

KEYNOTE ADDRESS: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN AUSTRALIA*

Introduction

In this keynote address I propose to highlight some topical matters in judicial review of administrative action in Australia. I will primarily focus on judicial review of Commonwealth administrative decision-making which has a legislative foundation.

One of the topical matters is the dramatic shift in terms of numbers away from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*) to review for jurisdictional error. A related matter is whether this shift unduly focusses the judicial review function on an assessment of statutory purpose as opposed to an approach which concentrates on the individual heads of judicial review.

As you are all aware, judicial review for jurisdictional error has Constitutional underpinnings in this country, not only at a Commonwealth level but, following the High Court's decision in *Kirk v Industrial Court (NSW)* [2010] HCA 1; 239 CLR 531 (*Kirk*), also at a State level. Jurisdictional error is emerging as a jurisprudentially acceptable doctrine for preserving the availability of judicial review even in the face of strongly worded privative clauses, especially in the field of migration.

Another notable feature of the existing state of administrative law in Australia is how many current or emerging principles are derived from judicial review challenges to migration and refugee decisions. This may be contrasted with earlier periods in our legal history, when many of the principles were established in other legislative contexts, relating mainly to taxation and industrial relations.

One of the common criticisms of the doctrine of jurisdictional error is the uncertainty which it is said to produce, particularly for public administrators who may feel frustrated by what they see as the fluid and unpredictable operation of that doctrine. This criticism echoes the dissatisfaction which is sometimes expressed about the practical difficulties of applying flexible principles of procedural fairness. Some would prefer a return to what they see as the greater certainty produced by the statutory codification approach exemplified in the *ADJR Act* or perhaps in formulas or slogans as reflected in concepts such as "unreasonableness", "illogicality" or "proportionality".

One of my central themes will be to highlight how jurisdictional error has the potential to provide a more satisfactory doctrinal basis for judicial review, albeit one which is intellectually more demanding on legal advisors, courts and lawmakers alike. That is mainly because it requires intense attention to be given to the relevant legislative basis for administrative action (as well as to the facts) in order to establish the limits of lawful executive power. The contemporary approach eschews the talismanic effect of slogans and formulas.

The doctrine of jurisdictional error

Much ink has been spilled on the utility of the concept of jurisdictional error. At the heart of the debate lies the perennial topic of the legitimacy of judicial review. In Australia, the debate can only properly be understood in the context of the separation of powers, a point which was nicely expressed by Chief Justice James Allsop in “Values in public law”, (2016) 13 *The Judicial Review* 53 at 68:

Administrative law is an area in which legal theory and values play vital roles. The essence of Australian administrative law is the dominant political theory that underpins Australian society: the division of government into three arms or branches of Parliament, Executive and judicature. There is nothing inevitable about this. It is a governmental and legal organisation of power based on secular society, and suspicion of power and those who wield it drawn in its modern form from the European, English and American political and intellectual struggles of the 17th and 18th centuries. The grasp of that elemental tripartite framework is essential to understanding the approach by the High Court of Australia to administrative law. The place of s 75(v) of the Constitution guaranteeing the citizen (and most influentially, the non-citizen) the right to seek review in the original jurisdiction of the highest court in the country of the exercise of power by officers of the Commonwealth is central and pervasive in the structure and content of Australian administrative law (Commonwealth and State) and the structure of Australian constitutionalism.

This is not the time for a detailed analysis of *Kirk*. Its key features may be summarised as follows:

- (a) at the heart of the concept of jurisdictional error is the notion of the “authority to decide”, a notion which itself is driven by “the public policy necessity to compel inferior tribunals to observe the law”;
- (b) as Professor Jaffe had noted, the identification of some questions as “jurisdictional” “is almost entirely functional” and the word “jurisdictional” “is not a metaphysical absolute but simply expresses the gravity of the error”;
- (c) notwithstanding the English position whereby any error of law by an inferior court or tribunal renders a decision *ultra vires*, constitutional considerations in Australia require the maintenance of the distinction between jurisdictional and non-jurisdictional errors;
- (d) a distinction must also be drawn between inferior courts and administrative tribunals in applying the concept of jurisdictional error, not the least because tribunals cannot authoritatively determine questions of law, but courts can;
- (e) it is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error and the grounds identified in *Craig v South Australia* [1995] HCA 58; 184 CLR 163 should not be seen as providing “a rigid taxonomy” of jurisdictional error; and
- (f) after carefully analysing relevant provisions of the *Occupational Health and Safety Act 1983* (NSW), it was held in *Kirk* that the Industrial Court had fallen into jurisdictional error by erroneously construing s 15 (which caused the Court to

misapprehend the limits of its functions and powers) and by failing to comply with the rules of evidence.

Kirk is a landmark decision in Australian administrative law. But it leaves open many unanswered questions as to whether any particular error by an administrative decision-maker involves a jurisdictional error. This uncertainty may frustrate some people but it is largely unavoidable given the wide diversity of legislative contexts and factual circumstances which potentially frame a judicial review challenge to a particular exercise of executive power. Inevitably, these complexities mean that one size does not fit all.

That is not to say that the task of identifying jurisdictional error is at large. Helpful guidance can be obtained from subsequent decisions which have grappled with the issue. These decisions reinforce the danger of approaching the task from the outset as involving a “tick the box” type exercise by front-end loading established heads of judicial review. The codification of the heads of judicial review in the *ADJR Act* has undoubtedly performed an educative function, but as Robertson J has pointed out, the listing of those heads has diverted attention from the prior necessity of construing the legislation.¹ The task of identifying jurisdictional error is far more sophisticated. It essentially involves the following steps:

- (a) a close analysis of the enabling legislation which purports to authorise the particular administrative action, with a view to determining the true nature of the decision-maker’s task and authority and any relevant procedural constraints which apply;
- (b) an identification of the alleged error or mistake, whether it involves misconstruction of a legislative provision or some other error, including an error in fact-finding;
- (c) error identification may be facilitated by an available statement of reasons for the challenged decision, but the absence of such reasons does not necessarily pre-empt judicial review; and
- (d) bearing in mind the limits of the judicial review function, ask whether what has gone wrong is of such significance and materiality in the context of the decision-maker’s legislative powers and function that the gravity of the error rises to the height of a jurisdictional error?

Two decisions of Robertson J helpfully illustrate the post-*Kirk* approach. In *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; 212 FCR 99 (*SZRKT*), the issue was whether the Refugee Review Tribunal fell into jurisdictional error by ignoring the protection visa applicant’s corroborative evidence. The Tribunal had found the applicant was not a credible witness because it considered he had given untruthful evidence about his studies in Pakistan. No reference was made to an academic transcript in evidence before the Tribunal which showed that the applicant had studied Persian, yet the Tribunal found that the applicant’s claim to have done so was implausible. The Minister contended that even if the Tribunal had failed to consider the transcript, jurisdictional error would not arise as long as the Tribunal had not overlooked the applicant’s claim to be a refugee because the Persian studies issue was not material to that claim.

¹ Alan Robertson, “Nothing Like the Curate’s Egg”, *Key Issues in Judicial Review* (Neil Williams ed), The Federation Press, 2014, at 191.

The following matters, including matters relating to review of fact-finding, were emphasised in *SZRKT* (noting that the High Court refused special leave to appeal):

- (a) consistently with the proper limits on judicial review, fact-finding is principally a matter for the primary decision-maker, but the Court is nevertheless required to consider whether the decision-maker has acted in a way which is beyond the task conferred on it by the legislation (at [97]);
- (b) ignoring material which is relevant only to fact-finding does not of itself give rise to jurisdictional error, but the gravity of the error needs to be assessed within the relevant statutory context; and
- (c) in considering questions of jurisdictional error in the context of decision-making under the *Migration Act 1958 (Cth)* (the ***Migration Act***), the primary focus must be on the claim which the *Migration Act* requires to be considered and whether or not the disregard of a relevant consideration which that legislation requires to be considered answers the description of jurisdictional error. This demands much more than the blind application of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 (***Peko-Wallsend***), which was a decision under the *ADJR Act* and involved a very different statutory context (at [99]).

More recently, in *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 (***Goundar***), the issue was whether the Minister had fallen into jurisdictional error in deciding not to revoke an earlier decision to cancel the applicant's visa under s 501 of the *Migration Act* (the visa holder had a substantial criminal record and did not pass the character test). The applicant had been convicted of manslaughter after he killed a man who was having an affair with his former wife. In support of his request that the Minister revoke the visa cancellation decision under s 501(3A), the applicant provided submissions and supporting material that there was a risk to his safety if he were removed to Fiji arising from threats of retribution from the families of both the deceased and the applicant's ex-wife. In declining to revoke the earlier decision, the Minister considered that it was unnecessary at that time to determine whether Australia owed the applicant non-refoulement obligations because it was open to the applicant to apply subsequently for a protection visa and the retribution risk could be considered then. This was held by Robertson J to involve jurisdictional error in circumstances where there was no basis to suggest that the applicant could or would apply for a protection visa. The relevant question was the risk to the applicant's safety as a matter of fact and not as an engagement of Australia's non-refoulement obligations. Accordingly, the Minister had misunderstood the law in deciding whether or not to revoke the cancellation decision.

His Honour then identified the next issue as whether the Minister's reasoning disclosed jurisdictional error. It was held that the error had a material effect on the Minister's decision because it was on the basis of the erroneous view that the risk of retribution was a harm which could be assessed at a later stage and need not be assessed at the time of the consideration whether or not to exercise the power of revocation. The Minister's "satisfaction" which enlivened the power to revoke under s 501(3A) was a state of mind which had to be formed on a correct understanding of the law. This was an implied condition

of the valid exercise of the power. Because the Minister had incorrectly understood the law, there was jurisdictional error.

It is notable that Robertson J found it unnecessary to determine whether the risk of retribution was a mandatory relevant consideration in the *Peko-Wallsend* sense. *Goundar* was determined after conducting a sophisticated analysis which was directed to the issue whether the Minister's misunderstanding of the law constituted jurisdictional error in the particular statutory context and factual circumstances.

Let me say something more about the danger of resorting to formulas and slogans in this area. The Federal Circuit Court is at the coalface of Commonwealth judicial review, most notably in migration cases. With such a heavy workload it is tempting for some judges to look for ways to manage their court dockets. Pithy slogans and aphorisms gain in attraction as convenient shorthand expressions to cut through what are often difficult and complex issues. The point is well illustrated by the way in which some courts have resorted to aphorisms in adopting an unduly narrow view of the availability of judicial review for errors in fact finding. Refuge is often found in Brennan J's observation in *Waterford v The Commonwealth* [1987] HCA 25; 163 CLR 54 at 77 that there "is no error of law simply in making a wrong finding of fact". What is frequently overlooked is that this statement was made in the specific context of review on a question of law under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) and that it was accompanied by a statement that a finding by the Administrative Appeals Tribunal (AAT) on a matter of fact cannot be reviewed on appeal under s 44 "unless the finding is vitiated by an error of law".

An inadequate appreciation of these subtleties can be productive of error in a judicial review case which raises a challenge to a finding of fact. The Full Court handed down a decision earlier this week which contains a timely and forceful reminder that findings of fact are amenable to jurisdictional error review, including on such familiar grounds as procedural unfairness, reaching a finding without any logical or probative basis and unreasonableness in the legal sense (see *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146 (*CQG15*) at [38] per McKerracher, Griffiths and Rangiah JJ). Such review may be available even where the finding of fact relates to a person's credibility, a point which is sometimes overlooked when an overly simplistic view is taken of what McHugh J said in *Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; 74 ALJR 405, when his Honour observed that a finding of credibility "is the function of the primary decision-maker *par excellence*". As the Full Court emphasised, findings on credibility are a function of a primary decision-maker, but that does not immunise them from judicial review for jurisdictional error (see *CQG15* at [36]-[38] and [40]-[50]).

Unreasonableness and proportionality

Not unexpectedly, some advocates have viewed the High Court's decision in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 (*Li*) as removing some of the shackles which previously were thought to inhibit review for *Wednesbury* unreasonableness. This is reflected in the large number of cases which are now coming

before the courts which have claims of unreasonableness and illogicality at their forefront. Few of those claims have succeeded.

In *Li*, the plurality (Hayne, Kiefel and Bell JJ) appeared to open the door to more rigorous judicial review of administrative action for unreasonableness and/or proportionality by:

- (a) observing that an obviously disproportionate response by the Tribunal there in refusing adjournment applications would be one path to a conclusion of unreasonableness (even though the appeal had not relied upon proportionality);
- (b) stating that the “legal standard of reasonableness” should not be considered as limited to what is in effect an irrational, if not bizarre, decision;
- (c) indicating that a conclusion of unreasonableness “may be applied to a decision which lacks evident and intelligible justification”; and
- (d) acknowledging that unreasonableness may be established not only where reasons have been provided but even if they have not the court may not be able to comprehend how the decision was arrived at.

French CJ and, perhaps even more so, Gageler J, were both more cautious in their approaches in *Li* to the ambit of review for unreasonableness. Yet, even though proportionality was not raised directly in *Li*, French CJ stated that “a disproportionate exercise of an administrative discretion... may be characterised as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves”.

Subsequent intermediate appellate court caselaw has sought to tease out and define the limits of judicial review for both unreasonableness in the legal sense and disproportionality. It is convenient to deal with those grounds of review in turn while not denying the overlap.

(a) Unreasonableness

The Full Court’s decision in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437 (***Singh***) establishes the following relevant principles concerning judicial review of the exercise of a discretionary power for unreasonableness in the legal sense:

- (a) legal unreasonableness “is invariably fact dependent” and requires a careful evaluation of the evidence. The outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles rather than by way of an analysis of factual similarities or differences between individual cases;
- (b) there is a presumption of law that the Parliament intends an exercise of statutory power to be reasonable;
- (c) the concept of legal unreasonableness can be “outcome focused” such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the characterisation of an underlying jurisdictional error;
- (d) where reasons are provided, they will be the focal point for an assessment as to whether the decision is unreasonable in the legal sense and it would be a rare case to

find that the exercise of a discretionary power is legally unreasonable where the reasons demonstrated a justification; and

- (e) perhaps most importantly of all, the standard of legal unreasonableness applies across a wide range of statutory powers, but the indicators of legal unreasonableness are found in the scope, subject and purpose of the relevant statutory provisions, as well as being fact dependent.

Some of these matters were further developed and explained in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 (*Stretton*). Chief Justice Allsop made the following pertinent observations concerning jurisdictional error and legal unreasonableness at [2]:

The proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another. 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.

Moreover, at [11], the Chief Justice said:

The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.

In separate reasons for judgment in *Stretton*, I emphasised the importance of paying close attention to the particular statutory framework within which the challenged decision has been made, with particular reference to indicators in the legislation which assist in determining whether a particular exercise of discretion is one which exceeds the authority of the decision-maker and is unreasonable in the legal sense. Pointers in the *Migration Act* which informed the breadth of the nature and ambit of the Minister's authority to cancel a visa under s 501 included:

- (a) the absence of an express list of considerations for the Minister to take into account;
- (b) the breadth of the stated object of the legislation as regulating “in the national interest” the movement in and out of Australia of non-citizens;
- (c) the Minister’s political office and personal accountability to the Parliament, as well as the absence of any right of review to the AAT if the Minister makes the decision (as opposed to a delegate);
- (d) the Minister’s obligation to provide a statement of reasons from which it can be ascertained whether there is an evident and intelligible justification for the decision; and
- (e) the Minister’s power to either refuse to grant or to cancel a visa is a substantive power, as opposed to being a power of a procedural nature, such as the power to adjourn a Tribunal hearing as was the case in both *Li* and *Singh*.

Matters such as these will be viewed by some as informing the intensity of the scrutiny of judicial review for jurisdictional error, and as beacons for judicial self-restraint. They might even be described as matters which are relevant to judicial deference. Perhaps nothing much turns on how the matters are described, although my personal preference is to characterise them as relevant matters to be considered in performing the judicial task of identifying whether or not there has been jurisdictional error. Naturally, the relevant surrounding facts and circumstances of a particular case are also important, but the task of identifying jurisdictional error is essentially an exercise in statutory interpretation with the object of assessing whether a particular error is beyond the power or authority conferred upon the primary decision-maker by the Parliament. Greater certainty is likely to be achieved if the Parliament and the executive devoted more time and attention to ensuring that legislation more clearly defined the function and powers of primary decision-makers.

(b) Proportionality

It is ironic that at a time when proportionality appears to be gaining more traction as a relevant principle in judicial review of administrative action in Australia serious questions are being raised about its future in the United Kingdom. The current division in the Supreme Court there is shaping as another Brexit, a topic to which I will return shortly.

It has been a rocky road for proportionality in judicial review in Australia. That is perhaps unsurprising given the history of the reluctance of some judges to adopt and apply that concept in either reviewing the validity of subordinate legislation or using it as a tool of analysis in testing the constitutional validity of legislation. It is appropriate to trace some of that history because, like rowers, lawyers look backwards to move forwards.²

(i) Proportionality in testing the validity of subordinate legislation

The use of proportionality to test the validity of subordinate legislation has long antecedents. It can be traced back at least to Dixon J’s judgment in *Williams v Melbourne Corporation* [1933] HCA 56; 49 CLR 142. There, in the context of reviewing a local government by-law

² Frederick Wilmot-Smith, “Blame Robert Maxwell”, 17 March 2016, *London Review of Books*, p 33.

for unreasonableness, Dixon J said that the true nature and purpose of the by-law making power had to be determined and that, even though there may appear to be a sufficient connection between the subject of the power and that of the by-law, on closer analysis it may emerge that the true character of the by-law is such that “it could not reasonably have been adopted as a means of attaining the ends of the power”.

In the *Tasmanian Dam Case* (*Commonwealth v Tasmania* [1983] HCA 21; 158 CLR 1), Deane J held that subordinate regulations had to be “capable of being reasonably considered to be appropriate and adapted for giving effect to the [particular] Convention” which was relied upon as the source of power. His Honour asked whether the regulations “would lack any reasonable proportionality to the purpose of discharging” an obligation created by the Convention.

In *South Australia v Tanner* [1989] HCA 3; 166 CLR 161 at 167, the majority (Wilson, Dawson, Toohey and Gaudron JJ) described the test of validity as whether “the regulation is capable of being considered to be reasonably proportionate to the end to be achieved”, whilst emphasising at 168 that it was not enough that the Court itself viewed the regulation as “inexpedient or misguided”. Rather, the regulation needed to be “so lacking in reasonable proportionality as not to be a real exercise of the power” (at 168). The issue was the validity of a planning regulation which totally prohibited the construction of a piggery, zoo or feedlot in a watershed, so as to prevent a planned development comprising shops and offices, an aviary and carparks. The majority acknowledged that, on one view, having regard to the nature of the proposed development, enforcing the prohibition could be described as using a sledge-hammer to crack a nut. Nevertheless, after noting that the Court must be cautious not to impose its own “untutored judgment” on the legislator, the validity of the regulation was upheld.

There is a helpful discussion of “proportionality” in reviewing the validity of delegated legislation in the Full Court’s decision in *Minister for Resources v Dover Fisheries Pty Ltd* [1993] FCA 522; 43 FCR 565. Gummow J traced the history of the concept of “reasonable proportionality” as a criterion for assessment of validity in constitutional and administrative law and how it entered the common law stream in the United Kingdom from Europe. Presciently, he remarked at 575 how the concept of proportionality might be adopted as a ground of review of administrative action, perhaps as an adjunct to *Wednesbury* unreasonableness, citing the House of Lords’ decision in *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696 at 762. Gummow J described the “proportionality doctrine” as having taken root in Australia, including in some areas of Federal Constitutional law involving both purposive and non-purposive prohibitions or restrictions. His Honour said that whatever may be the sweep of the proportionality principle in Federal Constitutional law, when the issue of the validity of delegated legislation arises the proportionality principle is “differently focused”. The fundamental question there is whether the delegated legislation is within the scope of what the Parliament intended when enacting a statute which empowers a subordinate authority to make law under delegation.

Some judges are troubled by the danger that proportionality can draw a court into overstepping the legitimate limits of the judicial function. These concerns are illustrated by the decision of the New South Wales Court of Appeal in 1996 (*Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* [1996] NSWCA 348), where proportionality was raised as a ground of review of the validity of an environmental planning instrument which was a form of delegated legislation. Handley JA stated that, in his view, the High Court authorities had not yet established proportionality as an independent ground for invalidity of delegated legislation. He concluded that a State environmental planning policy could not be declared invalid for lack of proportionality. Cole JA described as “unresolved” in Australia whether proportionality was an independent ground of invalidity of subordinate legislation while Sheller JA said, in effect, that if it was available it attracted “a much higher threshold”.

More recently, in *Vanstone v Clark* [2005] FCAFC 189; 147 FCR 299, Weinberg J at [141] described it as being “tolerably clear” that delegated legislation made pursuant to a purposive empowering statutory provision is liable to be held invalid if it fails the test of “reasonable proportionality”. There is a valuable discussion of the history of proportionality in that judgment. Weinberg J noted that instances of delegated legislation being struck down for lack of reasonable proportionality were “very much the exception, rather than the rule” and that most challenges have failed (at [161]). In those circumstances, it might be thought that proportionality adds little to the broader concept of unreasonableness. The same could be said concerning the use of proportionality as an analytical tool in judicial review of administrative action.

(ii) *Proportionality in Constitutional review*

The focus of this paper is not on Constitutional law thus I will confine my comments on the use of proportionality in that area. Proportionality has been used in a variety of Constitutional law contexts, including in relation to the external affairs, the defence power, the implied freedom of political communication; the corporations power; the incidental power and maintenance of the constitutionally protected system of representative government.³

In *McCloy v New South Wales* [2015] HCA 34; 325 ALR 15 (*McCloy*), in determining whether New South Wales legislation imposing restrictions on private funding of political candidates and parties was invalid as impermissibly infringing the implied freedom of political communication, the plurality held that, in determining whether the law was reasonably appropriate and adapted to advance a legitimate purpose, it was appropriate to apply what was described as “proportionality testing”. The plurality described “proportionality testing” as involving the following three stages:

suitable – as having a rational connection to the purpose of the provision;

³ See generally Kiefel, “Proportionality: A rule of reason”, (2012) 23 *Public Law Review* 85; McLure, “Proportionality – The New Wave” paper delivered at the NSW Supreme Court Judges’ Conference 2016; and Sir Anthony Mason, “The use of proportionality in Australian constitutional law”, (2016) 27 *Public Law Review* 109.

necessary – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and

adequate in its balance – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

The Honourable Carmel McLure QC recently described proportionality testing as approved by the plurality in *McCloy* as reflecting a choice that only the High Court could make and that:

It has the potential to widen the freedom and thereby reduce the scope of legislative and executive power. It also comes closer to a merits **review** of the exercise of legislative and executive powers than does the narrow proportionality test. On my reading of *McCloy*, there is no appetite for a “deference” or “margin of appreciation” approach which goes beyond that built into the test.

I will say more below about *McCloy* in the context of judicial review of administrative action. Suffice it to say that the High Court is not unanimous in embracing proportionality testing in Constitutional review. In *McCloy* at [141]-[152]), Gageler J identified the following two principal reservations concerning the content and application of the plurality’s approach, (which is sometimes described as “structured proportionality”: see *Murphy v Electoral Commissioner* [2016] HCA 36; 90 ALJR 1027 (*Murphy*)):

- (a) The approach, which draws on jurisprudence from Europe (including the United Kingdom), Canada and New Zealand, incorporates varying degrees of latitude afforded to governmental action, which degrees of latitude are rarely captured in generic tests of proportionality because they are embedded within the institutional arrangements and practices within which the tests are applied. In other words, the application of tests of proportionality in those jurisdictions is affected by subtle considerations of judicial self-restraint and deference.
- (b) The third step in proportionality testing, namely whether there is an adequate balance between the purpose served by the restriction and the extent of the restriction on the protected freedom, may not be a fully appropriate “criterion of validity which is sufficiently focused adequately to reflect the reasons for the implication of the constitutional freedom and adequately to capture considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed”. The adoption of “principled balancing” only at the third and final stage of the analysis serves to highlight the first reservation.

While not rejecting proportionality as an analytical tool along the lines of that applied in *Lange v Australian Broadcasting Corporation* [1997] HCA 25; 189 CLR 560 (*Lange*), Gageler J described as “imperative” that the entire analysis needs to be undertaken in a

manner which pays due regard to the reasons for the implication of the constitutional freedom to which the *Lange* analysis applies and protects. His Honour said at [150] in *McCloy*:

... Whatever other analytical tools might usefully be employed, fidelity to the reasons for the implication is in my view best achieved by ensuring that the standard of justification, and the concomitant level or intensity of judicial scrutiny, not only is articulated at the outset but is calibrated to the degree of risk to the system of representative and responsible government established by the *Constitution* that arises from the nature and extent of the restriction on political communication that is identified at the first step in the analysis.

It is unclear whether such reservations about “structured proportionality” is what French CJ and Bell J had in mind when, in their recent joint judgment in *Murphy*, their Honours emphasised that the test of proportionality was not universal in Constitutional law challenges. Using firm language, their Honours said at [37] (footnotes omitted):

The adoption of that approach in *McCloy* did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law. It is a mode of analysis applicable to some cases involving the general proportionality criterion, but not necessarily all. For example, as Kiefel J observed in *Rowe*:

“A test of reasonable necessity, by reference to alternative measures, may not always be available or appropriate having regard to the nature and effect of the legislative measures in question.”

(iii) *Proportionality in judicial review of administrative action*

The availability and utility of the concept of proportionality in judicial review of administrative action in Australia has been, and remains, controversial. In *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-Stock Corporation* [1990] FCA 181; 96 ALR 153, a case brought under the *ADJR Act*, Gummow J referred to Professor Margaret Allars’ identification of proportionality as one of three “paradigms” of unreasonableness. The applicant argued there that the withdrawal of its licence to export one shipment of live sheep in order to relieve the pressure for a total ban on live sheep exports was out of proportion in relation to the scope of the licensing power, which was tied to the purposes of promoting, controlling, protecting and furthering the interests of the Australian live-stock industry. Gummow J remarked that how this task was discharged was very much “a matter for judgment under all of the circumstances” and that if he had had to determine the challenge based on proportionality, he would not have described the revocation of the licence as one involving “a disproportionately arbitrary manner as to attract review on *Wednesbury* grounds” (at 168).

In 1998, in another NSW Court of Appeal decision (see *Bruce v Cole* [1998] NSWCA 45; 45 NSWLR 163), judicial review was sought of a decision by a statutory Conduct Division reporting on whether a Supreme Court Judge should be removed from office on the ground of proven misbehaviour or incapacity. Spigelman CJ accepted that a complete lack of proportion between the consequences of a decision and the conduct upon which it operates may manifest unreasonableness in the *Wednesbury* sense. But he expressly rejected the

proposition that proportionality was a separate ground of review of administrative action. The Chief Justice observed that the concept was “plainly more susceptible of permitting a court to trammel upon the merits of a decision than *Wednesbury* unreasonableness” (at 185).

In *Attorney-General for the State of South Australia v Corporation of the City of Adelaide* [2013] HCA 3; 249 CLR 1, the validity of a local government by-law which prohibited persons from preaching, canvassing, haranguing or distributing printed material on any road without permission of the local Council was challenged as:

- (a) infringing the implied constitutional freedom of communication on political and governmental matters; and
- (b) an unreasonable exercise of the by-law making power and was not a reasonably proportionate or proportionate exercise of that power.

The High Court rejected both grounds. The Chief Justice had the following to say at [55] about proportionality (emphasis added):

The difficulties of making out a challenge to validity on the basis of unreasonableness no doubt explain the focus in the third respondent's written submissions on the ground of contention asserting lack of reasonable proportionality. **Proportionality is not a legal doctrine. In Australia it designates a class of criteria used to determine the validity or lawfulness of legislative and administrative action by reference to rational relationships between purpose and means, and the interaction of competing legal rules and principles, including qualifications of constitutional guarantees, immunities or freedoms.** Proportionality criteria have been applied to purposive and incidental law-making powers derived from the Constitution and from statutes. They have also been applied in determining the validity of laws affecting constitutional guarantees, immunities and freedoms, including the implied freedom of political communication which is considered later in these reasons.

It is notable that these observations were directed to proportionality as a class of criteria which is used to determine the validity or lawfulness of both **legislative and administrative actions**.

This conjunction arose again in *McCloy*, which was primarily a Constitutional law case. However, it is notable that on this occasion in a joint judgment comprising the Chief Justice, Kiefel, Bell and Keane JJ, the following statements were made at [3] concerning “proportionality” (which echo the Chief Justice’s earlier observations in 2013):

As noted, the last of the three questions involves a proportionality analysis. The term “proportionality” in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative **or administrative acts** are within the constitutional or legislative grant of power under which they purport to be done. Some such criteria have been applied to purposive powers; to constitutional legislative powers authorising the making of laws to serve a specified purpose; to incidental powers, which must serve the purposes of the substantive powers to which they are incidental; and to powers exercised for a purpose authorised by the Constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication. Analogous criteria have been developed in other

jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools which, according to the nature of the case, may be applied in the Australian context. (Emphasis added).

Different views have been expressed as to whether the plurality's observations, albeit by way of obiter, represent an acceptance of proportionality as a class of criteria which is relevant to judicial review of administrative action. In *Stretton* both the Chief Justice and myself (Wigney J agreed with both of us) drew attention to this passage in *McCloy* concerning the place of proportionality in judicial review of administrative action, including the plurality's acceptance that "unreasonableness" can accommodate a proportionality analysis by reference to the scope of the power.

In two separate single instance decisions of the Federal Court, McKerracher J has taken a cautious approach. In *Lobban v Minister for Justice* [2015] FCA 1361, his Honour stated at [90] that disproportionality is not a recognised independent ground of jurisdictional error in Australian law, citing *Bruce v Cole* [1998] NSWCA 45; 45 NSWLR 163. But he accepted that disproportionality may be a factor to be taken into account in considering whether an administrative decision is unreasonable in the legal sense, citing French CJ's observations in *Li* at [30]. There the Chief Justice described the possible characterisation of a disproportionate exercise of an administrative discretion by, for example, taking a sledgehammer to crack a nut, as irrational and also as unreasonable simply on the basis that it exceeds what on any view is necessary for the purpose it serves. McKerracher J then added at [96] that, under existing Australian law, disproportionality does not offer a stand-alone basis for establishing jurisdictional error and that nothing said in *McCloy* affects the position.

Subsequently, in *Renzullo v Assistant Minister for Immigration and Border Protection* [2016] FCA 412, McKerracher J described *McCloy* as being "not particularly helpful" in the context of determining whether proportionality had a role in determining whether an administrative act is within power because that decision concerned examination of State legislation in which issues of constitutionality arose, however, his Honour appeared to accept that proportionality may be relevant to the consideration whether or not the exercise of an administrative discretion was unreasonable in the legal sense.

It may confidently be expected that there will be further refinements in the use of proportionality as a analytical tool in administrative law, reflecting what has occurred in the Constitutional law context. One aspect which I expect will receive close attention relates to the fact that the concept of proportionality operates by reference to the purpose of a statutory provision but the search for a single purpose of a statutory provision can be elusive. The point was well made by Gleeson CJ in *Carr v Western Australia* [2007] HCA 47; 232 CLR 138, in the context of highlighting the difficulty in some cases of applying a purposive construction to particular statutes. Both at common law and under various interpretation legislation, a construction of a provision which promotes the purpose or object underlying the Act is to be preferred to one which would not. But as Gleeson CJ observed at [5], that general rule of interpretation may be of little assistance where a statutory provision strikes a balance between competing interests (as is so often the case). The reality also is that, in

many if not most cases, there is uncertainty as to how far a particular statutory provision goes in seeking to achieve the underlying purpose or object of an Act, assuming that there is such a single purpose. His Honour highlighted the difficulty by reference to the construction of taxation legislation, the underlying purpose of which is to raise revenue for government. His Honour said at [6]:

... No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.

These sorts of difficulties can also arise when proportionality is raised in challenging a decision to refuse to grant or to cancel a visa on character grounds under s 501 of the *Migration Act*. It may be accepted that protecting the Australian public is one of the purposes which is served by this statutory power, but it would be wrong to view it as the only or even the most important purpose. Another is to protect family values as an important aspect of the “national interest”. The presence of multiple purposes and the related question of how competing purposes can be reconciled add to the complexity of applying a proportionality analysis, as is demonstrated by cases such as *Stretton* and *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; 240 FCR 158.

Interestingly, Sir Anthony Mason has weighed into the debate as to the significance of the obiter observations by the plurality in *McCloy* for judicial review of administrative action. In his recent article “The use of proportionality in Australian constitutional law”, (2016) 27 *Public Law Review* 109, Sir Anthony described how the use of proportionality as a possible ground of judicial review of administrative action has been the subject of “ongoing controversy”. He noted its possible use as an adjunct to *Wednesbury* unreasonableness, or as an independent but related ground, and the absurdity standard attaching to *Wednesbury* unreasonableness. Sir Anthony referred to the High Court’s decision in *Li*, which he described as possibly signalling a softening in the High Court’s attitude to the *Wednesbury* unreasonableness standard and as revealing a possible willingness to embrace the use of proportionality in judicial review, at least in conjunction with *Wednesbury* unreasonableness. While acknowledging that *Li* hardly gave a “ringing endorsement of the place of proportionality in judicial review”, Sir Anthony saw it as suggesting a more positive attitude to the use of proportionality in that setting.

After noting the relevant statements in both *Li* and *McCloy*, Sir Anthony concluded his paper with the following observations at 123:

Finally, what does the future hold for *Wednesbury* reasonableness and proportionality in the area of judicial review of administrative action, in particular where statutory limitations

impinge on freedom of communication and other rights or negative limitations on legislative power arising under the Constitution? Consistency would seem to require a stricter standard of review than that provided by the *Wednesbury* absurdity standard. In this respect, the judgments of the UK Supreme Court in *Pham v Secretary of State of the Home Department* and *Keyu v Secretary of State for Foreign and Commonwealth Affairs* merit close attention.

Turning to those and other UK cases, the current status of proportionality in UK public law appears even more uncertain. In *Kennedy v Information Commissioner (Secretary of State for Justice Intervening)* [2014] UKSC 20; 2 WLR 808 (*Kennedy*), a majority of the UK Supreme Court appeared to accept that both reasonableness and proportionality were principles of judicial review, particularly where important rights were at stake. Emphasis was placed on the need to recognise that the nature of judicial review in every case depended on the context. Professor Paul Craig's view was endorsed, i.e. that "both reasonableness review and proportionality involved considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context". This approach was considered to be relevant in judicial review of administrative action even where that occurred outside the scope of the Convention on Human Rights and EU law.

The Supreme Court's decision in March 2015 in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; 1 WLR 1591 (*Pham*) highlighted the extent to which there are divisions in the Court regarding the use of proportionality in judicial review of administrative action. The case concerned a challenge to the Home Secretary's decision to deprive the appellant of British citizenship because he had received terrorist training in Yemen. The Court sat seven members. Lord Mance (with whom three other judges expressly agreed) referred to *Kennedy* and described proportionality as "a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction" and that whether or not the principle was applied under EU, Convention or common law cases, context would determine the appropriate intensity of review.

The same three judges in *Pham* who agreed with Lord Mance also expressed agreement with the separate judgment of Lord Sumption, notwithstanding that his views regarding proportionality appear more restrained. Lord Sumption acknowledged that the courts had applied a proportionality test to acts of public authorities which were said to contravene principles of EU law and/or to interfere with the rights protected by the European Convention on Human Rights (both of which incorporate proportionality as an integral aspect of legal justification), but he stated that the courts had not adopted proportionality generally as a principle of English public law. His Lordship then added that, while not adopting the principle of proportionality generally, English courts had "for many years stumbled towards a concept which is in significant respects similar, and over the last three decades has been influenced by European jurisprudence even in areas lying beyond the domains of EU and international human rights law" (at [105]).

Lord Sumption referred to the differences between proportionality at common law and the principle when applied to the Convention, namely that:

- (a) a proportionality test may require the Court to form its own view of the balance which the decision-maker has struck and not just decide whether it is within the range of available rational balances;
- (b) the proportionality test may require attention to be directed to the relative weight accorded to competing interests and considerations; and
- (c) even heightened scrutiny at common law is not necessarily enough to protect human rights (at [107]).

In a separate judgment, Lord Reed commented at [113] that it might be helpful to distinguish between proportionality as a general ground of review of administrative action, confining it to the exercise of power to means which are proportionate to the ends pursued, as opposed to proportionality as a basis for scrutinising justifications put forward for interferences with legal rights.

In *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; 3 WLR 1665, a five member UK Supreme Court bench determined an appeal against a decision by two Secretaries of State not to hold a discretionary inquiry into claims that the British Army had been responsible in 1948 for civilian deaths in Malaya. By a majority, it was held that, applying traditional principles of judicial review, the Secretaries of State in the exercise of their discretion had considered the request for an inquiry seriously and rejected it for defensible reasons which made it impossible to stigmatise their decision as unreasonable or irrational. Furthermore, it was held that if the matter was to be considered by reference to principles of proportionality, the decision was proportionate. Three members of the Court indicated that it was not appropriate for a five-judge panel of the Supreme Court to accept the appellants' argument that the traditional rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality. Their Lordships said at [133] that a shift from rationality to proportionality:

would appear to have potentially profound and far reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each interest.

Most recently, in *Youssef v Foreign Secretary* [2016] UKSC 3; 3 All ER 261 at [55], Lord Carnwath flagged a desire to revisit the relationship between proportionality and rationality with a view to providing lower courts with greater guidance than is contained in "imprecise concepts" such as "anxious scrutiny" and "sliding scales", perhaps reflecting some of the concerns raised by Gageler J in *McCloy*.

It may be too early to seek to state definitively what role proportionality plays in judicial review of administrative action in Australia. However, it is probably safe to state that disproportionality is not a separate ground of judicial review but may inform an analysis of review for unreasonableness in the legal sense. As Katzmann J recently observed in *AMZ15 v Minister for Immigration and Border Protection* [2016] FCA 1195 at [77], it will be a rare case indeed in which a disproportionate response will lead to a finding of jurisdictional error.

Her Honour further observed that *Stretton* well illustrates how, where a decision under review is a discretionary one, “there are real dangers in applying a proportionality analysis to an administrative decision without sliding into merits review”.

Values in judicial review, procedural unfairness and good administration

I will turn now to raise what some may view as a more contentious topic. It concerns the importance of values in public law, including judicial review of administrative action.

I referred above to Chief Justice James Allsop’s paper entitled “Values in public law”, which was given as part of last year’s Spigelman oration. It is a paper which rewards close consideration. In it, the Chief Justice discussed five values which have informed the development and content of the law in Australia limiting the exercise of public power. The relevant values are reflected in the following extract from Professor Roscoe Pound’s lectures entitled *The Development of Constitutional Guarantees of Liberty* (Yale University Press, New Haven, 1957), in which he described the:

... fundamental reasonable expectations involved in life in civilised society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organised society to adjust relations and order conduct, and so are able to apply the force of that society to individuals. Liberty under law implies a systematic and orderly application of that force so that it is uniform, equal, and predictable, and proceeds from reason and upon understood grounds rather than from caprice or impulse or without full and fair hearing of all affected and understanding of the facts on which official action is taken.

The five public law values which were identified and analysed by Allsop CJ are:

- (a) public power needs to be reasonably certain, so that it can be understood, known, and exercised with responsibility by those who yield it and those who are affected by its exercise;
- (b) the principle of legality requires that there be honesty and fidelity to the *Constitution*, and to the freedoms and free society that it assumes;
- (c) the rejection of unfairness, unreasonableness and arbitrariness;
- (d) equality and the law; and
- (e) humanity and the dignity and autonomy of the individual, and the recognition of, and respect for, reciprocity in the human context of the exercise of the power and the necessary humanity of the process which translates in many contexts to the recognition of mercy.

The Chief Justice discussed the importance of judicial power in the context of these values and how the preservation of its independence and authority is a constitutional imperative for the guarantee of liberty. He describes at 69 how “the organisation of power and the independence of the judicial power come to be important elements in reciprocity and consent, as part of the sovereignty of the people”. His Honour is referring to the legitimacy of judicial power and the importance of its widespread acceptance as an essential part of our society and system of government within the framework of the rule of law.

The notorious difficulties of maintaining an appropriate balance between public power and judicial power is illustrated by the principles of procedural fairness. While describing the subject as one which has “a coherent organised structure based on developed rules and precedents”, Allsop CJ said that at its core “is the abiding informing principles of ‘fairness’”. He added at 69-70:

What is unfair will often be a matter of debate; it will often be affected by the terms of the statute or the content of a precedent; but in essence, it is an enduring human response rooted in democratic society’s expectations of equal and fair treatment of individuals by organs of power. Syllogistic reasoning expressed in language seeking to define an operative rule is often inadequate to express why an exercise of power is unfair. That is sometimes a product of an infelicity or inadequacy of language. More often, the difficulty arises from the fact that the exercise of power must be assessed in its human dimension taking into account evaluative assessment of, sometimes indefinable, characteristics and nuances of the human condition. Put bluntly, essential in many analytical reviews of the exercise of governmental power is the partly legal and partly human response to the facts: Is this how people should be subjected to the power of the state?

There is scope for legitimate debate as to what is unfair or not in a particular set of circumstances. The point is well illustrated by the fact that in recent litigation relating to the accidental disclosure of sensitive personal information by the Department of Immigration, three members of the Full Court found procedural unfairness while, on appeal, seven members of the High Court held that there was no procedural unfairness. The explanation for these polarised outcomes lies not so much in a disagreement as to the relevant principles, but rather in the application of those principles and the characterisation of the conduct which is said to be procedurally unfair.

Before proceeding to discuss the High Court’s decision in *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29; 90 ALJR 901 (*SZSSJ*), I should at the outset acknowledge and embrace what Sir Anthony Mason described, when reflecting upon his time on the NSW Court of Appeal and being reversed on appeal by the High Court, as a “purifying experience”. Nothing said below is intended to be disrespectful of the High Court.

In early 2014, the Department of Immigration and Border Protection published a report on its website which inadvertently disclosed the personal details of more than 9000 people who were held in immigration detention, some of whom (including the two appellants in *SZSSJ*), were unsuccessful applicants for protection visas (see *SZWAJ v Minister for Immigration and Border Protection* [2016] FCA 1173 at [33]). The disclosure was contrary to a provision in the *Migration Act* which prohibited the unauthorised disclosure of identifying information of the identity of asylum seekers. KPMG was engaged by the Department to do a report on the incident. Both an abridged and unabridged version of the report was provided to the Department.

The Department contacted people affected by the Data Breach and said that any implications for them individually would be assessed as part of the Department's "normal processes". SZSSJ requested further information to enable him to make informed submissions. He was told that the Department had commenced an International Treaties Obligations Assessment (ITOA) to assess whether Australia owed him non-refoulement obligations following the Data Breach. He was not provided any further details about the Data Breach or how the ITOA was to be conducted. SZSSJ repeated his request for further information about those matters, as well as access to the unabridged version of KPMG's report. These requests were not answered and no further information was provided.

SZSSJ complained of procedural unfairness. His complaint was rejected by the Federal Circuit Court but was upheld on appeal to the Full Court (see *SZSSJ v Minister for Immigration and Border Protection (No 2)* [2015] FCAFC 125; 234 FCR 1 per Rares, Perram and Griffiths JJ). The Full Court found procedural unfairness because:

- (a) where a decision-maker invites a person to make submissions about what should happen in consequence of the decision-maker's own failure to adhere to statutory safeguards of confidentiality, the decision-maker is required to disclose all information relevant to assessment of the claim (subject to proper considerations of confidentiality) and not merely disclose information which is adverse to the person;
- (b) the opportunity provided to make submissions in relation to the ITOA was deficient because the individuals could not make meaningful submissions about Australia's non-refoulement obligations arising from disclosure of their personal information without knowing to whom it had been disclosed; and
- (c) prior to the appeal to the Full Court, when for the first time the details of the decision-making process were revealed, the appellants were denied information concerning the identity of the decision-maker, the personal nature of the decision-making power with the consequence that the persons could not sensibly have understood what they were making submissions about, nor did they know the ultimate criteria by which decisions would be made in their individual cases.

The abridged version of KPMG's report found that 104 separate IP addresses had accessed the information, some more than once and that the entities included media organisations, internet proxies and web crawlers but the identities of other persons who had accessed the information was withheld. Significantly, the abridged report acknowledged that there was "further information" which was not being disclosed publicly because "it is not in the interests of detainees affected by this incident to disclose further information in respect of entities to have accessed the Document".

The Full Court considered that in a "rare" case such as this where a decision-maker invites submissions in consequence of a failure by the decision-maker personally to adhere to statutory safeguards of confidentiality, the decision-maker must show its full hand (subject to any proper considerations of confidentiality). After acknowledging that no submission had been made that the Department was precluded by considerations of bias from addressing the issue, the Full Court observed that it would undermine fairness in this unusual situation if the

Department did not have to reveal the full circumstances of the Data Breach. The Minister's argument that there was no procedural unfairness because Departmental officials conducting the ITOA process would themselves only have access to the abridged version of the report was not accepted.

The High Court held that the Full Court erred in finding that there was procedural unfairness. In reaching that conclusion the High Court applied what it described as "some basic principles". The first was that, in reviewing administrative action for jurisdictional error, a court must not exceed the legitimate ambit of its own power to declare and enforce the law which determines the limits and governs the exercise of the repository's power (citing Brennan J's oft-cited words in *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1 at 36). The Court added that if, in properly exercising its judicial review function, a court avoids administrative injustice or error, so be it, "but the court has no jurisdiction simply to cure administrative injustice or error".

The second basic principle, probably established for the first time by Gleeson CJ in (*Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1, is that, for there to be procedural unfairness, there must have been a "practical injustice".

The High Court concluded that what it described as the "extraordinary" circumstances of the Data Breach did not give rise to procedural unfairness. It was sufficient that the persons affected were told that an assessment was being conducted in the form of an ITOA in accordance with procedures set out in the Procedures Advice Manual and that its purpose was to assess the effect of the Data Breach on Australia's non-refoulement obligations. Although it was not until the matter reached the Full Court that the appellants learned for the first time that there was a statutory underpinning of the ITOA, this had no effect on what was in fact to occur and the appellants had not been deprived of an opportunity to submit evidence or make submissions bearing on the subject-matter of their respective ITOAs.

Finally, it was held that the failure to release a full copy of the report was not procedurally unfair because there was no practical injustice in circumstances where an assumption was made in the ITOA process that the appellants' personal information may have been accessed by authorities in their countries of origin. This assumption was sensible, so it was held, because "the true extent of access to the personal information of each affected applicant must in practicable terms have been unknowable" (at [90]). Thus even if the appellants could prove by reference to the unabridged report that one or more of the 104 IP addresses was associated with persons or entities from whom they feared harm, the High Court considered that their cases for engagement of Australia's non-refoulement obligations would be advanced no further than the assumption which had already been made in their favour.

The High Court spoke of "administrative injustice" as something which might be cured as a consequence of judicial review for jurisdictional error, but that it was not the object of such review.

There are several points to note. First, as noted above, the essential difference between the Full Court and the High Court relates to their respective characterisations of what had occurred and whether the relevant conduct constituted procedural unfairness. There is no apparent difference in fundamental principle, but the different outcomes highlight the nuances which can arise in applying reasonably well settled principles.

Secondly, there is nothing in the Full Court’s reasons for judgment which indicates that “administrative injustice” was the lodestar for its analysis of procedural unfairness.

Thirdly, there is room for debate concerning “good administration” as a potential value in informing principles and standards of procedural unfairness. For example, in *Kelson v Forward* (1995) 60 FCR 39 Finn J concluded that a public agency had engaged in conduct which was procedurally unfair in conducting an inquiry into alleged workplace harassment. His Honour made the following observations on the subject of “good administration” (emphasis added):

138. A shared concern both of courts and of public administrators within their particular spheres is with securing "good administration". While the respective emphases in, and understandings of, this may differ on occasion, the concern itself is a manifestly desirable and proper one. **In the law, securing good administration can properly be said to be an organising idea for a group of principles which, in exacting procedural fairness, are designed to maintain public confidence in the integrity of administrative government:** see e.g. *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] UKPC 2; [1983] 2 AC 629; *Consolidated Press Holding Ltd v Federal Commissioner of Taxation* [1994] FCA 1367; (1995) 129 ALR 443 at 453.

Fourthly, it is not easy to see why it was not a relevant circumstance in determining the content of the requirements of procedural fairness to take into account the fact that the Department was responsible for the Data Breach and needed to show its full hand as an aspect of procedural fairness (it being incontrovertible that the requirements of procedural fairness are flexible and are determined by what is fair in all the circumstances of a particular case – see, for example, *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 and *National Companies and Securities Commission v News Corporation Limited* [1984] HCA 29; 156 CLR 296 at 312).

Fifthly, noting that it is equally well established that disclosure of information is normally required if the material in question is credible, relevant and significant, even if it has not been taken into account in the ultimate decision (see *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; 225 CLR 88), why was it not procedurally unfair to withhold from the appellants the unabridged version of the report, especially in circumstances where the Department’s consultants who were responsible for producing the report advised the Department that it was “**not in the interests of detainees affected by this incident** to disclose further information in respect of entities to have accessed the information” (emphasis added) beyond identifying in the most general terms who had accessed the information? Without knowing more about the redacted information (which may not have been confined to identity information), how can a proper determination be made as to whether or not that information was “credible, relevant and significant”? And

despite the assumption referred to by the High Court, might not an analysis of Australia's non-refoulement obligations to an individual be affected by the knowledge, if it be the case, that the data had actually been accessed by some person or entity whom the individual particularly feared?

Conclusion

Some of the themes touched upon in this address will be more fully explored in later sessions of the Conference dealing with executive power, the distinction between fact and law and unreasonableness. Some questions remain unanswered but I consider that we are witnessing an important phase in the evolution of judicial review of administrative action in Australia which, when fully developed, should provide a solid doctrinal foundation for that judicial power and function.

While not suggesting that the values identified by Chief Justice Allsop are necessarily dispositive and determinative in every case, I respectfully agree that they form "part of the legal framework against which law is construed and moulded, rather than as necessarily providing the content for hard rules of law about limits of power". The formative role which such values can play should assist in the ongoing challenge of defining the legitimate ambit of judicial review of administrative action within the broader context of the division of power between the three branches of government.

Justice John Griffiths
Federal Court of Australia
28 October 2016