonableness in circumstances where other specific grounds of review are not applicable. This was a context- and fact-specific sense of

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<sup>44</sup> *Ibid* 229.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid* 230.

unreasonableness, as opposed to the earlier compendious sense in which his Lordship had used the term “*unreasonableness*” to cover the traditional categories of error.

- 36 Importantly, throughout his analysis, Lord Greene encapsulated the concept of reasonableness or unreasonableness within the framework of the statutory power that the decision maker was exercising. This was, I would suggest, the same thing that was said in 1597 in *Rooke’s Case*, where it was said that the decisions of the Commissioners “*ought to be limited and bound with the rule of reason and law*”.<sup>48</sup>

### **Unreasonableness in Australia subsequent to *Wednesbury* and prior to *Li***

- 37 The authoritative status of *Wednesbury* was established relatively quickly. There were early references to it in England in *Smith v East Elloe Rural District Council*,<sup>49</sup> *Fawcett Properties Ltd v Buckingham County Council*,<sup>50</sup> and *Padfield v Minister of Agriculture, Fisheries and Food*.<sup>51</sup>
- 38 In Australia, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,<sup>52</sup> in observing that the weight to be given to relevant considerations is generally a matter for the decision-maker, Mason J nonetheless recognised that judicial intervention might be warranted where the weight given to a consideration is “*manifestly unreasonable*”.<sup>53</sup> Mason J identified this ground of review as having been considered by Lord Greene MR in *Wednesbury*, and noted that Lord Greene MR’s formulation of unreasonableness had been applied in

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<sup>48</sup> *Rooke’s Case* (1597) 5 Co Rep 99b, 100a; 77 ER 209, 210.

<sup>49</sup> [1956] AC 736.

<sup>50</sup> [1961] AC 636.

<sup>51</sup> [1968] AC 997.

<sup>52</sup> [1986] HCA 40; 162 CLR 24.

<sup>53</sup> *Ibid* 41.

subsequent judicial decisions and had been incorporated into statute in Australia, specifically by ss 5(2)(g) and 6(2)(g) of the *Administrative Decisions Judicial Review Act 1977* (Cth).<sup>54</sup> The incorporation of *Wednesbury* unreasonableness in those sections is as a sub-set of the ground of review that the impugned decision was an “improper exercise of power”.

39 Whilst Mason J did not express any concern as to the availability of unreasonableness as a ground of review, and could not, given that the case had been brought under the *Administrative Decisions Judicial Review Act*, he noted that there had been “*considerable diversity in the readiness with which courts have found the test to be satisfied*”,<sup>55</sup> and stressed that a court should “*proceed with caution ... lest it exceed its supervisory role by reviewing the decision on its merits*”.<sup>56</sup>

40 There have been innumerable decisions dealing with *Wednesbury* unreasonableness and their review is not the purpose of this paper. However, reference should be made to the more recent decision of *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme*.<sup>57</sup> Gleeson CJ, Gummow and Heydon JJ held that no unreasonableness had been established in the fact-specific circumstances of that case by reference to two separate senses of unreasonableness, absurdity in a *Wednesbury* sense and bad faith:

[T]he Minister had before him the matters presented in a balanced fashion in the Submission. There is no weight in any complaint that, in acting upon the Submission, the Minister reached a decision so unreasonable ‘that it might almost be described as being done in bad faith’ or ‘so absurd that no sensible person could ever dream that it lay within the powers of [the Minister]’.<sup>58</sup> (citations omitted)

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 42.

<sup>57</sup> [2003] HCA 56; 216 CLR 212.

<sup>58</sup> Ibid [30].

- 41 Before turning to the decision in *Li*, it is useful to consider what was happening after *Wednesbury* in the parallel universes of delegated legislation and the jurisdictional requirement of a state of satisfaction.
- 42 Two decisions relating to delegated legislation are of interest. The first is the decision of the Full Court of the Federal Court in *Evans v State of New South Wales*,<sup>59</sup> which arose in the context of the World Youth Day celebrations held in Sydney in 2008. The *World Youth Day Act 2006* (NSW), s 58 conferred power for the making of regulations, not inconsistent with the Act, for or with respect to any matter that was necessary or convenient to be prescribed for carrying out or giving effect to the Act. Clause 7 of the regulations provided that an authorised person could direct a person within a World Youth Day declared area to cease engaging in conduct that, among other things, caused annoyance or inconvenience to participants in a World Youth Day event. Unremarkably, the Court examined the impugned regulation with a view to determining “*whether, on its proper construction, it falls within the statutory authority*”.<sup>60</sup> That drove the Court to the conferring legislation and the empowering words employed in the relevant statute, which referred to “*regulating ... the conduct of the public*”.
- 43 The Full Court noted that there were different constructional choices open on the text of the empowering provisions, but observed that the range of available choices was narrowed by the accepted canons of construction.<sup>61</sup> In this context, the Full Court stressed that principle of construction commonly referred to as the ‘principle of legality’ which requires “*that Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms*”.<sup>62</sup> The Court observed that “*freedom of expression*

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<sup>59</sup> [2008] FCAFC 130; 168 FCR 576.

<sup>60</sup> *Ibid* [60].

<sup>61</sup> *Ibid* [68].

<sup>62</sup> *Ibid*.



*in Australia is a powerful consideration favouring restraint in the construction of a broad statutory power when the terms in which that power is conferred so allow*.<sup>63</sup>

- 44 The decision of the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide*<sup>64</sup> also involved the scrutiny of delegated rule-making in circumstances involving what is sometimes described as the fundamental right of free speech. The *Local Government Act 1999* (SA) conferred power to make by-laws for, inter alia, the purpose of the prevention and suppression of nuisances and generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants. The question for the High Court was the validity of certain by-laws made under those provisions purporting to prohibit, without written permission, haranguing, canvassing or preaching on a road, and the distribution of literature. The High Court upheld the validity of the by-laws.
- 45 One of the bases upon which the by-laws were challenged was that they constituted an unreasonable exercise of the rule-making power and were not a reasonably proportionate exercise of that power. The judgment of French CJ is particularly illuminating in its analysis of the relationship between unreasonableness and the notion of proportionality.
- 46 His Honour noted that early authorities such as *Slattery v Naylor*, *Kruse v Johnson* and *Widgee Shire Council v Bonney* had adopted high threshold tests for establishing unreasonableness.<sup>65</sup> A transition from a formulaic approach to the identification of unreasonableness to a more context-dependent, statutory construction-based approach would seem to be what French CJ had in mind when he observed that:

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<sup>63</sup> Ibid [78].

<sup>64</sup> [2013] HCA 3; 249 CLR 1.

<sup>65</sup> Ibid [48]-[49].

It is logically possible that the limits defined by the content of a general power may intersect with the limits imposed upon it by the requirement that its exercise not be unreasonable.<sup>66</sup>

- 47 Having declined to characterise the by-laws as unreasonable, French CJ considered whether the by-laws were invalid for lack of reasonable proportionality. His Honour’s analysis in this regard commences with the emphatic statement that “[p]roportionality is not a legal doctrine”.<sup>67</sup> His Honour continued:

In Australia [proportionality] designates a class of criteria used to determine the validity or lawfulness of legislative and administrative action by reference to rational relationships between purpose and means, and the interaction of competing legal rules and principles, including qualifications of constitutional guarantees, immunities or freedoms. Proportionality criteria have been applied to purposive and incidental law-making powers derived from the Constitution and from statutes.<sup>68</sup>

- 48 In this regard, the context-dependent and construction-based approach to unreasonableness review of delegated rule-making adopted by Dixon J in *Williams v City of Melbourne* and discussed above at [23]ff, was described by French CJ as entailing a high threshold form of proportionality.<sup>69</sup> As his Honour noted, “[a]lthough a high threshold test, that formulation permitted greater judicial scrutiny than the test ... derived from *Slattery v Naylor and Kruse v Johnson*”.<sup>70</sup>

- 49 French CJ went on to conclude that the “*high threshold test for reasonable proportionality should be accepted as **that applicable to delegated legislation made in furtherance of a purposive power***” (emphasis added). Importantly, French CJ stated:

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<sup>66</sup> Ibid [52].

<sup>67</sup> Ibid [55].

<sup>68</sup> Ibid.

<sup>69</sup> Ibid [56].

<sup>70</sup> Ibid.

[60] The proportionality test formulated by Dixon J in *Williams*, adopted by Deane J in the *Tasmanian Dam Case*, and accepted in *Tanner*, makes it clear that a reviewing court is not entitled to substitute its own view of what would be a reasonable law for that of the legislature or a body exercising delegated legislative power. **So formulated, the criterion of reasonable proportionality can be regarded as an application of the unreasonableness criterion, adapted to a purposive law-making power ...**

[61] **The use of the term ‘proportionality’ in *Tanner* did not draw upon any novel or distinct theory of judicial review of delegated legislation. It was used to designate an evolved criterion defining the limits of a particular class of statutory power.** As discussed earlier in these reasons, ‘proportionality’ is a term used to designate criteria, going to validity, of rational law-making and decision-making in the exercise of public power ... (emphasis added)

50 Hayne J, at [123], and Crennan and Kiefel JJ, at [199]-[201], adopted the same approach by direct application of Dixon J’s test in *Williams*. Crennan and Kiefel JJ observed, at [201], that Dixon J’s test of reasonableness bore “*an obvious affinity with a test of proportionality*”.

51 The language of *Wednesbury* unreasonableness was also picked up in relation to the formation of states of satisfaction. In *Avon Downs Pty Ltd v Federal Commissioner of Taxation*,<sup>71</sup> the first case in the High Court on states of satisfaction following *Wednesbury*, Dixon J spoke in terms which were closer to the language of *House v The King* and appellate review of judicial directions.<sup>72</sup>

If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.<sup>73</sup>

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<sup>71</sup> [1949] HCA 26; 78 CLR 353.

<sup>72</sup> [1936] HCA 40; 55 CLR 499.

<sup>73</sup> *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; 78 CLR 353, 360.

- 52 However, subsequently in *Parramatta City Council v Pestell*,<sup>74</sup> the language of *Wednesbury* unreasonableness was used expressly. Having referred to the traditional grounds of review Gibbs CJ recognised that “[e]ven if the council has not erred in this way an opinion will nevertheless not be valid if it is so unreasonable that no reasonable council could have formed it”.<sup>75</sup>
- 53 By the time the High Court decided *Minister for Immigration and Multicultural Affairs v Eshetu*,<sup>76</sup> there was some questioning of the labelling of conduct in terms of “*Wednesbury* unreasonableness”. For example, Gleeson CJ and McHugh J observed that if this was merely an emphatic way of saying that the reasoning is wrong, then it may have no particular legal consequence.<sup>77</sup>
- 54 In *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*<sup>78</sup> and in *Minister for Immigration and Citizenship v SZMDS*<sup>79</sup> the language of irrationality and illogicality crept in. This is not the occasion to analyse those decisions. However, the following observations are warranted.
- 55 In *SGLB*, Gummow and Hayne JJ identified the critical question in reviewing the relevant state of satisfaction as “*whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds*”, and observed that where such defects subsist, “*it will be no answer that the determination was reached in good faith*”.<sup>80</sup> Subsequently, in

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<sup>74</sup> [1972] HCA 59; 128 CLR 305.

<sup>75</sup> *Ibid* 327.

<sup>76</sup> [1999] HCA 21; 197 CLR 611.

<sup>77</sup> *Ibid* [40].

<sup>78</sup> [2004] HCA 32; 207 ALR 12.

<sup>79</sup> [2010] HCA 16; 240 CLR 611.

<sup>80</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12 at [38].

SZMDS, Gummow ACJ and Kiefel J emphasised that this critical question “*should not receive an affirmative answer that is lightly given*”.<sup>81</sup>

56 In relation to the review of states of satisfaction for illogicality or irrationality, Crennan and Bell JJ observed in SZMDS that “*if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from [the] evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable*”. Importantly, their Honours observed that the concern is with abuse of power — that is, abuse of the power conferred by the statute.<sup>82</sup>

### **Reasonableness, rationality and proportionality in the United Kingdom**

57 In the years subsequent to Lord Greene MR’s decision, the European Economic Community was created, the United Kingdom entered the European Union (although it is now in the process of ‘Brexiting’ from it), and the *Human Rights Act 1998* (UK) was enacted, incorporating the protections of the European Convention on Human Rights into domestic UK law. In line with these developments, the law of reasonableness review in England did not stand still.

58 It is convenient to commence by considering the treatment of unreasonableness as a matter of what may be described as traditional English domestic law principle, that is, in contexts where the *Human Rights Act* and EU law are not directly relevant. In *Council of Civil Service Unions v Minister for the Civil Service*,<sup>83</sup> Lord Diplock provided an influential exposition identifying three grounds upon which administrative action in England is subject to judicial review, namely, “*illegality*”, “*irrationality*” and “*procedural*

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<sup>81</sup> *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [40].

<sup>82</sup> *Ibid* [39].

<sup>83</sup> [1985] 1 AC 374.

*impropriety*".<sup>84</sup> Lord Diplock expressly identified the ground of irrationality with *Wednesbury* unreasonableness.<sup>85</sup>

59 Lord Diplock clearly contemplated that irrationality/unreasonableness could "*stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review*".<sup>86</sup> However, in giving content to this ground of review, that is, in identifying irrationality, Lord Diplock used language that might indicate a higher degree of unreasonableness was required than what might be considered to be caught by *Wednesbury* unreasonableness. Lord Diplock explained his irrationality ground of review as applying:

... to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.<sup>87</sup>

60 In *Nottinghamshire County Council v Secretary of State for the Environment*,<sup>88</sup> decided the very next year, Lord Scarman stressed that there had been no question of constitutional propriety in *Wednesbury*, and that Lord Greene MR had not been concerned "*with the constitutional limits to the exercise of judicial power in our parliamentary democracy*".<sup>89</sup> Lord Scarman identified abuse of power as the basis upon which the English courts review the exercise of an administrative discretion by a public officer.<sup>90</sup> Unreasonableness in the *Wednesbury* sense was expressly identified as one form of abuse of power.<sup>91</sup>

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<sup>84</sup> *Ibid* 410.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid* 411.

<sup>87</sup> *Ibid* 410.

<sup>88</sup> [1986] 1 AC 240.

<sup>89</sup> *Ibid* 249.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Ibid*.

61 So far as is relevant, *Nottinghamshire County Council* involved proceedings by way of judicial review seeking to impugn the exercise of a ministerial power to impose expenditure targets for local councils, subject to approval in Parliament. The aggrieved councils challenged the relevant targets as unreasonable in that they were disproportionately disadvantageous to certain local government authorities. In concluding that *Wednesbury* unreasonableness had not been made out, Lord Scarman placed particular emphasis on the language of the statute, which he described as inevitably having “a significant bearing upon the conclusion of ‘unreasonableness’ in the *Wednesbury* sense”.<sup>92</sup> Thus, though Lord Scarman appears to have considered unreasonableness in terms of “perversity”, “absurdity” and lack of bona fides,<sup>93</sup> that approach being informed by statutory context.

62 Over the ensuing decades, there was some movement away from Lord Greene MR’s formulation of reasonableness review in England. The decision of the House of Lords in *R v Secretary of State for the Home Department; Ex parte Brind*<sup>94</sup> directly grappled with the relevance of notions of “proportionality” in the application of *Wednesbury* unreasonableness in traditional domestic English law. The case concerned the statutory power of the Secretary of State for the Home Department to restrict the broadcasting of direct speech by persons representing terrorist organisations. Freedom of expression was thus at the heart of the matter. Counsel for the applicants had invoked the concept of proportionality both as informing *Wednesbury* unreasonableness and as a free-standing basis for judicial review. The House of Lords rejected, by and large, the relevance of proportionality.

63 Lord Roskill acknowledged that, in light of the increasing influence of European Union law, proportionality might one day be adopted as an

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<sup>92</sup> Ibid 248.

<sup>93</sup> Ibid.

<sup>94</sup> [1991] 1 AC 696.

independent basis for review.<sup>95</sup> However, his Lordship expressly rejected the appropriateness of that course where application of proportionality analysis “*would be for the court to substitute its own judgment*”.<sup>96</sup>

64 Lord Templeman stressed that, absent demonstration that the Secretary had failed to consider a relevant consideration or had taken into account an irrelevant consideration, the proper basis for review was:

... whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable.<sup>97</sup>

65 Lord Ackner emphasised the importance of context, noting that “[i]n a field which concerns a fundamental human right ... close scrutiny must be given to the reasons provided as justification for interference with that right”.<sup>98</sup> His Lordship acknowledged the criticisms of the traditional *Wednesbury* formulation, but stressed that “*it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction*”.<sup>99</sup>

66 Lord Ackner did contemplate some limited relevance of proportionality, in the sense that “[c]learly a decision by a minister which suffers from a total lack of proportionality ... is, *ex hypothesi*, a decision which no reasonable minister could make”.<sup>100</sup> However, Lord Ackner was adamant that “*to invest the proportionality test with a higher status than the *Wednesbury* test, an inquiry into and a decision upon the merits cannot be avoided*”.

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<sup>95</sup> Ibid 750.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid 751.

<sup>98</sup> Ibid 757.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid 762.



67 Lord Lowry emphasised that the various formulations of the *Wednesbury* unreasonableness test “*emphasise the legal principle that judicial review of administrative action is a supervisory and not an appellate jurisdiction*”.<sup>101</sup> Of the concept of proportionality, Lord Lowry observed:

In my opinion proportionality and the other phrases are simply intended to move the focus of discussion away from the hitherto accepted criteria for deciding whether the decision-maker has abused his power and into an area into which the court will feel more at liberty to interfere.<sup>102</sup>

68 *R v Ministry of Defence; Ex parte Smith*<sup>103</sup> concerned a challenge to Ministry of Defence policy that homosexuality was “*incompatible*” with service in the armed forces, and was a basis for discharge. Sir Thomas Bingham MR, Henry LJ and Thorpe LJ each accepted the submission of counsel, based on *Brind*, that the courts cannot intervene on the basis of unreasonableness unless satisfied that the impugned decision “*is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker*”.<sup>104</sup> This of course was a direct application of *Wednesbury unreasonableness*. The Court was keen to point out, however, that:

The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.<sup>105</sup>

69 Likewise, in *R v Lord Saville of Newdigate; Ex parte A*,<sup>106</sup> which concerned a refusal by the Widgery tribunal to allow military witnesses to give evidence anonymously in the wake of the Bloody Sunday massacre, Lord Woolf MR

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<sup>101</sup> Ibid 765.

<sup>102</sup> Ibid 766.

<sup>103</sup> [1996] QB 517.

<sup>104</sup> Ibid 554, 565.

<sup>105</sup> Ibid 554.

<sup>106</sup> [1999] 4 All ER 860.

emphasised the contextual nature of the identification of unreasonableness warranting judicial intervention:

What justification is needed to avoid a decision being categorised as irrational by the courts differs depending on what can be the consequences of the decision. If a decision could affect an individual's safety then obviously there needs to be a greater justification for taking that decision than if it does not have such grave consequences.<sup>107</sup>

70 This point was further explained by Laws LJ in *R v Secretary of State for Education and Employment; Ex parte Begbie*<sup>108</sup> in terms of the *Wednesbury* principle constituting “a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake”.<sup>109</sup>

71 It is in cases concerning the *Human Rights Act 1998* (UK) that the English courts have more readily assimilated the concept of proportionality with that of unreasonableness. In *R (Daly) v Secretary of State for the Home Department*,<sup>110</sup> Lord Steyn observed that “[t]here is a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake”.<sup>111</sup> His Lordship went on to set out the three-stage approach to proportionality expounded by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*.<sup>112</sup> Under that approach, in determining whether a limitation or decision is arbitrary or excessive, the court asks:

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<sup>107</sup> Ibid 871.

<sup>108</sup> [2000] 1 WLR 1115.

<sup>109</sup> Ibid 1130.

<sup>110</sup> [2001] 2 AC 532.

<sup>111</sup> Ibid 546.

<sup>112</sup> [1999] 1 AC 69.

Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.<sup>113</sup>

72 This is an area in which there have been important developments in the UK, in the years following *Li*. Those developments are considered after an examination of the decision in *Li*.

### **The High Court's decision in *Li* and the subsequent application of unreasonableness in Australia**

73 The decision of the High Court in *Minister for Immigration and Citizenship v Li* provides the most recent and most comprehensive Australian consideration of the concept of unreasonableness in relation to the review of administrative discretions. The decision evidences a lean towards proportionality analysis, although just what that means is examined further below.

74 In brief terms, the impugned decision was the refusal of an adjournment by the Migration Review Tribunal. The respondent in *Li* had sought a skilled independent overseas student residence visa, a condition of which visa was that, at the time of the visa decision, the applicant had an assessment that their skills were suitable for their proposed occupation and that no adverse information had become available casting doubt on that assessment.

75 The respondent's initial skills assessment was found to have been based on false information submitted by the respondent's migration agent, and the Minister's delegate refused the visa application. Having engaged the services of a new migration agent, the respondent sought review of the delegate's decision in the Migration Review Tribunal. The new migration agent submitted an application for a new skills assessment. That application was unsuccessful. By letter to the Tribunal, the agent pointed out two fundamental errors in the treatment of the application by the skills assessor, and indicated

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<sup>113</sup> Ibid 80.

that a review was being sought. The agent requested that the Tribunal delay making any final decision in relation to the respondent's appeal pending the resolution of the skills assessment errors. The Tribunal decided to affirm the decision of the Minister's delegate without waiting for the outcome of the challenge to the skills assessment errors.

- 76 The High Court held that the Tribunal's refusal to grant an adjournment was unreasonable and thereby vitiated by jurisdictional error. Though agreeing in the ultimate result, the individual judgments of French CJ and Gageler J, and the joint judgment of Hayne, Kiefel and Bell JJ, exhibit subtly distinct approaches to the concept of unreasonableness in Australian administrative law.
- 77 The individual judgments of French CJ and Gageler J each quite clearly exhibit a bifurcated usage of the notion of unreasonableness. French CJ commenced his analysis of the unreasonableness question with the proposition that "[e]very *statutory discretion, however broad, is constrained by law*" and "*by the subject matter, scope and purpose of the legislation under which it is conferred*".<sup>114</sup> French CJ went on to observe that "[e]very *discretion has to be exercised ... according to the rules of reason*".<sup>115</sup> Citing the views of Brennan CJ in *Kruger v Commonwealth*<sup>116</sup> and Gaudron J in *Abebe v Commonwealth*,<sup>117</sup> French CJ placed this requirement of reasonableness on the footing of an implied legislative intention.<sup>118</sup> There is a necessary statutory attachment implicit in administrative law notion that administrative discretions must be exercised reasonably. It is that attachment that makes an

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<sup>114</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [23].

<sup>115</sup> *Ibid* [24].

<sup>116</sup> [1997] HCA 27; 190 CLR 1.

<sup>117</sup> [1999] HCA 14; 197 CLR 510.

<sup>118</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [29].

unreasonable exercise of discretion an abuse or excess of power, and thus provides a jurisdictional basis for the intervention of the courts.

78 In giving content to the identification of unreasonableness in particular circumstances, French CJ acknowledged Lord Greene’s formulation of an exercise of power as “*so unreasonable that no reasonable authority could ever have come to it*” but explained that “[t]hat limiting case can be derived from the framework of rationality imposed by the statute”.<sup>119</sup> This contextualisation of unreasonableness followed his Honour’s earlier reference to the framework “*defined by the subject matter, scope and purpose of the statute conferring the discretion*”, a framework to which his Honour made reference more than once.<sup>120</sup> Thus, in identifying those circumstances in which judicial intervention is actually warranted, there is again a clear attachment of unreasonableness to the statute in question.

79 Acknowledging that there is an “*area of decisional freedom*” in which the courts must not tread, French CJ nonetheless observed that “*the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense*”.<sup>121</sup> French CJ also acknowledged the lack of perfect symmetry between reasonableness and rationality, but nonetheless contemplated an overlap between those concepts. His Honour, in the course of explaining the overlap, picked up the language of disproportionality:

A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable ... **[A] disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves.** That approach is an application of the principles discussed above and within the limitations they

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<sup>119</sup> Ibid [28].

<sup>120</sup> Ibid [26].

<sup>121</sup> Ibid [28].

would impose on curial review of administrative discretions.<sup>122</sup> (emphasis added)

- 80 Gageler J also commenced his judgment by citing the proposition put by Brennan CJ in *Kruger v Commonwealth* that “*when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised*”.<sup>123</sup> His Honour further identified what he described as the accepted position in the High Court of “*reasonableness as a condition of the exercise of a discretionary power*”.<sup>124</sup> The rule of law overtones are clear in this positioning of reasonableness as a default requirement attached to the statutory conferral of administrative discretions.
- 81 Gageler J described the label of “*Wednesbury unreasonableness*” as entailing a “*special standard of unreasonableness*” that had withstood the test of time and was well understood.<sup>125</sup> He also expressed the view that Lord Greene MR’s formulation of a decision so unreasonable that no reasonable person could have come to it conveys, albeit imperfectly, the reluctance with which judges should intervene in administrative decisions.<sup>126</sup>
- 82 Importantly, given the observations I made at the outset in relation to language, his Honour saw no difference in the implication of reasonableness in discretionary decision making from the implication of reasonableness as a condition of an opinion or state of satisfaction.<sup>127</sup> Reasonableness is statutorily attached in relation to both categories of administrative action.

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<sup>122</sup> Ibid [30].

<sup>123</sup> Ibid [88].

<sup>124</sup> Ibid [89].

<sup>125</sup> Ibid.

<sup>126</sup> Ibid [106].

<sup>127</sup> Ibid [90].

83 Notwithstanding Gageler J's apparent acceptance of Lord Greene MR's formulation, his Honour was of the view that the application of that standard was intimately dependent on, and attached to, the relevant statutory context:

... reasonableness is not implied as a condition of validity if inconsistent with the terms in which a power or duty is conferred or imposed or if otherwise inconsistent with the nature or statutory context of that power or duty. The common law principle of construction by reference to which reasonableness is implied does not exclude implication of a different or more particular condition of an exercise of a particular statutory discretionary power or of the performance of a particular statutory duty. The principle rather establishes a condition of reasonableness as a default position. Absent an affirmative basis for its exclusion or modification, a condition of reasonableness is presumed.<sup>128</sup>

84 Indeed, the importance of statutory context is evident in his Honour's actual disposition of the case at hand. Noting the references throughout the *Migration Act 1958* (Cth) to the Tribunal acting in a 'fair and just' manner, Gageler J concluded that "[n]o reasonable tribunal, seeking to act in a way that is fair and just, and according to substantial justice and the merits of the case, would have refused the adjournment".<sup>129</sup>

85 The plurality judgment of Hayne, Kiefel and Bell JJ exhibits perhaps the greatest departure from the traditional understanding of *Wednesbury* unreasonableness in Australia, whilst still being explicable according to the two pronged nature of reasonableness which is the underlying thesis of this paper.

86 The plurality stressed that "[a] standard of reasonableness in the exercise of a discretionary power given by statute" has long been required by the law.<sup>130</sup> The rule of law imperatives of judicial review command no less, and, to a certain extent, the plurality employed 'unreasonableness' as a convenient

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<sup>128</sup> Ibid [92].

<sup>129</sup> Ibid [124].

<sup>130</sup> Ibid [64].

categorical reference for the various grounds on which an exercise of statutory power may be reviewed.<sup>131</sup> Indeed, the plurality noted Lord Greene MR's initial usage of 'unreasonableness' in an 'umbrella sense' for established grounds of judicial review, and his observation that "*all these things run into one another*".<sup>132</sup>

87 The plurality judgment of Hayne, Kiefel and Bell JJ also accepted that *Wednesbury* unreasonableness was an applicable standard by which discretionary decision making could be adjudged. However, to quote their Honours, it was "*neither the starting point for the standard of reasonableness, nor should it be considered to be the end*".<sup>133</sup>

88 There are perhaps three particularly important aspects of their Honours' reasoning.

89 First, their Honours pointed out that the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.<sup>134</sup>

90 Secondly, their Honours explained the application of *Wednesbury* unreasonableness in the same terms as the last category of *House v The King* error, that is, that an inference of unreasonableness may be objectively drawn even where a particular error could not be discerned, a principle that their Honours noted informed the reasoning of Dixon J in *Avon Downs*.<sup>135</sup>

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<sup>131</sup> Ibid [69].

<sup>132</sup> Ibid [69], [72].

<sup>133</sup> Ibid [68].

<sup>134</sup> Ibid [67].

<sup>135</sup> Ibid [68].



- 91 Thirdly, their Honours tied the application of unreasonableness in discretionary decision-making with unreasonableness in the exercise of delegated law-making powers.<sup>136</sup>
- 92 However, the aspect of *Li* that has caused the most agitation is the plurality's reference to proportionality. In explaining unreasonableness, the plurality, as I have mentioned, placed central focus on statutory context. As their Honours put it, "[t]he legal standard of reasonableness must be the standard indicated by the true construction of the statute".<sup>137</sup> It was at this point that the language of proportionality emerged, their Honours identifying "an obviously disproportionate response" as one path by which a conclusion of unreasonableness may be reached.<sup>138</sup>
- 93 There are subtle differences of approach between the different judgments in *Li*. French CJ and Gageler J, for example, both envisage utility in Lord Greene MR's formulation, or something akin to it, though stressing the importance of what I have termed its statutory attachment. The plurality, whilst acknowledging a role for *Wednesbury* unreasonableness, indicated that the legal standard of reasonableness "must be the standard indicated by the true construction of the statute".<sup>139</sup> What is common in the reasons of their Honours is the importance of context in identifying those circumstances in which judicial intervention is warranted.
- 94 It would seem that the importation of proportionality reasoning into administrative unreasonableness is an application of what French CJ meant when he stated in *Attorney-General (SA) v Corporation of the City of*

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<sup>136</sup> Ibid [70].

<sup>137</sup> Ibid [67].

<sup>138</sup> Ibid [74].

<sup>139</sup> Ibid [67].

*Adelaide*<sup>140</sup> that “*proportionality is not a legal doctrine*” and his explanation in that case of the application of proportionality reasoning as a means of applying the criterion of unreasonableness.<sup>141</sup> French CJ said as much in *Li*.<sup>142</sup> The plurality did not refer to the Chief Justice’s observations, but their Honours’ reference to “*proportionality*” as a path to a conclusion of unreasonableness invokes, I would suggest, the same notion.<sup>143</sup>

95 It is of interest that none of their Honours referred to the concerns that proportionality reasoning may cause a slippage in the hitherto observed constraints of the supervisory jurisdiction.<sup>144</sup> Presumably, it was unnecessary to do so. Abuse of power as the concern of the judicial review of administrative decision-making has been identified in numerous High Court decisions, and the accepted reticence of judicial interference in administrative decision making is well recognised.<sup>145</sup>

### **Australian decisions subsequent to *Li***

96 Since the decision in *Li*, the Full Court of the Federal Court has considered the implications of the High Court’s reasoning on a number of occasions. In line with the analysis in this piece, but adopting a slightly different perspective, Allsop CJ, Robertson and Mortimer JJ in *Minister for Immigration and Border Protection v Singh*<sup>146</sup> distinguished two contexts in which the judgments in *Li* employed the concept of unreasonableness. As the Full Court explained:

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<sup>140</sup> [2013] HCA 3; 249 CLR 1.

<sup>141</sup> *Ibid* [55].

<sup>142</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [30].

<sup>143</sup> *Ibid* [74].

<sup>144</sup> See above at [67].

<sup>145</sup> See, for example, *Minister for Aboriginal Affairs v Peko Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 41-42; *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [66].

<sup>146</sup> [2014] FCAFC 1; 308 ALR 280.

Legal unreasonableness can be a conclusion reached by a 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.<sup>147</sup>

97 In line with the conception here of the identification of circumstances warranting judicial intervention as a context-dependent inquiry, the Full Court stressed that:

... legal unreasonableness is invariably fact dependent, so that in any given case determining whether an exercise of power crosses the line into legal unreasonableness will require careful evaluation of the evidence before the court, including any inferences which may be drawn from that evidence.<sup>148</sup>

98 The Full Court in *Singh* also observed, by reference to the reasons of French CJ in *Li* at [30], that if proportionality analysis were applied, “*it could be said that the exercise of power to refuse a short adjournment in [the] circumstances was disproportionate to the tribunal’s conduct of the review*”.<sup>149</sup>

99 The Full Court in *Minister for Immigration and Border Protection v Eden*,<sup>150</sup> comprising Allsop CJ, Griffiths and Wigney JJ, reiterated the distinction proposed in *Singh*.<sup>151</sup> The Full Court stressed that:

... the evaluation of whether a decision is legally unreasonable should not be approached by way of the application of particular definitions, fixed formulae, categorisations or verbal descriptions.<sup>152</sup>

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<sup>147</sup> Ibid [44].

<sup>148</sup> Ibid [42].

<sup>149</sup> Ibid [77].

<sup>150</sup> [2016] FCAFC 28.

<sup>151</sup> Ibid [60].

<sup>152</sup> Ibid [65].

100 The Full Court went on to observe that “*the task is not an a priori definitional exercise*”.<sup>153</sup> Rather, as has been argued here, the actual identification of legal unreasonableness warranting judicial intervention is always a case and context specific inquiry, attached to the statute in question:

[I]n order to identify or define the width and boundaries of this area of decisional freedom and the bounds of legal reasonableness, it is necessary to construe the relevant statute. The task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making.<sup>154</sup>

101 Interestingly, one has here the incorporation of the “values of the common law” into the concept of reasonableness in decision making.<sup>155</sup> This is another expansion of language used in delimiting the scope of judicial review. I leave for another time the question whether that is an expansion of principle.

102 Subsequently, in *Minister for Immigration and Border Protection v Stretton*,<sup>156</sup> Allsop CJ acknowledged that an assessment of legal unreasonableness “*may involve some consideration of disproportionality*”, but emphasised that that “*does not authorise the Court to decide for itself what is necessary for the relevant purpose*”.<sup>157</sup> In this regard, Griffiths J noted the subtleties to “*unreasonableness and its relationship with the concept of proportionality*” and opined that:

A more sophisticated approach is required, one which focuses central attention on the question whether an administrative decision is one which is within the authority of the decision-maker to make. This necessarily requires

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid [63].

<sup>155</sup> For a reference to the legal system’s “fundamental values” see Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press,2005),88.

<sup>156</sup> [2016] FCAFC 11.

<sup>157</sup> Ibid [21].

that close attention be given to relevant features of the particular statutory framework within which that authority arises.<sup>158</sup>

### **Subsequent developments in proportionality in the United Kingdom**

- 103 The Supreme Court of the United Kingdom is still grappling with proportionality. The Court affirmed the *de Freitas* approach to proportionality in cases involving Convention rights and the *Human Rights Act 1998* (UK) in *Bank Mellat v Her Majesty's Treasury (No 2)*,<sup>159</sup> which concerned measures taken by the Treasury against a major Iranian bank restricting access to the UK's financial markets Lord Sumption JSC, with whom a majority of the Court agreed, identified the “*essential question*” as whether the action in question “*bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its weapons programs*”.<sup>160</sup> Lord Sumption then observed that “[t]he requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap”. Lord Sumption stressed that the *de Freitas* approach does not mean that the court is to take over the function of the administrative decision maker,<sup>161</sup> and that “[e]very case turns on its own facts, and analogies with other decided cases can be misleading”.<sup>162</sup>
- 104 Lord Sumption ultimately held that the Treasury's direction restricting Bank Mellat's access to UK financial markets was unlawful. The crux of his Lordship's reasoning focussed on Bank Mellat having been singled out

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<sup>158</sup> Ibid [62].

<sup>159</sup> [2014] AC 700.

<sup>160</sup> Ibid [19].

<sup>161</sup> Ibid [21].

<sup>162</sup> Ibid [26].

amongst Iranian banks, despite the same concerns being raised in respect of Iranian banks more generally.<sup>163</sup> Lord Sumption concluded as follows:

The direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective. I conclude that that it was unlawful.<sup>164</sup>

105 Lord Reed JSC was in dissent as to the ultimate result, but not as to the relevant principles of law.<sup>165</sup> Also accepting the *de Freitas* approach to proportionality, Lord Reed stressed that the “*approach to proportionality in our domestic case law under the Human Rights Act 1998 has not generally mirrored that of the Strasbourg court*”.<sup>166</sup> Importantly, Lord Reed made the following observation of the concept proportionality, and the *de Freitas* approach in particular:

Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit.<sup>167</sup>

106 Subsequently, in *Kennedy v Charity Commission*,<sup>168</sup> Lord Mance JSC expressed doubt as to whether there would be any difference in the nature or outcome of the court’s scrutiny as between reasonableness and proportionality, stressing that “[t]he common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle”.<sup>169</sup> Lord Mance went on to state

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<sup>163</sup> Ibid [27].

<sup>164</sup> Ibid.

<sup>165</sup> Ibid [65].

<sup>166</sup> Ibid [72].

<sup>167</sup> Ibid [74].

<sup>168</sup> [2015] AC 455.

<sup>169</sup> Ibid [51].

that “[t]he nature of judicial review in every case depends on the context”,<sup>170</sup> and observed that, in the context of fundamental rights, “it is a truism that the scrutiny is more likely to be more intense than where other interests are involved”.<sup>171</sup> Like Lord Reed in *Bank Mellat*, Lord Mance described the advantage of proportionality analysis as introducing:

... an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.<sup>172</sup>

107 In *Pham v Secretary of State*,<sup>173</sup> Lord Mance JSC reiterated his view that there may be no real difference between review on the basis of reasonableness and on the basis of proportionality.<sup>174</sup> Lord Mance expanded upon his view of proportionality as primarily a heuristic device providing structure to the evaluative inquiry as to whether judicial intervention is appropriate:

[P]roportionality is ... ‘a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction’, ‘just a rationalising heuristic tool’ ... ‘Whether it is also used as a tool to intensify judicial control of state acts is not determined by the structure of the test but by the degree of judicial restraint practised in applying it.’ Whether under EU, Convention or common law, context will determine the appropriate intensity of review.<sup>175</sup> (citations omitted)

108 Lord Reed JSC, in his concurring judgment, made particular observations in relation to proportionality. His Lordship distinguished “*proportionality as a general ground of review*” and “*proportionality as a basis for scrutinising justifications put forward for interferences with legal rights*”.<sup>176</sup> Lord Reed

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid [54].

<sup>172</sup> Ibid.

<sup>173</sup> [2015] 1 WLR 1591.

<sup>174</sup> Ibid [94].

<sup>175</sup> Ibid [96].

<sup>176</sup> Ibid [113].

accepted that “*reasonableness review, like proportionality, involves considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision-maker’s view depending on the context*”.<sup>177</sup> Indeed, his Lordship went on to observe that “*the application of a test of reasonableness may yield the same outcome as the application of a test of proportionality*”.<sup>178</sup> However, Lord Reed clearly did not accept proportionality itself as constituting a distinct head of review. As his Lordship explained:

In *Brind*, the House of Lords declined to accept that proportionality had become a distinct head of review in domestic law, in the absence of any question of EU law. This is not the occasion to review those authorities.<sup>179</sup>

- 109 The Supreme Court of the United Kingdom again considered proportionality in *R (Youssef) v Secretary of State*.<sup>180</sup> Lord Carnworth JSC, with whom the rest of the court agreed, commenced with the observation that “*there is a measure of support for the use of proportionality as a test in relation to interference with ‘fundamental’ rights*”.<sup>181</sup> However, his Lordship acknowledged, particularly in relation to cases involving issues of national security, that “*application of a proportionality test is unlikely to lead to a different result from traditional grounds of judicial review*”.<sup>182</sup>
- 110 Relevantly, the judicial review proceedings under consideration in *Youssef* concerned actions of the Foreign Secretary in relation to a regime for the listing and sanctioning of persons associated with terrorist organisations. In that context, Lord Carnworth observed that it “*would be quite inconsistent with*

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<sup>177</sup> Ibid [114].

<sup>178</sup> Ibid [116].

<sup>179</sup> Ibid [115].

<sup>180</sup> [2016] 2 WLR 509.

<sup>181</sup> Ibid [56].

<sup>182</sup> Ibid [58].



*that regime for a national court to substitute its own assessment of those matters*".<sup>183</sup> Even accepting the availability of proportionality review, Lord Carnworth observed that "*the courts should...be very slow to grant a substantive remedy in the circumstances now facing the court. Judicial review is a discretionary remedy*".<sup>184</sup>

### **Rationalising reasonableness review**

#### *Judicial review on the basis of unreasonableness*

- 111 In *Church of Scientology Inc v Woodward*,<sup>185</sup> Brennan J described judicial review as "*neither more nor less than the enforcement of the rule of law over executive action*", being "*the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law*".<sup>186</sup> Similarly, in *Attorney-General (NSW) v Quin*,<sup>187</sup> Brennan J described the duty of the courts in conducting judicial review as not going beyond "*the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power*".<sup>188</sup> The reverse side of the coin is that an abuse of the repository's powers will be amenable to judicial review.
- 112 The assertion that administrative action is reviewable by the courts on the basis of "*unreasonableness*" is fundamentally a reflection of these sentiments and of the role of the judicial branch of government in upholding the rule of law. Constitutional questions aside, when employed at a high level of abstraction, the judicial assertion that executive powers must be exercised reasonably is a summary statement of the limits of executive power over the

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<sup>183</sup> Ibid.

<sup>184</sup> Ibid [61].

<sup>185</sup> [1982] HCA 78; 154 CLR 25.

<sup>186</sup> Ibid 70.

<sup>187</sup> [1990] HCA 21; 170 CLR 1.

<sup>188</sup> Ibid 35-36.

citizenry and those affected by its decisions, and of the rule of law as a fundamental tenet of our society. That is, it is the assertion of a jurisdictional basis upon which judicial intervention is permitted. The reverse side of that coin, as *Li* suggests, is that administrative conduct that is successfully impugned as unreasonable will constitute an abuse of power, specifically, an abuse of statutory or regulatory power. Thus the rule of law foundations of judicial review are encapsulated in the nature of the judicial review task itself.

113 As Gummow J observed in *Eshetu*, Brennan J's description of the judicial review task is apt to invite a distinction between (1) judicial review as the declaration and enforcement of the law governing the *limits of the power* in question; and (2) judicial review as the declaration and enforcement of the law governing *exercise of the power* in question.<sup>189</sup> Taken strictly, reasonableness review of discretions would fall in the latter category, as going to the exercise of power, whereas the review of delegated legislation and states of satisfaction would fall in the former.

114 However, as Gummow J went on to suggest in *Eshetu*,<sup>190</sup> and as would now seem to be established by the decision in *Li*,<sup>191</sup> if reasonableness is an implied condition of the exercise of discretionary powers, judicial review of the exercise of discretion on the basis of unreasonableness ultimately goes to the limits of the power in question. By placing reasonableness on the footing of an implied statutory condition, that is, by statutory attachment, there is thereby a unification or at least association of the approaches to administrative discretions, delegated legislation and states of satisfaction.

#### *The contextualisation of reasonableness*

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<sup>189</sup> See *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 61 at [123].

<sup>190</sup> *Ibid* [124].

<sup>191</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [29], [89]

- 115 There is a clear argument that the enduring significance of Lord Greene MR's formulation of unreasonableness review in Australia stems from the doctrine of the separation of powers and the accepted role of the courts in the conduct of judicial review. In line with the constitutionally mandated separation of powers in Australia at the Federal level, the courts have been adamant that "[i]t is not the function of the court to substitute its own decision for that of the administrator ... [i]ts role is to set limits on the exercise of that discretion".<sup>192</sup> Likewise, the orthodox position in Australian administrative law is that whether an exercise of administrative discretion "is sound or not is not a question for decision by a court",<sup>193</sup> and the mere fact that the court disagrees with a decision will not warrant intervention.<sup>194</sup>
- 116 In seeking to identify unreasonableness in particular circumstances, that is, in the second sense of the term, as a jurisprudential basis for identifying when judicial intervention is warranted, there is a clear grappling with the interplay of the rule of law imperative of judicial review, and the limited nature of the courts' role. Lord Greene MR's formulation of unreasonableness undoubtedly speaks to such concerns, as Gageler J observed in *Li*.<sup>195</sup>
- 117 Though aptly giving expression to these concerns, the adoption over the years of different formulae for the identification of unreasonableness has thrown into relief the reality of the judicial task. In the end, the disposition of judicial review proceedings comes down to an evaluative decision, informed by principle but fundamentally dependent on the relevant statutory context as applied to the facts and circumstances of the individual case. Paying due regard to concerns about the separation of powers, what constitutes

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<sup>192</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J).

<sup>193</sup> *Parramatta City Council v Pestell* (1972) 128 CLR 305, 323 (Menzies J).

<sup>194</sup> See, for example, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 48 (Mason J); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 626 [40] (Gleeson CJ and McHugh J); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 174 [23].

<sup>195</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [106].

“*unreasonableness*”, and therefore invalidates exercise of a power, must vary depending on the power in question, the terms in which it is conferred, and what is at stake in its exercise.

- 118 This contextualisation of judicial review is by no means unique to Australian administrative law. In the United States, in relation to review under the *Administrative Procedure Act* and review on the “*arbitrary and capricious*” basis,<sup>196</sup> it has been argued that:

The meaning of arbitrary is actually a variety of meanings, dependent upon variations in contexts, which reflect differences in purposes and interests, and the gravity thereof—the stakes—according to the various actors directly or indirectly involved.<sup>197</sup>

- 119 In the United Kingdom, Professor Paul Craig, in examining the nature of reasonableness review, has argued that it is necessary to distinguish two issues: the nature or content of reasonableness review, and the intensity with which it is deployed.<sup>198</sup> Mason J, in effect, made the same observation in *Peko-Wallsend*.<sup>199</sup> In reality, both issues come back to context. What constitutes unreasonableness warranting judicial intervention in a particular case comes down to questions of statutory construction and factual circumstances. Likewise, the intensity of judicial review for unreasonableness must inevitably vary with context. For example, it should be uncontroversial that a lower level of scrutiny will apply to, that is, there will be less scope for judicial intervention in respect of, a ministerial discretion concerning issues of national security as opposed to a structured discretion concerning the private rights and interests of individuals as was in question in *Li*.

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<sup>196</sup> 5 USC §706(2)(A),

<sup>197</sup> R George Wright, ‘Arbitrariness: Why the most important idea in administrative law can’t be defined, and what this means for the law in general’ (2010) 44 *University of Richmond Law Review* 839, 851.

<sup>198</sup> Paul Craig, ‘The Nature of Reasonableness Review’ (2013) 66 *Current Legal Problems* 131, 139.

<sup>199</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 42.

*Does proportionality bring any additional content to judicial review?*

- 120 That leaves the question of proportionality. It is important to distinguish, as Lord Reed JSC has done, between “*proportionality as a general ground of review*” and “*proportionality as a basis for scrutinising justifications put forward for interferences with legal rights*”.<sup>200</sup> Even in England, the courts are yet to expressly recognise proportionality as a completely independent basis of review.
- 121 There are obvious reasons for this. At a high level of abstraction, there is obvious overlap between the notions of reasonableness and proportionality. Indeed, Kiefel J has noted extra-judicially the suggestion that the original Prussian conception of proportionality could aptly have been translated in terms of reasonableness.<sup>201</sup> This conceptual overlap has been acknowledged in both Australia and in England. The plurality in *Li*, for example, recognised that “*an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached*”.<sup>202</sup> Likewise, in *Brind*, Lord Ackner observed that “*a total lack of proportionality will qualify for the Wednesbury unreasonable epithet*”.<sup>203</sup>
- 122 As a matter of conclusory language, there is perhaps little real difference between saying that the courts will not tolerate an unreasonable exercise of power, and saying that the courts will not tolerate a disproportionate exercise of power. In both cases, there is little more than the assertion, at a high level of abstraction, of a jurisdictional basis for judicial review. Both accord with the rule of law imperatives underlying judicial review and yet, as a matter of terminology and shorn of context, carry little analytical content on their own.

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<sup>200</sup> *Pham v Secretary of State* [2015] 1 WLR 1591 at [113].

<sup>201</sup> The Hon Justice Susan Kiefel AC, ‘Proportionality: A rule of reason’ (2012) 23 *Public Law Review* 85, 87.

<sup>202</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [74].

<sup>203</sup> *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696, 762.

- 123 On one view, the recognition of a ground of judicial review under the mantle of “proportionality” runs the very risk referred to by Gleeson CJ and McHugh J referred in *Eshetu*.<sup>204</sup> That is, to impugn administrative action as “disproportionate” or lacking in proportionality may be no more than an emphatic way of disagreeing with it. As Lord Lowry observed in *Brind*, there is a danger that proportionality analysis may lead the courts beyond their supervisory role “into an area into which the court will feel more at liberty to interfere”.<sup>205</sup>
- 124 The question then remains whether proportionality analysis adds anything of jurisprudential value in the sense of the identification of cases in which judicial intervention is actually warranted. It should immediately be acknowledged, as we have seen, that notions of proportionality have long been employed in Australian administrative law. Dixon J’s analysis in *Williams v City of Melbourne* of the principles governing the review of delegated rule-making powers is couched in language reminiscent of what is now referred to as proportionality. It was this form of analysis, “reasonable proportionality”, that French CJ identified as unreasonableness review applied to powers cast in purposive terms in *Attorney-General (SA) v Corporation of the City of Adelaide*.<sup>206</sup> Likewise, proportionality analysis has been accepted in the constitutional sphere.<sup>207</sup>
- 125 On one view, the invocation of notions of proportionality, and of particular tests or forms of proportionality analysis, should not be seen to carry any real content per se. Proportionality does not, of its own, identify the circumstances in which the limits of power have been transgressed. It cannot — the

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<sup>204</sup> *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 626 [40].

<sup>205</sup> *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696,766.

<sup>206</sup> See above at [47]ff.

<sup>207</sup> See, for example, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *McCloy v New South Wales* [2015] HCA 34.

identification of such circumstances always comes back to context, to the relevant factual matrix and statutory framework.

- 126 There is much to be said for the view of Lord Mance that, rather than carrying any particular analytical content, proportionality reasoning should be understood primarily as a heuristic device. The English experience demonstrates the potential value of proportionality analysis in structuring the judicial review task, and in increasing the transparency and predictability of what is ultimately an evaluative inquiry. As Lord Reed JSC observed in *Bank Mellat*, proportionality analysis “*can clarify different aspects of ... an assessment, and make value judgments more explicit*”.<sup>208</sup> This would seem to accord with the views of French CJ in *Attorney-General (SA) v Corporation of the City of Adelaide* that proportionality is not a legal doctrine, but rather “*a class of criteria used to determine the validity or lawfulness of legislative and administrative action by reference to rational relationships between purpose and means*”.<sup>209</sup>
- 127 Where does this leave us? In an era of changing and broadening control by the government over the citizenry and those whose rights and circumstances depend upon executive action, the High Court’s engagement with proportionality in *Li* may be seen as the adoption of a reasoning device or process to assist in the determination of whether, in particular circumstances, executive action has fallen outside the area marked out for it by the Parliament, expressly and impliedly. Used in a heuristic sense, as an aid to structured and transparent reasoning, proportionality analysis is not inherently objectionable. However, caution is warranted lest, under the guise of proportionality, the proper role of the courts in judicial review is exceeded and the spectre of merits review given life. Indeed, it is probably the case that proportionality analysis is suited to some powers, such as powers conferred in purposive terms, but not others. Certainly proportionality would seem to be

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<sup>208</sup> *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC 700 at [74].

<sup>209</sup> *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; 249 CLR 1 at [55].

inapt in the review of states of satisfaction or in relation to subject matter powers.

128 At the end of the day, what *Li* clearly evinces is the contextualisation of reasonableness, and the fundamental importance of close attention to statutory and factual context for both those entrusted with administrative discretions and those who review their exercise.

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