# LEGAL UNREASONABLENESS: IN NEED OF A NEW JUSTIFICATION?

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*Over the past decade, the High Court of Australia has made significant changes to the administrative law ground of unreasonableness, yet has given few indications of what values and functional considerations precipitated this shift. This is not unusual. The High Court has a reputation for preferring rules-based reasoning to values-based reasoning in administrative law (and beyond). But this does not mean that values and functional considerations are not important in shaping, and in explaining, the new legal unreasonableness test. This article analyses the changes that have occurred in unreasonableness – both in rhetoric and in application – and seeks to illuminate what this says about, and means for, Australian administrative law values. It explores the return, in the rhetoric of some judges, to relying on abuse of power as a justification and threshold for unreasonableness, and argues that other administrative law values better explain the new legal unreasonableness test.*

## I INTRODUCTION

In the past decade, the High Court of Australia has made significant changes to a number of aspects of judicial review of administrative action. Perhaps the two most notable have been in relation to the principles of unreasonableness and jurisdictional error. Although the Court has attempted to locate both developments in precedent and has not acknowledged either as a radical change to legal principle or approach, commentators have not been fooled. The cases of *Minister for Immigration and Citizenship v Li* ('*Li*')[1] and *Hossain v Minister for Immigration and Border Protection* ('*Hossain*')[2] signalled relatively radical shifts in the way the Court approaches unreasonableness and jurisdictional error, respectively.[3] That

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1 (2013) 249 CLR 332 ('*Li*').

2 (2018) 264 CLR 123 ('*Hossain*').

3 On the changes to unreasonableness, see, eg, Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25(2) *Public Law Review* 117; Alan Freckelton, 'The Changing Concept of "Unreasonableness" in Australian Administrative Law' (2014) 78 *Australian Institute of Administrative Law Forum* 61; Michael Barker and Alice Nagel, 'Legal Unreasonableness: Life after *Li*' (2015) 79 *Australian Institute of Administrative Law Forum* 1. On the materiality threshold, see, eg, Lisa Burton

these judgments began important changes in doctrine is apparent in the amount of commentary that they have generated, in the number of judgments in lower courts attempting to interpret and apply the new principles, and in the number of appeals from those judgments.[4] Yet the High Court has given little by way of explanation for what the normative drivers for these shifts were.

Judicial silence on the values or guiding principles underpinning doctrine is not unusual in Australian administrative law,[5] or in Australian law more generally. Many Australian and comparative common law scholars and judges have examined (and many, particularly overseas, scholars have strongly criticised) the High Court's 'formalist' tendencies, and avoidance of 'top down', values-based reasoning.[6] But this minimal express engagement with values does not mean that values are absent

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Crawford, 'Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power' (2019) 30(4) *Public Law Review* 281, 294 ('Immaterial Errors'); Nicholas Carey, 'Presumptions upon Presumptions: Problems with the Threshold of Materiality' (2021) 44(2) *University of New South Wales Law Journal* 548; Courtney Raad, '*Hossain v Minister for Immigration and Border Protection*: A Material Change to the Fabric of Jurisdictional Error?' (2019) 41(2) *Sydney Law Review* 265.

4 For a crude demonstration, a search of the terms 'judicial review' and 'materiality' on the Australian Legal Information Institute ('AustLII') yields more than 300 results in the Federal Court of Australia since *Hossain* was decided, more than 200 in the Federal Circuit Court, 89 in the Full Federal Court and 10 in the High Court (on 31 December 2021). A search for the same length of time (3 years, 4 months and 15 days) immediately prior to *Hossain* for the same terms ('judicial review' and 'materiality') yields the following results: Federal Court of Australia (28 cases); Federal Circuit Court (37 cases); Full Federal Court (11 cases); High Court (2 cases). I fully acknowledge that this search is imprecise, as the search would capture cases in which materiality was not really in issue, and also fail to capture cases using variations of the term to mean the same thing. But the contrast, using the same search terms, is nevertheless revealing of the magnitude of cases raising materiality since *Hossain*. The same is true of unreasonableness – which is the issue I explore in Part II of this article in detail. For an equivalent examination of case numbers, see below n 51.

5 I use the term 'administrative law' as a shorthand for 'judicial review of administrative action'. I fully acknowledge that administrative law is far broader, but seek to distinguish judicial review of administrative action from judicial review of other action. In Part III below, I draw some distinctions between judicial review of administrative action and administrative law more broadly in accordance with other authors' discussions of values.

6 In the administrative law context, see especially Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36(1) *Federal Law Review* 1, 4, 6–7, 12 ('Australian Exceptionalism'); Dean R Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018) 37–47; Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 15, 17, 23; Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 187–8. On Australia's 'formalism' and lack of express engagement with values more generally, see Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106, 133–55 (in defence of formalism); Justice Keith Mason, 'What Is Wrong with Top-Down Legal Reasoning?' (2004) 78(9) *Australian Law Journal* 574; Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 3 (calling for greater attention to values in constitutional reasoning). Though there is disagreement about whether the Australian approach to administrative law is correctly characterised as a 'bottom up' approach. Stephen Gageler argues that the Court's focus on parliamentary intention amounts to 'top down' reasoning: Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28(2) *Federal Law Review* 303.

in Australian judicial reasoning.[7] Even if they might only be discerned through an examination of doctrine, as Chief Justice Allsop has said: 'Administrative law is an area in which legal theory and values play vital roles'.[8]

In this article, I explore how and which values might be helpful in understanding just one of these recent shifts in administrative law: the development from the *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* ('*Wednesbury*')[9] unreasonableness threshold to *legal unreasonableness*. I do this backwards: starting with an analysis of doctrine, and then turning to consider what this reveals about the values which explain the changes. It is necessary to begin with a detailed discussion of doctrine for a few reasons. First, because many of the shifts signalled, or hinted at in *Li* were initially quite unclear, and some pointed in different directions. The nature of the doctrinal changes to unreasonableness have only become apparent through their application in subsequent cases. It is therefore necessary to closely analyse these developments in order to appreciate what unreasonableness now involves in practice, and go beyond the Court's rhetoric in *Li*. The second reason to start with doctrine is the Court's limited engagement with values in its reasoning. There has been only one clear nod to values in the High Court's efforts to explain and justify the new *legal unreasonableness* test, and that is a return by some judges to 'abuse of power' as a threshold for judicial intervention.[10] As I explain, the phrase is controversial due, in large part, to its use by English courts to justify the expansion of judicial review principles, including unreasonableness. I argue that, despite its longstanding popularity in administrative law, an analysis of the post-*Li* case law reveals how little explanatory power the value of abuse of power has in relation to the new Australian unreasonableness test.

To be very clear, I am not attempting to come up with a 'meta-theory' of judicial review generally, for I am not 'in need of a life'.[11] Nor do I suggest that abuse of power has no role or explanatory power as a value in administrative law. I am simply seeking to explore the particular shift that has occurred in relation to unreasonableness in Australia, and the normative drivers which underpin, or at least help to explain it, now that the threshold has become somewhat clearer. I begin in Part II by surveying the case law since *Li*, with a focus on the High Court's efforts to explain and confine the new test. I then move on to analyse the role of guiding principles or values in Part III. My focus in this article is on the Australian approach, so I do not offer a detailed overview of overseas approaches or thorough comparative analysis.[12] However, where the High Court of Australia has explicitly

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7 This is an argument well made by Justice John Basten in a recent article: see Justice John Basten, 'The Foundations of Judicial Review: The Value of Values' (2020) 100 *Australian Institute of Administrative Law Forum* 32 ('The Value of Values').

8 Chief Justice James Allsop, 'Values in Public Law' (2017) 91(2) *Australian Law Journal* 118, 127.

9 [1948] 1 KB 223 ('*Wednesbury*').

10 *Li* (2013) 249 CLR 332, 364 [67] (Hayne, Kiefel and Bell JJ); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 572 [80], 573 [82] (Nettle and Gordon JJ) ('*SZVFW*').

11 Mark Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through' (2021) 28(1) *Australian Journal of Administrative Law* 6, 6 ('Muddling Through').

12 For such overviews and analyses, see Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford University Press, 2021) ('*Understanding Administrative Law*'); Knight (n 6) (for recent comparative studies of all four jurisdictions); Harry Woolf et al, *De Smith's Judicial Review* (Sweet &

drawn on overseas developments in its reasoning, I endeavour to briefly explain those developments in order to compare the Australian position and assess the extent to which the guiding principles and values articulated by those overseas courts might be helpful here.

## II UNREASONABLENESS REVIEW: PRE-*LI* AND POST-*LI*

For several decades, across the common law world, the administrative law standard of 'unreasonableness' was synonymous with the *Wednesbury* case.[13] The circular *Wednesbury* formulation (a decision must be 'so unreasonable that no reasonable authority could ever have come to it')[14] was in essence an attempt to convey that courts should not interfere in an administrative decision, where no other legal error was apparent, unless the outcome was so absurd that no person in their right mind would have reached it. As one Irish judge put it:

> [T]he kind of error that produces invalidity is one which no rational or sane decision maker, no matter how misguided, could essay. To be reviewably irrational it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and … inexplicably mad; taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality.[15]

This demanding threshold meant that the ground was often argued but rarely successful.[16]

Courts in England, Canada and New Zealand steadily moved away from this absurdity standard throughout the 1980s and 1990s, and adopted approaches which varied the intensity of unreasonableness review depending on the context.[17] The approaches in the three countries differ today, and have changed over time.[18] But in all there is a recognition that, in certain contexts at least, a more probing, less deferential standard of reasonableness is appropriate.[19] In particular, where a decision affected an individual's human rights (which are expressly protected in all

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Maxwell, 8th ed, 2018) ch 11 (for an account of English developments with comparative observations); Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (Hart Publishing, 2017) ch 6 (for a comparison of Australia and Canada) ('*The Newest Despotism*').

13 *Wednesbury* [1948] 1 KB 223.

14 *Ibid* 230 (Lord Greene MR).

15 *Aer Rianta v Commissioner for Aviation Regulation* [2003] IEHC 707, 48 (O'Sullivan J), quoted in Paul Daly, 'The Language of Administrative Law' (2016) 94(3) *Canadian Bar Review* 519, 535.

16 *Li* (2013) 249 CLR 332, 377–8 [113] (Gageler J).

17 For an excellent overview, see Knight (n 6) ch 4.

18 Ibid 147–66.

19 In England, decisions which limit rights protected by the *Human Rights Act 1998* (UK) are reviewed using structured proportionality, and decisions which limit 'fundamental' common law rights attract an 'anxious scrutiny' standard. See generally Woolf et al (n 12) 643–51. In Canada, unreasonableness has been described as a single standard which 'accounts for context': *Canada (Minister of Citizenship and Immigration) v Vavilov* [2019] SCC 65, [88]–[90] (Wagner CJ, Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ) ('*Vavilov*'). New Zealand courts have largely followed the English approach, but the approach remains uncertain: MB Rodriguez Ferrere, 'An Impasse in New Zealand Administrative Law: How Did We Get Here?' (2017) 28(4) *Public Law Review* 310.

three countries)[20] a proportionality standard will usually replace unreasonableness.[21] These developments led one commentator to suggest that a 'Wednesburial' was not too far off.[22]

Prior to 2013, the High Court of Australia had noted these overseas developments, but had refused to cave to peer pressure. Australian judges explained the need to retain the *Wednesbury* threshold on the basis of the separation of powers. The strict separation of judicial power at the federal level, implied by the Australian Constitution, prevents courts from exercising administrative powers.[23] Thus, in administrative law, Australian courts have drawn a purportedly impenetrable boundary around the 'merits' of administrative decisions, which they maintain are distinct from questions of law which are the sole purview of courts. The distinction, and its significance for the unreasonableness ground specifically, was described in the oft-quoted judgment of Brennan J in *Attorney-General (NSW) v Quin* ('*Quin*'):

> 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. … 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.[24]

But in *Li*, the High Court indicated that it was substantially refashioning the unreasonableness test, with the plurality stating that '*Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point'.[25] As I argued at the time, the *Li* judgments appeared to follow several aspects of the overseas approaches which previously seemed off limits in Australia, including: a relaxation of the strict *Wednesbury* standard; references to proportionality; a new focus on the quality of the justification provided by the decision-maker as opposed to simply the outcome of the decision; and a blurring of the process/substance distinction.[26] But it was not entirely clear from *Li* just how relaxed the new unreasonableness standard was, how it might interact with procedural fairness and how proportionality factored into the test, among other things. The decision caught many off guard, and led to speculation that it might lead to a dramatic relaxation of unreasonableness and pose a threat to the legality/merits divide.[27] It also led to some initial confusion in lower courts – evidenced by the number of cases in

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20 *Human Rights Act 1998* (UK) ch 42; *Canada Act 1982* (UK) ch 11 sch B pt I; *New Zealand Bill of Rights Act 1990* (NZ).

21 See generally Michael Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] (3) *New Zealand Law Review* 423 ('Proportionality').

22 Rodney Harrison, 'The New Public Law: A New Zealand Perspective' (2003) 14(1) *Public Law Review* 41, 56.

23 *R v Kirby; Ex parte Boilermakers*' *Society of Australia* (1956) 94 CLR 254.

24 (1990) 170 CLR 1, 35–6 ('*Quin*').

25 *Li* (2013) 249 CLR 332, 364 [68] (Hayne, Kiefel and Bell JJ).

26 Janina Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43(1) *Federal Law Review* 59 ('Reasonableness').

27 See, eg, Justice Alan Robertson, 'What Is "Substantive" Judicial Review? Does It Intrude on Merits Review in Administrative Decision-Making?' (2016) 85 *Australian Institute of Administrative Law Forum* 24; Aronson, Groves and Weeks (n 6) 371–5; McDonald, 'Rethinking Unreasonableness Review' (n 3); Chris Wheeler, 'Judicial Review of Administrative Action: An Administrative Decision-Maker's Perspective' (2017) 87 *Australian Institute of Administrative Law Forum* 79; Freckelton (n 3).

which judges spent considerable time unpicking the new test and the contradictory views about what amounts to 'legal unreasonableness' (the name given to the new threshold), and the need for the High Court to revisit the test to provide a further explanation.[28] The High Court has now addressed much of this confusion and concern by clarifying the threshold for legal unreasonableness. There are three central shifts which have become particularly evident and important – the new *legal unreasonableness* standard is: context-dependent; focused on the decision-maker's reasons, where they are provided; and extends to process discretions.

### A Unreasonableness Is a Context-Dependent Standard

The first shift is that unreasonableness no longer demands absurdity or utter madness by a decision-maker.[29] Legal unreasonableness is not a single, exceptionally high, threshold providing a backstop for outrageous decisions which could not be invalidated on any other ground. Both the High Court's rhetoric and its application of legal unreasonableness make it clear that legal reasonableness 'is inherently sensitive to context; it cannot be reduced to a formulary'.[30] The context which informs the content of reasonableness in a given case includes the statutory and institutional contexts and the facts of the particular case. The decision in *DVO16 v Minister for Immigration and Border Protection* ('*DVO16*')[31] illustrates the importance of the former, while a comparison of the positions of each of the applicants in *Minister for Home Affairs v DUA16* ('*DUA16*'); *Minister for Home Affairs v CHK16* ('*CHK16*')[32] provides an example of the fact-dependent nature of legal unreasonableness.

Each case concerned the 'fast track review' process under part 7AA of the *Migration Act 1958* (Cth) ('*Migration Act*'), a review process for unsuccessful protection visa applicants which strips back many of the procedural fairness protections that apply to other visa categories. For instance, the fast track process limits the ability of applicants to adduce new evidence on review (absent exceptional circumstances) and provides for most review decisions to be made on the papers alone.[33] The *Migration Act* expressly states that each provision is part of a set of statutory procedures which is an exhaustive statement of the requirements of the natural justice hearing rule.[34]

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28 *SZVFW* (2018) 264 CLR 541, discussed below.

29 Aronson, Groves and Weeks (n 6) 369.

30 *SZVFW* (2018) 264 CLR 541, 567 [59] (Gageler J).

31 (2021) 95 ALJR 375 ('*DVO16*').

32 (2020) 95 ALJR 54 ('*DUA16*').

33 See Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *University of New South Wales Law Journal* 1003; Andrew & Renata Kaldor Centre for International Refugee Law, '"Fast Track" Refugee Status Determination' (Research Brief, April 2019) <https://www.kaldorcentre.unsw.edu.au/sites/default/files/Research%20Brief_Fast%20track_final.pdf>.

34 See *Migration Act 1958* (Cth) ss 422B, 473DA ('*Migration Act*'), respectively. For a background to these provisions, see Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285; Grant Robert Hooper, 'Three Decades of Tension: From the Codification of Migration Decision-Making to an Overarching Framework for Judicial Review' (2020) 48(3) *Federal Law Review* 401.

The question in *DVO16* was whether the Immigration Assessment Authority had acted reasonably by relying on a recorded interview with the applicant in which there were translation errors to reach its decision, or whether a reasonable Authority would have interviewed the applicant. The joint judgment's conclusion that the Authority had not acted unreasonably rested on their Honours' finding that the translation errors had not materially affected the Authority's decision,[35] and on the nature of the task the statute conferred on the Authority. In particular, the statute provided that the Authority was ordinarily obliged to conduct its reviews on the papers, absent exceptional circumstances, and included an 'exhortation to the Authority to pursue the objective of providing a mechanism of limited review that is both "efficient" and "quick"'.[36] Edelman J added that the Authority's task under the statute was different from that of merits review tribunals, in that it was not a 'de novo' review.[37] He explained that a tribunal conducting a de novo review, in which there were serious doubts as to the accuracy of interpretation, might reasonably be expected to interview the applicant for itself to inform itself of the facts and reach its decision. But the same was not reasonably expected of the Authority, given the statutory framework setting out that fast track reviews 'must be conducted with efficiency, speed, and usually without a hearing'.[38]

The different outcomes in DUA16's and CHK16's cases, which were heard together and involved the same statutory power, illustrate the importance of facts to the unreasonableness assessment. Both applicants had the same migration agent, who had made pro forma submissions based on the personal details of other people to the Immigration Assessment Authority. The Authority realised that the submissions concerned the wrong people, but did not seek further, correct submissions from the applicants. Instead, the Authority disregarded the irrelevant information and only considered general information and information which was about the applicant (in DUA16's case – in CHK16's case all of the information was about the wrong applicant).[39] The Court unanimously found that the Authority had acted unreasonably in failing to invite further submissions in CHK16's case, but not DUA16's.[40] It explained that 'whether the implied requirements of legal reasonableness have been satisfied requires a close focus upon the particular circumstances of exercise of the statutory power'.[41] In CHK16's case,

> [r]ather than taking the simple route of asking for the correct submissions, consistently with its own procedures for returning submissions that are too long, the Authority filleted the submissions that plainly concerned the wrong person into generic and non-generic information. The Authority then treated the generic

35 *DVO16* (2021) 95 ALJR 375, 384 [35], 385 [43] (Kiefel CJ, Gageler, Gordon and Steward JJ). This and similar statements in *DUA16* (2020) 95 ALJR 54, 62 [30] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ) seem to settle the question that the materiality threshold is inbuilt into the unreasonableness test, even in procedural discretions.

36 *DVO16* (2021) 95 ALJR 375, 382 [21] (Kiefel CJ, Gageler, Gordon and Steward JJ). Similar comments were made by Edelman J: at 391 [68].

37 Ibid 391–2 [69].

38 Ibid 392 [70].

39 *DUA16* (2020) 95 ALJR 54, 56 [2]–[3] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

40 Ibid 62–3 [32]–[34] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

41 Ibid 61 [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

> information in the submissions concerning another person as though the information had been correctly provided in relation to CHK16's circumstances. On no view could that have been a reasonable course to take.[42]

By contrast, DUA16's case involved a smaller amount of erroneous material, and the Authority's reasons showed that it had assumed this was a mistake and disregarded the erroneous information. The Court found that in that factual context it was not unreasonable for the Authority to have proceeded to make its decision in that way, without drawing what it saw as a mistake to the applicant's attention.[43]

The notion that what is unreasonable varies depending on the context, together with the Court's rejection of *Wednesbury*, which, perhaps more than anything, acted as a signal of how reluctant courts should be to interfere with the merits of administrative decisions, invites questions about where the boundary between law and merit now lies. Commentators, judges and those in government raised questions immediately following *Li* about whether it represented a lowering of the threshold for unreasonableness, at least in some cases.[44] Indeed, the result in *Li* itself arguably raised this question, as many would not regard it as 'inexplicably mad' for a Tribunal to have prioritised efficiency over the interests of a visa applicant having a third shot at having her skills assessed to be sufficient for a skilled visa, after two unsuccessful attempts (albeit for reasons which were not her fault).[45] However, since *Li*, the High Court has been careful to emphasise that unreasonableness remains a 'stringent' test, and that 'the courts will not lightly interfere with the exercise of a statutory power involving an area of discretion'.[46]

In an apparent attempt to reassure that the new test does not traverse into merits review, some judges have returned to the idea of 'abuse of power' as the threshold and justification for intervention. The joint judgment in *Li* explained that 'the question to which the standard of reasonableness is addressed is whether the statutory power has been abused', citing the leading English text by Wade and Forsyth for that proposition.[47] Nettle and Gordon JJ (with whom Kiefel J agreed) picked up the phrase in *Minister for Immigration and Border Protection v SZVFW* ('*SZVFW*') and said:

> The question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed, has been *abused* by the decision maker …[48]

Nettle and Gordon JJ then repeatedly emphasised this threshold in their descriptions of the test, saying, for example, that 'abuse of statutory power [is not] limited to a decision which may be described as "manifestly unreasonable"',

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42 Ibid 62 [29].
43 Ibid 62–3 [34].
44 See above nn 3, 26, 27.
45 See, eg, Aronson, Groves and Weeks (n 6) 372.
46 *SZVFW* (2018) 264 CLR 541, 551 [11] (Kiefel CJ), 586 [135] (Edelman J). See, eg, *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 5 [8] (Allsop CJ), 23–5 [70] (Griffiths J) ('*Stretton*').
47 *Li* (2013) 249 CLR 332, 364 [67] (Hayne, Kiefel and Bell JJ), citing William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 296.
48 (2018) 264 CLR 541, 572 [80] (emphasis in original).

thereby using 'abuse of power' to justify the extension of unreasonableness in *Li*.[49] The phrase is important because it links back to Brennan J's seminal justification of unreasonableness review in *Quin*. After the passage quoted above, his Honour went on to say that

> '*Wednesbury* unreasonableness' … may appear to open the gate to judicial review of the merits of a decision or action taken within power. Properly applied, *Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power …[50]

The references to abuse of power and to *Quin* in recent cases are therefore a clear attempt to show that the fundamental justification for intervention has not shifted, and that unreasonableness review remains a legitimate task for courts. As I argue in Part III, however, abuse of power is not an apt or complete description of the new test or the values which underpin it.

Although unreasonableness is not so narrowly constrained as to be limited to abuses of power, the cases bear out that it remains a fairly high threshold. While there has been a dramatic rise in the number of cases which raise unreasonableness since *Li*, most still fail.[51] Many of the cases in which unreasonableness arguments have succeeded, including *DUA16* and *ABT17 v Minister for Immigration and Border Protection* ('*ABT17*')[52] in the High Court, have involved decision-making processes which were plainly unjust and denied the applicants a fair and reasonable opportunity to put their case. While a reviewing court 'has no jurisdiction simply to cure administrative injustice or error',[53] the common law duty to afford natural justice would ordinarily have captured the errors in those cases. But, as I explain below, the *Migration Act* expressly excludes the common law requirements of natural justice and replaces it with a rigid and limited procedural code. Thus, the extension of unreasonableness seems mostly to have operated to fill the gap left by Parliament's efforts to severely curtail natural justice in those cases.[54]

Another question raised by academic and judicial commentators in the aftermath of *Li* was whether the references to proportionality in the joint judgment[55] and French CJ's judgment[56] were a signal that Australia might follow its common

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49 Ibid 573 [82].

50 *Quin* (1990) 170 CLR 1, 36.

51 For example, an AustLII search of judicial review cases in which the term 'unreasonableness' appears in Federal Court of Australia judgments returns over 1,000 cases since the *Li* decision (to 31 December 2021, searching 'judicial review' and 'unreasonableness'), compared with 224 in the same time frame (8 years, 7 months and 23 days) before *Li* (2013) 249 CLR 332. This is obviously not a precise measure, as it returns cases in which the term was merely mentioned and not necessarily argued. But the comparison of the two periods with the same terms nevertheless illuminates the enormous growth in popularity of the ground amongst review applicants since *Li*. A review of the cases decided in the Federal Circuit Court and Federal Court during November 2019 shows that most applications still fail. In the Federal Circuit Court, 29 of the 30 cases which raised the ground failed. In the Federal Court, of 27 cases raising the ground, 5 succeeded (one other succeeded, but not on unreasonableness).

52 (2020) 269 CLR 439 ('*ABT17*').

53 *Quin* (1990) 170 CLR 1, 36 (Brennan J).

54 Hooper (n 34) 414.

55 *Li* (2013) 249 CLR 332, 365–6 [72]–[73] (Hayne, Kiefel and Bell JJ).

56 Ibid 352 [30].

law counterparts and develop proportionality as a standard or ground of review.[57] The joint judgment's explanation for finding the decision in *Li* unlawful was that the Tribunal had given disproportionate weight to the fact that the applicant had had an opportunity to put her case.[58] Although Taggart and other overseas scholars have advocated that *Wednesbury* unreasonableness be replaced (in at least some situations) with proportionality,[59] there are several objections to its adoption in Australia. One, which I do not share, is the impression that proportionality is necessarily a more intrusive standard than unreasonableness, and so risks sliding into merits review.[60] Another, which is more persuasive, is the absence of a 'rights anchor' to which proportionality could attach in the Australian federal context.[61] An assessment of whether any kind of government action is disproportionate requires *something* to have been intruded upon – some existing or protected individual interest or, usually, a protected *right*. Unlike Canada, New Zealand and England, Australia has no charter of rights. The limited constitutional freedoms of political communication and interstate trade and commerce do not attract proportionality review in individual administrative decisions because the Court has said they are not individual rights.[62] Even if proportionality could attach to decisions affecting some list of fundamental common law rights, *Li* would have been a curious case in which to make this move as it did not involve any recognised common law right or interest (other than fairness which, as I explain below, was not the basis on which the majority reasoned).

The references to proportionality in *Li* have, rightly in my view, not sparked any widespread move towards disproportionality becoming a distinct ground of review of the exercise of administrative discretions.[63] Numerous Federal Court judgments

57 See Boughey, 'Reasonableness' (n 26); McDonald, 'Rethinking Unreasonableness Review' (n 3) 132–3; Justice Andrew Greenwood, 'Judicial Review of the Exercise of Discretionary Public Power' (2017) 88 *Australian Institute of Administrative Law Forum* 76, 90; Justice Peter Davis, 'Proportionality in Australian Public Law' (2021) 102 *Australian Institute of Administrative Law Forum* 19, 28 ff.

58 *Li* (2013) 249 CLR 332, 366 [74] (Hayne, Kiefel and Bell JJ).

59 Taggart's view was that proportionality should replace *Wednesbury* where fundamental rights (constitutional, statutory or common law) are engaged: 'Proportionality' (n 21). Others take a different view of the situations in which proportionality should replace *Wednesbury*: see, eg, David Mullan, 'Proportionality: A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?' [2010] *New Zealand Law Review* 233; David Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights*, *Justification*, *Reasoning* (Cambridge University Press, 2014) 234 ('Proportionality and Deference').

60 I have argued elsewhere both proportionality and unreasonableness are capable of being applied with varying degrees of intrusiveness by a court: Janina Boughey, 'Proportionality and Legitimate Expectations' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 121, 134–9.

61 See Boughey, 'Reasonableness' (n 26) 70–2.

62 See *Palmer v Western Australia* (2021) 95 ALJR 229, 245 [65] (Kiefel CJ and Keane J), 254 [118] (Gageler J); *Comcare v Banerji* (2019) 267 CLR 373, 394–6 [19]–[20] (Kiefel CJ, Bell, Keane and Nettle JJ), 421–2 [96] (Gageler J). Though in my view, these cases are wrongly decided: Janina Boughey and Anne Carter, 'Constitutional Freedoms and Statutory Executive Powers' (2022) *Melbourne University Law Review* (forthcoming).

63 With the exception of Rares J's judgment in *Brett Cattle Co Pty Ltd v Minister for Agriculture*, *Fisheries and Forestry* (2020) 274 FCR 337, which I have argued was incorrect: Janina Boughey, '*Brett Cattle*:

mention proportionality, but only as an afterthought or as another descriptor of unreasonableness; it does not seem to have added anything.[64] Jackson J said in *Pangilinan v Queensland Parole Board* that he did not see *Li* as having endorsed an English-style, distinct proportionality test, and that proportionality did not advance the unreasonableness analysis.[65] Allsop J commented in *Minister for Immigration and Border Protection v Stretton* ('*Stretton*') that an assessment of legal unreasonableness 'may involve some consideration of disproportionality', but emphasised that that 'does not authorise the Court to decide for itself what is necessary for the relevant purpose'.[66] Griffiths J said that '[a] more sophisticated approach is required' to the relationship between unreasonableness and proportionality, which goes beyond 'a formulaic approach'.[67] It seems that to the extent proportionality is now part of Australian administrative law, it is merely a way of expressing the view that a decision is not logically supported by reasons and is hence unreasonable. It is not a standalone exercise in weighing competing interests.

What the post-*Li* case law shows is not that unreasonableness has become less strict generally, but that it is capable of varying the nature, and perhaps intensity, of judicial scrutiny depending on the context. What is unreasonable depends entirely on the statutory and the factual context. In some situations there may only be one legally reasonable outcome available on the facts. Thus, in some cases, 'reasonableness' really means 'correctness'. In others, the statute and facts will lend themselves to a narrow range of rational approaches. Some statutory contexts might make the reasonableness of a decision rest on the decision-maker having given sufficient weight to one matter versus another, in which case courts will examine the decision-maker's balancing. In yet other situations, the statute will give decision-makers very broad discretion and the facts will be capable of rational application in a wide array of different ways. This is clear from Gageler J's references in *SZVFW* to the test being 'context-specific', and his accompanying explanation that this is necessarily so, given that the source of the requirement is Parliament's implied intention.[68] The scope of each statutory authority is distinct, and what is reasonable or unreasonable – or the 'zone of discretion'[69] that Parliament has conferred – will broaden and contract depending on the statutory power in question, as well as the specific facts of a case.

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New Limits on Delegated Law-Making Powers?' (2020) 31(4) *Public Law Review* 347.

64 See, eg, *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 451 [77] (Allsop CJ, Robertson and Mortimer JJ) ('*Singh*'); *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158, 166 [37], 172 [65] (Allsop CJ, Griffiths and Wigney JJ); *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420, 425 [23], 445 [137], 467 [247] (Wigney J).

65 [2014] QSC 133, [82]–[84].

66 (2016) 237 FCR 1, 8–9 [21].

67 Ibid 19–20 [62].

68 *SZVFW* (2018) 264 CLR 541, 564 [52].

69 Ibid 565 [54] (Gageler J), quoting *Corporation of the City of Enfield v Development Assessment Corporation* (2000) 199 CLR 135, 153 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ) ('*Enfield*').

### B Focus on the Decision-Maker's Justification

A second important shift in the unreasonableness test is its focus on the quality of the justification provided by the administrative decision-maker. The *Wednesbury* formulation of unreasonableness – that a decision must be 'so unreasonable that no reasonable authority *could ever have* come to it'[70] – taken literally, seems to ignore the decision-maker's actual, motivating reasons, and look at the 'reasons a hypothetical decision-maker might have acted on'.[71] Although many, including I, have done so, it is overly simplistic to suggest that *Wednesbury*'s standard was entirely divorced from the decision-maker's motives. Indeed, in the *Wednesbury* case itself, Lord Greene gave the example of an unreasonable decision of a teacher being dismissed because of her hair colour.[72] In other words, his suggestion was that, if the teacher's hair colour formed the basis of the decision to dismiss the teacher, the decision would be unreasonable and unlawful on that basis, irrespective of whether there might have been some other reason to dismiss the teacher on which the decision-maker did not rely. Motives matter. Nevertheless, *Wednesbury* was often explained as an *outcome*-focused test, accompanied by statements that courts are not concerned with the weight a decision-maker has given to various relevant factors, and this aspect of *Wednesbury* was seen as distinguishing it from proportionality review.[73] This is largely due to the fact that much of the time in application, the *Wednesbury* standard was outcome-focused out of practical necessity, as Taggart and others have pointed out.[74] At the time *Wednesbury* unreasonableness developed, there was no general requirement for decision-makers to give reasons for their actions. Thus, review applicants often had no choice but to focus on the outcome in making their arguments.

In *Li* and subsequent cases, the High Court has made it clear that courts *will* interrogate a decision-maker's justification for reaching the decision, including the weight the decision-maker afforded to various competing relevant factors. If the reviewing court is of the view that the decision-maker gave disproportionate weight to one factor over another without adequately explaining why that balance was struck, then the decision may be legally unreasonable. This was the case in *Li*: the joint judgment explained that it was not apparent how the Tribunal had reached its conclusion that 'enough [was] enough' in Ms Li's case.[75] In the cases which have followed *Li*, the High Court has consistently looked closely at the reasons provided by the decision-maker to reach a view as to whether the decision was reasonable. For example, in *ABT17*, Kiefel CJ, Bell, Gageler and Keane JJ found that '[t]he Authority's statement of reasons … made clear that its conclusion was not solely

70 *Wednesbury* [1948] 1 KB 223, 230 (Lord Greene MR) (emphasis added).

71 Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84(2) *Modern Law Review* 265, 270.

72 *Wednesbury* [1948] 1 KB 223, 229, citing *Short v Poole Corporation* [1926] Ch 66, 90–1 (Warrington LJ).

73 See, eg, James Goodwin, 'The Last Defence of *Wednesbury*' [2012] (July) *Public Law* 445.

74 Taggart, 'Australian Exceptionalism' (n 6) 12–16; Leighton McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' (2015) 37(4) *Sydney Law Review* 467, 482–3 ('Reasons'); Charles Noonan, 'Reconsidering *Osmond*' (2018) 8 *Victoria University Law and Justice Journal* 43, 44.

75 *Li* (2013) 249 CLR 332, 368 [82] (Hayne, Kiefel and Bell JJ).

dependent on country information' but had also been based on the Authority's own conclusions as to the credibility of some of the applicant's claims.[76] The delegate had accepted the applicant's claims and found him credible. But the Authority had taken a different view of credibility based on the audio recording of his interview with the delegate alone, and without interviewing the applicant for itself and being able to assess his demeanour.[77] The joint judgment explained that 'the Authority will act unreasonably if, *without good reason*, it does not invite a referred applicant to an interview in order to gauge his or her demeanour for itself before it decides to reject an account given by the referred applicant … which the delegate accepted'.[78] This highlights that the courts will closely examine the decision-maker's reasons in their search for a justification – not in the sense that the Court is over-zealously scrutinising the way reasons are expressed 'with an eye keenly attuned to the perception of error',[79] but because reasons 'serve the purpose of showing whether the result falls within a range of possible outcomes'.[80] Reviewing courts are concerned with the decision-maker's mental process and not just the outcome reached in assessing reasonableness. There may be a legitimate justification for a decision, but if it is not readily apparent in the decision-maker's reasons, then a reviewing court can conclude that the decision is legally unreasonable. As Edelman J said, quoting the Supreme Court of Canada: 'it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome'.[81]

The Court has explained that legal unreasonableness '"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"'.[82] This quoted passage comes from Canadian administrative law, where it is established that the absence of adequate reasons for a decision may alone lead a court to conclude that the decision is unreasonable, even if there is an evident justification for the outcome.[83] The use of Canadian explanations of

76 (2020) 269 CLR 439, 454 [32].

77 Ibid 452–3 [27].

78 Ibid 452 [25] (emphasis added).

79 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ), quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287 (Neaves, French and Cooper JJ). The Full Federal Court made similar comments in *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3, [103] (Allsop CJ, Besanko and O'Callaghan JJ) ('*Djokovic*').

80 *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* [2011] 3 SCR 708, 715 [14] (Abella J), cited in *ABT17* (2020) 269 CLR 439, 491 [126] (Edelman J).

81 *ABT17* (2020) 269 CLR 439, 491 [127] (Edelman J), quoting *Vavilov* [2019] SCC 65, [96] (Wagner CJ, Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ).

82 *Li* (2013) 249 CLR 332, 375 [105] (Gageler J), quoting *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 220–1 [47] (Bastarache and LeBel JJ for McLachlin CJ, Fish and Abella JJ) ('*Dunsmuir*'). The rest of the Court has since endorsed this passage: *SZVFW* (2018) 246 CLR 541, 573 [82] (Nettle and Gordon JJ); *ABT17* (2020) 269 CLR 439, 451 [20] (Kiefel CJ, Bell, Gageler and Keane JJ), 472–3 [72] (Nettle J), 491–2 [126]–[127] (Edelman J).

83 *Vavilov* [2019] SCC 65, [83]–[84] (Wagner CJ, Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ). Though note the prior uncertainty over this issue (and continuing disagreement within the Supreme Court

unreasonableness is interesting because Australian administrative law differs from Canadian law in two important respects.

The first is that, unlike in Canada (and England and New Zealand) the common law in Australia will not usually require that decision-makers give reasons for their decisions.[84] As Taggart explained, a 'culture of justification' is 'required to make variable intensity unreasonableness review work optimally'.[85] He traced overseas developments towards variable intensity review to the emergence of a position where most decision-makers were under a common law duty to give reasons, and suggested that Australian law would not be able to follow the variegated approach without overturning the decision in *Public Service Board of New South Wales v Osmond* ('*Osmond*')[86] or adopting a charter of rights.[87] Yet the High Court has not overturned *Osmond*,[88] nor has the Federal Parliament enacted a justiciable charter of rights. This raises the question of whether *Li* overturned *Osmond* by stealth.[89] If a lack of intelligible justification by a decision-maker is *alone* enough to give rise to a finding that their decision is legally unreasonable, irrespective of the outcome, then must decision-makers provide reasons in order to ensure their decisions are lawful?

Justice Greenwood, writing extrajudicially, suggests not. He posits that the two strands of unreasonableness – outcome-focused and justification-focused – apply in different scenarios. Reviewing courts will take an outcome-focused approach where no reasons are given and a justification-focused approach where the decision-maker has given reasons.[90] This is supported by the case law. Despite the absence of a common law duty to give reasons in Australia, most decision-makers *are* under a statutory duty to give reasons for their ultimate decisions.[91] But in the few cases where no reasons were required by law, judges have looked at the evidence before the primary decision-maker to make their own assessment

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of Canada) discussed in Janina Boughey, 'A(nother) New Unreasonableness Framework for Canadian Administrative Law' (2020) 27(1) *Australian Journal of Administrative Law* 43; Janina Boughey, 'The Culture of Justification in Administrative Law: Rationales and Consequences' (2021) 54(2) *University of British Columbia Law Review* 403 ('Culture of Justification').

84 There is no general duty to give reasons in the United Kingdom, Canada and New Zealand, but the common law will usually require reasons. Not having a duty to give reasons is the exception, rather than the rule. See Woolf et al (n 12) 441–2; Matthew Groves, 'Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*' (2013) 35(3) *Sydney Law Review* 627, 639 ('Reviewing Reasons'); Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] (January) *Public Law* 56.

85 Taggart, 'Australian Exceptionalism' (n 6) 14.

86 (1986) 159 CLR 656 ('*Osmond*').

87 Taggart, 'Australian Exceptionalism' (n 6) 15.

88 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 497–8 [43] (French CJ, Crennan, Bell, Gageler and Keane JJ).

89 For academic discussion of this question, see Bruce Chen, 'A Right to Reasons: *Osmond* in Light of Contemporary Developments in Administrative Law' (2014) 21(4) *Australian Journal of Administrative Law* 208; McDonald, 'Reasons' (n 74); Noonan (n 74). Edelman J made a similar observation in *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 37–9 [77]–[84], in which the High Court held that a clause allowing the Minister to withhold the evidence on which a decision was based prevented the Court from performing its review function.

90 Greenwood (n 57) 89.

91 Groves, 'Reviewing Reasons' (n 84) 644–6.

of whether there was a rational justification for the outcome on the facts.[92] The Full Federal Court has cautioned that a line must remain between legality and merits in this assessment, emphasising that reviewing courts must '[bear] in mind that it is for the repository of the power, and not for the [c]ourt, to exercise the power but to do so according to law'.[93] In other words, courts review the evidence to search for a rational justification for the outcome, not to reach their own view of what the outcome should be. The same approach can be seen in High Court cases reviewing procedural discretions along the way to reaching a final decision (which I explain further below). Decision-makers may not have justified each of their process choices (eg, whether to adjourn) in their reasons for reaching the final outcome (eg, whether to grant a visa). In these cases, the High Court has looked at the outcome and the facts of the process decision and formed its own view on reasonableness. The result has not always been that, in the absence of reasons, a decision is unreasonable. For example, in *ABT17* the Court's focus was on the outcome of the Authority's decision not to interview the applicant before departing from the view of the officer who did interview the applicant as to the applicant's credibility.[94] There was no analysis of the Authority's reasons for this procedural choice, presumably because none were provided as the Authority had not turned its mind to exercising its power to interview the applicant. It is possible (though unlikely in the circumstances) that the Authority would have been able to provide reasons for its procedural choice. But in the absence of reasons, the Court determined reasonableness by looking at the facts and outcome. In practice, the Australian approach can be summarised as follows: if the outcome of the exercise of a discretionary power looks unjust on its face, a reviewing court will look to the reasons provided for an explanation. Where no reasons are provided, the court will examine the evidence for itself to assess whether there is a rational justification for the outcome.

The related point that is clear from the post-*Li* case law is that where an intelligible justification *is* provided by the decision-maker, courts *will not* assess the reasonableness of the outcome of the exercise of discretion independently. On this, Nettle and Gordon JJ have said '[i]t would be a *rare* case to find that the exercise of a discretionary power was unreasonable where the reasons demonstrated a justification for that exercise of power'.[95] I think this is essentially right, but does not go far enough, for it is hard to imagine *any* situation where a decision-maker's justification provides a compelling rationale for the outcome they have reached but the outcome nevertheless is *unreasonable*. This seems to be a logical impossibility: the outcome is *by definition* reasonable if there is a sound reason for it.

The real challenges will be cases that fall in between: where the decision-maker has given reasons, but they are inadequate, yet the reviewing court is able to see a clear justification for the decision on the facts which supports the

92 See, eg, *Alexander v Attorney-General (Cth)* [2019] FCA 1829; *CVO17 v Minister for Immigration and Border Protection* [2019] FCA 1612, [42]–[44] (Lee J).

93 *Singh* (2014) 231 FCR 437, 446 [45] (Allsop CJ, Robertson and Mortimer JJ).

94 *ABT17* (2020) 269 CLR 439, 452–4 [27]–[32] (Kiefel CJ, Bell, Gageler and Keane JJ).

95 *SZVFW* (2018) 264 CLR 541, 574 [84] (emphasis added).

decision-maker's inadequate reasons.[96] The prevailing rhetoric is that courts are 'confined to the reasons given by the decision-maker' and cannot substitute or supplement those reasons.[97] However, Canada's longer experience suggests that this is easier said than done. Difficult doctrinal issues continue to emerge about the precise relationship between reasons and reasonableness in Canada,[98] and will likely emerge in time here as well.

The second important way in which Australian administrative law differs from Canadian administrative law is with respect to the doctrine of deference. The Canadian standard of reasonableness is built on a foundation of judicial deference to the executive. Not in the sense of judicial 'servility'[99] or an 'abdication of judicial responsibility',[100] but of paying 'respectful attention to the reasons offered or which could be offered in support of a decision'.[101] As I have explained elsewhere, what this means in practice is that a court will look at the reasons given by a decision-maker but will not assess whether those reasons are correct. Rather, where deference is owed, the reviewing court will accept reasons that meet the standard of rationality.[102] The doctrine of deference acts as a counterbalance to the courts' attention to a decision-maker's reasons. It ensures that there is a boundary between the role of courts and the executive, and an area of decisional autonomy within which courts will not intervene, thus protecting democratic values.[103] In effect, deference substitutes the legality/merits divide.

Our High Court has shunned the language of deference in other administrative law contexts,[104] and confirmed this in the unreasonableness context in *SZVFW*. That case centred on the nature of an appellate court's task in determining whether the primary judge erred in finding that legal unreasonableness was, or was not, made out on the facts.[105] The Full Federal Court had described the conclusion as to whether an administrative decision was legally unreasonable as 'evaluative' and involving 'discretionary judgment', and for that reason applied a deferential standard of appellate review.[106] But the High Court held that the Full Federal Court had been incorrect, because the question of whether an administrative decision is

96 See above n 83.
97 Greenwood (n 57) 89; *Singh* (2014) 231 FCR 437, 446 [46] (Allsop CJ, Robertson and Mortimer JJ).
98 Boughey, 'Culture of Justification' (n 83).
99 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 240 [75] (Lord Hoffmann).
100 *Enfield* (2000) 199 CLR 135, 152 [41] (Gleeson CJ, Gummow, Kirby and Hayne JJ), quoting Stephen Breyer, 'Judicial Review of Questions of Law and Policy' (1986) 38(4) *Administrative Law Review* 363, 381.
101 *Dunsmuir* [2008] 1 SCR 190, 221 [48] (Bastarache and LeBel JJ for McLachlin CJ, Fish and Abella JJ), quoting David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy', in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 279, 286.
102 *Vavilov* [2019] SCC 65, [86]–[87] (Wagner CJ, Moldaver, Gascon, Côté, Browne, Rowe and Martin JJ).
103 Dyzenhaus, 'Proportionality and Deference' (n 59) 255. On the values protected by deference in this context, see Daly, *Understanding Administrative Law* (n 12) ch 4.
104 *Enfield* (2000) 199 CLR 135, 152–4 [43]–[44] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
105 See generally Kristina Stern and Georgina Westgarth, 'Standards of Appellate Review in Public Law Australia' (2019) 26(1) *Australian Journal of Administrative Law* 9.
106 *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1, 14 [45], 15–17 [49]–[55] (Griffiths, Kerr and Farrell JJ).

legally unreasonable is a question of law which 'demands a unique outcome',[107] and not one which involves the exercise of discretion by the primary judge.[108] The High Court was unanimous that appellate courts must decide for themselves whether the administrative decision was legally unreasonable, and not give lower courts any 'latitude' or deference.[109] While the *SZVFW* case centred on the appellate standard of review and not deference in the context of assessing whether the administrative decision under review was unreasonable – which is where deference applies in Canada – the High Court's analysis is revealing.

The High Court has firmly positioned the assessment of legal unreasonableness as a legal question, thereby justifying the role of reviewing courts looking at the facts and decision-maker's reasoning to determine whether the legal threshold is met. In other words, the law demands that decision-makers provide a rational explanation for their exercise of discretion. Reasonableness or rationality is the standard set by law, and so courts are within their jurisdiction assessing whether the standard has been met. This is evident in the repeated emphasis of statutory context in each of the judgments in *SZVFW*. For example, Nettle and Gordon JJ described the judicial task as to

> assess the quality of the administrative decision by reference to the statutory source of the power exercised in making the decision and, thus, assess whether the decision was lawful, having regard to the scope, purpose and objects of the statutory source of the power …[110]

Justice Gageler described it as 'a question as to the limits of statutory authority',[111] and Gageler J, Nettle and Gordon JJ and Edelman J all referenced Brennan J's canonical statements in *Quin* about unreasonableness, 'properly applied',[112] being a question of law.[113] That legislative intention remains the Court's rationale for the limit is evident even in the label given to the standard: *legal* unreasonableness. This contrasts with the Canadian position, where courts have accepted that it is 'inaccurate to speak of a rigid dichotomy' between merits and law.[114] When Canadian courts review the reasonableness of a decision, they assess whether *everything* the decision-maker has done – interpreting the law, finding facts, applying law to the facts and weighing competing considerations to reach an outcome – meets the threshold of rational justification. The deferential standard of reasonableness is what divides the judicial and administrative roles in place of the legality/merits divide.

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107 *SZVFW* (2018) 264 CLR 541, 563 [49] (Gageler J).

108 Ibid 574 [85] (Nettle and Gordon JJ, Kiefel CJ agreeing at 548–9 [1]), 566 [55] (Gageler J).

109 Ibid 574 [85]–[86] (Nettle and Gordon JJ, Kiefel CJ agreeing at 548–9 [1]), 566 [55]–[56] (Gageler J), 593–4 [155] (Edelman J).

110 Ibid 572 [79].

111 Ibid 565 [54].

112 *Quin* (1990) 170 CLR 1, 36.

113 *SZVFW* (2018) 264 CLR 541, 564 [51], [53] (Gageler J), 573–4 [83] (Nettle and Gordon JJ), 585 [134] (Edelman J).

114 In *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 854 [54] ('*Baker*'), L'Heureux-Dubé J for the majority used the labels 'discretionary' and 'non-discretionary' instead of merits and law. But as I explain elsewhere, the labels broadly mean the same thing: see Boughey, *The Newest Despotism* (n 12) ch 5.

The High Court's approach, positioning unreasonableness as a question of law which applies only to discretionary aspects of decision-making, avoids any need for an additional doctrine of deference in that context. A dichotomy between the judicial and administrative functions is retained, with courts having *exclusive* power to determine questions of law. Where it is argued that a decision-maker has exercised discretionary power in a way that is legally unreasonable, it is for the reviewing court to decide for itself whether the threshold of unreasonableness has been met. Deference is built into the standard of reasonableness, because it only requires decisions to be justified, not correct according to the Court's view. While most members of the Court would object to the language of deference being used even to describe the built in work of unreasonableness due to the connotations of the word,[115] Edelman J has acknowledged the deference, or 'judicial restraint', within the threshold.[116] In essence, the new Australian unreasonableness test seems to be drawn from the Canadian approach, with the critical distinction that Australia maintains that there is a line between questions of law (where there is no deference to decision-makers) and merit or discretion (where deference is built-in to existing standards and principles). The links to Canada raise the question of whether the normative drivers that Canadian courts have identified as underpinning the shift have explanatory power here. I consider this question in Part III.

### C The Process/Substance Distinction

A third, related and significant shift in unreasonableness has been a blurring of the distinction between process and substance. Unreasonableness as a standalone 'ground'[117] (as opposed to a broad descriptor of the various grounds concerned with the exercise of administrative discretion) has traditionally been concerned with outcome, as I explained above.[118] The process of decision-making was tested on other bases, most notably, fairness. The grounds of procedural fairness and unreasonableness now appear to overlap considerably because of the fact that unreasonableness now clearly applies to discretionary 'process' decisions. Indeed, since *Li*, all of the cases to reach the High Court in which the unreasonableness ground has been raised substantively have been process decisions in the migration context. What I mean by a 'process decision' is the exercise of a discretion as to *how* to conduct review, such as deciding: not to adjourn (*Li* and *SZVFW*); not to seek further information from an applicant (*DUA16* and *DVO16*); and not to invite the applicant for a further interview (*ABT17*). The challenges in these cases were not to the ultimate outcome to deny the applicants visas, but to discretions exercised in the course of reaching that outcome.

115 See Janina Boughey, 'Re-evaluating the Doctrine of Deference in Administrative Law' (2017) 45(4) *Federal Law Review* 597.

116 *SZVFW* (2018) 264 CLR 541, 588 [143].

117 Note the problematic nature of the term 'grounds': Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Butterworths, 2019) 102.

118 Evident in the fact that the leading text in the field discusses it under the broader heading of 'Illegal Outcomes and Acting Without Power': Aronson, Groves and Weeks (n 6) ch 6.

The migration context of these cases is important because of the significant limits that the *Migration Act* places on procedural fairness. The *Migration Act* sets out detailed codes of procedure which, in relation to certain decisions, including fast track reviews, it provides are an 'exhaustive statement of the requirements of the natural justice hearing rule'.[119] This was the context in which *Li* was decided, and cannot be divorced from the High Court's decision to expand unreasonableness into process aspects of decision-making. In *Li*, the applicant originally sought review on the ground that the Tribunal's refusal to adjourn its hearing and proceed to make its adverse decision had denied her a fair opportunity to present her case in the circumstances. The Minister responded that the relevant provisions of the *Migration Act* constituted an exhaustive statement of the requirements of the natural justice hearing rule, and had not been breached.[120] This raised difficult interpretive, and potentially constitutional questions, about Parliament's power to restrict the content of the natural justice hearing rule and authorise decision-makers to act in a way which denies natural justice to an applicant. These were complicated by the complexity of the legislative framework, which includes provisions which appear on their face to contradict the apparently clear legislative intention exhibited in the 'exhaustive statement' provisions to limit procedural fairness.[121] But Burnett FM largely avoided these issues by describing the applicant's claim as 'in essence … that in refusing it an adjournment the Tribunal acted so unreasonably as to deny it procedural fairness'[122] and went on to find that the refusal to adjourn had been unreasonable (on the *Wednesbury* standard).[123]

On appeal, the Justices of the Full Federal Court and High Court took a range of approaches to these issues, including relying solely on unreasonableness, finding methods to resolve the interpretive challenges regarding procedural fairness, as well as other routes. All Justices agreed that the decision was unlawful, but not about why. In the High Court, French CJ found that the *Migration Act*'s code of procedure did not deal with the details of how an adjournment decision would be made, and so the common law fair hearing rule applied.[124] He found the Tribunal's decision was both procedurally unfair and legally unreasonable.[125] The joint judgment, however, did not find it necessary to answer the question of whether the common law fair hearing requirements added to the procedural code because unreasonableness provided 'a more direct route to its resolution'.[126] Gageler J went further, stating that

> [t]he legislative declaration that Div 5 of Pt 5 'is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it

119 *Migration Act 1958* (Cth) s 473DA(1). See above n 34 for Hooper's analysis of the evolution of the *Migration Act*'s procedural code and its interaction with common law.

120 *Li v Minister for Immigration* [2011] FMCA 625, [37]–[38] (Burnett FM).

121 See, in particular, the overarching requirements in sections 353 and 357(A) of the *Migration Act 1958* (Cth) that the Tribunal's function is to provide a review mechanism that is 'fair' and 'just'.

122 *Li v Minister for Immigration* [2011] FMCA 625, [39].

123 Ibid [49].

124 *Li* (2013) 249 CLR 332, 346 [18].

125 Ibid 347 [21], 352 [31].

126 Ibid 362 [62] (Hayne, Kiefel and Bell JJ).

> deals with' … gives added significance to the implied requirement for the MRT to act reasonably in the performance of its procedural duties and in the exercise or non-exercise of its procedural powers. The significance is that the implied statutory requirement for the performance of those duties and the exercise of those powers always to be reasonable results in the division providing a measure of procedural fairness sufficient to meet the statutory description of it as a statement of the requirements of the natural justice hearing rule.[127]

The extension of unreasonableness to process decisions may not have been absolutely necessary to resolve the case in *Li* (as French CJ's reasoning shows), but it has proven to be a prescient development. The provisions of the procedural code in the *Migration Act* which deal with the fast track review process are explicit about the exhaustiveness of their operation. They apply to 'the entirety of the performance of the overriding duty' on the Authority to perform review, such that it would be far harder to find that the common law principles of natural justice had something to add to the codified procedures.[128] The consequence is that in fast track cases,

> except to the extent that procedural unfairness overlaps with legal unreasonableness, procedural fairness analysis is not the 'lens' through which the content of the procedural obligations imposed on the Authority in the conduct of a review under Pt 7AA is to be determined.[129]

The extension of unreasonableness means, however, that these process decisions are not 'islands of power immune from supervision and restraint'.[130] The individual interests and dignity that procedural fairness was designed to protect are ensured via another route.

It is thus now clear that the procedural choices administrative decision-makers make in the course of reaching their ultimate decision must be both procedurally fair (unless fairness is successfully curtailed by statute) *and* legally reasonable. That is, when deciding whether to adjourn at the request of an applicant, for instance, a decision-maker must consider the applicant's fair opportunity to put their case *and* whether there is a sound justification for refusing to adjourn. Process decisions can be challenged on, and reviewed against, both of these standards.[131] While it is hardly outrageous to demand that decision-makers have regard to both the fairness of the affected individual and their justification for procedural decisions, it is not entirely clear how the two requirements and grounds now intersect with one another where both apply. The extension of unreasonableness to process decisions also raises the question of whether unreasonableness in this context in essence amounts to the

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127 Ibid 373 [99].

128 *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 43 [31] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

129 Ibid 44 [34]. See also *DUA16* (2020) 95 ALJR 54, 61 [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

130 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

131 This has always been the position under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'), section 6 of which provides that 'conduct' for the purposes of making a decision may be reviewed on both natural justice and unreasonableness grounds (see sections 6(1)(a) and 6(2)(g) in particular). However, the remedies for applications under section 6 of the *ADJR Act* are limited: see *ADJR Act 1977* (Cth) s 16(2).

adoption of a substantive fairness standard, which the High Court has previously rejected, as I discuss below.

Edelman J confronted this issue head-on in *ABT17* and explored the nature of 'process focused' unreasonableness.[132] He indicated that there are now two categories of unreasonableness: one process-focused; the other outcome-focused. Other judges have taken this view too,[133] and the Commonwealth conceded it in *ABT17*,[134] but it is not universally accepted. For instance, Nettle and Gordon JJ have said that legal unreasonableness is concerned with abuse of power (an issue I return to in Part III), and '[h]ow that abuse of statutory power manifests itself is not closed or limited by particular categories of conduct, process or outcome'.[135] Edelman J explained that process-focused unreasonableness is limited: it does not apply to 'the process of decision-making generally, unmoored from the particular statutory duties, functions, and powers that govern that process'.[136] To review the whole process of decision-making for reasonableness would, he said, blur the boundary between law and merit too much. Rather, according to Edelman J, the extension of unreasonableness to the process of decision-making only applies to 'the performance or exercise of a statutory duty, function or power'.[137] In other words, it is only where a statute expressly confers discretionary procedural powers on a decision-maker – such as the power to adjourn a hearing, or invite an applicant to give further information in writing or in person – to which there is attached an implication that those procedural powers be exercised reasonably. If this proves to be correct, it means that there is considerable overlap in the duties of fairness and reasonableness. There may be numerous discretionary process decisions made in the course of reaching an ultimate outcome in any given administrative decision. But the explanation retains a coherent distinction between the principles, provides a rationale for the extension of unreasonableness to those discretions, and leaves procedural fairness to be procedural and not substantive.

Procedural fairness is not the only 'ground of review' about which the development of process-focused unreasonableness raises boundary questions. Legal unreasonableness now also appears to have swallowed the 'irrationality or illogicality' ground. As Aronson, Groves and Weeks detail, the ground of irrationality and illogicality developed in reaction to a statutory provision (again in the *Migration Act*) which claimed to prevent review for unreasonableness.[138] It often appeared quite similar to unreasonableness but applied in the particular context of subjective jurisdictional facts, while unreasonableness applied to the outcome of the decision as a whole. Because irrationality was concerned with fact-finding, some iterations of the test involved the courts looking at the weighting

132 *ABT17* (2020) 269 CLR 439, 489 [122].
133 See, eg, *Singh* (2014) 231 FCR 437, 445 [44] (Allsop CJ, Robertson and Mortimer JJ); Greenwood (n 57) 89.
134 *ABT17* (2020) 269 CLR 439, 489–90 [123] (Edelman J).
135 *SZVFW* (2018) 264 CLR 541, 573 [81].
136 *ABT17* (2020) 269 CLR 439, 490 [124].
137 Ibid 490 [125].
138 Aronson, Groves and Weeks (n 6) 263–9.

the decision-maker had given to evidence and the logic of their conclusions.[139] The development of process-focused unreasonableness negates the need for a distinct approach to subjective jurisdictional facts (unless Parliament revisits its previous attempts to prevent judicial review for unreasonableness). Furthermore, the more expansive language that the courts have used to describe unreasonableness, which includes irrationality, illogicality, disproportionality and myriad other terms, suggest that the two might now have merged.[140]

The Full Federal Court's decision in *Minister for Immigration and Border Protection v Gill*[141] is illustrative. In it, the Court held that it was not unreasonable for the Tribunal to reach a view that the applicant was not credible based on anonymous information, followed by corroborating evidence supporting that anonymous information. The important point for present purposes is that the Court conflated the concepts of irrationality, illogicality and unreasonableness.[142] As Allsop CJ explained in *Stretton*, this merger is eminently sensible, and was perhaps inevitable because

> [t]he 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. Both concepts concern the lawful exercise of *power*. For that reason alone, any attempt to be comprehensive or exhaustive in defining when a decision will be sufficiently defective as to be legally unreasonable and display jurisdictional error is likely to be productive of complexity and confusion. One aspect of any such attempt can be seen in the over-categorisation of more general concepts and over-emphasis on the particular language of judicial expression of principle. Thus, it is unhelpful to approach the task by seeking to draw categorised differences between words and phrases such as arbitrary, capricious, illogical, irrational, unjust, and lacking evident or intelligent justification, as if each contained a definable body of meaning separate from the other.[143]

The Full Federal Court confirmed this merger and gave further consideration to the relationship between irrationality, illogicality and unreasonableness in *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[144] Dealing with arguments framed variously in terms of irrationality, illogicality and unreasonableness, the Court said that a decision may be characterised 'as legally unreasonable because of illogicality or irrationality'.[145] They went on to explain that if

> it cannot be said to be possible for the conclusion to be made or the satisfaction reached logically or rationally on the available material. It will then satisfy the characterisation of unjust, arbitrary or capricious.[146]

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139 See especially Crennan and Bell JJ's judgment in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611. Cf Gummow CJ and Kiefel J's approach.

140 Boughey, Rock and Weeks (n 117) 124.

141 (2019) 268 FCR 575.

142 Ibid 577–8 [8]–[10] (Moshinsky, Charlesworth and Lee JJ).

143 *Stretton* (2016) 237 FCR 1, 3 [2] (emphasis in original).

144 [2022] FCAFC 3.

145 Ibid [33] (Allsop CJ, Besanko and O'Callaghan JJ).

146 Ibid [35].

In other words, irrationality and illogicality now seem best viewed as a subset of the broader concept of legal unreasonableness.

## III A NEW APPROACH IN SEARCH OF A JUSTIFICATION

Although the changes brought by *Li* may not have been as dramatic or radical as some feared (or perhaps hoped), it is clear that they *do* amount to a 'large step' in judicial review.[147] They also move Australia closer to the overseas approaches, particularly the Canadian approach where unreasonableness 'takes its colour from the context'[148] and involves a search for justification. As Taggart (and many others) noted, the expansion of unreasonableness beyond *Wednesbury* in Canada, England and New Zealand was accompanied by a more functionalist approach with an explicit articulation of the values and norms that courts are seeking to protect.[149] In Canada, the 'rule of law' has become the dominant explanation for the source of limits on executive discretion.[150] The rule of law has, of course, always appeared in connection with judicial review, and is no stranger to English, New Zealand and Australian law either.[151] But as an explanation for the particular limits on executive power, its influence on Canadian law has been especially pronounced in the last 20 years. In England, the expression of these values took the form of courts increasingly justifying intervention on the basis that the government had

147 Justice John Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 35, 35.

148 *Canada (Citizenship and Immigration) v Khosa* [2009] 1 SCR 339, [59] (Binnie J).

149 Taggart, 'Australian Exceptionalism' (n 6) 28–9; Poole (n 6); Knight (n 6) ch 4; Boughey, *The Newest Despotism* (n 12) ch 7.

150 See, eg, *Baker* [1999] 2 SCR 817, 853 [53] (L'Heureux-Dubé J); *Dunsmuir* [2008] 1 SCR 190, 211–13 [27]–[31], 218–19 [42] (Bastarache and LeBel JJ for McLachlin CJ, Fish and Abella JJ), 249–50 [125] (Binnie J); *Catalyst Paper Corporation v North Cowichan (District)* [2012] 1 SCR 5, 10–11 [11]–[12], 12 [15] (McLachlin CJ for the Court); *Régie des rentes du Québec v Canada Bread Co Ltd* [2013] 3 SCR 125, 147 [50] (McLachlin CJ for Fish J, dissenting); *Dr Q v College of Physicians and Surgeons of British Columbia* [2003] 1 SCR 226, 235–6 [21], 238 [26] (McLachlin CJ for the Court); *Montréal (City) v Montreal Port Authority* [2010] 1 SCR 427, 445 [33] (LeBel J for the Court); *Canada (Attorney General) v TeleZone Inc* [2010] 3 SCR 585, 602 [24] (Binnie J for the Court); *Smith v Alliance Pipeline Ltd* [2011] 1 SCR 160, 187 [78] (Deschamps J).

151 For discussions and examples in England, see, eg, Paul Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24(2) *Oxford Journal of Legal Studies* 237; Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001). For a New Zealand discussion see Phillip A Joseph, 'The Demise of Ultra Vires: Judicial Review in the New Zealand Courts' [2001] (Summer) *Public Law* 354. For an analysis of the Australian position see Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017).

abused its powers.[152] Though more recently, courts and commentators have become less monistic in their view of the values underpinning these developments.[153]

Unlike in those other jurisdictions, our High Court has not moved away from the ultra vires justification for judicial review. At every juncture the High Court of Australia has made it clear that its ultimate justification for constraining administrative discretions to being exercised reasonably remains Parliament's deemed intention. This is apparent in the very name given to the test – legal unreasonableness – and in every explanation for it before, in and since *Li*.[154] But there can be no doubt that the intention attributed to the legislature *has* changed in and since *Li*. Parliament is no longer simply taken to intend that administrative decisions not be utterly absurd in their outcome. Parliament is now taken to intend something else: that the exercise of all discretionary administrative powers be justifiable (and where reasons are given, justified).

So what explains this shift? The High Court is well known (arguably infamous) for its disinclination to articulate the normative drivers of legal rules it applies, including the principles of statutory interpretation.[155] Nevertheless it is clear the presumptions that courts attribute to the legislature *are* driven by values and functional considerations. As Justice Basten has explained: 'the implied limits on powers derive from the values, or standards, which are found within our legal and political systems of government' and characterising the exercise of ascertaining these limits as one of statutory interpretation 'reveals little as to the source or justification of the applicable principles'.[156] The principles of statutory interpretation are not rigid decrees from some higher source. Nor are they plucked from thin air. They are judicially constructed. The High Court has not always admitted this; Taggart criticised Brennan J for his failure to acknowledge that 'where the line is drawn [between legality and merits] involves normative commitments and judicial discretion'.[157]

More recently, however, the High Court has been more transparent about the fact that values and functional considerations drive the principles of statutory interpretation. For instance, the joint judgment in *Hossain*, justifying the introduction of the new 'materiality' threshold for jurisdictional error, said that

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152 See generally Woolf et al (n 12) 644. See, eg, *R v Inland Revenue Commissioners; Ex parte National Federation of Self Employed & Small Businesses Ltd* [1982] AC 617, 632 (Lord Wilberforce), 650, 655 (Lord Scarman), 658 (Lord Roskill); *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 404, 406 (Lord Scarman); *R v Inland Revenue Commissioners; Ex parte Preston* [1985] 1 AC 835, 851 (Lord Scarman), 864 (Lord Templeman); *R v Disciplinary Committee of the Jockey Club; Ex parte Aga Khan* [1993] 1 WLR 909, 916 (Bingham MR); *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696, 765–6 (Lord Lowry); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2009] 1 AC 453, 488–9 [60] (Lord Hoffmann), 513 [135] (Lord Carswell). See especially *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 243–51 (Lord Woolf MR for the Court).

153 See Joanna Bell's thoughtful and thorough analysis: Joanna Bell, *The Anatomy of Administrative Law* (Hart Publishing, 2020) 137–8.

154 See, eg, *SZVFW* (2018) 264 CLR 541, 564–5 [53]–[54] (Gageler J), 572–3 [80] (Nettle and Gordon JJ), 583 [131] (Edelman J); *Stretton* (2016) 237 FCR 1, 3–4 [5] (Allsop CJ).

155 See above n 6.

156 Basten, 'The Value of Values' (n 7) 41.

157 Taggart, 'Australian Exceptionalism' (n 6) 28.

> [t]he common law principles which inform the construction of statutes conferring decision-making authority … reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in … Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. They are not so delicate or refined in their operation that sight is lost of the fact that '[d]ecision-making is a function of the real world' …[158]

Crawford describes this as an 'extraordinary statement', which admits that 'the presumptions of statutory interpretation deployed in the administrative law context represent what *the courts* think the limits of executive power ought to be'.[159] Gageler J similarly acknowledged in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* that the

> 'canons' of statutory construction … have contemporary interpretative utility to the extent that they are reflective and protective of stable and enduring structural principles or systemic values which can be taken to be respected by all arms of government.[160]

Crawford argues that these statements amount to frank admissions from the Court 'that the interpretation of executive power is informed by judicially constructed values and functional concerns'.[161] This transparency about the role of values and functional considerations, she argues, is new. But Crawford criticises the Court for its failure 'to articulate what those values and functional concerns are' in the context of materiality.[162]

The same points can be made in relation to unreasonableness. The significant shift in the intention attributed to the legislature *must* be a result of some change in the High Court's view of the balance between competing values and functional considerations, or a reconceptualisation of those factors. But the Court has given few indications of what those guiding principles are. The most significant contribution has come from some judges' revived focus on *abuse of power* as a justification for judicial intervention under the new test. But this suggestion has not been universally welcomed. In the following sections, I draw on my above analysis to explore how values appear to have influenced the doctrinal move from *Wednesbury* to legal unreasonableness. I argue that, despite its longstanding and renewed popularity, abuse of power has limited utility in the legal unreasonableness context.

## A Administrative Law's Values

It seems trite, yet necessary, to make the point that attempting to define and articulate the values of administrative law is fraught as values are vague and contested, as is the definition and boundaries of 'administrative law' (as compared with other areas of law).[163] Nevertheless many leading scholars and jurists have

158 *Hossain* (2018) 264 CLR 123, 134 [28] (Kiefel CJ, Gageler and Keane JJ), citing *Enichem Anic Srl v Anti-Dumping Authority (*1992) 39 FCR 458, 469 (Hill J).

159 Crawford, 'Immaterial Errors' (n 3) 294 (emphasis in original).

160 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 22 [58] (Gageler J).

161 Crawford, 'Immaterial Errors' (n 3) 282.

162 Ibid.

163 Mark Aronson, 'Public Law Values in the Common Law' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 134, 134–6 ('Public Law

made efforts to do so, demonstrating the importance of the task in seeking to make sense of and critique doctrinal developments.[164] Because values are necessarily somewhat abstract and contestable, the list espoused by each author differs. Each author who has attempted to articulate the values of administrative law approaches the task with a different perspective, and so defines values at a different level of abstraction. For example, Paul Daly's list (individual self-realisation, good administration, electoral legitimacy and decisional autonomy) takes values back to the highest level of constitutional principle.[165] While French CJ's list (lawfulness, good faith, rationality and fairness) is focused on the way those constitutional values are operationalised in the judicial review context. French CJ makes the important point that judicial review is just one component of administrative law, and administrative law more broadly would add accessibility, openness, participation and accountability to the list of values.[166] He is right, but most do not draw this distinction.

There is also a particular challenge in defining judicial review values in the fact that some of its principles, rules or presumptions of legislative intention are themselves already expressed in values language. In particular, many lists of values include reasonableness. But as I have shown in Part II, as doctrinal principles these are capable of dramatic shifts and different meanings, which makes reference to a value by the same name entirely unilluminating. Referring to 'reasonableness' as a value underpinning the doctrinal rule of the same name tells us nothing further about either the content or purposes of the rule. What is more revealing is that in many discussions reasonableness and rationality are discussed as related but distinct concepts.[167] As I explained in Part II(C) above, there is good reason to think that the two have now merged.

Compounding these difficulties are vastly different perspectives about what administrative law is 'about' at its core.[168] It may be accurate to describe judicial review as 'first and foremost about the law governing administrative decision-making',[169] but *what* objective does that law seek to achieve? The literature is replete with different attempts to define administrative law's 'mission statement'[170]

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Values'); Michael Taggart, 'The Province of Administrative Law Determined?' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 1, 3; Dawn Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' [1997] (Winter) *Public Law* 630.

164 See, eg, Daly, *Understanding Administrative Law* (n 12); Chief Justice RS French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) ('Values Revisited'); Aronson, 'Public Law Values' (n 163); Allsop (n 8); David Dyzenhaus, 'Constituting the Rule of Law: Fundamental Values in Administrative Law' (2002) 27(2) *Queen's Law Journal* 445 ('Constituting the Rule of Law').

165 Daly, *Understanding Administrative Law* (n 12) 108.

166 French, 'Values Revisited' (n 164) 26.

167 See, eg, Allsop (n 8) 128; Robert French, 'Rationality and Reason in Administrative Law: Would a Roll of the Dice be Just as Good?' (Annual Lecture, Australian Academy of Law, 29 November 2017).

168 Aronson, 'Muddling Through' (n 11) 6.

169 Ibid.

170 Daly, 'The Language of Administrative Law' (n 15) 524.

or 'meta-value'.[171] Common meta-values include lawfulness or the enforcement of the rule of law,[172] government accountability,[173] good administration,[174] controlling abuses of power,[175] the pursuit of public interests,[176] and the protection of individual rights and dignity against state power.[177] Others are deeply sceptical about whether mission statements are capable of encompassing the large and varied nature of the subjects, statutes, decisions and relationships covered by administrative law.[178] For instance, Aronson argues that 'judicial review's normative drivers … will themselves vary between different administrative fields'.[179] Joseph's take is even more enigmatic, describing the 'true motivation' for judicial review as 'instinctual impulse' about whether 'something has gone wrong'.[180]

My point is that, with this level of disagreement about the most basic questions of what 'administrative law' *is*, what it seeks to achieve and what values it protects, there cannot be an exhaustive, universally accepted list of administrative law or judicial review values. Nevertheless, while it might not be possible to develop a definitive, exhaustive list of administrative law's values, looking across the literature it *is* possible to discern a fair degree of consensus amongst scholars and jurists about a few central, overlapping themes which give rise to some core values (albeit expressed in different terms by different scholars and jurists).

The first is that courts, in judicial review proceedings, are responsible for determining the legal, or jurisdictional, limits of executive power, and whether those limits have been breached. Legality, lawfulness and the rule of law (narrowly

171 Joe Tomlinson, 'The Narrow Approach to Substantive Legitimate Expectations and the Trend of Modern Authority' (2017) 17(1) *Oxford University Commonwealth Law Journal* 75, 81.

172 See, eg, French, 'Values Revisited' (n 164) 27–33; Dyzenhaus, 'Constituting the Rule of Law' (n 164).

173 See, eg, Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020) (though Rock's analysis and arguments are not limited to 'administrative law' accountability mechanisms and explore private law's application to government as well). Cf Peter Cane, 'Theory and Values in Public Law' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford University Press, 2003) 3, 15.

174 See, eg, Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 46.

175 See, eg, Lord Justice Sedley, *Freedom*, *Law and Justice* (Sweet & Maxwell, 1999) 33; Philip A Joseph, 'Exploratory Questions in Administrative Law' (2012) 25(1) *New Zealand Universities Law Review* 73, 76–7 ('Exploratory Questions'); Sir Alfred Denning, *Freedom Under the Law* (Stevens & Sons, 1949) 99–126; Adrian Vermeule, 'Optimal Abuse of Power' (2015) 109(3) *Northwestern University Law Review* 673; John Laws, 'Public Law and Employment Law: Abuse of Power' [1997] (Autumn) *Public Law* 455, 460–3; TRS Allan, *The Sovereignty of Law: Freedom*, *Constitution*, *and Common Law* (Oxford University Press, 2013) 373–4; Paul Daly, 'Administrative Law: Characteristics, Legitimacy, Unity' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal*, *Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 101, 106–7.

176 See, eg, Jason NE Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal*, *Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 39, 69; Jason NE Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 45, 52.

177 See, eg, David Dyzenhaus, 'Dignity in Administrative Law: Judicial Deference in a Culture of Justification' (2012) 17(1) *Review of Constitutional Studies* 87.

178 For a particularly good recent contribution, see Bell (n 153).

179 Aronson, 'Muddling Through' (n 11) 6.

180 Joseph, 'Exploratory Questions' (n 175) 74–5.

defined) are values commonly used to express this idea.[181] This idea and those values are widely accepted, but not particularly helpful when it comes to explaining presumptions such as reasonableness, rationality and fairness in Australia because, by definition, once a court has attributed those intentions to Parliament, breaches become breaches of law and hence contrary to the rule of law or legality.

A second, related theme centres on a thicker account of what democratic accountability and legitimacy require. These values are also very much connected with fairness to individuals (a value I discuss below) and in some accounts are indistinct. For example, the value of participation falls under both. But I am setting the two apart based on the levels at which they operate: democratic concerns are more systemic and less individually-focused compared with dignitarian/fairness values. The values encompassed by the democratic legitimacy theme include: accountability in the sense that the administration must be answerable for, and give an explanation for, its decisions;[182] rationality in the sense that the reviewing court must be capable of seeing the logic in the decision-maker's explanation; and transparency. These values are directed at ensuring the democratic legitimacy of the administrative state, as Etienne Mureinik has argued:

> Democracy means making government more responsive. That means fostering (a) participation and (b) accountability, which is to say, the responsibility of government to justify its decisions to those whom it governs.[183]

Legal unreasonableness gives more weight to these thick democratic values compared with *Wednesbury*. Legal unreasonableness is centred on the 'justification, transparency and intelligibility' of decisions – a phrase borrowed from Canada, where the Supreme Court expressly sought to give effect to Mureinik's theory (via the work of Dyzenhaus).[184] This is more than mere rhetoric. As I explained in Part II(B), one of the defining new features of *Li* and the post-*Li* cases is a much greater emphasis on the justification which has been, or could be, offered for administrative decisions.

A third theme in the values literature is respect for the political branches. This is given expression in constitutional values terms, including parliamentary sovereignty, democracy and the separation of powers. Although some of the same terms are used to justify administrative accountability to the judiciary, this theme essentially represents the other side of the coin. These democratic values acknowledge the limits of the judicial function and the legitimate role of legislatures in conferring executive power and defining its limits. On one view,

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181 Daly's account sees this as part of the broader value of electoral legitimacy: Daly, *Understanding Administrative Law* (n 12) 106–11. Though his earlier work had the rule of law as a separate value: Paul Daly, 'Administrative Law: A Values-Based Approach' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 23.

182 Note the contestability of what accountability is and comprises of, both generally and in administrative law contexts specifically: Janina Boughey and Greg Weeks, 'Government Accountability as a "Constitutional Value"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99, 102–3.

183 Etienne Mureinik, 'Reconsidering Review: Participation and Accountability' [1993] *Acta Juridica* 35, 46.

184 See Boughey, 'Culture of Justification' (n 83) 412–3, quoting *Dunsmuir* [2008] 1 SCR 190, 220–1 [47] (Bastarache and LeBell JJ for McLachlin CJ, Fish and Abella JJ).

the shift from *Wednesbury* to legal unreasonableness reflects a diminution of respect for the political branches, as in many cases it seems to set the bar lower for applicants. However, legal unreasonableness might also be viewed as *more* respectful of the executive's role and Parliament's conferral of functions on the executive. That is because it is arguably clearer now what the executive must do to exercise discretion lawfully: it must simply provide a rational explanation, as explained in Part II(B).[185] By contrast, although the *Wednesbury* threshold may have been set higher, it was more impressionistic.

A fourth theme in discussions of administrative law's values concerns the impact of administrative decisions on individuals. Virtually every list of values includes some expression of the idea that decisions should be made in a way which is cognisant of this impact; to protect the dignity of affected individuals by treating them with respect and fairness. Some go further and add human rights, or their protection, as a value of administrative law, but this is more controversial, particularly in Australia. Dignitarian values have some utility in explaining the recent changes to unreasonableness in Australia. As I argued in Part II(C) above, the fact that the shift occurred in the migration setting, where procedural fairness has been expressly curtailed by the legislature, is no accident. The High Court's extension of the presumption of reasonableness to process decisions in a context where Parliament has eroded procedural protections seems to have been driven, at least in part, by a desire to protect the value of individual fairness or justice.

A fifth set of values drills down into the legitimate motives for administrative action. These values in essence require that public powers be exercised for public purposes, so decision-makers must act honestly and in good faith and not abuse their powers. I address abuse of power specifically in the next section.

The sixth and final theme focuses on the workability of the system of administration and administrative law. 'Good administration' is often used as the term to express this value, but that term is broader and more contestable. Arguably, good administration encompasses most of the other values set out above: lawfulness, fairness, accountability, rationality, participation and more. But it also weighs efficiency and certainty into that mix, and those workability concerns are distinct, but arguably not values so much as functional, practical considerations. The High Court's emphasis of context in the legal unreasonableness test, examined in Part II(A) above, might be seen as a nod to workability. On the other hand, the greater justificatory demands that legal unreasonableness places on the administration and the higher chances of review applicants succeeding on this ground might be viewed as evidence of a lesser emphasis on efficiency.

These normative drivers must be calibrated in each case with the policy goals of the particular legislative scheme under which the decision-maker was operating. The many and varied legislative schemes in the 'statutory universe' in which we live means that the balance between these values and functional factors necessarily changes in different legislative contexts.[186] For example, in a decision-

185 David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed), *The Province of Administrative Law* (Hart, 1997) 279, 302–7.

186 Bell (n 153); Daly, *Understanding Administrative Law* (n 12).

making context with more significant implications for individual liberty, the value of fairness might factor in more heavily. The fact that so much of the workload of Australia's federal courts is in the field of migration[187] – an area where decisions have great impact on individuals and where fairness has often been expressly curtailed[188] – cannot be separated from the recent changes to unreasonableness. However, by its very nature, the new legal unreasonableness test accommodates this need for adaptability because it enhances the ability of courts to alter the balance between values in different statutory circumstances. It is far more flexible in the way it engages values compared to a single, rigid, high *Wednesbury* threshold. In this way, it also reflects functionality at its very core.

Thus, although the Court has not itself expressly discussed the normative drivers of the recent shifts in the unreasonableness standard in any depth, it is fairly easy to see how they reflect commonly understood, well-recognised administrative law values. The central changes explored in Part II display a rebalancing of core values. Greater weight is given now to individual interests, to reflect the statutory limits on procedural fairness. Legal unreasonableness also gives more weight to thick democratic values through its focus on justification and transparency. However, legal unreasonableness retains respect for the political branches through the deference it gives to cogent justifications provided by decision-makers, and arguably makes the duties of decision-makers clearer than under *Wednesbury*. The new threshold also balances the need for workability through its contextual variability. Interestingly, however, the only references to values in the High Court's legal unreasonableness judgments point elsewhere – to abuse of power. I now turn to consider whether this phrase has any useful explanatory power.

### B Is *Abuse of Power* the Justification for Legal Unreasonableness?

As I noted in Part II(A), in their efforts to explain the new reasonableness test, some Australian judges have returned to the phrase 'abuse of power' as the threshold or justification for judicial intervention.[189] These references link back to Brennan J's justification of the unreasonableness ground from *Quin*.[190] His Honour used the phrase 'abuse of power' as both a threshold and justification for judicial intervention on the unreasonableness ground. Several leading commentators and judges across the common law world have argued that controlling abuses of government power is the *defining* rationale for judicial review of administrative

187 Despite a decrease in cases during the COVID-19 pandemic, migration cases make up 67% of the Federal Court's appellate workload, and 67% of the Federal Circuit and Family Court's filings in the general federal law jurisdiction. Further, numbers alone do not show the impact of the courts' migration caseloads on workload, as migration cases are typically complex, and are more likely to go to written judgment than other areas of the Federal Circuit Court's work. See Federal Court of Australia, *Annual Report 2020–2021* (Report, September 2021) 23–4; Federal Circuit and Family Court of Australia, *Annual Report 2020–2021* (Report, September 2021) 10, 20, 39–41.

188 See above n 34 and accompanying text.

189 See above nn 47–50 and accompanying text.

190 Nettle and Gordon JJ's discussion in *SZVFW* (2018) 264 CLR 541, 572–4 [80]–[83] refers to the joint judgment in *Li* (2013) 249 CLR 332, 363–4 [67] (Hayne, Kiefel and Bell JJ), which reflects the language used by Brennan J in *Quin* (1990) 170 CLR 1, 36.

action.[191] It is probably the most popular mission statement offered for administrative law.[192] The phrase is also used in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which, after enumerating specific grounds on which review may be sought, includes several 'catch-all'[193] grounds, including 'any other exercise of a power in a way that constitutes abuse of the power'.[194]

Other judges, however, have objected to abuse of power being used as the touchstone for legal unreasonableness, despite its endorsement by Brennan J and the continuing influence of his judgment. In particular, Gageler J in *SZVFW* said that the joint judgment's use of the phrase in *Li* 'cannot be read as treating a judicial conclusion of unreasonableness as admitting of a margin of appreciation of the kind involved in a judicial conclusion of "abuse of process"'.[195] He continued, explaining that a reviewing judge would 'impermissibly enter the zone of discretion committed to the administrator' if they were to form their own conclusion that the decision-maker had 'exercised power in a manner which, though lawful, might be characterised as an abuse'.[196] Allsop CJ, in his influential exposition of the legal unreasonableness test in *Stretton*, was similarly wary of the phrase, saying that the submissions made in the case 'reflected the dangers of overly emphasising the words of judicial decisions concerning the nature of abuse of power, and of unnecessary and inappropriate categorisation'.[197] He urged that the joint judgment 'should be read as a whole – as a discussion of the sources and lineage of the concept' and the various ways in which it has been described as setting a boundary between the legitimate task of courts and that of decision-makers.[198]

These doubts about the appropriateness of abuse of power being used in descriptions of the test for legal unreasonableness can be traced to the way the phrase has been used by English courts to extend judicial review principles in controversial ways. This is clear in Gageler J's reference to McHugh and Gummow JJ's judgment in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* ('*Lam*').[199] In *Lam*, McHugh and Gummow JJ discussed the expansion of the grounds of judicial review in England, and the development of the principles of proportionality and substantive legitimate expectations in particular. They explained that those principles 'fix upon the quality of the decision-making and thus the merits of the outcome',[200] in a way which would not be consistent with the separation of powers in Australia. The details of why substantive legitimate expectation and proportionality review of administrative decisions might be inconsistent with Australia's separation of powers are explored in detail

191 See above n 175.
192 Joseph, 'Exploratory Questions' (n 175) 77; Daly, 'The Language of Administrative Law' (n 15) 524.
193 Mark Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?' (2004) 15(3) *Public Law Review* 202, 203.
194 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(2)(j), 6(2)(j).
195 *SZVFW* (2018) 264 CLR 541, 566 [58].
196 Ibid.
197 *Stretton* (2016) 237 FCR 1, 5 [10].
198 Ibid.
199 (2003) 214 CLR 1, 23 [72] ('*Lam*'), cited in *SZVFW* (2018) 264 CLR 541, 566 [58].
200 *Lam* (2003) 214 CLR 1, 23 [73].

elsewhere,[201] and I need not repeat those explanations here. What is important for present purposes is that McHugh and Gummow JJ, like many English authors before them, traced these particular English developments to the adoption of abuse of power as the overarching rationale for judicial intervention in administrative decision-making. For instance, they said that '[i]n *Coughlan*, the Court of Appeal appears to have linked the doctrine of legitimate expectation with respect to substantive benefits to unfairness amounting to an "abuse of power"'.[202] They went on to explain that

> in England, the course of decisions has not stopped there … Laws LJ spoke of 'abuse of power' as the rationale alike of all the 'general principles of public law', including both legitimate expectations and procedural fairness as well as *Wednesbury* unreasonableness, 'proportionality' and 'illegality'. In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.[203]

Other judges in *Lam* expressed similar views about the concept of abuse of power insofar as it could be seen to justify the extension of judicial review to protect substantive legitimate expectations, but not so vehemently as McHugh and Gummow JJ.[204]

Even apart from its association with these English developments, there are other reasons to doubt the utility of abuse of power in defining or explaining developments in the unreasonableness standard. Firstly, the consensus in England about the justificatory influence of abuse of power has since splintered. There is now recognition that even substantive legitimate expectations cannot be explained entirely on this basis.[205] In addition, despite its frequent use, abuse of power is not a phrase which appears to provide much specific guidance; it 'goes no distance to tell you, case by case, what is lawful and what is not'.[206] Adrian Vermeule has summarised the different ways the term is used in public law:

> Abuse may be defined in legal terms as action that flagrantly transgresses the bounds of constitutional or statutory authorization, or in welfare-economic terms as action that produces welfare losses – either because officials have ill-formed beliefs … or because they act with self-interested motivations.[207]

The phrase has also been used to perform a range of interrelated tasks in administrative law. One which is particularly problematic in the Australian context has been its taxonomical usage. Abuse of power has been used to refer collectively

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201 See especially Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) ch 7; Boughey, 'Reasonableness' (n 26).

202 *Lam* (2003) 214 CLR 1, 23 [71].

203 Ibid 23 [72] (citations omitted).

204 See ibid 10 [28] (Gleeson CJ), 37 [118]–[119] (Hayne J).

205 See Bell (n 153) 137–8.

206 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [67] (Laws LJ).

207 Vermeule (n 175) 675.

to those common law[208] principles developed to constrain administrative discretion which focus on the motives of decision-makers, from objective, textual limits on administrative powers.[209] Abuses of power are framed as distinct from breaches of law.[210] For example, Lord Denning spoke of the task of courts as ensuring that executive powers 'are not exceeded *or* abused'.[211] This use would directly contradict the High Court's justification for legal unreasonableness as an excess of statutory power. Another use of abuse of power is the use to which it was put by Brennan J in *Quin*. As I explained above, his Honour used the phrase as a 'signal'[212] of judicial restraint, viewing it as a threshold for judicial intervention on the *Wednesbury* ground in order to communicate the strictness of that test.

This confusion about the meaning of the phrase makes it hard to see what it could contribute to our understanding of legal unreasonableness. It is no clearer (and arguably even less clear) than the word *reasonableness* itself. Even Brennan J's most limited use of the phrase poses real problems for the new test. The recent decision of the Full Federal Court in *Minister for Immigration and Border Protection v Mohammed* ('*Mohammed*')[213] highlights the risks of abuse of power being used as a threshold test for legal unreasonableness. In that case, there had been no abuse of power on any of the above definitions. The decision-maker (the Migration Review Tribunal) had followed precedent which meant that the applicant did not meet the criteria for a temporary partner visa. Accordingly, the applicant's permanent partner visa was later refused because one of the criteria for a permanent visa is that the applicant holds the temporary visa. The precedent on which the Tribunal had based its first decision was overturned with the result that the Tribunal's first decision was a nullity, but only after the decision about the permanent visa had already been made.[214] The question for the courts on judicial

208 I note the long running debate in England about whether these limits on administrative power are sourced in common law or are implications. But the High Court of Australia has made it clear that this is a false dichotomy, and that '[t]he principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law': *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

209 See especially the debate in the 1970s between leading English authors about whether English law had yet developed equivalent principles to the French abuse of power (*détournement de pouvoir*) principles discussed in DCM Yardley, 'The Abuse of Powers and Its Control in English Administrative Law' (1970) 18(3) *American Journal of Comparative Law* 565. On the French principles and the distinction between breach of law and abuse of power, see Jean-Marie Auby, 'The Abuse of Power in French Administrative Law' (1970) 18(3) *American Journal of Comparative Law* 549.

210 This distinction between breaches of law and abuses of power is also evident in the language of the High Court of Australia in constitutional cases in the middle of the 20th century: see, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 154 (Latham CJ), 242 (Webb J); *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170, 185 (Latham CJ); *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492, 516 (Dixon J); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 84–5 (Gavan Duffy CJ and Starke J), 86–7 (Rich J), 100, 103–4 (Dixon J), 125 (Evatt J); *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37, 67–8 (Latham CJ).

211 Denning (n 175) 100 (emphasis added). *Roncarelli v Duplessis* [1959] SCR 121, 140–1 (Rand J for Judson J) provides another important illustration.

212 Daly, 'The Language of Administrative Law' (n 15) 533.

213 (2019) 269 FCR 70 ('*Mohammed*').

214 Ibid 72–3 [5]–[11] (Middleton, Bromberg and Kerr JJ).

review was whether the Tribunal's decision on the permanent visa was legally unreasonable, given that the basis on which it had been made turned out to be legally (though not factually) incorrect.[215] That is, the Tribunal's decision on the permanent visa had been reached on the sole basis that the applicant did not hold the temporary visa, but in law, at the time the Tribunal made its decision, no lawful decision had yet been made about his temporary visa. The applicant argued, and the Court held, that no reasonable tribunal, appraised of these facts, would have reached a decision on the permanent visa had the circumstances been known to it at the time.[216] Middleton, Bromberg and Kerr JJ followed Allsop CJ's analysis of unreasonableness, finding that it was not inconsistent with anything that Nettle and Gordon JJ or Kiefel CJ had said, and that at other points in their judgments the High Court Justices had endorsed Allsop CJ's explanation of unreasonableness.[217] Importantly, in *Mohammed*, Allsop CJ's analysis allowed the Court to take a broader approach to unreasonableness, which was unconstrained by abuse of power. Had the Court required abuse of power to be present to make out unreasonableness, the applicant would have failed because the Tribunal could not possibly have known that the first decision was invalid, as it had not yet been ruled invalid at the time.

## IV CONCLUSION

This article has analysed the significant changes which have taken place in the unreasonableness standard in Australian administrative law since *Li*. I have examined both the rhetoric and application of the new legal unreasonableness test over the last nine years and argued that legal unreasonableness, as applied, is distinct from the *Wednesbury* standard which preceded it in three main ways: it is context specific; it focuses on the decision-maker's justification (where one is given); and it extends to limit procedural discretions. These shifts are considerable and bring Australia closer to the approaches to unreasonableness in other English-speaking common law jurisdictions. Unlike those jurisdictions, however, the High Court of Australia has not replaced the ultra vires theory of judicial review with a more functional, values-driven approach. Nor has the High Court articulated the values, normative and functional drivers which underpinned the development of legal unreasonableness, with the exception of a renewed emphasis by some judges on abuse of power as a rationale for judicial intervention. The new unreasonableness test reflects a change in the intention attributed to legislatures in relation to the limits on discretionary administrative powers, which must have been underpinned by a change in or rebalancing of values and functional factors. However, I have argued that, despite its longstanding and revived popularity in the context of administrative law's unreasonableness standards, abuse of power does not have any explanatory power. Other administrative law values, particularly those concerned with individual dignity/fairness and the democratic accountability

215 Ibid 76 [19].
216 Ibid 92 [93].
217 Ibid 80 [26].

of the administrative state, are more illuminating in describing and explaining the changes to the unreasonableness standard. Importantly, the realignment of administrative law's values evident in the legal unreasonableness test serves to provide more flexibility to reviewing courts to balance democratic and individual values against practical, functional considerations in order to accommodate the policy objectives of the particular statutory scheme under which each decision-maker operates.