

Judicial Review of the Exercise of Discretionary Public Power¹

This address is concerned with two topics.

Part 1 concerns the constitutional implications of the phrases “the Supreme Court of any State” and “or of any other court of any State” as those terms are used in s 73 of Chapter III of the Constitution, and the limitations upon State executive and legislative power according to the *Kable*² and *Kirk*³ principles. **Part 2** concerns the notion of “unreasonableness” and the implications of the High Court decision in *Minister for Immigration and Citizenship v Li*⁴ in the review of the exercise of discretionary power and whether the decision-maker has exceeded the limits of the power.

Part 1

The impressive London statue of Winston Churchill by Ivor Roberts-Jones has Churchill looking across to the Westminster Parliament and particularly the House of Commons to where the statue of Oliver Cromwell stands outside the House.

That gaze seems appropriate because Churchill looked upon and described Cromwell as “our greatest man”⁵, bound up in the assertion of the “supremacy of Parliament” which would, over time, ultimately be regarded as the expression of the will of a sovereign people.

The point of Churchill’s observation really is that the great English constitutional struggles which took many forms were concerned with the *supremacy of Parliament* and not with any notion of the *separation of powers*.

The colonial legislatures reflected that Westminster model.

As Chief Justice French has observed in *Totani*⁶ there was, at Federation, no doctrine of separation of powers entrenched in the Constitutions of the States although unsuccessful

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² *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

³ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531

⁴ (2013) 249 CLR 332. As to a brief outline of the context of the discretionary decision of the Tribunal under challenge in *Li*, see footnote 123

⁵ This is a remark made by Churchill in a BBC interview with Malcolm Muggeridge. The source of the title of Antonia Fraser’s biography of Cromwell, “Cromwell, Our Chief of Men”, 1973, may have been influenced by this remark but the title seems, clearly enough, to be drawn from John Milton’s Sonnet 16 “Cromwell, our chief of men, who through a cloud ...”.

⁶ *South Australia v Totani* (2010) 242 CLR 1, French CJ at [66]

attempts were made in New South Wales, Western Australia and South Australia in the 1960s and 1970s and in Victoria in 1993 to persuade courts of the existence of such a doctrine⁷.

The Commonwealth Constitution, of course, provides for a distribution of Commonwealth executive, legislative and judicial power.

Of present relevance to the supervisory jurisdiction of administrative decision-making at the Federal and State level is Chapter III of the Constitution and the way in which it vests the judicial power of the Commonwealth by s 71 of the Constitution. I will return to this aspect of the matter shortly because of its centrality to the constitutionalisation of the supervisory jurisdiction exercised by the State Supreme Courts, of administrative decision-making. One of the limitations on Commonwealth legislative power, of course, is the well-known *Boilermakers'* doctrine⁸.

The Constitution also reflects at least three other features of present importance. The *first feature* is the conception on which the Constitution is framed which has come to be known as the *Melbourne Corporation* principle, put this way by Sir Owen Dixon in 1947⁹:

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

The *second feature* is the notion discussed by Mason CJ in 1992 in *Australian Capital Television Pty Ltd v The Commonwealth*¹⁰ that the *very concept* of representative government and representative democracy signifies government by the people through their representatives and, translated into constitutional terms, the Constitution brought into existence a system of representative government in Australia in which elected representatives

⁷ See footnotes 223 to 227, *ibid* at [66]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, French CJ at [22]

⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; the *Boilermakers'* doctrine prevents the Commonwealth Parliament from conferring judicial power on bodies other than courts and prevents it from conferring any power that is not judicial power (or power incidental to judicial power) on courts specified in s 71 of the Constitution.

⁹ *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82; emphasis added

¹⁰ (1992) 177 CLR 106 at 137 and 138

exercise sovereign power on behalf of the Australian people¹¹. Thus, in 1997 in *Lange v Australian Broadcasting Corporation*¹², the High Court held that the Constitution provides for an “implied freedom” of political communication as “an indispensable incident of that [constitutional] system of representative government”¹³. The freedom is not absolute. As Gummow and Hayne JJ observe in *Mulholland v Australian Electoral Commission*¹⁴, the High Court had, put anecdotally, had enough of the “great difficulties” created by the phrase “absolutely free” in s 92, to give rise to another “incompletely stated ‘freedom’ ... discerned in the Constitution”¹⁵. Thus the freedom is limited. It gives rise to invalidity in the exercise of legislative or executive power which burdens the freedom in a way which is “not reasonably appropriate and adapted” to secure a legitimate end compatible with the constitutionally prescribed system of government.

I mention this matter of the implied freedom because of its potential role of invalidating exercises of legislative and executive power as the source of a discretion.

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

A number of modern statutes confer broad discretionary powers which might, when exercised by the repository of the power, impose conditions on a citizen that burden the freedom. That was the unsuccessful contention in 2012 in *Wotton v State of Queensland*¹⁶ concerning the exercise of powers by the Parole Board to impose particular conditions on Wotton’s release on parole. As to the relationship between the statute and the exercise of the discretionary powers conferred by it, the majority¹⁷ accepted these propositions¹⁸:

¹¹ *ibid* at 138

¹² (1997) 189 CLR 520

¹³ *ibid* at 559

¹⁴ (2004) 220 CLR 181 at [179]

¹⁵ *ibid* at [179]

¹⁶ (2012) 246 CLR 1

¹⁷ I prefer to use the term “majority” rather than “plurality”; French CJ, Gummow, Hayne, Crennan and Bell JJ.

¹⁸ *Wotton v State of Queensland* (2012) 246 CLR 1 at [22], submissions put by S J Gageler SC, Solicitor-General for the Commonwealth; emphasis added

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

There is a continuing debate about the constitutionality of the exercise of such a discretion and about aspects of these observations in *Wotton* in the literature¹⁹. I do not propose to examine that debate any further here. I simply wish to draw your attention to it.

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

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

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

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

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

Section 76 provides for the conferral, by Parliament, upon the High Court of original jurisdiction in any “matter” arising under the Constitution or involving its interpretation

¹⁹ Professor James Stellios, ‘Marbury v Madison: Constitutional Limitations and Statutory Discretions’ (2016) 42 *Australian Bar Review* 324

(s 76(i)); or arising under any laws made by the Parliament (s 76(ii)); and otherwise by s 76(iii) and s 76(iv).

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

Certiorari is not referred to in Chapter III but lies as ancillary to the effective exercise of the jurisdiction conferred by s 75(v)²⁰.

Although the term “prohibition” was thought to import the law relating to the grant of prohibition by King’s Bench²¹, the terms “prohibition” and “jurisdiction” are regarded as “constitutional expressions”. Thus, prohibition lies in circumstances not contemplated by the Court of King’s Bench including conduct undertaken under an invalid law of the Parliament or conduct beyond the executive power of the Commonwealth. Importantly, prohibition will go under s 75(v) in respect of a *denial of procedural fairness* by an officer of the Commonwealth resulting in a decision made in *excess of jurisdiction*²². In other words, such a decision engages “jurisdictional error”.

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

²⁰ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Gaudron and Gummow JJ at [14]

²¹ *R v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (Incorporated)* (1979) 143 CLR 190 at 201, Barwick CJ

²² *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Gaudron and Gummow JJ at [14]

²³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

²⁴ *Minister for Immigration v Li* (2013) 249 CLR 332

²⁵ (1985) 159 CLR 550 at 584

intention” that observance of the principles of natural justice “is a condition of the valid exercise of the power”²⁶. Ultimately, it is a question of statutory construction.

Brennan J said this²⁷:

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

Brennan J put the matter in more emphatic terms in this way²⁸:

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

The *content* of the principles to be applied may be another matter, as a question of statutory construction.

Brennan J put the dynamic in this way²⁹:

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

In *Saeed v Minister for Immigration and Citizenship*³⁰, the majority³¹ re-shaped the basis of the principle distilled by Mason CJ, Deane and McHugh JJ in *Annetts v McCann*³². In *Annetts*, their Honours said that it could be treated as settled that when a statute confers

²⁶ *ibid* at 609

²⁷ *ibid* at 609; emphasis added

²⁸ *ibid* at 610; emphasis added

²⁹ *ibid* at 615 and 616; emphasis added

³⁰ (2010) 241 CLR 252

³¹ French CJ, Gummow, Hayne, Crennan and Kiefel JJ

³² (1990) 170 CLR 596 at 598

power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice *regulate* the *exercise* of that power unless those principles are excluded by plain words of necessary intendment. The support cited and quoted for that view included Mason J's observations in *Kioa v West*³³.

In *Saeed*³⁴, the statement of principle is adopted but firmly anchored to the views of Brennan J.

A failure to fulfil the condition governing the exercise of the power means that the decision is not "authorised" by the statute and is thus invalid³⁵, as an *excess* of power.

In 1997, in *Kruger v The Commonwealth*³⁶, Brennan CJ continued this theme of searching, as a matter of construction of the statute, for the legislature's intention and added, in the context of a discretionary power conferred by statute this:

Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised *reasonably*, for the legislature is taken to intend that the discretion be so exercised.

Wednesbury was cited as authority for that proposition.

Gummow J adopted that view in *Eshetu*³⁷. The reasoning in *Kruger* was expressly relied upon by Gaudron and Gummow JJ in *Aala*³⁸ to support the reach of *prohibition* on the footing that a failure to accord procedural fairness where the statute has not "relevantly (and validly) limited or extinguished any obligation to accord procedural fairness" results in an *excess* of jurisdiction.

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

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

³³ (1985) 159 CLR 550 at 584

³⁴ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, the majority at [13]; see also Brennan J, *Annetts v McCann* at 604-605

³⁵ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [13]

³⁶ (1997) 190 CLR 1 at 36; emphasis added

³⁷ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [126]

³⁸ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [40] to [42]

The Federal Parliament may not by legislation deny the High Court its entrenched original jurisdiction in s 75(v). The constitutional writs of mandamus and prohibition go for jurisdictional error and so too certiorari as *ancillary* to that relief. Certiorari, however, is not confined to the review of administrative action for jurisdictional error³⁹. It may lie, subject to the existence of a “matter” in the exercise of jurisdiction under s 75(iii)⁴⁰ or s 76(i)⁴¹ and because no constitutional provision confers jurisdiction with respect to certiorari, it is open to the Parliament to legislate to prevent the grant of such relief (except as ancillary to prohibition and mandamus)⁴². Thus, certiorari might validly be removed for non-jurisdictional error of law on the face of the record.

It is uncontroversial since the decision in 2003 in *Plaintiff S157/2002*⁴³ that federal legislation that purports, by privative clause or otherwise, to remove the High Court’s supervisory jurisdiction of ensuring that Commonwealth officers stay within the limits of legislative and executive authority (that is, review for jurisdictional error) cannot be removed. An administrative decision which involves jurisdictional error is regarded, in law, as no decision at all⁴⁴.

As to State decision-makers, the prevailing view for a long time was that a privative clause appropriately framed in State legislation could remove, from the Supreme Court of a State, review for errors of any kind whether amounting to jurisdictional errors or non-jurisdictional errors⁴⁵. That seemed to be consistent with the views of Gaudron and Gummow JJ in *Darling Casino* in 1997⁴⁶.

In 2010, in *Kirk*⁴⁷, the Court recognised that since the important decision in *Kable*⁴⁸ in 1996, the term “the Supreme Court of any State” in s 73 is a “constitutional term” and thus there must be as Gummow, Hayne and Crennan JJ said in *Forge*⁴⁹ “a body fitting [that] description” with the result that it is beyond the legislative power of a State to alter the

³⁹ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476

⁴⁰ All matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party

⁴¹ In any matter arising under the Constitution or involving its interpretation

⁴² *Plaintiff S157/2002 v The Commonwealth*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [80] and [81]

⁴³ (2003) 211 CLR 476

⁴⁴ *Plaintiff S157/2002 v The Commonwealth*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [76]

⁴⁵ Provided that the principles described in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 are satisfied.

⁴⁶ *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, Gaudron and Gummow JJ at 634

⁴⁷ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531

⁴⁸ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

⁴⁹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63]

character or constitution of its Supreme Court such that it ceases to meet the Constitutional description.

In *Forge*, Gummow, Hayne and Crennan JJ explained the principle in this way⁵⁰:

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

64 It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. ...

In *Kirk*, the majority⁵¹ also accepted that, at federation, the Supreme Court of each State had jurisdiction that included such jurisdiction as the Court of Queen’s Bench had in England and the jurisdiction included, having regard to the Privy Council decision in *Colonial Bank of Australasia v Willan*⁵² in 1874, jurisdiction to grant certiorari for jurisdictional error notwithstanding a privative clause in a statute⁵³. It followed that the supervisory jurisdiction of each State Supreme Court was, at federation, and remains, the “mechanism” for the determination and enforcement of the *limits* of the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. It is the path to legality.

The majority put the principles in these terms⁵⁴:

98 ... [The] supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining

⁵⁰ *ibid* at [63] and [64]; emphasis added

⁵¹ French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

⁵² (1874) LR 5 PC 417 at 422

⁵³ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [97]

⁵⁴ *ibid* at [98] to [100]; emphasis added

characteristic of those courts. And because, “with such exceptions and subject to such regulations as the Parliament prescribes”, s 73 of the Constitution gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of *that* supervisory jurisdiction is ultimately subject to the superintendence of *this* Court ... in which s 71 of the Constitution vests the judicial power of the Commonwealth.

- 99 ... [Thus] the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are *set* by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits of the exercise of State executive and judicial power by persons and bodies other than that Court would be to create *islands of power* immune from supervision and restraint. It would permit what *Jaffe* described as the development of “distorted positions”. And as already demonstrated, it would remove from the relevant State Supreme Court *one* of its defining characteristics.
- 100 [That] is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the *continued need* for, and *utility* of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is *beyond* State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is *not beyond power*.

The above reference to *Jaffe* is a reference to the writings of Professor Jaffe of Harvard University who was writing on the role of judicial review of administrative action throughout much of the same period as Professor Davis of Chicago University. Both of these authors were very influential upon United States jurisprudence in this area and also influential in Australia. As to that, see the observations of the Hon Justice Stephen Gageler in 2015 in the *University of New South Wales Law Journal*⁵⁵.

In the later High Court decision in 2013 of *New South Wales v Kable*⁵⁶ when Mr Kable, who had been imprisoned under the impugned order, unsuccessfully sued the State for damages, the Court explained that the New South Wales Act was beyond the legislative power of the New South Wales Parliament because its enactment was contrary to the requirements of Chapter III. That was so because the exercise of jurisdiction which the Act purported to give to the Supreme Court was held to be incompatible with the institutional integrity of that

⁵⁵ The Hon Justice Stephen Gageler, ‘Whitmore and the Americans: Some American Influences on the Development of Australian Administrative Law’ 38(4) *University of New South Wales Law Journal* 1316

⁵⁶ (2013) 252 CLR 118

Court⁵⁷, as a suitable repository for the exercise of federal jurisdiction as contemplated by s 77(iii) of the Constitution because it rendered the Court an *instrument* of the *executive*.

Mr Stephen McLeish SC, writing as the Solicitor-General for Victoria⁵⁸, has expressed concern that the *Kable* doctrine may have lost its constitutional moorings because the emphasis now seems to be upon whether the jurisdiction, purportedly conferred upon the relevant State Court, is incompatible with the institutional integrity of that court *without* measuring that incompatibility against the notion of whether it remains “a suitable repository for the exercise of federal jurisdiction”. The State legislation, he contends, is only invalid to the *extent* that it confers a jurisdiction which *exceeds* the boundaries of compatibility with the institutional integrity of the State court having regard to whether or not it is or remains a “suitable repository for the exercise of federal jurisdiction”.

For my own part, I am not so sure that, in the more recent authorities, the ship of principle has lost its moorings.

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

In *Kable*, Gummow J said this⁵⁹:

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

⁵⁷ *ibid* at [15] to [17]

⁵⁸ Stephen McLeish SC, ‘The Nationalisation of the State Court System’ (2013) 24 *Public Law Review* 252. Mr McLeish is now a Judge of Appeal, Court of Appeal, Victoria.

⁵⁹ *Kable v Director of Public Prosecutions (NSW)* at (1996) 189 CLR 51 at 132; original emphasis

The function to be fulfilled was not *judicial*. Nor was the power properly characterised as a *judicial function*. Gummow J described it in *Fardon*⁶⁰ as engaging a “legislative plan” to conscript the New South Wales Supreme Court.

The *Kable* principle was applied by the High Court in 2009 in *International Finance Trust*⁶¹ to invalidate s 10 of the *Criminal Assets Recovery Act 1990* (NSW) which enabled a law enforcement authority to seek, ex parte, from the New South Wales Supreme Court, an order preventing any dealing with specified property. Section 10 required the making of the order if the law enforcement officer *suspected* the relevant person had committed any of a broad range of crimes or the officer *suspected* that the property was derived from criminal activity and the Court considered that there were reasonable grounds for the suspicion. The majority construed s 10 as excluding any power in the Supreme Court to review and reconsider the continuation of the ex parte order which amounted to, in effect, sequestration of the property upon “suspicion of wrongdoing” for an indefinite period with no effective curial enforcement of the duty of full disclosure on an ex parte application *where* the only possibility of release from sequestration was upon proof of a “complex of negative propositions”.

It was also applied in *Totani*⁶² in 2009 to invalidate s 14(1) of the *Serious and Organised Crime Control Act 2008* (SA). The Act’s aim was to disrupt and restrict the activities of organisations involved in serious crime and it conferred powers on the Attorney-General, on the application of the Commissioner of Police, to make a declaration in relation to an organisation if satisfied that members of it associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity. Section 14(1) required the Magistrates Court to make a “control order” against a person if satisfied that the person is a member of a declared organisation. Whether and why an organisation should be declared was entirely a matter for the Executive. The only question left to the Court was whether a person was a member of a declared organisation. Section 14(1) was invalid because it authorised the Executive to enlist the Court to implement the decisions of the Executive in a manner repugnant to, or incompatible with, its institutional integrity or, put another way, it had the effect of reducing the Court to “an instrument of the Executive”⁶³.

⁶⁰ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [100]

⁶¹ *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319

⁶² *Totani v South Australia* (2010) 242 CLR 1

⁶³ *ibid*, Crennan and Bell JJ at [436]

It was applied in *Wainohu*⁶⁴ to invalidate the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The Act recited that it was enacted to provide for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations and their members. It made provision for Judges of the Supreme Court of New South Wales to give their consent to be declared “eligible judges” for the purposes of Part 2 of the Act. It empowered the Commissioner of Police to apply to an eligible Judge for an order declaring an organisation to be a “declared organisation” for the purposes of the Act. A majority held the Act invalid because it exempted eligible Judges from any duty to give reasons in connection with the making or revocation of a declaration of an organisation as a declared organisation. This feature of the Act was critical to the conclusion that the Act was repugnant to or incompatible with the continued institutional integrity of the Supreme Court of New South Wales. The question was not whether the task to be performed by an eligible Judge would be performed as *persona designata*, or whether the task of the eligible Judge was to be characterised as judicial or administrative. The critical matter was the exemption from an obligation to give reasons for the making of a declaration or the revocation of a declaration order.

As to examples of statutory instruments which were held to be valid, see *K-Generation*⁶⁵ in which s 28A of the *Liquor Licensing Act 1997* (SA) was held not repugnant to or incompatible with the continued institutional integrity of the relevant South Australian State courts because those courts could determine “for themselves” both whether the relevant information (classified by the Commissioner of Police as criminal intelligence) met the definition of criminal intelligence in the Act and left those courts free to determine what steps were to be taken to maintain the confidentiality of the information.

In *Condon*⁶⁶, Gageler J held the relevant sections of the *Criminal Organisation Act 2009* (Qld) valid on the footing that although the use by the Commissioner of the Police Service of declared criminal intelligence could, in some circumstances, amount to an abuse of process, there was a procedural solution to that problem. The solution lay in the capacity of the Supreme Court of Queensland to stay a substantive application made by the Commissioner (for a declaration that a particular organisation was a “criminal organisation”) in the exercise of its *inherent jurisdiction* in any case in which practical unfairness to a respondent became

⁶⁴ *Wainohu v New South Wales* (2011) 243 CLR 181

⁶⁵ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501

⁶⁶ *Condon v Pompano Pty Ltd* (2013) 252 CLR 38

manifest. Thus, the criminal intelligence provisions of the Act were saved from incompatibility with Chapter III of the Constitution *but only* by reason of the preservation of “that capacity”⁶⁷. The majority⁶⁸ held that although the procedure might be novel and thus said to amount to a denial of procedural fairness, “attention must be directed to questions of fairness and impartiality”⁶⁹. The majority also said this: “*Observing that the Supreme Court can and will be expected to act fairly and impartially, points firmly against invalidity*”⁷⁰. Thus, the provisions were not repugnant to or inconsistent with the institutional integrity of the Supreme Court.

In *Kable*, Gaudron J observed⁷¹ that a matter of significance emerging from a consideration of the provisions of Chapter III is that the Constitution does not permit of *different grades or qualities of justice* depending upon whether judicial power is exercised by State courts or federal courts created by the Parliament. That being so, State courts have a role and existence *transcending* their status as State courts which directs the conclusion that Chapter III requires that the Parliaments of the States cannot legislate to confer powers on State courts which are repugnant to or incompatible with “their exercise of the judicial power of the Commonwealth”⁷².

Gaudron J also observed that the prohibition on State legislative power which derives from Chapter III is *not at all* comparable with the limitation on the legislative power of the Commonwealth derived from the *Boilermakers’* doctrine.

That follows because the Chapter III limitation on State legislative power is “more closely confined” and relates to “powers or functions imposed on a State court” which are “repugnant to or incompatible with the exercise of the judicial power of the Commonwealth”.

Mr McLeish SC, for example, contends that *Wainohu* is an emblematic example of the *Kable* principle being reformulated based upon “impairment of institutional integrity” *unconditioned* by any consideration of whether the power conferred under the State Act renders the State court unfit as a repository for the vesting of federal jurisdiction. That is said to follow because the majority in *Wainohu* regarded the “touchstone” of the “constitutional principle” to be protection against “legislative or executive intrusion upon the institutional

⁶⁷ *ibid* Gageler J at [212]

⁶⁸ Hayne, Crennan, Kiefel and Bell JJ

⁶⁹ *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [169]

⁷⁰ *ibid* at [169]; emphasis added

⁷¹ (1996) 189 CLR 51 at 103

⁷² *ibid* at 103

integrity of the courts, whether federal or State”⁷³ without any reference to the relationship between such intrusion and the capacity of the relevant court to be or remain a fit repository for the vesting of federal jurisdiction.

Although it is true that the various formulations of the *Kable* principle in later decisions of the High Court do not necessarily expressly capture the precise language of the principle as formulated in *Kable*, it seems to me that two things remain.

First, there can be little doubt that the fundamental principle articulated in *Kable* remains constant throughout.

Second, some later reformulations expressly recognise a synthesis of the principle whilst guarding against inaccuracy.

A question remains of whether invalidity by reason of Chapter III gives rise to something in the nature of a *separation of powers* as if that doctrine had been adopted in the Constitution of each State. It is true that in *Kable*, McHugh J observed that “in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers”⁷⁴. Gaudron J thought not. Williams JA, however, in 2004, put the matter in reasonably plain terms in *Re Criminal Proceeds Act 2002*⁷⁵ in this way:

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

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

Part 2 - Unreasonableness

⁷³ *Wainohu v New South Wales* (2011) 243 CLR 181 at [105]

⁷⁴ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 118

⁷⁵ *Re Criminal Proceeds Act 2002* [2004] 1 Qd R 40 at 44

As already mentioned, Brennan CJ in *Kruger* observed⁷⁶ that when a discretionary power is statutorily conferred on a repository, the power *must* be exercised *reasonably* because the *legislature is taken to intend* that the discretion be *so exercised*. Thus, the power must, as a matter of construction of the statute conferring the power, be exercised reasonably (unless the plain words of the statute clearly and necessarily convey a different intention).

Normally, the likelihood is that exercise of the power will be *conditioned* by an obligation of reasonableness, as a presumption of law in the construction of the Act conferring the power on the repository. This is unsurprising as it accords with the approach to determining whether the exercise of a power statutorily conferred is conditioned on the observance of the principles of natural justice as earlier mentioned⁷⁷.

In *Abebe*⁷⁸, Gaudron J put the matter more emphatically by saying that it was difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, the statute should not be construed so that it is an “essential condition” of the exercise of the power that it be exercised reasonably, adding, however, the qualification “at least in the sense that it not be exercised in a way that no reasonable person could exercise it”⁷⁹. That qualification is not (and is less demanding than) the language of *Wednesbury* unreasonableness but it raises the dilemma of an emphatically expressed statutory *condition* of the *exercise* of the power on the one hand, and how conduct falling short of the condition, legal unreasonableness, might be *measured*, on the other hand.

In 1990, in *Attorney-General (NSW) v Quin*⁸⁰, Brennan J also accepted that the legislature is taken, impliedly (unless the Act expressly provides for the matter) to intend that a power be exercised *reasonably* by the repository of the power. That was the view of Hayne, Kiefel and Bell JJ in *Li*⁸¹. In *Quin*, Brennan J expressed observations which have been described by Gageler J as *canonical* about the true nature of the Court’s “duty and jurisdiction” in reviewing administrative action (informed by the well-known observations in 1803 of Marshall CJ in *Marbury v Madison*⁸²). Brennan J said this⁸³:

⁷⁶ (1997) 190 CLR 1 at 36

⁷⁷ See the discussion related to footnotes 23 to 38

⁷⁸ *Abebe v The Commonwealth* (1999) 197 CLR 510 at [116]

⁷⁹ *ibid* at [116]

⁸⁰ (1990) 170 CLR 1 at 36

⁸¹ *Minister for Immigration v Li* (2013) 249 CLR 332 at [63]

⁸² (1803) 1 Cranch 137, at p 177 [5 U.S. 87, at p 111]; “It is, emphatically, the province and duty of the judicial branch to say what the law is”.

⁸³ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35 and 36; emphasis added

The duty and jurisdiction of the court to review administrative action *do not go beyond the declaration and enforcing of the law* which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, *to the extent that they can be distinguished from legality*, are for the repository of the relevant power and, subject to political control, for the repository alone.

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

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

However, canonical orthodoxy dictates that because the court's duty and jurisdiction do not engage judicial scrutiny of the merits of administrative action (although Brennan J's qualification quoted above should be carefully noted "to the extent that they can be distinguished from legality") and an examination of the reasonableness of a decision "may appear to open the gate"⁸⁴ to "merits review" of an action taken "within power"⁸⁵, the *Wednesbury* incarnation of "unreasonableness" was calculated to leave the merits of a decision unaffected *unless* the decision or action was such as to amount to an *abuse of power* and thus go to *legality* and thus an *excess of jurisdiction*.

The balance was this: *even though* the court acts on an implied intention of the legislature that a power be exercised reasonably, the measure of invalidity is that the court will hold, invalid, a purported exercise of the power if it is "so unreasonable" that "no reasonable repository of the power could have taken the impugned decision or action"⁸⁶. Taxonomically, this was understood as "an abuse of power". The limitation on the exercise of the power, however, was said by Brennan J to be "extremely confined"⁸⁷. In other words, the exercise of the discretion would need to travel well beyond the zone or orbit of reasonableness to ensure that the Court's supervisory role was not ensnared in de facto merits review.

⁸⁴ *ibid* at 36

⁸⁵ *ibid* at 36

⁸⁶ *ibid* at 36

⁸⁷ *ibid* at 36

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

In 1986, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*⁸⁸, Mason J also expressed observations (also described as canonical) about the court's limited role in reviewing the exercise of an administrative discretion and the role of *Wednesbury* unreasonableness in that context.

Mason J said this⁸⁹:

The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned: *Wednesbury Corporation*.

It follows that, in the absence of any statutory indication of the *weight* to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power. ... I say "generally" because *both principle and authority* indicate that in some circumstances a court may set aside an administrative decision which has *failed to give adequate weight* to a relevant factor of great importance, or *has given excessive weight* to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "*manifestly unreasonable*". This ground of review was considered by Lord Greene M.R. in *Wednesbury Corporation*, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it. ... The test has been embraced in both Australia and England.

For present purposes, two things should be noted about these observations.

⁸⁸ (1986) 162 CLR 24

⁸⁹ *ibid* at 40 and 41; emphasis added

First, the *Wednesbury* formulation translates into a notion that the decision is “manifestly unreasonable”.

Secondly, failures to give adequate weight to a relevant factor of great importance or attributing excessive weight to a relevant factor of no great importance is ultimately reduced to a question of whether the decision is manifestly unreasonable rather than one of whether there is an evident failure to take into account relevant considerations or the taking into account of irrelevant considerations.

In 1995, Brennan, Deane, Toohey, Gaudron and McHugh JJ said in *Craig*⁹⁰ that “if an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely upon irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers”.

Such an error of law amounts to jurisdictional error invalidating any order or decision of the tribunal which reflects it. That position was affirmed in *Yusuf*⁹¹. Importantly, McHugh, Gummow and Hayne JJ observed in *Yusuf* that jurisdictional error in accordance with the *Craig* formulation embraces “a number of different **kinds of errors**”⁹² and the list of errors in *Craig* is “not exhaustive” and the “different kinds of error may well **overlap**”⁹³.

Moreover, their Honours said this⁹⁴:

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

⁹⁰ *Craig v South Australia* (1995) 184 CLR 163 at 179

⁹¹ *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]

⁹² *ibid* at [82], emphasis added

⁹³ *ibid* at [82]; emphasis added

⁹⁴ *ibid* at [82]; emphasis added

Importantly, the High Court’s approach to jurisdictional error in the context of *Craig* is the subject of significant discussion by the majority in *Kirk*⁹⁵.

What is the true scope of unreasonableness?

In *Li*⁹⁶, Hayne, Kiefel and Bell JJ observed that the “legal standard” of unreasonableness should **not** be considered as “limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it”. Moreover, Lord Greene MR should not “be taken to have limited unreasonableness in this way” in *Wednesbury*⁹⁷. Lord Greene’s formulation “may more *sensibly* be taken to recognise that an *inference* of unreasonableness may in some cases be *objectively drawn* even where a particular error in reasoning *cannot* be identified”⁹⁸.

That notion conforms with the principles about which Dixon J spoke in *Avon Downs*⁹⁹ concerning a decision of the Federal Commissioner of Taxation:

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

Chief Justice French, in *Li*¹⁰⁰, took the view that Lord Greene’s formulation enabled the Court to intervene due to the “framework of rationality imposed by the statute”¹⁰¹ and the formulation, “so unreasonable that no reasonable authority could ever have come to it”, reflects a limitation “imputed to the legislature” on the basis of which courts can say that Parliament never intended to authorise that kind of decision. The Chief Justice observed that “[a]fter all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion [which seems to be a reference to a decision-maker not falling into errors of the kind described in *Craig* and

⁹⁵ *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [60] – [77]

⁹⁶ (2013) 249 CLR 332 at [68]

⁹⁷ *ibid* at [68]

⁹⁸ *ibid* at [68]

⁹⁹ *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; emphasis added

¹⁰⁰ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, French CJ at [28]

¹⁰¹ *ibid* at [28]

Yusuf], there is generally *an area of decisional freedom*". That area of decisional freedom, however, cannot be construed "as attracting a legislative sanction to be *arbitrary* or *capricious* or to *abandon common sense*"¹⁰².

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

In *Li*, Hayne, Kiefel and Bell JJ said this¹⁰³:

The more specific errors in decision-making, to which the courts often refer may *also be seen* as encompassed by unreasonableness. This may be consistent with the observations of Lord Greene MR, that some decisions may be considered unreasonable in more than one sense and that "all these things run into one another"¹⁰⁴. Further, in [*Peko-Wallsend Ltd*] Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is "manifestly unreasonable". Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed *a particular error in reasoning*, given *disproportionate weight* to some factor or *reasoned illogically* or *irrationally*, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

As to the question of when inferences might be drawn of legal unreasonableness, Hayne, Kiefel and Bell JJ saw a close analogy with the way in which inferences may be drawn by an appellate court when reviewing the exercise of a discretion by the primary judge identified in the well understood passages in *House v The King*¹⁰⁵. Their Honours put the matter this way¹⁰⁶:

As to the inferences that may be drawn by an appellate court, it was said in *House v The King* that an appellate court may infer that in some way there has been a failure properly to exercise the discretion "if upon the facts [the result] is unreasonable or plainly unjust". The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference *drawn from the facts* and from the matters falling for consideration *in the exercise of the statutory power*. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a *conclusion* which may be applied to a decision which lacks *an evident and intelligible justification*.

¹⁰² *ibid* at [28]

¹⁰³ *ibid* at [72]; emphasis added

¹⁰⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229

¹⁰⁵ (1936) 55 CLR 499 at 505

¹⁰⁶ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76], emphasis added

Two matters are worthy of note.

The *first* is that where errors in decision-making are identified of the kind described in *Craig* and *Yusuf*, those errors, plainly enough, give rise to jurisdictional error on the footing that the decision-maker has exceeded the limits of the statutory power.

The *second* is that it seems inevitable (although the matter remains open to debate) that in circumstances where a *conclusion* of unreasonableness arises in the exercise of the discretionary decision-making power, because a decision “lacks an evident and intelligible justification”, the decision-maker also falls into jurisdictional error and that is so because exercising the power in a way which fails to conform to the “legal standard of reasonableness”¹⁰⁷, recognising that the statute imposes an obligation to exercise the power reasonably, involves an *excess* of jurisdiction.

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

For example, in *Li*, the decision in question was an exercise of a power of adjournment exercised adversely to Ms Li which carried, with it, the consequence that the Migration Review Tribunal had failed to discharge its “core statutory function” of reviewing, on the merits, the decision of the Minister’s delegate to refuse Ms Li the relevant class of visa¹⁰⁸ as the decision to refuse the adjournment prevented Ms Li from placing a critical document before the Tribunal which the Tribunal knew Ms Li was seeking to obtain and was required as a matter of *fairness* in the discharge and performance of the critical review power.

As to the two streams of unreasonableness made up of unreasonableness inherent in a “conclusion” that a decision lacks an “evident and intelligible justification”, on the one hand, and unreasonableness as an underlying rationale for “the more specific errors in decision-making to which courts often refer”, see also the discussion in the Full Court of the Federal Court in *Minister for Immigration and Border Protection v Singh*¹⁰⁹.

As to the test for unreasonableness, Gageler J said¹¹⁰ that the label “*Wednesbury* unreasonableness” indicates the *special standard* of unreasonableness which has become *the*

¹⁰⁷ *ibid*, Hayne, Kiefel and Bell JJ at [68]

¹⁰⁸ The visa in question was a Skilled-Independent Overseas Student (Residence) (Class DD) visa pursuant to the provisions of the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth).

¹⁰⁹ (2014) 308 ALR 280 at [44], Allsop CJ, Robertson and Mortimer JJ at [44] to [52]

¹¹⁰ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, Gageler J at [106]

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

In judging unreasonableness, Gageler J put the matter this way in *Li*¹¹¹:

... Review by a court of the reasonableness of a decision made by another repository of power “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” but also with “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” [*Dunsmuir v New Brunswick*].

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

A number of other matters should be noted.

First, where no reasons are given for the exercise of a discretionary power, all a supervisory court can do is focus on the outcome of the exercise of the power, in the factual context presented, and assess for itself, whether there is an evident and intelligible justification for the exercise of the power, keeping in mind, of course, that it is for the repository of the power, and the repository alone, to exercise the power. The repository of the power must do so, however, according to law¹¹².

Second, where reasons are given for the exercise of the discretionary power, the court will look to the reasoning process of the decision-maker to identify the factors in the reasoning said to make the decision legally unreasonable. In doing so, the court is confined to the reasons given by the decision-maker. The decision cannot be supported on review by the court on the basis of an hypothesis (living outside the actual reasons for decision) about the things that may otherwise accord reasonableness to the decision.

Third, where the exercise of the power is said to be unreasonable on the footing that the decision-maker has fallen into “the more specific errors in decision-making to which courts often refer” (such as the *Craig* and *Yusuf* formulations recognising, of course, that those

¹¹¹ *ibid*, Gageler J at [105]

¹¹² *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280 at [45]

formulations are not “exhaustive”) which may well “overlap”, the reasonableness review will concentrate on an examination of the reasoning process reflected in the reasons given by the decision-maker. Where the challenge to the reasonableness of the exercise of the power is based upon the notion that a conclusion arises¹¹³ that the decision lacks an evident and intelligible justification, the court will examine the reasons, however brief, and determine, in light of those reasons, *and* the facts and matters falling for consideration in the exercise of the statutory power, whether an evident and intelligible justification is lacking.

Fourth, although reference is made to the analogue of *House v The King*¹¹⁴, it must be remembered that on an appeal from the exercise of the discretion by a primary judge, the *court* re-exercises the discretion once it has demonstrated that the exercise of the discretion has miscarried. That is not the role of the supervising court in reviewing an exercise of discretionary power by an administrative decision-maker so as to determine the legality of the exercise of the power.

Fifth, the standard of legal reasonableness determined in accordance with these principles will apply to a range of statutory powers conferred upon decision-makers “but the indicia of *legal unreasonableness* will need to be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case”¹¹⁵.

Sixth, in reviewing a decision on the ground of legal unreasonableness, the supervising court will be required, inevitably, to closely examine the facts upon which the exercise of the power was dependent. This is done not for the purpose of enabling the court to substitute its own view of the exercise of the discretionary power for that of the decision-maker. The point of the exercise is to recognise that any analysis which engages a question of *whether* there is an **evident** and **intelligible** justification for the exercise of the power will involve “scrutiny of the factual circumstances in which the power comes to be exercised”¹¹⁶.

Seventh, it is important to recognise the implications of the observations of McHugh, Gummow and Hayne JJ in *Yusuf*¹¹⁷ that “different kinds of error may well overlap”. In examining the exercise of the power and determining whether it is legally unreasonable, there may well be an interaction between the obligations of procedural fairness in the exercise of the power and the standard of legal reasonableness in the exercise of the power. Thus, in

¹¹³ A conclusion of the kind described in *Li* by Hayne, Kiefel and Bell JJ at [76].

¹¹⁴ (1936) 55 CLR 499 at 505

¹¹⁵ *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280 at [48]

¹¹⁶ *ibid* at [48]

¹¹⁷ *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]

some circumstances, “an exercise of power which is said to be legally unreasonable may overlap with alleged denial of procedural fairness *because* the result of the exercise of the power may affect the **fairness** of the decision-making process”¹¹⁸.

Eighth, as to examples of the application of these principles and the true nature of a factual inquiry which would not engage merits review, see *Singh*¹¹⁹, *SZRKT*¹²⁰ and *Goodwin*¹²¹.

Ninth, in making these observations, two further things should be mentioned. *First*, obviously enough, I have not had regard to any of the State judicial review legislation or the application of the *Administrative Decisions (Judicial Review) Act 1997* (Cth) as any of those Acts can from time to time be rendered inapplicable to particular legislation conferring decision-making powers. *Second*, in *Li*, Hayne, Kiefel and Bell JJ observe¹²² that the duty cast on the Tribunal to invite an applicant for review to appear before it is *central* to the conduct of the review and that the statutory purpose is one of providing the applicant with an opportunity to present evidence and argument relating to the issues addressed in the review as an essential element of the statutory review function. Thus, in exercising the discretionary power to adjourn (or not) a review proceeding before it:

... consideration could be given to whether the Tribunal gave excessive weight – more than was reasonably necessary – to the fact that Ms Li had had an opportunity to present her case¹²³. So understood, **an obviously disproportionate response is one path** by which a **conclusion** of unreasonableness may be reached. However, the submissions in this case do not draw upon such an analysis.

These observations of the majority raise the spectre of whether a conclusion of unreasonableness might arise in the exercise of a discretion having regard to the law relating to *proportionality analysis*. That topic, however, is a topic for an entirely separate address

¹¹⁸ *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280 at [50]

¹¹⁹ *ibid* at [53] to [77]

¹²⁰ *Minister for Immigration & Citizenship v SZRKT* (2013) 212 FCR 99 at [77]

¹²¹ *Goodwin v Commissioner of Police (NSW)* [2012] NSWCA 379

¹²² (2013) 249 CLR 332 at [60] and [74]; emphasis added

¹²³ Ms Li, a Chinese national, had applied for a Skilled-Independent Overseas Student (Residence) (Class DD) visa under the provisions of the *Migration Act 1958* (Cth). A criterion for the grant of the visa under the *Migration Regulations 1994* (Cth) was that Ms Li, at the time of the visa decision (by the Migration Review Tribunal, relevantly, at the time of the review decision) hold a favourable “skills assessment” from a relevant “assessing authority”. Ms Li had, in fact, obtained an unfavourable assessment (which was her second assessment) from an assessing authority called Trades Recognition Australia (TRA) and had applied to TRA for a review of that assessment. Ms Li’s migration agent had requested the Tribunal not to make a decision on Ms Li’s pending review application until the TRA’s review of the assessment had been completed and the assessment itself completed. The Tribunal refused to do so and affirmed the decision of the delegate which was adverse to Ms Li. To the extent that the Tribunal gave “reasons” for refusing to withhold consideration of the review decision until the TRA had completed its exercises, the Tribunal said that Ms Li had “had enough time”.

both as to the content of such an analysis and the jurisprudence relating to it and its application in the context of the questions I have been discussing. I have kept you too long and I thank you for your attention.

The Hon Justice Andrew Greenwood

Federal Court of Australia

27 April 2017