

LEGAL UNREASONABLENESS AFTER *Li*— A PLACE FOR PROPORTIONALITY

ANTHONY J BESANKO

Judge of the Federal Court of Australia
Inns of Court Visiting Fellow (2019–2020)
IALS (University of London)¹

Abstract

Substantive legal unreasonableness as a ground of judicial review of the exercise of an administrative discretionary power was not often successful in Australia due to the strictness of Lord Greene’s formulation of the test in *Wednesbury*. In 2013, the High Court of Australia reformulated the test in *Minister for Immigration and Citizenship v Li*. That gives rise to questions as to how certain and transparent a test of legal reasonableness can be. The courts in England have considered similar questions concerning *Wednesbury* unreasonableness often accompanied by a consideration of proportionality principles. This article examines those questions and the extent to which the Australian courts may follow developments in England.

[A] INTRODUCTION

In Australian administrative law, the specific grounds upon which the exercise of a discretionary power may be set aside on an application for judicial review are well known and include errors such as bad faith, taking into account irrelevant considerations, or failing to take into account relevant considerations, and exercising a discretionary power for an improper purpose. There is also a more general ground of unreasonableness, or, as it has been referred to in more recent cases, legal unreasonableness. Before the High Court of Australia’s decision in 2013 in *Minister for Immigration and Citizenship v Li* (2013) (*Li*), the more general ground of unreasonableness was commonly described in terms of Lord Greene MR’s formulation in *Associated Provincial Picture Houses*

¹ The author wishes to express his thanks to the Institute of Advanced Legal Studies (IALS) at the University of London and the Inns of Court for their sponsorship of the Inns of Court Visiting Fellowship 2019–2020.

Ltd v Wednesbury Corporation (1948) (*Wednesbury*): an exercise of an administrative discretionary power is legally unreasonable if it results in a decision that is so unreasonable that no reasonable person could ever have come to it. Although this formulation was strongly criticized from time to time for its circularity and vagueness, it held its position firmly as the test of legal unreasonableness, not involving one of the specific errors, until 2013. As noted by Professor Paul Craig (Craig 2021: paragraph 21-007), Lord Greene used unreasonableness in two senses, that is, first as an ‘umbrella’ term to describe all the errors comprising jurisdictional error in the case of the exercise of an administrative discretionary power, and secondly, giving unreasonableness a ‘substantive’ meaning in its own right.

This article is addressed to the substantive meaning of unreasonableness as a ground of judicial review. In *Li*, the High Court said that Lord Greene’s formulation was open to the interpretation that it is limited to what is, in effect, an irrational, if not, bizarre decision. The court also said that Lord Greene’s judgment in *Wednesbury* should not be taken to have limited unreasonableness in that way, but it is not necessary for me to examine that proposition. The court said that the legal standard of unreasonableness was not limited to the irrational, if not, bizarre decision (*Li* 2013: 68 per Hayne J, Kiefel J (as her Honour then was) and Bell J). This represented an expansion of the ground of legal unreasonableness in the case of the exercise of an administrative discretionary power or, at least, in the understanding of many administrative lawyers in this country as to the scope of the ground.

One purpose of this article is to identify, as far as possible, the matters which, since *Li*, determine the standard of legal unreasonableness in the case of the exercise of an administrative discretionary power. Another purpose is to consider whether a form of proportionality analysis may be fit for the purpose of determining legal unreasonableness in all cases involving the exercise of an administrative discretionary power or, at least, in some cases. Notions of proportionality inform legal principle in many areas of law, but the test of proportionality may, depending on the context, vary from a highly structured test involving a number of steps to a simple more general test. If a proportionality analysis is useful in determining legal unreasonableness, it is necessary to consider what form the analysis should take.

Wednesbury unreasonableness and the proportionality principle are important doctrines in administrative law in England and have been the subject of considerable analysis and development in recent cases,

including argument at the highest level that the proportionality principle should replace *Wednesbury* unreasonableness. I will examine those developments with a view to commenting on the extent to which they might be adopted in this country.

[B] THE AUTHORITIES BEFORE *LI*

There is very early authority for the proposition that an apparently unconfined discretion cannot be exercised in an arbitrary or capricious way.

In *Rooke's Case* (1597), the Commissioners of Sewers had imposed taxes on landowners adjoining the River Thames. The issue raised was whether the Commissioners were justified in imposing taxes on some landowners, but not others whose lands were equally subject to flooding. The court said (citations omitted):

and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections;

In the often-cited case of *Sharpe v Wakefield* (1891), the House of Lords considered the breadth of the discretion entrusted to Licensing Justices to grant a licence by way of renewal for the sale of intoxicating liquors. In addressing the discretion reposed in the Licensing Justices, Lord Halsbury LC said (citation omitted):

An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case*; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular (*Sharpe v Wakefield* 1891: 179).

In an early decision of the High Court of Australia, the court considered the breadth of the discretion given to a local government authority to register and grant a certificate of registration to an occupier of ground to conduct public amusement and entertainment on that ground (*Randall v Northcote Town Council* 1910). Griffith CJ referred to Lord Halsbury LC's observations in *Sharpe v Wakefield* (1891: 105-106). Isaacs J (as his Honour then was) said:

To justify interference I am of opinion that the reasons actuating the Council must be such that no reasonable men could honestly view them as coming within the wide, indefinite and elastic limits of the powers of local self-government as conferred by Parliament (*Randall v Northcote Town Council* 1910: 118).

A formulation of legal unreasonableness akin to Lord Greene's formulation was applied by the High Court in the case of a municipal council levying a local rate for the execution of work or service under local government legislation (*Parramatta City Council v Pestell* 1972: 327 per Gibbs J (as his Honour then was)), the determination of the price of bread by the Prices Commission under statute (*Bread Manufacturers of New South Wales v Evans* 1981: 420 per Gibbs CJ), and the exercise of jurisdiction by the Conciliation and Arbitration Commission under the Conciliation and Arbitration Act 1904 (Cth) (*R v Moore; Ex parte Co-operative Bulk Handling Ltd* 1982: 222).

In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) (*Peko-Wallsend*), Mason J (as his Honour then was) said that Lord Greene's formulation of legal unreasonableness had been embraced in both Australia and England. His Honour noted that Lord Greene's formulation had been adopted by the legislature in the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act). The ADJR Act gave a right of review to aggrieved persons with respect to certain decisions made under Commonwealth legislation. The grounds of review in the Act reflected the grounds of judicial review at common law and include a ground that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made (section 5(1)(e)). An improper exercise of power was defined to include, among other errors, the exercise of a power that is so unreasonable that no reasonable person could have so exercised the power (section 5(2)(g)).

Justice Gummow, before his elevation to the High Court and sitting as a judge of the Federal Court of Australia in *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat & Livestock Corporation* (1990: 166) (*Fares Rural Meat*) also observed that sections 5(1)(e) and 5(2)(g) of the ADJR Act were drawn from the ground of review at general law propounded by Lord Greene MR in *Wednesbury*. At the same time, his Honour made the observation that there was force in the criticism that both Lord Greene's formulation of unreasonableness and subsequent attempts to explain or amplify it have been 'bedevilled by circularity and vagueness' and he referred to Allars (1990: paragraph 5.52). His Honour referred to Dr Allars' attempt to instil a measure of order into the authorities dealing with *Wednesbury* unreasonableness by identifying three paradigm cases

of unreasonableness as rooted in the law as to the misuse of fiduciary powers. The paradigm cases are as follows: (1) the capricious selection of one of a number of powers open to an administrator in a given situation to achieve a desired objective, the choice being capricious or inappropriate in that the exercise of the power chosen involves an invasion of the common law rights of the citizen, whereas the other powers would not; (2) discrimination without justification, a benefit or detriment being distributed unequally amongst the class of persons who are the objects of the power; and (3) an exercise of power out of proportion in relation to the scope of the power.

Justice Gummow decided that the exercise of power in the case before him could not be characterized as having been carried out ‘in such a disproportionately arbitrary manner as to attract review on *Wednesbury* grounds’.

The judgment of Brennan J (as his Honour then was) in *Attorney-General (NSW) v Quin* (1990) (*Quin*) has been very influential in Australian administrative law. His Honour said the following as to the difference between the legality of administrative action and the merits of such action:

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 (*Quin* 1990: 35-36).

His Honour said that the consequence is that the scope of judicial review must be defined in terms of the extent of the power and the legality of its exercise.

His Honour then referred to *Wednesbury* unreasonableness in the terms identified by Lord Greene and said that, properly understood, such a ground of challenge leaves the merits of a decision or action unaffected unless the decision or action amounts to an abuse of power. The limitation on the exercise of the power embodied in Lord Greene’s formulation is ‘extremely confined’ (*Quin* 1990: 36).

Justice Brennan said that the court must not usurp the role of the decision-maker, a role given to the decision-maker by the legislature. A court was not equipped to evaluate the policy considerations which might bear on the balance to be struck between the interests of the community

and those of minority groups. Nor is the adversary system with its costs consequences best suited to assessing the interests of those who may not be represented before the court.

[C] THE DECISION IN *LI* AND SUBSEQUENT CASES

The facts in *Li* were simple. The respondent was a non-citizen who had been training and obtaining work experience as a cook. She applied for a Skilled-Independent Overseas Student (Residence) (Class DD) visa. Her application was refused by a delegate of the Minister for Immigration and Citizenship. A necessary requirement for the visa for which the respondent had applied was a favourable skills assessment by Trades Recognition Australia (TRA). The respondent applied to TRA for a fresh assessment of her skills, but had not received a response when she applied to the Migration Review Tribunal (the Tribunal) for a review of the delegate's decision. The TRA's decision on the respondent's application for a fresh skills assessment was unfavourable and the respondent applied to the TRA for a review of that decision. Her application for review by the Tribunal and her application to TRA for a review of its assessment of her skills were both pending.

The review by the Tribunal of the delegate's decision was conducted under Part 5 of the Migration Act 1958 (Cth) and within that Part, the Tribunal was given a general power to adjourn the review from time to time (section 363(1)(b)). The Tribunal affirmed the delegate's decision without waiting for advice from the applicant as to the outcome of the representations of the respondent's migration agent to the TRA. The Tribunal's explanation for why it had decided to proceed in those circumstances was because it considered 'that the applicant has been provided with enough opportunities to present her case'. The court at first instance held that the Tribunal's decision to proceed in those circumstances was unreasonable 'in the *Wednesbury Corporation* sense' and that decision was upheld by the intermediate appellate court. The High Court dismissed the Minister's appeal.

There were three sets of reasons, joint reasons of Hayne, Kiefel and Bell JJ, and separate reasons by French CJ and Gageler J respectively.

The plurality pointed out that the tribunal's power to adjourn was subject to a legal presumption that the legislature intended that a discretionary power, statutorily conferred, will be exercised reasonably. The plurality decided that the Tribunal's decision to bring the review

to an abrupt conclusion was not reasonable in light of its obligation to invite an applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review (section 360). In relation to Lord Greene's formulation of legal unreasonableness, the plurality said:

Lord Greene MR's oft-quoted formulation of unreasonableness in *Wednesbury* has been criticised for 'circularity and vagueness', as have subsequent attempts to clarify it. However, as has been noted, *Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. 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—nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment 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 (Li 2013: 68 citations omitted).

The plurality referred to the judgment of Dixon CJ in *Klein v Domus Pty Ltd* (1963) (*Klein v Domus*) where the following expression in section 63(3) of the Workers' Compensation Act 1926–1960 (NSW) was under consideration: 'if he is satisfied that sufficient cause has been shown, or that having regard to all the circumstances of the case, it would be reasonable so to do'.

As to the scope of the power governed by this expression, Dixon CJ in *Klein v Domus* said:

We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case (1963: 473).

In *Li*, the plurality went on to say that the legal standard of reasonableness must be the standard indicated by the true construction of the statute.

The plurality referred to various existing concepts and principles which may assist in determining the standard of legal reasonableness in a particular case, recognizing that ultimately the decisive factor is the

scope and purpose of the statute. Those existing concepts and principles include the following concepts and principles.

First, the plurality said that the approach to appellate review of the exercise of a judicial discretion may also be of assistance in determining legal unreasonableness in a particular case. Many of the modern Australian authorities refer to the close analogy between judicial review of administrative action and appellate review of a judicial discretion (*Peko-Wallsend* 1986: 42 per Mason J). It is sufficient to refer to the leading case in Australia on appellate review of a judicial discretion, *House v The King* (1936: 505), where Dixon, Evatt and McTiernan JJ said:

It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred (*Lovell v Lovell* 1950; *Gronow v Gronow* 1979; *Mallett v Mallett* 1984).

In *Norbis v Norbis* (1986: 518), Mason and Deane JJ described a discretionary power as one involving assessments calling for value judgments ‘in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right’.

Secondly, albeit a case concerning the validity of by-laws, the plurality referred to the often-cited remarks of Lord Russell of Killowen CJ in *Kruse v Johnson* (1898) that by-laws may be struck down because: (1) the by-laws are partial and unequal in their operation as between classes; (2) the by-laws are manifestly unjust; (3) there is bad faith; (4) the by-laws involve such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.

The plurality in *Li* said that unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification. Chief Justice French said that the canons of rationality mean that administrative decision-makers exercising discretion must reach their decisions by reasoning which is intelligible and reasonable

and directed towards and related intelligibly to the purposes of the power. The Chief Justice went on to say that the requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters, or has made an evaluative judgment with which the court disagrees even though that judgment is rationally open to the decision-maker. Finally, his Honour noted that a distinction may 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 characterized as irrational, and it may also be characterized as unreasonable ‘simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves’ (*Li* 2013: 30).

Justice Gageler referred to the implication of reasonableness as a manifestation of ‘the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to *reason* within limits set by the subject-matter, scope and purposes of the statute’ (*Li* 2013: 90). His Honour noted that there will be room for disagreement in the judicial application of legal unreasonableness to the exercise of administrative discretion and, in that context, his Honour referred to the following observations of Frankfurter J in *Universal Camera Corp v National Labor Relations Board* (1951: 488–489) (*Universal Camera*):

A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

Finally, his Honour observed that a supervising court was in a better position to assess reasonableness in the case of the exercise of a power familiar to it such as the exercise or non-exercise of a power to adjourn than in a case where the exercise of the power is informed by policies of which the court had no experience.

The High Court and the Full Court of the Federal Court have considered the effect of *Li* in subsequent decisions.

In *Minister for Immigration and Border Protection v SZVFW* (2018), the respondents’ applications for protection visas were refused by a delegate

of the Minister for Immigration and Border Protection. The respondents applied to the Refugee Review Tribunal under Part 7 of the Migration Act for review of the delegate's decision. As required by the Act, they were invited to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review, but they did not appear on the scheduled date. They were also invited to provide documentation in support of their application for review, but did not do so.

Under the Act, the Tribunal was given the power, if the applicant did not appear before the Tribunal in response to an invitation, to make a decision on the review without taking further action to allow or enable the applicant to appear before it. The Tribunal took that course and it affirmed the delegate's decision.

The respondents sought judicial review of the Tribunal's decision and the court at first instance held that the Tribunal's decision was legally unreasonable because the Tribunal could not have been satisfied that the letter inviting the respondents to attend the hearing was received by them. The court said that the attendance of the respondents at the hearing was important to them and the Tribunal could have attempted some other action before proceeding to make its decision.

The decision of the court at first instance was upheld by the intermediate appellate court on the ground that the assessment of unreasonableness by the court at first instance involved a discretionary judgment and the principles applicable to an appellate court's interference with a discretionary judgment were engaged. The result was that the intermediate appellate court declined to interfere with the decision of the court at first instance.

On appeal to the High Court, the court held that the intermediate appellate court had erred in treating the decision by the court at first instance as to unreasonableness as one involving the exercise of a discretion. The High Court held that the Tribunal's decision to proceed was not legally unreasonable.

Of present importance are the High Court's observations as to the standard of legal reasonableness. Kiefel CJ said that one test of legal unreasonableness was that the decision lacked an evident and intelligible justification (*Li* 2013: 10). The Chief Justice said that, on any view, the test for legal unreasonableness is necessarily stringent (*Li* 2013: 11). Gageler J said that reasonableness is not exhausted by rationality and that it is inherently sensitive to context and that it could not be reduced

to a formulary (*Li* 2013: 59). Nettle and Gordon JJ said that it would be a rare case in which the exercise of a discretionary power was unreasonable where the reasons of the decision-maker demonstrated a justification for that exercise of power (*Li* 2013: 84). Their Honours also stressed that 'legal unreasonableness is invariably fact dependent and requires a careful evaluation of the evidence' (*Li* 2013: 84). Edelman J referred to the now abandoned distinction in Canadian law between patent unreasonableness reflecting Lord Green's formulation and unreasonableness simpliciter. There are not two tests of unreasonableness. There is but one test based on the statutory context, including the scope, purpose and real object of the statute (*Li* 2013: 134).

In *ABT17 v Minister for Immigration and Border Protection* (2020), the appellant was a citizen of Sri Lanka of Tamil ethnicity who arrived in Australia without a visa. He applied for a protection visa and stated his fear of persecution related to his treatment in Sri Lanka by the Sri Lankan army and the belief of the authorities that he was involved with the Liberation Tigers of Tamil Eelan. He claimed that he had been beaten by members of the Sri Lankan army and sexually tortured.

The legislative scheme under which his application was considered involved a decision by a delegate of the Minister for Immigration and Border Protection and then, if the decision was unfavourable to the applicant, administrative review by the Immigration Assessment Authority (the IAA). The IAA was empowered to consider the matter afresh and to make what it considered to be the correct and preferable decision. The IAA was provided with review material which had been before the delegate. It was not obliged to interview an applicant, but could do so in the exercise of a discretion.

The delegate interviewed the appellant in person before making a decision and the interview was the subject of an audio-recording, but not a video-recording. The audio-recording was part of the review material provided to the IAA. The delegate found that the appellant's account of being detained and sexually tortured by the Sri Lankan army was plausible, but rejected the appellant's application for a protection visa on an unrelated ground.

The IAA listened to the audio-recording and drew conclusions from it which were adverse to the appellant. It departed from the delegate's findings concerning the appellant's detention and sexual torture by the Sri Lankan army. The IAA did not interview the appellant.

The legislative scheme proceeded on the basis that the IAA would review the delegate's decision by reference to the review material which had been before the delegate, subject to an ability to obtain new information. The difficulty in the case before the High Court arose because of the informational gap in the information before the delegate who had both *seen* and heard the appellant, and the IAA who had only heard the appellant. The court observed that the opportunity to see the appellant is an opportunity to assess his demeanour.

The High Court held that the implied condition of reasonableness attaching to both the duty to review the delegate's decision and to the power to get new information had been breached by the rejection of the appellant's account of detention and torture without inviting the appellant to an interview.

The plurality (Kiefel CJ, Bell, Gageler and Keane JJ) said that the implied condition of reasonableness applied to not only why a decision is made, but also to how it is made and that a decision must not only have an intelligible justification, but also be arrived at through an intelligible decision-making process. In the case before the court, the IAA had not arrived at its decision through an intelligible decision-making process.

The Full Court of the Federal Court considered the effect of the High Court's decision in *Li* in *Minister for Immigration and Border Protection v Singh* (2014) (*Singh*) and in *Minister for Immigration and Border Protection v Stretton* (2016) (*Stretton*).

The Full Court in *Singh* made the following observations: (1) there is no single form of words that expresses the standard of legal unreasonableness in the sense of unreasonableness not involving a specific error; (2) one form of words used in *Li* and used in *Singh* is whether there is an intelligible justification for the decision; (3) where reasons are given, the intelligible justification must be found in those reasons; (4) the indicia for legal unreasonableness will be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case; (5) the analysis of legal unreasonableness will require a very close examination of the facts of the case before the court; (6) in the case of power of adjournment which was the power in issue in *Singh*, there is clearly potential for an overlap between legal unreasonableness and a denial of procedural fairness; and (7) if a proportionality analysis were adopted, there was a lack of proportionality between the object of proceeding expeditiously on the one hand, and the refusal of a short adjournment when the effect of the latter on the applicant for review is considered, on the other. In other words, the exercise of the power to adjourn will result in the delay of the

review. Nevertheless, there may be good reason to adjourn and a failure to adjourn may have severe consequences for the applicant for review. The refusal of a *short* adjournment may, and in *Singh* did, amount to a disproportionate response to the circumstances such that the exercise of the power was legally unreasonable.

In *Stretton*, Allsop CJ said that the proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another. Griffiths J considered that there might be support in the decision of the High Court in *McCloy v New South Wales* (2015: 3) (*McCloy*) for the proposition that the concept of proportionality is an aspect of judicial review of administrative action. His Honour considered that resort to formula distracted attention from the key question which is whether *the administrative decision is one which is within the authority of the decision-maker to make* and that, in turn, required close attention to be given to the statutory framework, including the subject matter, scope and purpose of the relevant statutory power (*McCloy* 2015: 62).

In summary, the effect of *Li* and the cases which have followed is that legal reasonableness is implied into the conferral of an administrative discretion and it is no longer appropriate to identify the standard by reference to Lord Greene's formulation. The standard is fixed by reference to the statutory context, including the subject matter, scope and purpose of the relevant statutory power. If it is to be reduced to a single question, that question is whether a reasonable decision-maker could have reached the decision under challenge, or could have reached the decision by the process adopted in the case under challenge? There is no indication that the move away from Lord Greene's formulation is intended to have any effect on the principles identified by Brennan J in *Quin* that the court is not to usurp the role of the principal decision-maker by involving itself in the merits of a decision.

The courts have used phrases which identify in different words the conclusion reached (eg within the area of decisional freedom) or identify general aspects of reasonableness or aspects that might arise in a particular case. Examples of phrases or expressions identifying general aspects of reasonableness are an evident and intelligible justification or an intelligible decision and an intelligible decision-making process. Examples of phrases or expressions that identify aspects that might arise in a particular case are the three paradigms referred to by Gummow J in *Fares Rural Meat* and the grounds upon which by-laws may be struck down identified by Lord Russell in *Kruse v Johnson*. Finally, as I have

said, in an appropriate case, a court may rely on the principles developed in relation to appellate intervention in the exercise of a judicial discretion.

Reference has been made in the authorities to an exercise of power being illogical, irrational or based on findings of fact or inferences of fact not supported by logical grounds. There is debate in Australia as to whether this is a subset of unreasonableness or a ground for setting aside a finding of jurisdictional fact which involves the reasonable satisfaction of the administrative decision-maker as to a particular matter (*Minister for Immigration and Citizenship v SZMDS* 2010: 39 per Gummow ACJ and Kiefel J, per Crennan and Bell JJ 129; *Li* 2013: 90 per Gageler J).

What role, if any, does proportionality play in determination of the standard of legal reasonableness in Australia in the case of judicial review of an administrative discretionary power? Obviously, it is not a free-standing ground of judicial review. Nor is it simply an alternative way of describing legal reasonableness. A lack of proportionality is an appropriate description in some cases of the feature in the case that gives rise to the conclusion of legal unreasonableness. Cases in which there are clearly defined purposes for the exercise of the power and a number of available options are more likely to attract a proportionality analysis. A conclusion of a lack of proportionality giving rise to legal unreasonableness does not involve the application of the highly structured test of proportionality applied in other areas of the law. Furthermore, it is not a form of proportionality which involves a consideration of the merits of an administrative decision.

[D] PROPORTIONALITY IN AUSTRALIA

A form of the proportionality principle is applied in a number of areas of Australian law. Even in cases in which it is not the actual tool of analysis, proportionality contributes to the formulation of legal principle. A great deal can be said about this topic, but I need make only three points.

First, Australian courts have applied a proportionality test in dealing with the implied freedom of communication of and concerning political and governmental matters under the Constitution (*McCloy*), the guarantee contained in section 92 of the Constitution that trade, commerce and intercourse between the States shall be ‘absolutely free’ (*Palmer v State of Western Australia* 2021: 54-68 per Kiefel CJ and Keane J, 264-276 per Edelman J; but contra Gageler J at 140-151 and Gordon J at 198), control orders under the Criminal Code (Cth) to reduce the risk of the commission of terrorist acts (*Thomas v Mowbray* 2007: 19 per Gleeson CJ); sentencing for offences under the criminal law (*Veen v The Queen* (No

2) 1988: 477 per Mason CJ, Brennan, Dawson and Toohey JJ; *Pattinson v Australian Building and Construction Commissioner* 2020: 41 per Allsop CJ, White and Wigney JJ) and in determining the validity of delegated legislation in certain circumstances (*Attorney-General (SA) v Adelaide City Corporation* 2013: 61 per French CJ).

Secondly, proportionality does not have one fixed meaning. It can range from a simple analysis of the balance between means and ends to the highly structured approach adopted when legislative interference with an implied freedom under the Constitution is in issue. The highly structured approach involves, at the stage of the analysis where the question being considered is whether the law is reasonably appropriate and adapted to advance an object determined at an earlier stage of the analysis to be legitimate, a consideration of whether the law meets the following criteria: (1) suitability, that is to say, it has a rational connection to the purpose of the provision; (2) necessity, that is to say, there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and (3) adequate in its balance, that is, a criterion which requires a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom (*McCloy* 2015: 2 per French CJ, Kiefel, Bell and Keane JJ). The value judgment referred to in (3) does not entitle the courts to substitute their own assessment for that of the legislative decision-maker.

Finally, a far less structured test of proportionality has, from time to time, been identified as a feature which can be used to determine the question of the legal reasonableness of the exercise of an administrative discretionary power. Gummow J's approach in *Fares Rural Meat* drew on such an analysis as did French CJ's example of using a sledgehammer to crack a nut in *Li*. More recent authority indicates that the terms of the legislation conferring the administrative discretion may carry with it a requirement of proportionality in the decision-making process. For example, Kiefel J took that view in *Wotton v State of Queensland* (2012: 91) in the case of a power to impose such conditions as the decision-maker 'reasonably considers necessary'. Furthermore, the task of imposing a penalty by the exercise of an administrative discretion will, in order to be judged as reasonable or unreasonable, inevitably involve a consideration of the relationship between the nature of the breach and the severity of the penalty, that is whether the latter is proportionate to the former (*Comcare v Banerji* 2019: 84 per Gageler J).

[E] DEVELOPMENTS IN ENGLAND

The law in England as to *Wednesbury* unreasonableness and the principle of proportionality has developed through a series of important decisions of the House of Lords (Supreme Court). The enactment of the Human Rights Act in 1998, including, as a Schedule to that Act, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European principle of proportionality, have been major influences.

The starting point is Lord Diplock's speech in *Council of Civil Service Unions v Minister for the Civil Service* (1985: 408). In that case, not only did his Lordship suggest that proportionality may in time become a fourth ground of judicial review, but he described *Wednesbury* unreasonableness in terms no less demanding than Lord Greene's formulation. His Lordship said that it comprised 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.

In 1991, the House of Lords considered arguments in a judicial review application that certain directives issued under a statutory power in the Broadcasting Act and relating to the content of broadcasts by an independent broadcaster and a public broadcaster were invalid on the grounds of unreasonableness and a lack of proportionality: *R v Secretary of State for the Home Department, Ex parte Brind* (1991) (*Brind*). In support of their challenge, the broadcasters relied on the right to freedom of expression in Article 10 of the Convention. The court held that the statutory provision was unambiguous and the Convention had no role to play in its application. The court held that the Secretary of State who had issued the directives had not made a decision which was legally unreasonable. The possibility of applying a doctrine of proportionality to the exercise of power (in addition to the doctrine of legal unreasonableness) was rejected in the particular case because to do so would be to substitute the court's view for that of the Secretary of State. Lord Lowry made the following important observations: (1) the *Wednesbury* unreasonableness test may be reformulated as a question whether a decision-maker acting reasonably could have reached the decision with the qualification that in answering this question, the supervising court must bear in mind that it is not sitting on appeal, but satisfying itself as to whether the decision-maker has acted within the bounds of his discretion; and (2) there is no doctrine of proportionality in English law and there are very good reasons why the courts do not involve themselves in a consideration of the merits of administrative

decisions. Lord Lowry's statement of those reasons reflects to a significant extent the reasons identified by Brennan J in *Quin*.

In *R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd* (1999), the applicant for judicial review challenged the Chief Constable's decision about how police resources were to be allocated to deal with protests in respect of live animal exports. The decision was challenged on two grounds, namely, *Wednesbury* unreasonableness and a European Union (EU) element being a breach of Article 34 of the EC Treaty. The application for judicial review failed. In the course of his speech, Lord Cooke made observations to the following effect: (1) the application of European concepts of proportionality and a margin of application produced in the particular case, and is likely to in many cases, the same results as the application of *Wednesbury* principles; (2) Lord Greene's formulation is tautologous and may be described as an admonitory circumlocution; (3) unnecessary complexity is avoided by the simple test of whether the decision was one which a reasonable authority could reach. The converse of such a test is 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt', referring to the words of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* (1977: 1064). Lord Cooke concluded his remarks by saying: 'These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers' (*R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd* 1999: 452).

In *R (Daly) v Secretary of State for the Home Department* (2001) (*Daly*), a prisoner serving a term of life imprisonment brought an application for judicial review in which he challenged a policy adopted by the Home Secretary concerning searches of prisoners' cells and, in particular, the examination by the authority in the prisoner's absence of legal correspondence. The application for judicial review was based on two grounds: (1) common law judicial review grounds; and (2) an alleged breach of the right in Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) as it appears in a Schedule to the Human Rights Act 1998 to respect for his correspondence.

The court upheld the challenge and held that the Home Secretary's policy was void insofar as it permitted searches of a prisoner's legal correspondence in his absence in all cases. The court noted that the common law grounds and the Convention ground overlapped and, in the case before the court, produced the same result as (it was said) they would often do.

Nevertheless, the court said that the common law test formulated in *Wednesbury* was not the same as the test of proportionality applied in the case of an alleged breach of a right in the Convention.

The court identified the proportionality principle as applied to the Human Rights Act and a Convention right as one which involves a three-stage process where the court asks itself the following questions:

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 (*de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* 1999: 80 per Lord Clyde).

It is necessary to digress briefly to identify the heightened scrutiny test formulated by Sir Thomas Bingham *MR in R v Ministry of Defence, Ex parte Smith* (1996) (*Smith*). The Master of the Rolls formulated the *Wednesbury* test in terms of a decision being unreasonable if it is beyond the range of responses open to a reasonable decision-maker. Following *R v Secretary of State for the Home Department, Ex parte Bugdaycay* (1987) and *Brind*, the Master of Rolls said that the greater the inference by the exercise of power with human rights, the more the court will require, by way of justification, before concluding that the decision is reasonable. On the other side, the court will show greater caution than normal where decisions are policy laden or esoteric or security-based, ‘the test itself is sufficiently flexible to cover all situations’ (*Smith* 1996: 556).

Returning then to *Daly*, Lord Steyn identified the differences between the proportionality principle and the common law *Wednesbury* test as follows: (1) the proportionality principle may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational and reasonable decisions; (2) the proportionality principle may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) even the heightened scrutiny test formulated in *Smith* is not necessarily appropriate for the protection of human rights.

In *Bank Mellat v Her Majesty’s Treasury (No 2)* (20130 (*Bank Mellat*), an application for judicial review was made in relation to an Order in Council made under the Counter-Terrorism Act 2008. The effect of the Order in Council was that a major Iranian Bank, Bank Mellat, had restricted access to the United Kingdom’s financial markets because of its alleged connection with Iran’s nuclear weapons and ballistic missiles

programmes. A Convention right to the peaceful enjoyment of possession (First Protocol, Article 1) was in issue. The Bank's challenge to the Order in Council included a substantive challenge on the grounds of irrationality and a lack of proportionality. The Bank's challenge succeeded by a majority. The differences between the majority and the minority largely related to the application of the legal tests to the facts, rather than the formulation of the tests themselves.

Of note in the *Bank Mellat* decision is the apparent detail and structure of the proportionality principle applied in a case involving an interference by the exercise of power with fundamental rights. Lord Sumption identified the four steps in applying the principle as follows:

- 1 whether the objective of the measure is sufficiently important to justify a limitation of a fundamental right;
- 2 whether the measure is rationally connected to the objective;
- 3 whether a less intrusive measure could have been used without unacceptably compromising the objective; and
- 4 whether having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

These steps overlap in that the same facts will be relevant to more than one step and they involve the making of value judgments, the prime example being the third step and the notion of 'unacceptably' compromising the objective. Furthermore, it is important not to overlook the fact that the test cannot be applied mechanically and it involves matters of judgment and assessments of weight and balance.

Lord Reed made important observations about the different ways in which the proportionality principle itself is formulated and applied, for example, with notions of a margin of appreciation and deference to the national legislature by different courts—the national court, the court at Strasbourg or the Court of Justice of the EU—and in different contexts, for example, interference with human rights, on the one hand, and the interference in economic activity, on the other.

In *Kennedy v Information Commissioner (Secretary of State intervening)* (2015) (*Kennedy*), the issue concerned the construction of the Freedom of Information Act 2000 and Article 10 (freedom of expression) of the Convention. Lord Mance JSC said that the common law no longer relied on the uniform application of the rigid test of irrationality once thought applicable under the 'so-called' *Wednesbury* principle and that the nature of judicial review in every case depends on the context (*Kennedy* 2015:

51). The common features of reasonableness review and proportionality are that they both involve considerations of weight and balance and the primacy of context in determining the intensity of the supervising court's review and the weight to be given to the primary decision-maker's view. The benefit of using proportionality is that it brings structure to the analysis, 'by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages' (*Kennedy* 2015: 54).

The facts in *Pham v Secretary of State for the Home Department* (2015) (*Pham*) are not relevant for present purposes. The Supreme Court's consideration of the content of *Wednesbury* unreasonableness and its relationship to the proportionality is relevant. Lord Mance adopted the descriptions in an academic work of proportionality as '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' (Lübbe-Wolff 2014). His Lordship said that whether under EU law, Convention or common law, the context will determine the appropriate intensity of review (see also Lord Sumption JSC, *Pham* 2015: 105-110).

Lord Reed said that it was helpful to distinguish between proportionality as a general ground of review of administrative action where the exercise of power is limited to means proportionate to the ends pursued, from proportionality as a basis for scrutinizing justifications put forward for interferences with legal rights (*Pham* 2015: 113). Lord Reed noted that the authorities (ie *Daly* and *Brind*) were to the effect that the *Wednesbury* test, even the heightened scrutiny test, was not the same as proportionality as understood in EU law or as explained in the cases decided under the Human Rights Act 1998.

The decision of the Supreme Court in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* (2015) (*Keyu*) is an important one because it involved the exercise of a discretionary power where no Convention right was in issue.

In 1948, a British army patrol shot and killed 24 civilians in the State of Selangor. At that time, the State of Selangor was a British protected state within the Federation of Malaya. There were three investigations into the killings, all of which proved inconclusive. The relatives pressed for a fourth inquiry by the relevant authorities under the Inquiries Act 2005 (section 1(1)), but the relevant Secretaries of State refused. The relatives brought an application for judicial review.

The relatives' claims based on the Convention for the Protection of Human Rights and Fundamental Freedoms and customary international law failed. That left their claim based on traditional principles of judicial review. The relatives asked the court to take the step of replacing the traditional rationality basis for challenging executive decisions with the more structured and principled challenge based on proportionality. The court declined to take that step.

Lord Neuberger PSC (with whom Lord Hughes JSC agreed) held that the decisions were not irrational within the traditional common law principles. His Lordship said the submission that proportionality should be applied in place of rationality in all domestic judicial review cases had potentially profound implications in constitutional terms and implications which are potentially very wide in applicable scope because

it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the *balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest* (*Keyu* 2015: 133; emphasis added).

Lord Neuberger referred to two other matters which meant that the consideration of a move from rationality to proportionality in all domestic judicial review cases was more nuanced and complex than it might at first appear. First, his Lordship said that as the cases illustrated, the domestic law may already be moving away to some extent from the irrationality test in some cases. He referred to *Kennedy* and *Pham*. Secondly, his Lordship said that the answer to the question whether the court should approach a challenged decision by proportionality rather than rationality may depend on the nature of the issue.

Lord Neuberger did not consider it appropriate for a five-member panel of the Supreme Court to consider a move from rationality to proportionality. However, it was not necessary for the matter to be re-argued before a panel of nine justices because his Lordship went on to apply a test of proportionality and he concluded that the decisions were not disproportionate.

Lord Mance referred to the views he had expressed in *Kennedy* and *Pham* and said he did not need to comment further because he agreed that there was no ground for treating the refusal of an inquiry as either *Wednesbury* unreasonable or disproportionate.

Lord Kerr made, with respect, a number of important points: (1) the proportionality principle does not involve the supervising court substituting its decision for that of the decision-maker and, in broad

terms, the question is whether the decision is proportionate to meet the aim that it professes to achieve; (2) in the case before the court the relatives had no right to have an inquiry and, conventionally, inference with a fundamental right has been the setting where proportionality has been most frequently considered in recent times; (3) following what Lord Reed said in *Pham* (2015: 113), even if proportionality replaced irrationality as the relevant test in cases not involving fundamental rights, the four-stage test identified in *Bank Mellat* would not be feasible and a more loosely structured proportionality test of the type identified by Lord Mance in *Kennedy* (2015: 51) would be appropriate, that is to say, a test which directed attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.

Baroness Hale dissented on the basis that the Secretaries of State did not take into account relevant considerations and the decision was not one which a reasonable authority could reach.

Since *Keyu*, the Supreme Court has not had occasion to consider whether it should take the step it was invited to take in *Keyu*. The decision in *R (Youssef) v Foreign Secretary* (2016) was not such an occasion (see Lord Carnwath JSC at 55-57). The High Court of England and Wales declined to consider the matter in light of Lord Neuberger's comments in *Keyu (R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* 2019: 95-109 per Singh LJ and Carr J).

[F] CONCLUSION

In Australia, the requirement that the exercise of an administrative discretionary power meet a standard of legal reasonableness is based on an implication that the legislature intended that such a power be exercised reasonably. That issue is no longer determined by the application of Lord Greene's formula. If reduced to a single question, it is now whether, both as to outcome and process, a reasonable decision-maker could reach the decision under challenge, or could reach the decision under challenge by the process adopted.

Central to the determination of that question is the ascertainment of the true limits of the power by reference to the scope, purpose and object of the statute and the statutory provision. There are various expressions (eg an evident and intelligible justification, an intelligible decision, an intelligible decision-making process) and tests in analogous areas (eg appellate intervention in the exercise of a judicial discretion) and existing authorities which provide guidance in the answering of the general question, but none of them are the ultimate question when legal

reasonableness is raised. Of course, a clear restriction on the court's power of intervention is that the merits of the decision are for the decision-maker, not the court.

This results in a somewhat open-ended test, but it is inherent in the ground of review, the importance of the particular facts and the particular statute and statutory provision in issue. Frankfurter J said in *Universal Camera* (1951: 489):

Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.

Is the proportionality principle able to provide additional certainty and transparency to the formulation and application of the standard of legal reasonableness in the case of judicial review of administrative discretionary powers? Clearly, with no individual rights entrenched by the Constitution or statute at the federal level in Australia, there is no scope for a highly structured proportionality principle of the type identified by the High Court in *McCloy* or the Supreme Court in *Bank Mellat*.

There are at least three difficulties with adopting the more loosely structured proportionality principle suggested by Lord Kerr in *Keyu*. First, it involves another form of words which, arguably, does not add greatly in terms of certainty and transparency to the existing concepts deployed in Australia. Secondly, and importantly, it would have to be qualified by a proviso that made it clear that the court was not authorized to interfere with the decision by reference to its merits. Finally, even the more loosely structured proportionality principle would not seem to be appropriate in the case of all administrative discretionary powers. An example of where it would not be appropriate is a decision of the Parole Board assessing the risk posed by a prisoner (*Browne v The Parole Board of England and Wales* 2018: 41 per Coulson LJ).

The notion of proportionality has a role to play in the judicial review of the exercise of administrative discretionary powers in circumstances where, because of the nature of the power and the circumstances of the case, means and ends are at the forefront of the analysis. In such cases, it may provide a ready explanation of the reason the exercise of power is legally unreasonable.

About the Author

Justice Besanko is a Judge of the Federal Court of Australia. He was admitted to practise in 1978. He practised as a barrister and solicitor in South Australia until 1984 when he joined the independent bar. He was appointed Queen's Counsel in 1994. He had an appellate and first instance practice primarily in commercial, company and administrative law at the time of his appointment as a Justice of the Supreme Court of South Australia in 2001. He transferred to the Federal Court in 2006. The jurisdiction of the Federal Court comprises primarily the areas of Commonwealth power in the Federation and includes company law, competition and consumer law, migration and general administrative law, intellectual property law, taxation and defamation. His Honour has worked as a judge for over 20 years.

References Cited

- Allars, Margaret (1990) *Introduction to Australian Administrative Law* Sydney: Butterworths.
- Craig, Paul (2021) *Administrative Law* 9th edn London: Sweet & Maxwell.
- Lübbe-Wolff, Gertrude (2014) 'The Principle of Proportionality in the Case Law of the German Federal Constitutional Court' 34 *Human Rights Law Journal* 12.

Legislation Cited

- Administrative Decisions (Judicial Review) Act 1977 (Cth)
- Broadcasting Act 1990
- Conciliation and Arbitration Act 1904 (Cth)
- Criminal Code (Cth)
- European Convention for the Protection of Human Rights and Fundamental Freedoms 1953
- Freedom of Information Act 2000
- Human Rights Act 1998
- Inquiries Act 2005
- Migration Act 1958 (Cth)
- Workers' Compensation Act 1926–1960 (NSW)

Cases Cited

ABT17 v Minister for Immigration and Border Protection [2020] HCA 34; (2020) 269 CLR 439

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

Attorney-General (NSW) v Quin [1990] HCA 21; (1990) 170 CLR 1

Attorney-General (SA) v Adelaide City Corporation [2013] HCA 3; (2013) 249 CLR 1

Bank Mellat v Her Majesty's Treasury (No 2) [2013] 3 WLR 179

Bread Manufacturers of New South Wales v Evans [1981] HCA 69; (1981) 180 CLR 404

Browne v The Parole Board of England and Wales [2018] EWCA Civ 2024

Comcare v Banerji [2019] HCA 23; (2019) 267 CLR 373

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69

Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat & Livestock Corporation [1990] FCA 139; (1990) 96 ALR 153

Gronow v Gronow [1979] HCA 63; (1979) 144 CLR 513

House v The King [1936] HCA 40; (1936) 55 CLR 499

Kennedy v Information Commissioner (Secretary of State intervening) [2015] AC 455

Klein v Domus Pty Ltd [1963] HCA 54; (1963) 109 CLR 467

Kruse v Johnson [1898] 2 QB 91

Lovell v Lovell [1950] HCA 52; (1950) 81 CLR 513

Mallett v Mallett [1984] HCA 21; (1984) 156 CLR 605

McCloy v New South Wales [2015] HCA 34; (2015) 257 CLR 178

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24

Minister for Immigration and Border Protection v Singh [2014] FCAFC 1; (2014) 231 FCR 437

- Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1
- Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611
- Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541
- Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332
- Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513
- Palmer v State of Western Australia* [2021] HCA 5; (2021) 388 ALR 180
- Parramatta City Council v Pestell* [1972] HCA 59; (1972) 128 CLR 305
- Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; (2020) 282 FCR 580
- Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591
- R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd* [1999] 2 AC 418
- R v Ministry of Defence, Ex parte Smith* [1996] QB 517
- R v Moore; Ex parte Co-operative Bulk Handling Ltd* (1982) 56 ALJR 697; (1982) 41 ALR 221
- R v Secretary of State for the Home Department, Ex parte Brind* [1991] AC 696
- R v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] AC 514
- R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532
- R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2019] 1 WLR 4105
- R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665
- R (Youssef) v Foreign Secretary* [2016] AC 1457
- Randall v Northcote Town Council* [1910] HCA 25; (1910) 11 CLR 100
- Rooke's Case* (1597) 5 Co Rep 99b; 77 ER 209

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014

Sharpe v Wakefield [1891] AC 173

Thomas v Mowbray [2007] HCA 33; (2007) 233 CLR 307

Universal Camera Corp v National Labor Relations Board 340 US 474 (1951)

Veen v The Queen (No 2) [1988] HCA 14; (1988) 164 CLR 465

Wotton v State of Queensland [2012] HCA 2; (2012) 246 CLR 1