LECTURE 2

THE SCOPE OF JUDICIAL REVIEW

Statutory interpretation and the democratic process

In Lecture 1 I drew attention to the way in which the English courts succeed in giving robust effect to the common law principles of judicial review, while recognising the *ultra vires* doctrine in the case of the exercise of statutory discretions. In particular, I referred to the "assumption" on which, according to Lord Steyn, the courts approach the interpretation of a statute and the prima facie effect to be given to the statute, namely that a clear and specific provision is required to displace the traditions and principles of the common law.1

In *Coco v The Queen*,2 a majority of the High Court enunciated a similar principle of interpretation, though differently based. The majority said that an intention to interfere with fundamental rights —

> … must be manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

The majority observed that insistence on such an expression of intention to abrogate or curtail fundamental freedoms —

> … will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights".3

The same approach has been advocated in England and now for the same reason. In *R v Secretary of State for the Home Department; ex parte Simms*,4 Lord Hoffmann stated:

> [T]he principle of legality means that Parliament must squarely confront what it is doing and confront the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the political process …

In this way, the principle of interpretation plays an important part in ensuring that the legislators are alerted to the implications for fundamental rights and that the executive cannot achieve statutory curtailment without specifically addressing that very topic.

The principle advocated by Lord Hoffmann is not a by-product of the *Human Rights Act 1998* (UK). It is a basic common law principle which was stated as early as 1985.5 It is consistent with parliamentary supremacy, because it can be displaced. It enhances the democratic process because it squarely raises the issue for the legislators.

Separation of powers considerations

The doctrine of the separation of powers influences administrative law principles in various ways. In *Enfield City Corporation*,6 the High Court repeated7 the statement of Brennan J in *Attorney-General (NSW) v Quin*:8

> The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.9

The basic principle of administrative law is that an administrative decision is reviewable judicially on recognised grounds and those grounds do not include review on the merits. On the other hand, it is possible, where the matters relevant to the exercise of a statutory discretion involve the exercise of judicial power, for the legislature to provide for an appeal to a federal court and that the appeal shall extend to the merits. In other words, the court could be required to give the decision which it considers to be correct on the materials before it. Such a determination by the court, though called an appeal, is an exercise of original jurisdiction by the court. In that sense, the court is not actually reviewing the decision of the decision-maker; the court arrives at its own determination and substitutes its determination for that of the decision-maker.10

It is important to note that, lying behind the principle of administrative law referred to in *Enfield City Corporation*, is the limitation on merits review stemming from the limits of judicial power. The general run of statutory discretions involving substantial policy considerations cannot be determined by federal courts simply because they lie outside federal judicial power.

Justiciability

The concept of justiciability takes account of this limitation on federal judicial review. The conclusion that federal judicial power is not engaged may arise either: (i) because the issue is not one capable of resolution by legal criteria or ascertainably objective standards; or (ii) because the issue is committed exclusively to a non-judicial agency; or (iii) because the issue is "essentially political" in character or is "policy-driven".

The second ground is sometimes expressed by saying that some matters have been traditionally regarded as not falling within the scope of judicial review — treaty-making, recognising the government of a foreign state, recognising the boundaries of a foreign state, declaring war, conduct of foreign policy, dissolving Parliament, budget and financial policy decisions and national security are often given as examples. Whether all these matters are committed by the Constitution to the executive or the Governor-General to the exclusion of judicial review is an unresolved question. The first three examples consist of executive decisions which are committed by the Constitution to the executive government and are unreviewable except on constitutional11 and perhaps scope of power grounds, if they should arise.

Whatever may be the correct formulation of the third ground, it has some support in authority. In *Chandler v Director of Public Prosecutions*,12 Lord Reid considered that the disposition and armament of the armed forces was a political question which could not be determined by the courts.13 Reflecting a similar approach was a later statement in the House of Lords:

> The formulation and the implementation of national economic policy are matters depending essentially on political judgment. The decisions which shaped them are for politicians to take …14

But, in *Chandler*, Viscount Radcliffe rejected the absolutist approach, saying that it was not enough that an issue is ordinarily known as "political". Such issues "may present themselves in courts of law if they take a triable form".15

And, in *Minister for the Arts Heritage and the Environment v Peko-Wallsend Ltd*,16 the Full Court of the Federal Court held that a decision, which involved complex political questions relating to the environment, aboriginal rights, mining and the impact of the decision on Australia's economic position, placed it beyond review.

These statements and decisions are best understood on the footing that some matters are so much part of the political process in terms of their content and the way in which they require to be resolved that they are not susceptible to judicial review at all or, perhaps more accurately, are not susceptible to judicial review on particular grounds. Reviewability is not an "all or nothing" question. A particular decision may be reviewable for want of procedural fairness but not for *Wednesbury* unreasonableness. Another decision might be reviewable in terms of the scope of the power but not otherwise.

It is difficult to justify the proposition that the courts can identify, by reference to general subject matter alone, issues which are inherently non-justiciable. Some questions relating to international relations, national security, even politics may be justiciable,17 depending upon what the precise question is. Thus, the grant of executive power in s 61 of the Constitution necessarily entails the imposition of enforceable limitations on the exercise of that power, whether it be in the area of international relations or elsewhere.18 The modern focus of the courts on the precise issue for determination rather than on a broad topic, such as international relations or national security, supports this approach.

A distinction needs to be drawn between a decision which is "essentially political" in character and one which is "policy-driven". A decision which is essentially political in character is much more likely to be unreviewable than one which is policy-driven. The policy-driven decision, depending upon its nature and the context in which it is made — it may be a decision pursuant to statute — may be reviewable on one or more but not all grounds. A "polycentric" decision is unlikely to be reviewable generally, though it will be reviewable for *ultra vires*. And it has generally been thought that Cabinet decisions are not subject to review,19 though it is conceivable that a Cabinet decision specifically determining the rights of an individual might be subject to review.20

Another aspect of justiciability in the context of judicial review is the "political questions" doctrine. This is the name given to a nebulous doctrine which has been applied sparingly by the Supreme Court of the United States in constitutional cases21 and has echoes in Australian constitutional decisions.22 To the extent that the doctrine suggests that non-justiciability extends beyond the separation of powers elements involved in grounds (i) to (iii) above, it seems to rest on uncertain, if not insecure, foundations. The doctrine provides no justification for the making of a discretionary judgment by a court that it will decline to exercise jurisdiction by way of judicial review simply because the issue or the decision is "politically controversial".23 The most that can be said and, in my view, it may go too far, is to say, as Lord Wilberforce did, that —

> … the very fact that … decisions are of a type to attract political criticism and controversy shows that they are outside the range of discretionary problems which the courts can resolve.24

Although courts have taken account in recent times of the public interest in maintaining public confidence in the administration of justice in a number of areas of the law, including the Constitution, the separation of powers and the staying of criminal prosecutions on the ground of abuse of process,25 it is difficult to see how a court could decline to exercise jurisdiction by way of judicial review because to do so might erode public confidence in the administration of justice. To decline jurisdiction for this reason would open a veritable Pandora's box. To take the very recent *Tampa Case*26 in the Federal Court as an example, justiciability was not an issue. If it had been, the Court would not have been justified in declining to exercise jurisdiction because the controversy was non-justiciable. In *Tampa*, the application was for *habeas corpus* and a claim of right was asserted which the Court was bound to deal with. Courts are under an obligation to exercise jurisdiction. That means that courts must be satisfied that the issue is non-justiciable before they decline to deal with the matter.

Another factor to which reference is often made is the institutional lack of competence of the judges to deal with political and policy considerations. This factor has been urged as a reason why judges should not engage in the review of decisions based on such considerations. It is a factor which, while relevant to justiciability, is not decisive. Institutional lack of competence may have more to say in relation to judicial deference, where that is relevant. Thus, a court will give weight to the views of an expert or specialist tribunal on matters of policy and practice with which the tribunal is familiar.

The legislative choice versus (a) the role of judicial review in enhancing democratic accountability and (b) administrative justice

Emphasis is rightly placed by many commentators on the importance of respecting the legislature's choice in reposing the decision-making power in the decision-maker. The force of this emphasis is in denying to the courts a jurisdiction to review on the merits. Once this is accepted, the legislative choice is fully respected, except in so far as the legislative choice can also validly support an argument for judicial deference, as, for example, giving weight to the view of an expert or specialist tribunal on matters within its competence. Legislative choice may also be relevant to attempts on other grounds, for example *Wednesbury* unreasonableness, to convert judicial review into review on the merits. Otherwise legislative choice has little or nothing to say about the grounds of review.

There are countervailing factors which justify judicial review. One is the rule of law which calls for administrative decisions to be made in accordance with law. A second factor is the principle of good administration which calls for the application of acceptable standards in decision-making. Another factor is the role which judicial review plays in enhancing democratic accountability. Proceedings for judicial review subject administrative decision-making to close scrutiny and, in many cases, to publicity. No other democratic process provides such a window on the administrative decision-making process. This scrutiny and publicity results not only in a form of accountability but also in a valuable democratic sanction in the form of public opinion.

It can be argued that, in some instances, judicial review proceedings are an element in what is primarily a political campaign against the making of the decision under challenge. For understandable reasons, judges do not welcome the bringing of proceedings for political purposes. However, in those instances, it is difficult to establish that the purpose in bringing the legal proceedings is such as to amount to an abuse of process. In most cases the applicant for judicial review seeks the relief to which the applicant, if successful, is entitled.

The other factor is the concept of "administrative justice". This expression has been used from time to time in order to convey the notion that administrative tribunals offer a system of justice, though the system differs from the court system. The description is a misnomer. Nonetheless it serves to indicate that administrative decision-making is supplemented by judicial review, judicial review being designed to ensure that the decisions are made in conformity with the law. In one sense, this is another way of expressing the rule of law argument.

The distinction between jurisdictional and non-jurisdictional errors of law

The distinction between jurisdictional and non-jurisdictional errors of law gave rise to continuing difficulties over a very long period of time and generated much debate. This was because prohibition and certiorari are directed to jurisdictional errors except in so far as certiorari is available to correct errors of law on the face of the record. The distinction does not have the same significance for the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act).

In essence the difference is between an error which goes to the existence of jurisdiction and an error in the exercise of jurisdiction. The distinction was a central pillar of judicial review in England and Australia until the House of Lords decided *Anisminic Ltd v Foreign Compensation Commission*.27 The precise effect of that decision on the distinction in the context of judicial review was not altogether clear until 1993 when the House of Lords decided *R v Hull University Visitor*; *ex parte Page*.28 In that case, Lord Browne-Wilkinson expressed the principle of law on which the reasoning was based when he said:

> [I]n general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law.29

The basis of this principle is either that such a tribunal or inferior court which makes an error of law acts outside its jurisdiction and acts *ultra vires* or that jurisdiction is no longer relevant in determining whether an error of law is a basis for judicial review.

The consequence of this decision and the principle on which it is based is that the difference between certiorari for jurisdictional error and certiorari for error of law on the face of the record is no longer of relevance.

The new English approach is subject to an important qualification. It is that, in England, Parliament can confine a question of law to a particular inferior court and provide that the decision shall be final so that it is not challenged by appeal or judicial review.30 It seems that, when such a provision applies, the question is not whether the court made a wrong decision but whether it inquired into and decided a matter which it had no right to consider. This qualification appears to resurrect in a different form the difference between an error of law as to the existence of jurisdiction and an error of law within the jurisdiction. The qualification, however, has no application to a decision of an inferior court which is not protected by a statutory finality provision.

In this respect, the English approach has not been followed in Australia. In *Craig v South Australia*,31 in the context of review of inferior court decisions, the High Court maintained the distinction between errors of law going to jurisdiction and errors of law within jurisdiction. The Court went on to hold that, in the context of the availability of certiorari for error of law on the face of the record, the "record" is confined to the documents initiating and defining the matter in the inferior court and the order or determination which is challenged. Ordinarily, the transcript, the exhibits and the reasons for decision will not form part of the record, though it may be necessary, as it was in *Craig*, to examine the transcript in order to identify the nature of the application that was made. The Court noted that, although the reasons could be incorporated in the order or determination, incorporation is not achieved by words such as "accordingly" or "for these reasons".

On what constitutes the "record", *Craig* has been criticised.32 With that criticism I am not concerned, except to say that the availability of review should not depend upon the decision-maker's choice to incorporate the reasons or not. The distinction between express incorporation and implied incorporation does seem to be rather technical, though the Court supported it by the policy argument that expanding the record, thereby exposing the decision to review, could represent "a significant financial hazard" to small litigants.

To return to the issue of principle in *Craig*. The Court rejected the proposition, taken from *Anisminic*, that an inferior court commits jurisdictional error whenever it addresses the wrong issue or asks itself the wrong question.33 The Court distinguished the inferior court from the tribunal on the ground that an inferior court has jurisdiction to make an authoritative decision on questions of law, whereas a tribunal does not. This gives rise to a presumption that an inferior court has jurisdiction to decide legal questions.

The end result is to differentiate between tribunals and inferior courts and, in the case of inferior courts, to leave the existence of jurisdiction/exercise of jurisdiction divide theoretically in place but with reduced scope for operation. Even there, an error will be jurisdictional, if the court has wrongly asserted or denied jurisdiction or if it has misunderstood or disregarded "the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist".34

It would be a mistake to assume that all errors of law made by an administrative decision-maker or tribunal in reaching its decision are jurisdictional errors of law. *Craig* does not stand for such a large proposition.35 Moreover, the distinction between jurisdictional and non-jurisdictional error is important in the context of the constitutional writs and certiorari (other than perhaps for error of law on the face of the record) because they do not lie for non-jurisdictional error.36

Neither the English nor the Australian position in relation to inferior courts is free from complexity. Of the two, the English position is more simple. The troublesome existence of the jurisdiction/exercise of jurisdiction distinction is banished from centre stage and review for error of law on the face of the record ceases to have much importance.

On the Australian approach, not every failure by an inferior court to have regard to a relevant consideration or to disregard a relevant consideration amounts to jurisdictional error.37 However, a mistake of that kind may result in a tribunal wrongly denying the existence of jurisdiction or wrongly confining its powers. Thus, in *Re McJannet; ex parte Minister for Employment, Training and Industrial Relations (Qld)*,38 there was no error as to jurisdictional fact. There was, nevertheless, an error on the part of the Federal Court about one of the statutory provisions and an error in applying another provision to the facts. This, according to the Court, resulted in a wrongful assumption of jurisdiction. Compared with the English approach, this is more complex and illustrates the proposition that there is no brightline distinction which enables us to identify jurisdictional errors from errors within jurisdiction.

The English view is consistent with the *ultra vires* theory of judicial review. An error of law on the part of the decision-maker results in an *ultra vires* decision. On the Australian view, in the case of an inferior court, an error of law within jurisdiction without more would not result in *ultra vires*. In relation to an administrative decision, many but not all errors of law would be jurisdictional and result in *ultra vires*. Relief under the AD(JR) Act would be available, where appropriate.

The distinction between an error of law going to the existence of jurisdiction and an error of law within jurisdiction is conceptually sustainable. On the other hand, the distinction is problematic because there are so many cases where it is difficult to conclude on which side of the divide a particular case falls. The new English approach to the problem, because it downplays the importance of the distinction, is simpler.

The power of an administrative tribunal to correct mistakes

It is convenient here to refer to a very recent decision of the High Court, *Bhardwaj v Minister for Immigration & Multicultural Affairs*,39 which deals with the power of an administrative tribunal to re-exercise its jurisdiction when it discovers that its initial decision is flawed. As no less than six judgments were delivered, the effect of the decision is not easy to state. Three propositions can be stated:

(1) The doctrine of *functus officio* has an application in administrative decisions; the decision-maker cannot re-exercise the power simply because of a change of mind.

(2) The decision-maker can re-exercise the power if the initial attempt is ineffective by reason of an error which amounts to jurisdictional error but not if it is simply an error within jurisdiction.

(3) Propositions (1) and (2) are subject to the relevant legislative intention, that is, does the statute evince an intention to permit the decision-maker to have a second go and, if so, in what circumstances?

Lying behind these three propositions is a lot of messy law about whether erroneous administrative decisions are void or voidable. To its credit, the High Court endeavours to escape from these terminological wars but it does so at the price of plunging the decision-maker into the quicksands of jurisdictional error, the mysteries of which may well baffle Immigration Tribunal members. In this area, the difference between jurisdictional and non-jurisdictional error is alive and well, despite *Craig v South Australia*.

Gleeson CJ endeavours to resolve this kind of problem by reference to statutory intention alone but his is a lone voice. There is a joint judgment by Gaudron and Gummow JJ which endeavours to revive their dissenting view in *Abebe*, an attempt which was condemned by McHugh J in his short judgment.

Bhardwaj was a case where the Tribunal, through an oversight, failed to accord natural justice to the respondent, so the Tribunal's second decision replacing its first decision was valid, the first decision being invalid for jurisdictional error.

The distinction between a question of law and a question of fact. Is judicial review available in relation to a question of fact?

Judicial review has always been based on the existence of an error of law. Traditionally judicial review has not been available simply to correct an error of fact. The *ultra vires* theory of judicial review and, for that matter, the alternative rule of law basis, proceeds on the footing that the decision under challenge is to be made in accordance with law. That requirement does not necessarily require a correct finding of fact when judicial review does not extend to merits review.

On the other hand, jurisdictional facts are subject to judicial review. That is because an error as to jurisdictional fact is considered to be an error of law. An erroneous assertion or denial of jurisdiction, for whatever reason, is an error of law.

Although the courts will not review a finding of non-jurisdictional fact *simpliciter*, there are various ways in which such a finding of fact may give rise to a question of law. A decision-maker may make a finding of fact in consequence of misdirecting himself or herself in law, for example, by applying the wrong test or failing to take account of a relevant consideration or taking account of an irrelevant consideration. Likewise, absence of evidence ("no evidence") to support a finding of fact either gives rise to a question of law or is reviewable as such on that specific ground. Insufficient evidence has not generally been recognised as a ground of review. This is on the view that to recognise it as a ground would come too close to merits review.

Giving insufficient weight to a relevant factor does not necessarily amount to failure to take account of a relevant consideration. Where, however, the decision-maker has failed to give adequate weight to a relevant factor of great importance or has given excessive weight to a relevant factor of no great importance, my own view has been that it falls under *Wednesbury* unreasonableness.40 That approach was adopted in *Chan v Minister for Immigration and Ethnic Affairs*.41 Alternatively, it may be possible to say in a given case that the weight given to relevant matters was so lacking in balance that there has been no proper exercise of the decision-making power.

In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,42 a majority of the Court treated *Chan* as a case in which the Court held, in effect, that the determination "involved an error of law" within the meaning of s 5(1)(f) of the AD(JR) Act, on the ground that the decision-maker had misdirected himself in law. There is an obvious difficulty in characterising cases where insufficient weight is given to a relevant consideration as a *failure to take account* of a relevant consideration. Further, it has generally been thought that courts should be extremely cautious in using the giving of insufficient weight to a relevant consideration as a ground for quashing the decision-maker's decision. Otherwise, judicial review on this ground might verge on merits review.43 It should be noted, however, that, in England, courts do not appear to be as reluctant to embrace insufficient weight as a ground of review.44

The relevant/irrelevant consideration grounds have been expressed as applying to "considerations" or "factors". Whether they extend to "evidence" as distinct from "considerations" or "factors" is an unresolved question. The answer to the question may well depend upon the construction of the statute. There is, for example, support for the principle that it is to be implied that an administrative decision is to be made on the basis of the most current material available to the decision-maker.45

Further, there has been an increasing tendency to formulate the "relevant consideration" and "irrelevant consideration" grounds in terms of "relevant materials" and "irrelevant materials". If the grounds of review embrace "materials" as well as "considerations", why should not the grounds extend also to "facts"?

Associated with these matters is the question whether *Wednesbury* unreasonableness applies to fact finding. My own view has been that the *Wednesbury* unreasonableness ground applies to the decision which is subject to challenge and that it is legitimate, in demonstrating unreasonableness, to show that a material fact has been wrongly found. Of course, in order to make out the unreasonableness ground, it is not enough to show that a material fact has been wrongly found, unless that finding was not merely wrong but resulted in a conclusion that no reasonable person could reasonably have reached. The point may be stated more accurately by saying that it is the duty of the court to leave the decision of fact to the decision-maker in whom the power has been reposed by Parliament save where the decision-maker is acting perversely.46

True it is that applying the unreasonableness ground in a way that takes account of wrong fact finding gives rise to a concern that review will extend to fact finding. It has to be remembered that there is no review of fact finding *simpliciter*. As Brennan J observed in *Waterford v Commonwealth*,47 "[t]here is no error of law simply in making a wrong finding of fact".48 If review is restricted as already suggested, this concern should not be significant. There is no common law duty to make relevant findings of fact.49

In England, a more expansive view has been taken. In *Secretary of State for Education and Science v Tameside Metropolitan BC*,50 Lord Wilberforce stated that an official exercising discretionary power made a jurisdictional error if he acted on an incorrect basis of fact, even in a case where the power is conditioned on his satisfaction as to the facts.51 This proposition has not been accepted in Australia. In *Eshetu*,52 Gummow J said it was wrong as applied to a power which was expressed to be exercisable in accordance with the decision-maker's satisfaction as to the facts.

In England, however, not only has Lord Wilberforce's statement in *Tameside* been confirmed, it has been taken further. A material error of fact can be reviewed under the relevant/irrelevant consideration grounds or on the ground that there has been a failure to provide adequate reasons or on the ground of no evidence.

There is now growing support in England for the proposition that a material error of fact is reviewable.53 De Smith, Woolf and Jowell54 go so far as to say:

> The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention.

Wade and Forsyth55 are more circumspect.

The breadth of review available in the United Kingdom is well illustrated by the following statement by Lord Hope of Craighead:

> [T]he decision … may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence or of *sufficient evidence,* to support it, or *through* account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision …56

His Lordship's statement is to be understood in the light of Lord Wilberforce's statement in *Tameside*. The change in the English position is not surprising given the emergence of more thorough-going review there.

Review for *Wednesbury* unreasonableness and the place of proportionality

In referring to *Wednesbury* unreasonableness, I have in mind Lord Greene MR's statement in *Associated Provincial Picture Theatres Ltd v Wednesbury Corporation*,57 that —

> … if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.58

Unreasonableness in this sense is a ground on which a decision may be challenged at common law and under ss 5(2)(g) and 6(2)(g) of the AD(JR) Act.59

Australian courts have not displayed much enthusiasm for this ground of review, preferring to rely on other grounds of review, particularly the consideration grounds and the error of law ground. Lack of enthusiasm for *Wednesbury* unreasonableness springs from the belief that it may open the door to judicial merits review.

In conformity with this approach, Australian courts have applied unreasonableness in the terms stated by Lord Greene.60 They have not equated the ground with irrationality. This is understandable. Lord Greene expressed the ground in such a way that it may apply only to extreme or outrageous cases. Plainly his Lordship conceived of it as a fall-back ground, one which could cover obvious cases not covered by other grounds.

In England, however, a more exacting version of Lord Greene's statement has been preferred. Lord Diplock considered that conduct which was *Wednesbury* unreasonable was conduct that "no sensible authority acting with due appreciation of its responsibilities would have decided to adopt".61 Lord Cooke has perhaps taken this further by saying that the test is whether the decision "is one which a reasonable authority could reach".62 In explaining his reasons for adopting this test, his Lordship criticised the tautological expression of the test by Lord Greene and reproved him for stating the test in such a restricted form. Lord Cooke dismissed concerns that judges would engage in merits review under this ground by saying that judges were used to giving effect to the ground.

There is no occasion to treat Lord Greene's formulation of the ground as if it were holy writ. And there is much to commend the formulation by Lord Diplock. If applied literally, it would not result in merits review. The argument that some judges would use it for that purpose (even if not intending so to do) does not warrant serious consideration. Judges are well aware of their responsibilities and, if they err, they can be corrected on appeal. We should not be deterred from adopting a correct principle simply because we think that it is possible that some judges may not apply it accurately. On the other hand, we are bound to give effect to the language in s 5(2)(g) of the AD(JR) Act and this takes us back to Lord Greene's words. They are capable of the interpretation placed upon them by Lord Diplock.

Proportionality

This brings me to the concept of proportionality. Another import from European law, it has had a chequered history so far in Australia and England. In both jurisdictions the concept encountered opposition on the ground that it has the potential to lead to merits review, thereby circumventing the legislature's decision to repose the power in the decision-maker.

It is obvious that the opposition to proportionality is the stronger where a stricter version of *Wednesbury* unreasonableness applies, as it does currently in Australia.63 In England, where a less exacting version applies, it was to be expected that the objections to proportionality would become more muted. Other factors tending to favour proportionality in the United Kingdom are the *Human Rights Act 1998* (UK) and the use of proportionality by the European Court of Justice and the European Court of Human Rights. Proportionality is a concept which is particularly helpful in dealing with cases in which it is alleged that a decision results in an unacceptable violation of, or interference with, fundamental rights. Proportionality poses the question whether that result is disproportionate to the need to protect the legitimate interest which the decision-maker has sought to protect.

The current position in England is that proportionality is alive and well. In *International Trader's Ferry*,64 Lord Slynn of Hadley, speaking for a majority of the House of Lords, acknowledged that *Wednesbury* unreasonableness and proportionality were different in some ways. He went on, however, to say —

> … the distinction between the two tests in practice is in any event much less than is sometimes suggested. The cautious way in which the European Court applies this test, recognising the importance of the margin of appreciation, may mean that whichever test is adopted, and even allowance for a difference in onus, the result is the same.65

Three comments should be made about this statement. First, one should compare this statement with the earlier denunciation of proportionality by Lord Ackner and Lord Lowry in *Brind's Case*.66 Secondly, despite Lord Slynn's endeavour to play down the difference between the two tests, it has been recognised in the very recent decision *Ex parte Daly*67 that, even on the broader English version of Wednesbury unreasonableness, proportionality as a separate ground would extend judicial review68 and would in some cases yield different results because it involves greater intensity of review. That is because proportionality requires the decision-maker to assess the balance struck by the decision-maker. It may also require attention to be directed to the relative weight accorded to relevant interests and considerations. Thirdly, in England, proportionality is treated as an additional ground of review, in accordance with the suggestion initially made by Lord Diplock.69 In England, there seems to be no difficulty in using it in the context of the unreasonableness ground as an elucidation of that ground of review.

In Australia, we are free from the influences which favour making proportionality a separate ground of review. As I see it, for us, the question is whether proportionality is a concept which should inform our understanding of *Wednesbury* unreasonableness and its application. The question should be answered in the affirmative. A decision which involves the application of policy to an individual to his detriment in circumstances where there is no reasonable basis for thinking that the integrity of the policy will be significantly compromised if the decision went the other way, is *Wednesbury* unreasonable and it is unreasonable because the end result is grossly disproportionate to the interest which the decision-maker seeks to protect. Gross disproportionality in this sense often lies behind a conclusion that a decision is unreasonable. It is proportionality in this sense that is relevant to Australian Administrative Law rather than the various applications which it has in European law.

It is sometimes suggested that proportionality is only of use where there is an alleged impairment of fundamental rights or freedoms. True it is that proportionality has an accepted and important role in that area, but it is not and should not be confined to that area. It is a concept which has a potential application when the unreasonableness of a decision is in issue on the ground that the detriment to the individual occasioned by the application of a policy is grossly disproportionate to the risk of compromise of the policy if the decision went the other way.

Relevant to the relationship between *Wednesbury* unreasonableness and proportionality is what has been called the varying degrees of intensity of review. Thus, it has been accepted in England that the more substantial the interference with fundamental rights the more the court will require by way of justification before it can be satisfied that the interference is reasonable in the *Wednesbury* sense.70

Legitimate expectation

Proportionality is sometimes linked to legitimate expectation, yet another importation into the common law from Europe. Legitimate expectation also has a link with the rule of law. Hitherto, the concept of legitimate expectation has been accepted as having a role in Australian Administrative Law. The concept plays a part in extending the protection of the individual beyond protection of the individual's rights and interests.71 The High Court has now expressly left unresolved the content and continued utility of the doctrine.72

With that question, I am not concerned. Nor am I presently concerned with *Teoh's Case*,73 though I should mention that it has been referred to uncritically on two occasions by the Privy Council.74

My concern is with the substantive protection of a legitimate expectation. The question arose in *Attorney-General (NSW) v Quin*.75 Although a majority in that case rejected substantive protection of an expectation on the part of certain magistrates that they would be re-appointed to the Local Court, a new court brought into existence to replace their court as part of a court re-organisation, it would be a mistake to regard that decision as ruling out substantive protection of legitimate expectations altogether. The most that can be said is that the majority judgments tend to proceed on the footing that legitimate expectations are mainly, if not solely, relevant to the imposition of a duty of procedural fairness. So, it is best to proceed on the footing that, as yet, we have not accepted that the courts will substantively protect a legitimate expectation.

In England, it is otherwise. After some degree of initial vacillation,76 the Court of Appeal has, in a series of recent decisions,77 affirmed the availability of substantive protection of a legitimate expectation. In *R v Home Secretary; ex parte Hindley*,78 the House of Lords made reference to the first of these decisions, *Coughlan*. Although Lord Hobhouse of Woodborough described Lord Woolf's judgment in *Coughlan* as "valuable",79 Lord Steyn (with whom the other Law Lords agreed) observed80 that there appeared to be dicta in *In re Findlay*81 which were opposed to the argument on substantive legitimate expectation.82 But his Lordship did not stop to consider whether *Findlay* was distinguishable or wrong on this point.

Since then the House of Lords appears to have endorsed the substantive protection of legitimate expectations. In *R v East Sussex County Council*; *ex parte Reprotech (Pebsham) Ltd*,83 Lord Hoffman, in a speech in which the other Law Lords spoke with approval of the first of the Court of Appeal decisions, *R v North and East Devon Health Authority*; *ex parte Coughlan*,84 said:

> In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury District Council v Secretary of State for the Environment*, estoppels bind individuals on the ground that it would [be] unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into 'the public law of planning control, which binds everyone'.
>
> There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the *Human Rights Act 1998*, so that, for example, the individual's right to a home is accorded to a high degree of protection while ordinary property rights are in general far more limited by considerations of public interest.
>
> It is true that in early cases such as the *Wells* case and *Lever Finance Ltd v Westminster (City) London Borough Council*, Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful. In the *Western Fish* the Court of Appeal tried its best to reconcile these invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty. But the results did not give universal satisfaction: see the comments of Dyson J in the *Powergreen* case. It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.

These remarks indicate how the substantive protection of legitimate expectations has occupied a space in public law which is occupied in private law by estoppel. Just how Australian law will develop in this area remains to be seen, more particularly in view of the difficulty the High Court had in dealing with the notion of estoppel in *Attorney-General (NSW) v Quin*.85

In its decisions, the Court of Appeal has held that judicial review for substantive unfairness is not limited to *Wednesbury* unreasonableness. The essence of these decisions is that, when government or official conduct has given rise to a substantive benefit, an administrative decision based on government policy which disappoints the expectation is capable of judicial review on the ground of substantive unfairness.

It is convenient to state briefly the principles as the English Court of Appeal has formulated them in *R v London Borough of Newham and Bibi and Attaya Al-Nashed (Bibi)*.86 The common law requires that a legitimate expectation be considered by the decision-maker if it falls within the ambit of his discretionary power. Further, effect should then be given to the expectation, unless there are reasons recognised by law for not doing so. In the event that effect is not given to the expectation, fairness requires that the decision-maker gives reasons for the conclusion. If policy considerations adverse to giving effect to the expectation are relevant to the making of the decision, the decision-maker must make the decision in the light of the legitimate expectation. Failure to do so will result in vitiation of the decision on the ground either of failure to take into account a relevant consideration or abuse of power.

It should not be assumed, however, that these are only grounds of review available for failing to give effect to a legitimate expectation. Where the expectation is taken into account but subordinated to policy, the decision, it would seem, may be open to challenge for *Wednesbury* unreasonableness and for disproportionality.

In *Bibi*, the Housing Authority made a promise to the applicants that it would provide legally secure housing accommodation within eighteen months. The Authority refused to honour its promise. The Court held that, in coming to its decision, the Authority failed to take account of the legitimate expectation. The Authority's decision was therefore vitiated. The Court declined to make the decision itself. It was for the Authority to consider the matter afresh. The making of the decision was committed to the Authority, not to the Court. But the Court made a declaration that the Authority was under a duty to consider the applications for suitable housing on the basis that the applicants have a legitimate expectation, that they will be provided by the Authority with suitable accommodation on a secure tenancy.

The exposition by the Court of Appeal of substantive protection of a legitimate expectation does not impinge upon the freedom of government or of an authority to change its policy. Any undertaking given by government or an authority may be modified, even revoked, subject to judicial review.87 Neither modification of existing policy nor adoption of a new policy displaces the decision-maker's duty to take account of a legitimate expectation.

An interesting illustration of substantive protection of legitimate expectations is to be found in the Hong Kong Court of Final Appeal's recent decision in *Ng v Director of Immigration*.88 There, as a result of representations made by government officials, certain persons had a legitimate expectation that they would be treated in the same way as the plaintiffs who, in an earlier case, had established a right of abode in Hong Kong. A subsequent change in the law, stemming from an Interpretation, issued by the NPC Standing Committee in Beijing and binding on the Hong Kong courts under Art 158 of Hong Kong's Basic Law, denied the government the power and authority to give effect to the legitimate expectation. It was, however, permissible for the Director to exercise his statutory powers in such a way as to permit these persons to remain in Hong Kong, though not permissible to accord them a right of abode. In refusing to allow them to remain in Hong Kong and making orders for their removal, the Director had not taken their legitimate expectation into account. The orders were set aside on the ground that the Director had failed to have regard to a relevant consideration.

By contemporary Australian standards, the English approach, which applies in Hong Kong under the Basic Law, is revolutionary. If, however, one accepts that a legitimate expectation is a legal concept which is entitled to protection, it is in principle unsatisfactory to restrict protection to procedural protection and to stop short of substantive protection. There are other justifications for extending judicial review to substantive protection. It is important, as a matter of good administration and integrity in government, that government and public authorities should be held to their promises and representations, excluding, presumably, election promises and representations upon which, ironically, electors are not expected to rely. Further, substantive protection, provided that the decision is ultimately left to the decision-maker, does not result in the court imposing its solution on the decision-maker. And, as explained by the Court of Appeal, substantive protection does not result in any expansion of *Wednesbury* unreasonableness. Substantive protection rests on the ground of failure to take account of a legitimate expectation.

On the other hand, before one gets to this ground, it is necessary to conclude that there is a duty to take account of the expectation. The basis for erecting this duty is the notion of substantive fairness. There is little, if any, support for the adoption of substantive fairness as a guiding principle in Australian Administrative Law. The long judgment of Gummow J in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*[89] ends with the unequivocal statement:

> I reject the view that a legitimate expectation to a favourable exercise of a discretion is entitled to substantive, rather than procedural protection as a matter of law.

1 *R v Secretary of State for the Home Department*; *ex parte Pierson* [1998] AC 539 at 587.
2 (1994) 179 CLR 427.
3 *Ibid* at 437–438.
4 [1999] 3 WLR 328 at 412.
5 It was explicitly stated by Lord Browne-Wilkinson (then Browne-Wilkinson LJ) in *Wheeler v Leicester City Council* [1985] AC 1054 at 1065. Although the Court of Appeal majority decision was overruled, the House of Lords upheld the dissenting judgment of Browne-Wilkinson LJ.
6 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135.
7 *Ibid* at 413.
8 (1990) 170 CLR 1.
9 *Ibid* at 36.
10 As to the distinction between a hearing de novo and more traditional forms of appeal, see *Coal and Allied v Australian Industrial Relations Commission* [2000] 203 CLR 194 at 203 per Gleeson CJ, Gaudron and Hayne JJ.
11 See *Horta v Commonwealth* (1994) 181 CLR 183 at 195–196.
12 [1964] AC 763.
13 *Ibid* at 791.
14 *R v Secretary of State for the Environment*; *ex parte Hammersmith & Fulham LBC* [1991] 1 AC 52 at 97.
15 [1964] AC at 798.
16 (1987) 75 ALR 218.
17 Peter Cane, "Merits Review and Judicial Review: The AAT as Trojan Horse" (2000) 28 *Federal Law Review* 213 at 216–217.
18 *Re Ditfort*; *ex parte Deputy Commissioner of Taxation (NSW)* (1988) 19 FCR 347 at 369 et seq.
19 See *Minister for the Arts Heritage and the Environment v Peko-Wallsend* ibid; *South Australia v O'Shea* (1987) 163 CLR 378.
20 *Ibid* at 387 per Mason ACJ.
21 *Baker v Carr* 369 US 186 at 217 (1962).

22 *Victoria v Commonwealth* (1975) 134 CLR 87 at 134–135 per McTiernan J (dissenting); *Gerhardy v Brown* (1984) 159 CLR 70 at 137–139 per Brennan J; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 295–296 per Mason CJ and Brennan J.

23 *Century Minerals & Mining NL v Yeomans* (1989) 40 FCR 564 at 587.

24 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 482.

25 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1966) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Jago v District Court (NSW)* (1989) 168 CLR 23.

26 *Ruddock v Vadarlis* (2001) 183 ALR 1.

27 [1969] 2 AC 147.

28 [1993] AC 682.

29 *Ibid* at 702.

30 *Ibid* at 693.

31 (1996) 184 CLR 163.

32 See the discussion in M Aronson & B Dyer, *Judicial Review of Administrative Action* (2nd ed, LBC, 2000) at 182–186.

33 *Anisminic v Foreign Compensation Compensation* [1967] 2 AC 147.

34 (1996) 184 CLR at 177.

35 (1996) 184 CLR at 179; see also *Coal and Allied v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208–209 per Gleeson CJ, Gaudron and Hayne JJ (where their Honours concluded that relief was not available if the error made by the tribunal was non-jurisdictional).

36 See *Re McBain*; *ex parte Australian Catholic Bishops Conference* [2002] HCA 16 (18 April 2002).

37 *Abebe v Commonwealth* (1999) 197 CLR 510 at 552 per Gaudron J.

38 (1995) 184 CLR 620.

39 [2002] HCA 1 (14 March 2002).

40 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J.

41 (1989) 169 CLR 379.

42 (1996) 185 CLR 259 at 273 per Brennan CJ, Toohey, McHugh and Gummow JJ. See also *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626–627 per Gleeson CJ and McHugh J.

43 *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 627 per Gleeson CJ and McHugh J.

44 See *Reid v Secretary of State for Scotland* [1999] 2 WLR 28 at 54 per Lord Hope of Craighead.

45 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 45 per Mason J. See *Craig v South Australia* (1996) 184 CLR 163 at 179 per *curiam* (where the references are to relevant *material* and irrelevant *material*). Note also *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1 at 22 per McHugh, Gummow and Hayne JJ ("ignoring relevant material or relying on irrelevant *material* in a way that affects the exercise of power is to make an error of law" (my emphasis)).

46 *Ibid*; see also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358–359 per Mason CJ (with whom Brennan J concurred); 366–368 per Deane J.

47 (1987) 163 CLR 54.

48 *Ibid* at 77.

49 *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR at 19–20 per McHugh and Hayne JJ.

50 [1977] AC 1014.

51 *Ibid* at 1047.

52 (1999) 197 CLR 611 at 655–656.

53 *R v Criminal Injuries Compensation Board*; *ex parte A* [1999] 2 AC 330 at 344–345 per Lord Slynn of Hadley; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929 at 976–977 per Lord Slynn of Hadley, at 978 per Lord Nolan.

54 *Judicial Review of Administrative Action* (5th ed, 1995) at 228.

55 *Administrative Law* (7th ed, 1994) at 316–318.

56 *Reid v Secretary of State for Scotland* [1999] 2 WLR 28 at 54 (emphasis added).

57 [1948] 1 KB 223.

58 *Ibid* at 230.

59 The AD(JR) formulation of the ground is taken from the statement by Lord Greene MR.

60 *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 322–323, 327, 331–332.

61 *Secretary of State for Science and Education v Tameside Metropolitan BC* [1977] AC 1014 at 1064.

62 *R v Chief Constable of Sussex; ex parte International Trader's Ferry Ltd* [1998] 3 WLR 1260 at 1288–1289.

63 Note, however, that it is now accepted that a discretionary power conferred by statute must be exercised reasonably (*Kruger v Commonwealth* (1997) 190 CLR at 36). This principle may provide a basis for relaxing the test of reasonableness at common law.

64 [1998] 3 WLR 1260.

65 *Ibid* at 1277 (with the concurrence of Lord Nolan and Lord Hope of Craighead).

66 *R v Secretary of State for the Home Department*; *ex parte Brind* [1991] 1 AC 696 at 762–763, 763.

67 2001 UKHL 26, 23 May 2001.

68 Michael J Beloff QC, "English Public Law — Europhiliac or Eurosceptic" in P Rishworth (ed), *The Struggle for Simplicity in the Law* (Butterworths, Wellington, 1997) 273 at 285.

69 *Council of the Civil Service Union v Minister for the Civil Service ("GCHQ Case")* [1985] AC 374 at 410.

70 *R v Ministry of Defence*; *ex parte Smith* [1996] QB 517; *R v Secretary of State for the Home Department*; *ex parte Simms* [1999] 3 WLR 328 at 340.

71 Though an expansion in the content of "interests" could conceivably render it unnecessary.

72 *Sanders v Snell* (1998) 196 CLR 329 at 348 per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

73 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

74 *Thomas v Baptiste* [1999] 3 WLR 249; *Fisher v Minister of Public Safety and Immigration (No. 2)* [1999] 2 WLR 349 at 356.

75 (1990) 170 CLR 1.

76 See *R v Secretary of State for the Home Department*; *ex parte Hargreaves* [1997] 1 WLR 906 at 921, 924–925 (where an attempt to review for substantive unfairness a decision which denied a legitimate expectation on policy grounds was rejected).

77 *R v North and East Devon Authority*; *ex parte Coughlan* [2000] 2 WLR 622; *R v Secretary of State for Education and Employment*; *ex parte Begbie* [2000] 1 WLR 1115; *R v Secretary of State for the Home Department*; *ex parte Zeqiri* [2001] EWCA Civ 342; *R v London Borough of Newham and Bibi and Attaya Al-Nashed* [2001] EWCA Civ 607; reversed on appeal [2002] UKHL 3.

78 [2001] 1 AC 410 at 421.

79 *Ibid* at 421.

80 *Ibid* at 421.

81 [1985] AC 318.

82 His Lordship's comment should not be understood as throwing doubt on the doctrine of substantive protection of a legitimate expectation. It seems that the comment was directed to the question whether the particular legitimate expectation relied upon in *Hindley* was contrary to the reasoning in *Findlay*.

83 [2002] UKHL 8.

84 *Ibid*.

85 (1990) 170 CLR 1.

86 *Ibid*.

87 *R v North and East Devon Authority*; *ex parte Coughlan* [2000] 2 WLR 622 at 647.

88 [2002] HKCFA 1. The author was one of the majority judges.

89 (1990) 92 ALR 93 at 129.