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Overview

This paper outlines some of the key administrative law developments over the last 12 months of relevance to NSW practitioners.

First, it addresses several recent administrative law decisions, with a particular focus on the High Court's analysis of "unreasonableness" as a ground of review in *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225. Secondly, it summarises the effect of new Pt. 59 of the *Uniform Civil Procedure Rules 2005* ("*UCPR*") concerning judicial review proceedings.

"Unreasonableness" in the exercise of a statutory discretion

Judicial review of government action is concerned with the *legality* of the action, rather than its merits, which is generally the domain of administrative tribunals.[1]

One of the most oft-cited grounds of judicial review is "*Wednesbury* unreasonableness", so named because of the decision of the UK Court of Appeal in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. In rejecting the cinema's argument that a condition restricting it from admitting children under the age of fifteen years on a Sunday was invalid, Lord Greene MR accepted that an independent ground for legal challenge on the basis of "unreasonableness" could arise in an "overwhelming" case if a decision was "so unreasonable that no reasonable authority could ever have come to it".[2]

Although *Wednesbury* unreasonableness is frequently pleaded in judicial review proceedings, Australian courts have customarily been hesitant to apply it. This is largely because a consideration of whether a decision is so unreasonable that no reasonable decision-maker could ever come to it looks, in many cases, very much like a review of the *merits* of the decision. Nonetheless, "[p]roperly 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".[3]

The High Court has recently explored a challenge to the exercise of administrative discretion by a tribunal on the basis of "unreasonableness".

Minister for Immigration and Citizenship v Li (2013) 297 ALR 225 (8 May 2013)

Ms Li, a cook, applied for a skilled-independent overseas student visa. One of the requirements for the visa was that an assessing authority had assessed the applicant's skills as suitable for his or her nominated skills occupation and no evidence had become available that the information given or used as part of the assessment was materially false or misleading. Ms Li's application was supported by a skills assessment conducted by the Trades Recognition Authority ("TRA"). However, as Ms Li admitted to the Minister's delegate, she had not in fact been employed at a particular restaurant as the TRA had been informed. She claimed that her former migration agent had provided this information to the TRA without her knowledge. The Minister's delegate refused the application for a visa.

Ms Li, through a new migration agent, applied for a review of the decision by the Migration Review Tribunal ("MRT"). (This review involved a fresh consideration of Ms Li's visa application and was not limited to information before the Minister.) Ms Li's agent subsequently requested the TRA to undertake a new skills assessment and informed the MRT of this.

At a hearing in December 2009, the MRT questioned Ms Li about the earlier misrepresentation of her work experience. It discussed the possible provision of a second skills assessment by TRA with her migration agent but left undecided the question of whether it would consider this. The

[1] *Attorney-General v Quin (NSW)* (1990) 170 CLR 1 at 36. Although some specialist state courts, such as the NSW Land and Environment Court, have a merits review jurisdiction.

[2] At 230.

[3] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36.

agent was invited to address it further on the matter. On 21 December 2009, the MRT sought, by 18 January 2010, further information from Ms Li about the false information, noting that it would consider a request for an extension of time.

The agent replied on 18 January 2010, advising that the application for a second skills assessment had been unsuccessful, but explained "two fundamental errors" in TRA's assessment. He advised that Ms Li had applied to TRA for a review and asked the MRT to "forbear from making any final decision regarding her review application until the outcome of her skills assessment application is finalised". He undertook to keep the MRT informed of the progress of the application and emphasised that Ms Li no longer relied upon the first skills assessment as the second skills assessment, when finalised, would satisfy the criterion.

On 25 January 2010, without waiting for the outcome of the migration agent's representation to TRA, the MRT affirmed the delegate's decision on the basis that the first skills assessment was affected by fraud. It acknowledged the agent's last letter but did not explain its decision beyond saying: "The tribunal considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further…". On 12 April 2010 the TRA provided a successful assessment to Ms Li.

Ms Li applied to the (then) Federal Magistrates Court for a review of the MRT's decision. Although her application was couched in terms of a denial of procedural fairness, the Federal Magistrate set aside the MRT's decision on the basis that its decision to proceed "rendered it unreasonable such as to constitute unreasonableness in the *Wednesbury Corporation* sense".[4] A majority of the Full Federal Court dismissed the Minister's appeal as the requirements of procedural fairness had not been met and an unreasonable refusal to adjourn meant that the MRT had not discharged its core statutory function of reviewing the decision.[5]

The High Court's decision

In three separate judgments, the High Court dismissed the Minister's appeal.

French CJ agreed that the MRT had denied Ms Li procedural fairness, because a reasonable opportunity to present her case extended to the opportunity to obtain evidence that her skills had been assessed as suitable.[6] There was a proper basis for expecting a favourable outcome from the TRA and "no practical countervailing consideration disclosed in the MRT's reasons for refusing to defer its decision".[7] His Honour also considered that there was, in the circumstances, an "arbitrariness about the decision, which rendered it unreasonable".[8] The MRT's decision to proceed "was not, on the face of it, informed by any consideration other than the asserted sufficiency of the opportunities provided to [Ms Li] to put her case".[9]

Hayne, Kiefel and Bell JJ did not consider it necessary to determine whether there had been a failure to accord Ms Li procedural fairness, although agreed that "a failure to accede to a reasonable request for an adjournment can constitute procedural unfairness".[10] Rather, their Honours addressed whether the MRT's discretionary power had been "exercised reasonably".[11] While they accepted the MRT was not under an obligation "to afford every opportunity to an applicant for review to present his or her best possible case and to improve upon the evidence", it

[4] *Li v Minister for Immigration and Citizenship* [2011] FMCA 625 at [49].

[5] *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at 395 [27], [29] and 397 [38] and [39].

[6] At 235.

[7] Above.

[8] At 239.

[9] Above.

[10] At 243.

[11] At 246.

was not apparent how it concluded "enough is enough" in this case.[12] The MRT did not suggest there was no prospect of the second skills assessment being obtained, or that the outcome could not be known, in the near future. The plurality suggested several errors that the Tribunal may have made. It could, for instance, have taken into account an irrelevant consideration (namely Ms Li's previous conduct in providing false information) or, alternatively, it could have given too much weight to some factors and insufficient weight to others. While it was not possible to say which error was made, "error must be inferred" because "the result itself bespeaks error". It followed that the MRT "did not discharge its function (of deciding whether to adjourn the review) according to law" and so acted beyond jurisdiction.[13]

Gageler J also decided the matter on the basis of "unreasonableness", rather than procedural fairness. His Honour considered that a failure to adjourn to allow a visa criterion to be met could, in some circumstances, be so unreasonable as to constitute a failure to review.[14] In the circumstances of this case, "[n]o reasonable tribunal, seeking to act in a way that is fair and just, and according to substantial justice and the merits of the case, would have refused the adjournment".[15] There was "no countervailing consideration on the basis of which it might be concluded that the refusal to adjourn was one reasonably open to the MRT".[16]

Comment

The decision is interesting in a number of respects, not least because of the Court's analysis of "unreasonableness" as a ground of review.

The starting point for French CJ was that a statutory discretion has to be exercised according to "the rules of reason".[17] The concept of "unreasonableness" may be "expressive of a particular error", such as improper purpose, taking into account irrelevant considerations, failing to take into account relevant considerations, a failure to comply with a condition of a procedural or substantive character or a failure to accord procedural fairness.[18] It also encompasses "unreasonableness from which an undisclosed underlying error may be inferred". A decision affected by such an error "falls outside the framework of rationality provided the statute". (This is "a limitation imputed to the legislature on the basis of which courts can say that parliament never intended to authorise that kind of decision".[19]) "*Wednesbury* unreasonableness" refers to an error where the decision-maker has "kept within the four corners of the matters it ought to consider" but has still transgressed the "framework of rationality".[20] Beyond this there is "generally an area of decisional freedom" within which "reasonable minds may reach different conclusions about the correct or preferable decision", although there is no "legislative sanction to be arbitrary or capricious or to abandon common sense".[21] It is possible that French CJ's ultimate rejection of the MRT's decision on the basis of "arbitrariness" was intended to invoke *Wednesbury* unreasonableness as his Honour conceived it, as opposed to unreasonableness from which an undisclosed underlying error may be inferred, although this is certainly not clear.

Hayne, Kiefel and Bell JJ's analysis of the relevant principles was similar. The plurality accepted that "the legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably", with the content of this standard to be determined by construction of the

[12] At 251. This was in view of s. 360(1) of the *Migration Act 1958* (Cth) which provided that the MRT "must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review".

[13] Above.

[14] At 255.

[15] At 260.

[16] At 259-260.

[17] At 236.

[18] At 237.

[19] At 237-238.

[20] At 237.

[21] At 238.

statute.[22] Like French CJ, they do not see this standard of reasonableness as being confined to "*Wednesbury* unreasonableness", which they describe as "an irrational, if not bizarre, decision".[23] More specific errors going to jurisdiction, such as, misdirecting oneself as to the operation of the statute, taking into account irrelevant considerations or failing to take into account relevant considerations may be encompassed by "unreasonableness".[24] An inference of unreasonableness may also be drawn "even where a particular error in reasoning cannot be identified".[25] (That was ultimately the approach their Honours took to the facts of this case.) They described "unreasonableness" as "a conclusion which may be applied to a decision which lacks an evident and intelligible justification", that is, where it is not possible to comprehend how the decision was arrived at.[26] The plurality, like French CJ, accepted that "there is an area within which a decision-maker has a genuinely free discretion" which "resides within the bounds of legal reasonableness".[27]

Gageler J similarly viewed "reasonableness" to be an implied condition of the exercise of a discretionary power, "[a]bsent an affirmative basis for its exclusion or modification".[28] However, his Honour focused on "*Wednesbury* unreasonableness" describing this as indicating "the special standard of unreasonableness which has become the criterion for judicial review of administrative discretion".[29]

For the most part, the High Court's analysis of "unreasonableness" is not necessarily novel. It is well established, as each of the judgments recognised, that a standard of "reasonableness" is generally implied into a discretionary power.[30] It has also been accepted that "unreasonableness" can be descriptive of many of the specific grounds of jurisdictional error.[31] This was apparent in *Wednesbury* itself, where the owner and licensee of the cinema sought a declaration that the relevant condition "was ultra vires and unreasonable". Lord Greene MR observed:[32]

> "Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must… direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said,…to be acting 'unreasonably'."

Nor is it necessarily novel to say that an inference of unreasonableness may be drawn where a particular error in reasoning cannot be identified,[33] although it is uncommon.

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[22] At 246-247.

[23] At 247-248.

[24] At 248-249.

[25] At 248.

[26] At 250.

[27] At 247.

[28] At 252-253.

[29] At 256.

[30] Aronson, M. and Groves, M., *Judicial Review of Administrative Action*, 5th ed., 2013, LawBook Co., Pyrmont, at [6.400].

[31] Aronson and Groves at [6.410].

[32] At 229.

[33] See *Avon Downs Proprietary Limited v The Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 and *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 250. Such an approach is used in appellate review of judicial discretion (*House v R* (1946) 109 CLR 467 at 505), a point noted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at 75, as well as by the plurality in *Li* (at 249-250).

Nonetheless, the decision in *Li* is still significant in a number of respects. First, the judgment of the plurality represents a rather startling example of inferring "unreasonableness" from the result without identification of a particular error. (The same might be said of the similar conclusions French CJ and Gageler J reached, albeit on grounds expressed slightly differently.) While each eschewed trespassing into the area of "decisional freedom", they conceived this area to be exceedingly narrow. Each judgment seems influenced by the view that there was (apparently) no plausible justification for the MRT's decision to refuse to adjourn the matter. (This was perhaps not helped by the fact that a favourable skills assessment was issued a relatively short time after the MRT's decision.) This suggests the analyses in this decision may only be replicated in a "rare case".[34]

Secondly, the judgments of French CJ and the plurality indicate, in obiter dicta, the potential relevance of considerations of "proportionality", which Australian courts have largely avoided, in contrast to their English counterparts.[35] French CJ gave the example of "a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut…on the basis that it exceeds what, on any view, is necessary for the purpose it serves".[36] The plurality similarly suggested that an "obviously disproportionate response", reached by giving excessive weight to certain facts, may be "one path by which a conclusion of unreasonableness may be reached".[37] This has the potential for narrowing the area of "decisional freedom" for decision-makers.

Thirdly, and perhaps most significantly, the judgments apply considerations of "(un)reasonableness" to an intermediate procedural decision, that is, a step along the way to the MRT's ultimate decision, whether or not to affirm the Minister's decision to reject Ms Li's visa application. The judgments indicate that "unreasonableness" in the taking of an intermediate procedural step in the decision-making process may permit the ultimate decision to be impugned on grounds other than a failure to accord procedural fairness.[38]

Gageler J expressly acknowledged this, explaining that "[t]he implied condition of reasonableness is not confined to why a statutory decision is made; it extends to how a statutory decision is made".[39] He held the MRT would fail to perform its statutory duty to review a decision where:[40]

> "(i) the manner of its performance of a procedural duty, or of its exercise or non-exercise of a procedural power, is so unreasonable that no reasonable tribunal…could have done what the MRT in fact did; and (ii) that unreasonableness, or neglect, on the part of the MRT is shown to be material to the outcome of the review that the MRT has undertaken in fact."

In doing so, his Honour imposed a qualification on orthodox understanding of *Wednesbury* unreasonableness, namely, the materiality of the unreasonableness on the ultimate decision. The other judgments do not question the application of "unreasonableness" to an intermediate procedural step, with the plurality expressly rejecting it as a relevant point.[41]

As a final matter, it is curious why the High Court did not simply decide the matter on the basis of procedural fairness. French CJ concluded that there was a denial of procedural fairness and it seems likely from the analysis of the plurality that their Honours would have reached the same

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[34] As Gageler J described this case: at 258.

[35] Aronson at [6.390].

[36] At 239-240.

[37] At 249.

[38] This is not entirely unique, for example, a decision-making process may be challenged on the basis that a step that is statutorily required in order for the ultimate decision to be valid has not been undertaken.

[39] At 253.

[40] At 254-255.

[41] At 252.

conclusion. It is possible this can be explained by provisions in the *Migration Act 1958* (Cth) ("*Migration Act*") which were expressed to be "an exhaustive statement of the requirements of the natural justice hearing rule".[42] This provided no barrier to French CJ,[43] however, it appears to have influenced the analysis of the other judges.[44]

Procedural fairness: the threshold test

An issue which often troubles decision-makers is whether an obligation to accord procedural fairness arises in a particular case. In most instances, the answer is affirmative.

It is established that the duty to accord procedural fairness not only arises in respect of the exercise of statutory power, but is also relevant to the exercise of prerogative and executive power.[45] The duty attaches simply to "the exercise of public power".[46] There are some limited circumstances where the duty to accord procedural fairness may not arise. A statute may expressly oust the requirements of procedural fairness. Alternatively, a statute may impliedly do so, however, courts are generally reluctant to make such a finding, requiring a "clear expression of intention".[47]

The "threshold test" for determining the applicability of procedural fairness, absent a clear contrary statutory intention, is most commonly described as whether the relevant decision (or exercise of power) affects "rights, interests and legitimate expectations" in a "direct and immediate way".[48]

The High Court has had recent cause to give consideration to this "threshold test".

Plaintiff S10/2011 v Minister for Immigration and Citizenship and Anor (2012) 246 CLR 636 (7 September 2012)

Each plaintiff was a non-citizen of Australia. Three of the plaintiffs sought, and were refused, a protection visa by the Minister's delegate. Each unsuccessfully sought a merits review by the Refugee Review Tribunal ("RRT"). The fourth arrived on a student visa and was granted two further student visas. Her further application was refused by a delegate and her review by the RRT was also unsuccessful.

Each plaintiff then unsuccessfully sought that the Minister exercise his power to dispense with the requirements of the *Migration Act*, for example, to substitute the RRT decision with a more favourable decision. (In each case, the dispensing power was exercisable only by the Minister personally, the Minister had to think it in the public interest to exercise the power and there was no duty to consider whether to exercise the power even if requested to do so.) In some instances, officers of the Minister's department found that the request made did not meet criteria in "guidelines" issued by the Minister addressing the exercise of the dispensing powers and, as stipulated in the guidelines, the request was not referred to the Minister. In respect of the other requests, the Minister himself considered that it would not be in the public interest to intervene and consequently did not exercise the relevant dispensing powers.

The plaintiffs commenced proceedings in the original jurisdiction of the High Court seeking to challenge the Minister's failure to exercise the dispensing powers by arguing, in essence, that in deciding whether or not to consider the exercise of the relevant power, the Minister was obliged to afford procedural fairness.

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[42] Section 375A.

[43] At 234.

[44] At 243-246, 255.

[45] *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *State of Victoria v Master Builders' Association (Vic)* [1995] 2 VR 112.

[46] *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 386.

[47] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 263.

[48] *Kioa v West* (1985) 159 CLR 550 at 584; *Annetts v McCann* (1990) 170 CLR 596 at 598; Aronson at [7.4].

The High Court's decision

The Court held that the Department's consideration of the requests for the Minister to consider exercising the dispensing powers did not attract the requirements of procedural fairness.

French and Kiefel JJ held that, as the Minister has no duty to *consider* the exercise of the dispensing powers, no question of procedural fairness can arise when the Minister declines to embark on such a consideration.[49] The advice provided by the Departmental officers under the "guidelines" was "an executive function incidental to the administration of the [*Migration Act*]". However, there was nothing about the guidelines that attracted a requirement to observe procedural fairness; they did not condition the exercise of the dispensing provisions.[50] This could be contrasted with the following situation:[51]

> "An administrative inquiry may be undertaken and an advice prepared for the purposes of the exercise of a statutory power. If the requirements of procedural fairness constrain the exercise of that power, and the decision-maker relies entirely upon advice proffered in disregard of those requirements, then the statutory decision may be infected by jurisdictional error".

Of broader interest, Gummow, Hayne, Crennan and Bell JJ addressed the Minister's argument that the applications could be dismissed on the basis that the failure to exercise the dispensing provisions would not have "a substantial adverse effect on some identifiable right, interest, privilege or legitimate expectation" (that is, the "threshold test").

In rejecting this submission, the plurality criticised the phrase "legitimate expectation" observing that this "either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded".[52] Rather, the question to be asked is whether the Minister's failure to consider and exercise the dispensing powers "is apt to affect adversely what is the sufficient interest of a party seeking the exercise of those powers in favour of that party".[53] Their Honours expressed agreement with an earlier statement of the Court that it is presumed natural justice applies "to any statutory power which is apt to affect any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation".[54] They also acknowledged, with apparent endorsement, the proposition that "the interest which tends to attract the protection of the principles of natural justice may be equated with the interest which, if affected, gives 'standing' at common law (and, one might add, in equity), to seek a public law remedy".[55] The plaintiffs in this matter had a sufficient interest for the principles of procedural fairness to be attracted given that they sought "to obtain a measure of relaxation" of the visa system which had to be met "to lift what otherwise are the prohibitions upon entry and continued presence in Australia".[56]

In relation to whether there was, nonetheless, an implied obligation to accord procedural fairness, the plurality acknowledged that the "common law" will usually imply, as a matter of statutory interpretation, "a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power".[57] However, properly construed, the dispensing provisions were not

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[49] At 653-654.

[50] At 655.

[51] At 654.

[52] At 658.

[53] Above.

[54] Above, referring to *Kioa v West* (1985) 159 CLR 550 at 619 (Brennan J).

[55] At 659, referring to *Kioa v West* at 621 (Brennan J).

[56] Above.

[57] At 666.

conditioned on the observance of the principles of procedural fairness.[58] This was primarily because of the "distinctive nature of the powers conferred upon the Minister (as personal, non-compellable, 'public interest' powers), and of the availability of access to the exercise of those powers only to persons who have sought or could have sought, but have not established their right to, a visa".[59] Heydon J reached a similar conclusion.[60]

Each of the judgments distinguished *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 (the *Offshore Processing Case*), where the High Court had concluded that the principles of principle fairness *did* apply to the Minister's consideration of whether to exercise similar dispensing powers in connection with unlawful non-citizens found in an excised off-shore place.

The ultimate conclusion in *Plaintiff S10/2011* is probably of less relevance to NSW practitioners given that it turned upon the construction of a unique set of non-compellable Ministerial powers in the *Migration Act*. However, the threshold test outlined by the plurality, including the broader approach to "interests" and rejection of "legitimate expectations", is of wider significance. The plurality's rejection of the concept of "legitimate expectations" expands upon the general criticism of the concept apparent in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.[61] Of particular interest is the *apparent* endorsement of the proposition that the relevant nature and degree of affectation required for procedural fairness is similar to the test for standing at common law and equity.[62]

Procedural fairness: avoiding practical unfairness

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, the High Court emphasised that what procedural fairness entails is driven by practical considerations. In particular, Gleeson CJ explained: "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."[63] The High Court has recently reiterated these sentiments.

RCB (as litigation guardian of EKV, CEV, CIV and LRV) v The Honourable Justice Forrest and Ors **(2012) 292 ALR 617 (7 November 2012)**

A mother brought her four children to Australia and unlawfully refused to return them to their father in Italy. At the father's request, a government agency applied to the Family Court for, and obtained, an order for the return of the children under the *Family Law (Child Abduction Convention) Regulations* (Cth).

The maternal aunt of the children, as litigation guardian, commenced proceedings in the original jurisdiction of the High Court seeking to quash the return order. The arguments included that the Family Court had acted contrary to the rules of natural justice with respect to the children.

The High Court's decision

The High Court dismissed the application. The following refers to the Court's assessment of the procedural fairness argument.

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[58] At 668.

[59] Above.

[60] At 672-673.

[61] The Victorian Court of Appeal recently noted that, because of *Li*, there was "no place for consideration of a 'legitimate expectation'": *Director of Public Prosecutions v Patrick Stevedores Holdings Pty Ltd (ACN 060 462 919) (S APCI 2012 0024)* (2012) 296 ALR 156 at 175.)

[62] A "special interest in the subject matter": *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 527; sometimes framed as an interest "which is greater than that of other members of the public": *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 36.

[63] At 14.

French CJ, Hayne, Crennan, Kiefel and Bell JJ accepted that the children's interests were affected by determination of an application for a return order, as were the parents' and the agency's interests.[64] However, determining such issues "in a way that is procedurally fair to all who are interested in or affected by their decision…presents an essentially practical issue".[65] The question was "[h]ow is the court to be sufficiently and fairly apprised of what the child concerned wants, how strongly that view is held, and how mature the child is?".[66] Their Honours considered that this was achieved by the appointment of a family consultant, an officer of the Family Court, who heard and assessed the children's views and reported these to the court and the parties.[67] There was "no suggestion of any practical unfairness resulting to the children from their non-intervention as parties in the proceeding".[68] There was, accordingly, no procedural unfairness to the children.[69] Heydon J reached the same conclusion for similar reasons.[70]

The decision demonstrates the importance of adopting a practical approach when considering whether the requirements of procedural fairness have been satisfied.

Improper purpose: the relevance of legal consequence of the exercise of power

A statutory power must be exercised for the purpose for which it was conferred. This purpose may be specified in legislation. Alternatively it may be derived from an exercise in statutory construction.[71] If a power is exercised for an ulterior purpose (and that is a substantial purpose if there is more than one), it will have been exercised invalidly.[72]

The High Court recently considered a challenge based on improper purpose.

Plaintiff M79/2012 v Minister for Immigration and Citizenship (2013) 298 ALR 1 (29 May 2013)

The plaintiff, a Sri Lankan national, arrived at Christmas Island by boat without a visa and claimed refugee status. Under the *Migration Act*, unlawful non-citizens who have arrived in an excised offshore place cannot make a valid application for a protection visa unless the minister exercises a dispensing power. The Minister granted the plaintiff a 7-day temporary safe haven visa and a 6-month bridging visa. The purpose of the bridging visa was to enable the plaintiff to remain in the community and work and access services pending completion of the assessment of his claim of refugee status. If the Minister had merely issued the bridging visa, the plaintiff would have been able to make a valid application for a protection visa. The grant of a safe haven visa enlivened another statutory bar preventing the plaintiff from making a valid application for a protection visa unless the Minister exercised a dispensing power.

The plaintiff sought to quash the Minister's decision to issue him with a temporary safe haven visa and then require the Minister to consider his application for a protection visa. The plaintiff argued, among other things, that the Minister granted the temporary safe haven visa for the improper purpose of preventing him from making a valid protection visa application.

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[64] At 628.

[65] Above.

[66] Above.

[67] At 628-629.

[68] At 629.

[69] Above.

[70] At 632.

[71] *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

[72] *Thompson v Council of the Municipality of Randwick* (1950) 81 CLR 87 at 106; *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 41 ALR 467 at 468.

The High Court's decision

A majority of the High Court (French CJ, Crennan, Bell and Gageler JJ; Hayne J dissenting) held that the grant of the temporary safe haven visa to the plaintiff was valid, with the consequence that the plaintiff's application for a protection visa was invalid.

French CJ, Crennan and Bell JJ considered the purpose of a temporary safe haven visa was "to provide a temporary refuge for non-citizens who would be at risk of some form of harm if returned to another country".[73] This could be distinguished from "the legal characteristics and consequences" which were, relevantly, it could be granted for a short time…and its grant prevents the visa holder from making a valid application for any other kind of visa unless the Minister exercises his dispensing power.[74] Their Honours rejected the plaintiff's argument that a temporary safe haven visa could only be granted in response to a humanitarian emergency. Such a visa could be granted if the Minister thinks it is in the "public interest" to do so.[75] That "is a matter which, within the general scope and purposes of the Act, it is left for the minister to judge".[76] Their Honours concluded that "[i]t was open to the minister…to grant a temporary safe haven visa by reference to its legal characteristics and consequences unconstrained by the purpose for which it was created under the Act".[77] The purposes for which such visas could be granted "were those purposes which would serve the public interest as the minister judged it".[78] These "were not shown to be beyond the scope and purpose of the Act nor the power conferred" to grant the visa.[79] It followed that the grant of the temporary safe haven visa to the plaintiff was valid and the plaintiff's application for a protection visa was not valid.

Gageler J similarly concluded that "[t]he statutory consequences that attach to the grant of a visa of a particular class are considerations that the minister is entitled to take into account in considering whether the minister thinks that is in the public interest to grant a visa of that class".[80]

The Court's reasoning again turned on the highly prescriptive and specific provisions of the *Migration Act*. Nonetheless, it emphasises that where a statutory discretion is couched in broad terms, such as by reference to the public interest, it may be permissible to take into account the statutory consequence of the exercise of the discretion. This will ultimately depend upon the particular statutory regime.

Failure to take into account evidence and/or submissions

Challenges are often made against decisions on the basis that the decision-maker has failed to take into account evidence and/or submissions that have been put to the decision-maker. These arguments can be couched in various ways; including a failure to accord procedural fairness.[81] Somewhat problematically, they are sometimes couched as a failure to take into account a relevant consideration.

Both the Full Federal Court and NSW Court of Appeal have had cause to consider such arguments relatively recently.

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[73] At 8.

[74] At 9.

[75] At 10.

[76] At 10 and 12.

[77] At 13.

[78] Above.

[79] Above.

[80] At 32-33.

[81] Eg., *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24].

Soliman v University of Technology, Sydney **(2012) 207 FCR 277 (24 October 2012)**

Mr Soliman was a senior lecturer at the University. He submitted an examination paper for the end of semester exam, but also disclosed the contents of the paper to his students during revision classes. The university established a misconduct investigation committee, to investigate an anonymous complaint about the incident, which found him to be guilty of misconduct. He was subsequently demoted by the acting Vice-Chancellor.

Fair Work Australia ("FWA") heard Mr Soliman's challenge to the disciplinary action and determined that the Committee was entitled to make the findings it did and that the Vice Chancellor was entitled to reach the conclusions on the misconduct and disciplinary action involved. An appeal to the Full Bench of FWA was dismissed.

Mr Soliman commenced proceedings in the High Court which were remitted to the Federal Court. Mr Soliman had argued that the disciplinary action was disproportionate to the misconduct and had advanced submissions before FWA regarding the existence of "mitigating factors" and the action being "neither fair nor reasonable". He submitted that FWA had either failed to address his submissions or had failed to give reasons for the decision.

The Full Federal Court's decision

The Full Federal Court (Marshall, North and Flick JJ) determined to quash FWA's decisions.

In particular, the Court accepted that FWA's reasons failed to resolve the submissions advanced by the applicant: there was, for example, no finding of fact or reason which expressly addressed the submission that the sanction was harsh and oppressive and sufficient to amount to an abuse.[82] Their Honours stated that:[83]

> "Although there is no requirement that a decision-maker need refer to every piece of evidence and every submission which may be advanced for resolution, no conclusion…is open in the present proceedings other than that [FWA] failed to engage with and address the submissions advanced in respect to the perceived harshness of the sanction imposed."

The Court held that "a failure to address a submission centrally relevant to the decision being made may…found a basis for concluding that that submission has not been taken into account" which may constitute jurisdictional error.[84] In the present case:[85]

> "the failure to refer to the submissions relating to mitigating circumstances and the reasonableness of the decision of the acting vice-chancellor is properly to be characterised as a failure on the part of [FWA] to resolve, in accordance with law, the application that had been made".

They acknowledged that "eyes should not be so blinkered as to avoid discerning an absence of reason or reasons devoid of any consideration of a submission central to a party's case".[86] However, the author of the reasons was an experienced senior member of FWA with legal qualifications, who had the considerable benefit of submissions filed by experienced legal practitioners, and the reasons disclosed no real attempt to engage with Mr Soliman's

[82] At 289-290.

[83] At 290.

[84] At 295.

[85] Above.

[86] At 295-296.

submissions.[87] As the decision of the Full Bench of FWA gave no greater consideration to the submissions, both should be quashed.[88]

The decision demonstrates the importance of ensuring any reasons provided for a decision are sufficiently thorough and address the substance of submissions put to the decision-maker.

***Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443 (8 August 2012)**

The claimant was injured in a motor vehicle accident. The insurer admitted liability. A claims assessor appointed under the *Motor Accidents Compensation Act 1999* assessed the claimant's damages as including $75,000 for past economic loss and $400,000 for future economic loss. The insurer sought judicial review of the assessor's decision. The Supreme Court at first instance dismissed the summons.[89]

On appeal, the issues for determination included whether the assessor erred by apparently failing to consider an opinion of an orthopaedic surgeon that Ms Cervantes could continue in her chosen profession until retirement age and an opinion of a psychiatrist that Ms Cervantes had no psychiatric disability.

The Court of Appeal's decision

The Court (Basten JA, with whom McColl and Macfarlan JJA agreed) dismissed the appeal.

The appellant couched its argument as a failure to take into account relevant considerations, namely, the two medical opinions. Basten JA took issue with this characterisation, reminding that "to describe evidence as 'relevant' to the case of one party is not to identify a 'relevant consideration' for judicial review purposes".[90] A relevant consideration "is a reference to a factor which, by law, the decision-maker is bound to take into account".[91] It was, accordingly, necessary for the insurer to identify a legal obligation to take particular evidence into account.[92] No such obligation existed.[93] There was authority for the proposition that a failure to respond to a "substantial, clearly articulated argument relying upon established facts" was "at least to fail to accord…natural justice"[94] and that there may be a constructive failure to exercise jurisdiction by failing to consider the substance of the relevant application.[95] However, neither proposition implied an obligation to consider every piece of evidence presented.[96]

[87] At 296.

[88] Above.

[89] *Allianz Australia Ltd v Cervantes* [2011] NSWSC 1296.

[90] At 447.

[91] Above.

[92] At 448.

[93] At 448-449.

[94] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24].

[95] *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 26 CLR 57 at [81].

[96] At 449.

Legislative development: introduction of Pt. 59, *Uniform Civil Procedure Rules 2005*

New Pt. 59 of the *Uniform Civil Procedure Rules 2005* ("*UCPR*"), entitled "judicial review proceedings", commenced on 15 March 2013. It applies to judicial review proceedings in the Supreme Court[97] and Land and Environment Court[98] commenced on or after this date (r. 59.1).

The key features of the new Part are as follows:

1. Judicial review proceedings must be commenced within 3 months of the date of the decision (r. 59.10(1)), subject to any extension by the court (r. 59.10(2)). This time limit does not apply where there is already a statutory limitation period or where a decision is not required to be set aside (r. 59.10(4) and (5)).

2. Judicial review proceedings must be commenced by summons (r. 59.3(1))[99] which must state (r. 59.4):

   (a) the orders sought;

   (b) if there is a decision in respect of which relief is sought: the identity of the decision-maker, the terms of the decision to be reviewed and the part/parts of the decision in respect of which relief is sought; and

   (c) with specificity, the grounds on which the relief is sought.

3. Where relief is sought in relation to a decision of a public authority (which includes a public officer) the plaintiff may, within 21 days of commencing proceedings, serve a notice on the public authority requiring it to provide a copy of the decision and a statement of reasons for the decision (setting out findings on material questions of fact, referring to the evidence or other material on which those findings were based and explaining why the decision was made) (r. 59.9(1)-(3)). If the public authority does not comply within 14 days, or the plaintiff has not served the notice on time, the plaintiff may seek a court order for such (r. 59.9(4)).

4. The rules prescribe the appropriate parties depending on the circumstances: for instance, the body or person responsible for a decision to be reviewed is required to be joined as a defendant, although not as the first defendant (unless there is no other defendant) (r. 59.3(4)).

5. A plaintiff cannot be required to provide security for costs in respect of judicial review proceedings except in exceptional circumstances (r. 59.11).

6. Finally, there are new procedural requirements (generally subject to any contrary direction), including:

   (a) each defendant is to file and serve a response, within 21 days after being served with the summons, stating whether the relief is opposed and, if so, on what grounds (r. 59.6);

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[97] Proceedings in the Court's supervisory jurisdiction, including under ss. 65 and 69 of the *Supreme Court Act 1970*.

[98] Proceedings for, or in the nature of, judicial review in classes 4 and 8 of the Land and Environment Court.

[99] Paragraph 14 of Supreme Court Practice Note CL 3 – Supreme Court Common Law Division – Administrative Law List stated (and still does): "Proceedings are generally commenced by summons although on occasions where there is an extensive challenge to the decision of a public official or public body they may be commenced by statement of claim".

(b) evidence is to be given by way of affidavit and the court's leave is required for cross-examination, discovery and interrogatories (r. 59.7(1), (3), (4));

(c) the parties are to confer and prepare a Court Book, in a prescribed form and with specified contents, to be filed and served by the plaintiff at least 7 working days prior to the hearing (r. 59.8(1),(2)); and

(d) the parties are required to file and serve summaries of argument (with specified maximum lengths) at prescribed times (r. 59.8(1)(b), (3), (4)).