WHAT IS 'SUBSTANTIVE' JUDICIAL REVIEW? DOES IT INTRUDE ON MERITS REVIEW IN ADMINISTRATIVE DECISION-MAKING?

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There is a distracting ambiguity in the use of the word 'substantive' to describe what a court on judicial review does or does not do, particularly in its consideration of the lawfulness of the administrative action.

The argument in this article is that it is accurate to describe as 'substantive', in the sense of 'qualitative', the court's consideration of the administrative action which is under review in a particular case, although it is important in that respect to try to understand what is and what is not 'the merits' from which the courts must stay away. This is, arguably, what Brennan J had in mind in *Attorney-General (NSW) v Quin*.[1] The article seeks to distinguish 'merits review' and judicial review.

As to remedies, I argue that it is, and should be, only in a rare case that in Australia a court grants 'substantive' relief. Here, 'substantive' relief is generally limited to where there is only one possible answer once the legal framework has been properly understood. By way of contrast, reference will be made to the concept of 'substantive legitimate expectations' in English public law. But at least one commentator[2] reviews developments in that jurisdiction over the last 20 years in terms which bear some similarity to the abandoning of pigeonholes necessary to apply the Australian concept of jurisdictional error.

In this article I confine myself to judicial review, but I have no new empirical data as to the extent to which judicial review does 'make a difference'.[3]

I can give you some bare statistics: in the Administrative and Constitutional Law and Human Rights National Practice Area (ACLHR NPA) of the Federal Court, there were approximately 295 matters filed in each of the last two financial years. In the last financial year, 107 of them were first-instance *Migration Act 1958* (Cth) matters and 184 of those were not Migration Act matters. Of the approximately 295 matters to which I have referred, 220 were classified as administrative law (the balance being human rights (32) and constitutional law (39) matters). In addition, in the last financial year there were 630 Migration Act appeals to the Federal Court from the Federal Circuit Court and 31 other appeals within the ACLHR NPA. The Migration Act appeals generally involve whether or not the judge of the Federal Circuit Court erred in finding that there was or was not jurisdictional error on the part of the Administrative Appeals Tribunal.

For an empirical view, there is a recent paper by Professor Sunkin and Varda Bondy[4] in which the authors refer to the work exploring whether judicial review does lead to the highest standards of public administration; whether it does encourage public bodies to adhere to the standards of legality, fairness and justice implicit in the principles of judicial review; and if so, whether such standards are conducive to good administration. The authors refer to the

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earlier work done by Professor Creyke and Professor McMillan in Australia.[5] Sunkin and Bondy discuss the limits on judicial review but also refer to a study they did investigating the effect and value of judicial review litigation and exploring what happened following judgments of the Administrative Court between July 2010 and February 2012 inclusive. They refer to 34 cases, in only four of which were they told that the public body had made the same decision on the substance as it had originally made. In the remaining 30 cases the public body made a fresh decision that differed from the original decision and favoured the claimant. What the authors were keen to examine was whether the reconsideration by the public authorities was a response that was 'wholly negative or ritualistic'.[6] You may recall that, in their work, Professor Creyke and Professor McMillan found that over half of the remitted matters were determined in the applicant's favour. I suspect that the percentages would be very different depending on the area of public administration in question.

There is a gulf, as you know, between the substance, as seen by an applicant for judicial review; the story, as seen by journalists; and what the courts actually do on judicial review.

An example is *Yasmin v Attorney-General of Commonwealth of Australia*[7] (*Yasmin*), which was ultimately about the age of a crew member on an asylum seeker vessel in 2009 and whether the crew member was a child who was then imprisoned in Australia. But for the Court the question was whether or not the Commonwealth Attorney-General had a duty to consider an application — that application being to the Attorney-General to refer a case to the Court of Criminal Appeal of Western Australia — so that that Court could consider a petition of mercy. This was reported in the press as the Full Court finding that the Attorney-General was obliged to help to correct a miscarriage of justice. As it happened, although not required by the Court's order, it was reported in the press that the Attorney-General accepted what the Full Court had found — that it was his duty to consider the application — in the sense that he did not apply for special leave to appeal; considered the application; did so positively; and referred the case to the Court of Criminal Appeal.

Lawyers need always to look at the orders of the court. On judicial review, in all but a small number of cases, as in *Yasmin*, the matter is remitted to the decision-maker; the decision-maker now knows what the law is. The phrase 'to be determined according to law' means 'consistently with the reasons of the court'.

In relation to *Haneef v Minister for Immigration and Citizenship*,[8] I draw attention to the orders made by the primary judge, Spender J, quashing the Minister's decision to cancel the applicant's visa.

The Full Court dismissed the appeal.[9] The result was that the matter was remitted to the Minister in accordance with the orders made by the trial judge. The Full Court noted a submission, which is relevant to remedies, put by the Solicitor-General that the primary judge should have concluded that it would be futile to remit the matter because it would be virtually certain that Dr Haneef's visa would be cancelled in any event. The Full Court said:

> having found that the Minister applied the wrong test, and that this was very much to Dr Haneef's disadvantage, it is difficult to see how, or why, relief should have been refused in the exercise of discretion. It is certainly far from clear that it would have been futile to remit the matter for reconsideration. Apart from anything else, when the Minister next considers whether to revoke Dr Haneef's visa the circumstances will have changed. For example, he will be aware of the fact that the charge against Dr Haneef has been withdrawn. The Minister may regard that fact as highly significant.[10]

So sometimes, but not in that case, there is only one possible answer and the court makes a substantive order. That principle can work either in favour of or against the applicant for judicial review: in favour of the applicant if the court finds there is only one answer, makes a

declaration and does not remit the matter to the primary decision-maker; against the applicant if the court finds there was a legal error but that it would be futile to remit the matter.

A well-known case involved a group of American entertainers known as The Platters. In *Conyngham v Minister for Immigration and Ethnic Affairs*,[11] the primary judge set aside the decision and made the following additional orders:

> (1) That the court declares that the application lodged by the first applicant in respect of the entry into Australia of the third to eleventh applicants inclusive was within the policy guidelines issued by the respondent for the approval of sponsorship relating to grant of temporary entry permits.
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> (2) …
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> *(3) That the respondent issue or cause to be issued within twenty-four (24) hours to the first applicant an approval of the application made by him on 29 May 1986 in respect of the sponsorship by the second applicant of the visit to Australia of the third to eleventh applicants inclusive, being an approval for the purposes of the subsequent issue of temporary entry permits under s 6 of the Migration Act, such approval being upon such terms and conditions as will permit the said third to eleventh applicants to fulfil the engagements itemised in the itinerary which is part of Exhibit C herein.*[12]

The Full Court, in *Minister for Immigration & Ethnic Affairs v Conyngham*,[13] allowed the appeal, set aside the declaration and the mandatory order and substituted an order that the Minister consider the applications for temporary entry permits in accordance with law.

Sheppard J, for the Full Court, said that there was no ground for elevating the guidelines here (now referred to as 'soft law') to the status of law. That was why the primary judge fell into error in making a declaration that the application for sponsorship was within the policy guidelines issued by the respondent for the grant of temporary entry permits. Sheppard J said:

> Wide though the provisions of s 16 of the [Administrative Decisions (Judicial Review)] Act are, they do not in my opinion authorise the making of a declaration unless what is being declared is a right in the true sense of the word. The guidelines themselves conferred no rights. They operated only to indicate … the manner in which the application for a temporary entry permit would usually be dealt with.
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> …
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> … where the court comes to the question of what remedy it will grant an applicant who has made out a case for relief, it should concentrate its attention on what statutory provisions are applicable to the case. *If the decision-maker, although his discretion has miscarried, is left with a residual discretion under the statute to decide the ultimate question favourably or unfavourably to the successful applicant, the order which the court makes should, notwithstanding the width of s 16 of the Act, usually, if not invariably, be one which remits the matter for further consideration according to law.* Where, as here, what has transpired has amounted to a constructive failure to deal with the real application which has been made, it will sometimes be appropriate (for example, in cases of substantial urgency from the point of view of the aggrieved party) to require the decision-maker to make a decision forthwith or within a limited time.[14]

A subtler version, albeit unsuccessful, on the part of the decision-maker of an 'only one answer' proposition may be seen in the High Court's decision in *Samad v District Court of New South Wales*[15] — a case concerning whether or not the District Court of New South Wales had a discretion, in certain circumstances, to cancel or not cancel a methadone licence. One question was whether discretionary relief should be refused on the basis that the decision was not based upon the error identified — that error being construing 'may' as if it conferred no discretion. The argument with which I am presently concerned was that relief should be refused, as a matter of discretion, because the decision of Herron DCJ was virtually inevitable.

Chief Justice Gleeson and McHugh J said that they were not persuaded that there was only one possible outcome. The appellants were, and remained, entitled to have their case determined according to law. Justices Gaudron, Gummow and Callinan described the argument and their conclusions on it as follows:

> This was that, whilst cl 149(f) did confer a discretion upon the Director-General, in the circumstances the Director-General had been obliged to exercise the discretion in favour of cancellation because there was no permissible reason indicating why the Director-General should decide otherwise. This was said to be a case where 'the discretion [had] effectively run out' and, indeed, because the grounds for not deciding upon cancellation would be impermissible, mandamus would have been available to compel cancellation. Undoubtedly particular legislation and circumstances arising thereunder may call for such a remedy. [Referring to *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 187-8; *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 536–7; *Comptroller-General of Customs v ACI PET Operations Pty Ltd* (1994) 49 FCR 56 at 81–2.] However, the present case is not one of them. The existence of the state of affairs identified in para (f) of cl 149 *enlivens the discretion but does not dictate the outcome of its exercise*.[16]

What I have described so far are the ordinary parameters of judicial review. You will have discerned a strong theme in what I have described as the courts, at the point of remedy, staying away from the merits of the administrative action.

I note that, in terms of whether administrative law makes a difference, it may well be that, from the perspective of the individual affected, the greatest reform of the mid to late 1970s in Australia was the concept of a general administrative tribunal — what became the Administrative Appeals Tribunal, with its still expanding 'jurisdiction' to review decisions on their merits. Also, there is the important role of the Ombudsman, which for litigators and the courts tends to be below the radar. It is from the point of view of principle, the structure of government and its administration, the legality of actions and other exercises of power that judicial review is more significant.

But what I want to dwell on — and these are not matters free from controversy — is what the courts do on judicial review of administrative action. I wish to tease out what is a distracting ambiguity in the use of the word 'substantive' to describe what a court on judicial review does in its consideration of the administrative action.

I wrote on this topic in a 2014 paper.[17] My argument then was, and is now, that in judicial review there is in practice no clear division between process and substance: the courts must and do make qualitative judgments in relation to the particular exercise of administrative power. This may be expected to increase owing to the 'increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power'.[18] Properly understood, the qualitative judgments made in relation to process are no different from those made on so-called substantive review. I therefore question the usefulness of an analysis by reference to process or substance. The common question on judicial review does not depend on that divide but on whether something has gone wrong, in a legal sense, that is of such gravity that the decision-maker has not performed the (usually statutory) task given to them. Further, even where courts make qualitative judgments on judicial review, that is to be distinguished from merits review.

It may be accepted that (for Australia) judicial review is not so much about the outcome of the exercise of administrative power but the process by which that outcome was achieved. It is said that the grounds almost invariably go to the process of exercising the power, not the outcome. The commonly stated exception is *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[19] (*Wednesbury*)).

The classic exposition in Australia is by Brennan J in *Attorney-General (NSW) v Quin*,[20] who said:

> The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government … The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error…
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> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. …
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> There is one limitation, 'Wednesbury unreasonableness' …[21]

In *Minister for Immigration and Border Protection v SZSSJ*[22] the seven members of the High Court unanimously applied this dictum in a procedural fairness context and described it as axiomatic.[23] This was not to say, their Honours said, that the court must proceed in a normative vacuum; it was to say that the court can proceed only for the purpose of declaring and enforcing the law which determines the limits and governs the exercise of the repository's power. Their Honours added that the circumstances of a data breach did not provide a principled foundation for converting the ordinary requirement of procedural fairness that an affected person be given notice into a duty that the Department reveal 'all that it knows' about the data breach.[24]

My contention is that, at least in cases of any complexity, judicial review does involve a qualitative assessment and is qualitative. What has been done by the person who has exercised the administrative power must, on judicial review, be considered and evaluated; and that evaluation involves a qualitative assessment of what was done. Indeed, it has been said that the development by the courts of techniques for reviewing the quality of decision-making has been a fundamental doctrinal shift central to the development of administrative law during the 20th century and occurring primarily after the Second World War.[25] But this judicial review is not for the purpose of the judge considering whether or not he or she agrees with the decision and whether it is correct in that sense. Merits review and judicial review overlap, but each type of review is conducted for a different purpose.

One also sees this in assessing what a tribunal has said. In *SZTAP v Minister for Immigration and Border Protection*[26] the Full Court said:

> '… the reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.' As Brennan CJ, Toohey, McHugh and Gummow JJ said in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (*Wu Shan Liang*), these propositions from *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review … Of course, it does not follow that any ambiguity in approach or reasoning has to be resolved in the decision-maker's favour: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 at [190]. *It was recognised in Wu Shan Liang itself, at CLR 271 that: 'The words used by the delegate must be analysed to establish what they say as to the thought process in fact applied by the delegate to the determination of refugee status.' In our opinion, the Court must give the Tribunal's reasons a fair reading, in context, and attention must be given to the substance of the Tribunal's reasons for decision.*[27]

A major difference between judicial review and merits review, in my opinion, is that the legislature has not vested in the court the power directly to decide the ultimate outcome so that the court is not concerned with what ultimately is the correct or preferable decision. Likewise, the court is not concerned with good administration of or in itself. However, I contend that the conceptual division between process and substance may tend to disguise

what goes on in judicial review. Conversely, I question whether what happens in judicial review when *Wednesbury* unreasonableness is deployed is accurately described as substantive review.

The difference, I suggest, is essentially the purpose for which, and thus the perspective from which, the primary exercise of power is being examined rather than process or substance, except when it comes to remedy. It would be quite incorrect, in my experience, to characterise what a judge does on judicial review as involving the question: 'Do I think this is the correct or preferable decision?' As illustrated by *FTZK v Minister for Immigration and Border Protection*[28] (*FTZK*), in the circumstances of that case, the claim that the Tribunal had committed a jurisdictional error warranting the issue of constitutional writs did not involve an examination of the correctness of the findings of fact made by the Tribunal but did involve a consideration of whether those findings disclosed that the Tribunal responded to the question it was required to ask in order to perform its task.

In addition, although in judicial review the facts are not at large, being in most cases limited to the material before the person exercising the primary power, they must be understood in order to understand in turn what the exercise of the power has been without divorcing the substance of what was decided from how (the process by which) it was decided. In *Reid v Secretary of State for Scotland*[29] Lord Clyde said:

> But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.[30]

I next examine the concept of 'merits'. What are the merits from which the judicial arm must stay away? This is a distinction which is blurred at the edges. Indeed, in *Greyhound Racing Authority (NSW) v Bragg*[31] Santow JA said that 'the merits' is that diminishing field left after permissible judicial review. In comparing judicial and merits review, Sir Anthony Mason has written:

> The comparison is hampered by the blancmange-like quality of the expression 'merits review'. For the most part, it is used in the sense of review that includes, but goes beyond, what is comprehended in review for legality. The distinction between judicial review and merits review assumes that the content of review for legality is not co-extensive with the scope of potential review; in other words, the grounds of judicial review for legality do not include review on the basis that the decision-maker, though making no error of law, arrived at a decision which, though not unreasonable, falls short of the correct or preferable outcome.
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> …
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> The difference between judicial review and appeal is well recognised. In an appeal, the tribunal can substitute its opinion of what is a correct (or preferable) outcome on the material before it for that of the decision-maker; in judicial review, the court cannot do that. The difference is a central element of recent High Court judgments, and of English judgments of high authority as well.[32]

The search for a clear line of demarcation is perhaps explained, in part, as follows. First, there is the statutory history in Australia, particularly the enactment of the *Administrative Appeals Tribunal Act 1975* (Cth), establishing what is called a 'merits review system' in a tribunal. Secondly, by its early decisions the Tribunal explained its powers and functions. I refer particularly to *Drake v Minister for Immigration and Ethnic Affairs*,[33] establishing that the question for the determination of the Tribunal was not whether the decision which the decision-maker made was the correct or preferable one on the material before him; the question for the determination of the Tribunal was whether that decision was the correct or preferable one on the material before the Tribunal. Thirdly, there was the later enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act), dealing with judicial review, not limited to jurisdictional error, primarily in the Federal Court. Fourthly,

there is the background of the separation of executive power and judicial power required by the *Constitution*.

Rather than seeking to identify the merits as opposed to the lawfulness of the exercise of power in question, perhaps the better enquiry is to emphasise the distinguishable and distinct processes: merits review on the one hand and judicial review on the other.

In merits review the facts need to be found and evaluated, and this involves choice. Where the matter turns on evaluation of, and choice between, competing views of the facts by the person exercising administrative power, there is likely to be 'mere' fact-finding in respect of which no legal error could be successfully maintained on judicial review.[34] In contrast, in judicial review it is necessary to understand the facts and, often, the fact-finding process of the person who has exercised the power in order to understand and judge the claims of legal error.

Next, in merits review the making of the correct or preferable decision is a defining characteristic. Where there is a legally available alternative then to select one over the other, whether or not accurately described as 'policy', is plainly a matter of merits, but in my view the same analysis applies where, upon an evaluation of the facts, only one decision, described after the conclusion has been reached as the correct decision, is available. In each case what happens is accurately described as choice.[35]

Thus, choices are at the heart of merits review and, on judicial review, the court must understand the choices but must do no more than decide whether the choice that was made was legally available.

There is also a clear distinction between the 'place' of executive decision-making and judicial review. The merits may be seen as the outcome of executive decision-making, what is described as the 'correct or preferable' decision on the material before the primary decision-maker, and most often that will be the final decision. On the other hand, judicial review is review of the legality of the process and of the exercise of administrative power.

As I have said, this is reflected in the usual form of order on successful judicial review, at least in Australia, which is to set aside the decision or exercise of power and to remit the matter to the person in whom the primary power is vested for further consideration or determination 'according to law', which includes the court's reasons. Generally, it is where only one answer would be available on remitter, or where the parties consent, that the court will dispose of the matter finally. In matters of procedural fairness, most often there will be 'more than one answer', as the court will have looked only at procedure. The position may well be different if, for example, a fixed time limit for making the original decision has expired.

Chief Justice French, writing extrajudicially, has said that '[a] better distinction might be drawn by using the terms "factual merits review" and "legal merits review"'.[36] The former is a power to reconsider decisions; the latter is to police the limits of the power to decide.[37]

I prefer the description 'consideration of the merits but not a decision on the merits', and I resist the proposition that the distinction between merits review and judicial review reduces to the fact that on judicial review the court does not substitute its decision.

To illustrate this, I turn to consider categories of judicial review. I have not accepted, for present purposes, a division between review grounds that deal with process, including errors of law, and other grounds, such as *Wednesbury* unreasonableness, which are said to turn on the quality of the decision.[38] My proposition is that both process review and substantive

review are qualitative but not, in either case, in the sense of the court undertaking merits review.

Procedural fairness

Procedural fairness, particularly an opportunity to be heard, is conventionally allocated to 'process'. But judicial review on this ground will often be a qualitative exercise. Procedural fairness may extend to the quality of the hearing, such as where there have been frequent interjections by a tribunal member in relation to the credibility of the claims[39] or, where there was an interpreter, the quality of interpretation before a tribunal.[40] The High Court has held that a decision of the Refugee Review Tribunal was procedurally unfair where the Tribunal made demeanour-based findings against the appellants in circumstances where four and a half years had elapsed between the observation of the demeanour and the making of the findings.[41]

Those are perhaps obvious cases where a qualitative assessment is involved in deciding whether or not there has been a denial of procedural fairness.

More commonly, the issue is the content of natural justice in the circumstances of the particular case. The court works out what the applicant knew to be in issue and what the steps or stages of the exercise of the power were in order to answer whether what happened was unfair, in a practical sense,[42] as a matter of process. And, in so doing, it is inevitable that the court assesses the quality of the exercise of the power and, although focused on process, it does so in light of what was done or decided: the substance.

Another basis on which the courts are involved in qualitative assessment in this context arises because the applicant for judicial review is not limited, in terms of evidence in the court, to material which was before the primary decision-maker. For example, the Supreme Court said in *R (Osborn) v Parole Board*[43] that the courts below were wrong to adopt the approach that the reviewing court should decide the question of the Parole Board's fairness as if it were reviewing a matter of judgment on *Wednesbury* grounds. The court must determine for itself whether a fair procedure was followed: its function was not merely to review the reasonableness of the decision-maker's judgment of what fairness required.[44]

Turning to the bias limb of natural justice, in Australia a claim of reasonable apprehension of bias depends on a qualitative assessment of what was said and done against the legal test 'whether a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial and unprejudiced mind to the resolution of the question the [decision-maker] is required to decide'. The same assessment would have to be made in applying the English test:

> [t]he court *must first ascertain all the circumstances which have a bearing on the suggestion* that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.[45]

While therefore it is true that on judicial review for an alleged denial of natural justice or procedural fairness the courts are reviewing the process by which a power has been exercised, the judicial review itself is qualitative. Perhaps this is implicit in what Lord Mustill said: '[w]hat fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.'[46]

Relevant and irrelevant considerations

I now consider two other grounds of judicial review, which are often a more or less well-disguised appeal to the merits. They are, first, whether a mandatory (relevant) consideration *was not* taken into account and, secondly, whether a prohibited (irrelevant) consideration *was* taken into account by the person who has exercised the primary power.

It is at least primarily to the provisions of the legislation that one must look in order to decide whether a particular consideration is obligatory (relevant in the sense of mandatory), extraneous (irrelevant in the sense of prohibited) or a consideration which is of neither of those characters and which is therefore 'available'.[47] Considerations that are neither legally mandatory (relevant) nor legally prohibited (irrelevant) but are simply 'available' would constitute the bulk of most primary exercises of administrative power.

However, I wish to concentrate on the qualitative nature of the assessment by the court of the material which was before the person exercising the power, and his or her reasons, in order to decide whether or not an improper purpose (as that term is used in the AD(JR) Act) is disclosed.

Whatever language is used to describe taking into account or having regard to or considering a relevant consideration — and many descriptions have been offered in the cases — the fundamental point is that the court needs to assess the quality rather than the mere fact of the consideration in order to work out whether it has or has not been taken into account. In addition, the statute may be construed as involving a consideration of a particular factor to a particular standard.

Again, whether and whatever descriptions are used, what must be avoided is merits review and what has to be borne in mind is the distinction, albeit elusive, between understanding the terms in which the power has been exercised and evaluating it for the purpose of seeing whether a matter has been taken into account, on the one hand, and, on the other hand, evaluating the decision in the sense of second-guessing *relative* weight.[48] But I see no alternative to assessing the nature of the consideration.

As to descriptions that have been used by the courts of the quality of the assessment required by the decision-maker, in Australia these include: 'active intellectual process or engagement', 'give weight to as a fundamental element in making the determination', 'a process of evaluation, sufficient to warrant the description of the matters being taken into consideration',[49] 'focal points' and 'proper, genuine and realistic consideration' — the last being taken out of its original context in *Khan v Minister for Immigration and Ethnic Affairs*.[50] 'But whether or not it can be judged that a matter has been considered is essentially an evaluative process based exclusively on what the decision-maker has said or written'.[51] In other words, it is for the court to assess qualitatively what, in the particular statutory context, constitutes 'due regard' by the decision-maker exercising the power conferred.

Turning to whether the person exercising the power has taken into account an irrelevant (prohibited) consideration, in my view the same analysis applies. It may well be necessary to analyse the reasons for, and the terms of, the exercise of the power and the material before the person exercising the power in order to reach a conclusion on whether the prohibited consideration has been taken into account.

Unreasonableness

Next I consider the legally unreasonable exercise of a discretion: classic *Wednesbury*. It has been said that *Wednesbury* involves substantive intervention in that:

> [a]ll tests of substantive judicial review entail the judiciary in taking some view of the merits of the contested action. This is so even in relation to the classic *Wednesbury* test. What distinguishes different tests for review is not whether they consider the merits or not, but the stringency of the judicial scrutiny.[52]

I offer a different emphasis to the conclusion that this ground involves substantive intervention.

First, in my opinion, judicial review of the exercise of a discretion for legal unreasonableness does not involve the court in the merits of the primary decision. Of course, the court must understand the substance of what has been decided, but it is the legal context which must dominate. Secondly, I do not see the *Wednesbury* ground as involving a view of the merits of the decision different in kind from the grounds of judicial review to which I have already referred. In my opinion, there is a real difference, as a matter of mental process, between taking a view of the merits in the sense of understanding the facts and, on the other hand, taking a view of the merits in terms of what the judge thinks is the correct or preferable outcome. It is for this reason I questioned above whether *Wednesbury* unreasonableness is accurately described as substantive review. I accept that the court considers the outcome by reference to the standard of legal unreasonableness and, where satisfied that the outcome is not legally reasonable, remits the matter for further consideration. Thirdly, it seems to me that manifest unreasonableness or classic *Wednesbury* unreasonableness is a shorthand way of further describing the area of difference beyond which (reasonable) minds may not reasonably differ, as a matter of legal reasonableness. The questions are: what is the scope of the discretionary power; and is what has been done by the executive within that scope?

Furthermore, the plurality in *Minister for Immigration and Citizenship v Li*[53] (*Li*) said that *Wednesbury* is no longer to be the yardstick of the legal standard of unreasonableness in relation to the exercise of discretion. I take this to mean that what is no longer to have exclusive sway is the test 'so unreasonable that no reasonable person could have arrived at it', because the legal standard of reasonableness must be the standard indicated by the true construction of the statute unless there be an affirmative (statutory) basis for its exclusion or modification. This, in my view, must have been at least implicit in *Wednesbury* itself since the Court of Appeal there referred to the subject-matter or scope of the statute and the otherwise unqualified terms of the power to impose conditions.

In *Minister for Immigration and Border Protection v Singh*,[54] the Court said that *Li* did not create some kind of factual checklist to be followed in determining whether there had been a legally unreasonable exercise of a discretionary power: legal unreasonableness is invariably fact dependent, so that, in any given case, determining whether an exercise of power crosses the line into legal unreasonableness will require careful evaluation of the evidence before the court, including any inferences which may be drawn from that evidence.

In similar vein, I refer to *Minister for Immigration and Border Protection v Stretton*[55] — a case involving judicial review of the Minister's decision to cancel the respondent's visa on character grounds and where the primary judge had characterised the Minister's decision as legally unreasonable. I draw your attention to what Allsop CJ said at [10]–[12], particularly the following:

> 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, insufficiently 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.
>
> Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, *the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful.* The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.[56]

It will be recalled that, in *Wednesbury*, Lord Greene did not consider that he was creating new doctrine and, indeed, treated other 'grounds' of judicial review, such as taking into account irrelevant considerations, as one example of an unreasonable decision. Lord Greene certainly did not envisage encouraging merits review and, indeed, the very thrust of the decision is that the courts should not engage in merits review. It is to be remembered that the underlying issue in *Wednesbury* was who was to be master: whether it could be said the discretion miscarried because the exercise of the discretion appeared unreasonable to the court or, as was held, whether the alleged miscarriage of the discretion should be tested from the perspective of the authority and from the perspective of a hypothetical reasonable authority (the standard being set by the judges) and the discretion could only be said to have miscarried if 'no reasonable authority' could have so exercised the power.

Irrational fact-finding

I turn to fact-finding. There are real differences between England and Australia as to the availability on judicial review of challenges, as such, to findings of fact, or fact-finding.

In contrast to the position in England, where it seems that judicial review may be had for fundamental error of fact[57] and that *Wednesbury* unreasonableness is also applied to fact-finding, in Australia there is a no evidence ground, with the emphasis on the word 'no', but irrational or unreasonable fact-finding is not, as such — at least, yet — a well-established ground of judicial review. I have not seen applied in Australia the approach of the Court of Appeal in *E v Secretary of State for the Home Department*[58] (*E*), apparently now applied in *IA (Iran) v Secretary of State for the Home Department*.[59] For present purposes, it would seem that each of the paradigms in *E* involves a degree of evaluative judgment by the court. It also seems that, as in Australia (*Ex parte Hebburn Ltd; Re Kearsley Shire Council*[60] (*Hebburn*)), there are mistakes and mistakes, although in *Hebburn* Jordan CJ was dealing with a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction.

In Australia, the better view is that *Wednesbury* unreasonableness should be limited to its origins — that is, as a ground of review of the exercise of a discretion. But a similar principle may be emerging on which fact-finding may be judicially reviewed for serious irrationality. It is to be noted, however, that in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[61] Gummow and Hayne JJ were making the point that, although the satisfaction of the criterion in question may include consideration of factual matters, 'the critical question is whether the *determination* was irrational, illogical and not based on findings or inferences of fact supported by logical grounds'.[62] This may mean that to look only at one instance, or more than one instance, of erroneous fact-finding may not of itself give rise to the conclusion that there has been a jurisdictional error. A wider enquiry is required and one which is founded in the statutory task vested in the person exercising the power.

It seems to be relatively uncontroversial that the absence of a reasonable or rational basis for a finding may found an inference that the decision-maker made a jurisdictional error on other grounds.[63]

Aronson and Groves say that '[t]here is a significant difference between supervising discretionary choices on the one hand (unreasonableness), and the care with which decision-makers have approached their tasks (irrationality)'.[64] However, in my opinion, this statement should not be taken as exhaustive of the available categories of judicial review in relation to fact-finding. In *Minister for Immigration and Citizenship v SZRKT*,[65] I said that what may be considered to be fact-finding is not universally immune from judicial review because it may be that, where there is an error, and having assessed the gravity of the error, what has gone wrong is of such significance to the statutory task, and that the person exercising the power has so departed from the task, that he or she has not carried it out or completed it. There may be some correspondence, even if it is non-conceptual, between that and 'the close link between judicial scrutiny of evidence [evidentiary review] and the general issue as to the reviewability of fact in judicial review proceedings' to which Paul Craig has referred.[66]

The point, for present purposes, is that any ground of serious irrationality in fact-finding must involve a close and qualitative evaluation of the fact-finding of the person exercising the primary power. As with all alleged unreasonableness, on judicial review it is necessary to identify precisely the 'nature and quality' of the error attributed to the administrative decision-maker and the legal principle that attracts a particular legal consequence.[67]

Although *Waterford v Commonwealth*[68] states that there is no error of law simply in making a wrong finding of fact, the emphasis should be on 'simply' and the question can be framed: 'was the factual conclusion so badly formed as to reveal error to be characterised as legal error going to jurisdiction?'

Where a ground of judicial review involves error of fact, the court must understand the facts and test, for example, whether there was any evidence for a finding or whether the finding has otherwise departed from the norm and, if so, to what extent.

Other grounds of judicial review

What about other commonly formulated grounds of judicial review?

A question of statutory construction would not commonly (except perhaps in Canada or the United States) involve qualitative review of the primary exercise of the power.

However, *FTZK* shows that error of law may also involve a detailed consideration and evaluation of the findings of fact made by the Tribunal in the particular context of the structure of the reasoning. Having done so, the High Court held unanimously that the Tribunal misconstrued art 1F of the *Convention Relating to the Status of Refugees* 1951.[69]

Returning to the traditional categories or 'grounds': in my view, non-observance of procedures that were required by law to be observed in connection with the making of the decision would be approached in the same way as denial of natural justice or procedural fairness. An exercise of a power in such a way that the result of the exercise of the power is uncertain — a species of ultra vires — would also, I think, be approached in the same way as error of law.

Other grounds — that the decision was induced or affected by fraud, or an exercise of a power for a purpose other than a purpose for which the power is conferred, or an exercise of

a discretionary power in bad faith, or an exercise of a personal discretionary power at the direction or behest of another person, or an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case — would each, I think, require a qualitative evaluation. I have already referred to the ground of no evidence or other material to justify the making of the decision.

The courts must leave the merits to the person exercising the primary power, and it seems reasonably clear that the courts will stay away from a choice or policy at least where the statutory power has been exercised reasonably, not limiting the legal standard of unreasonableness to the irrational. A state of satisfaction by the person who has exercised the primary power must be reasonable in that it could be reached by a person understanding the statutory function being performed.

To summarise, judicial review is largely qualitative in the areas I have primarily identified: natural justice, whether mandatory considerations have been taken into account or prohibited considerations have not been taken into account, and unreasonableness/irrationality. Qualitative judicial review may be involved in an error of law case. I have sought to explain that judicial review of impugned fact-finding is also qualitative. I agree that 'the quality of the [administrative] decision made, both substantive and procedural, is the province of judicial review, whether or not the decision was "correct and preferable"'.[70]

None of this is to say that judicial review tends to merits review as opposed to legality or that it tends to policy rather than law. Understanding the quality of the exercise of the power is not merits review: the court does not or should not ask itself whether or not it agrees with the exercise or brings to the task the question of whether the exercise is right or wrong, albeit the court needs to understand the substance of what has been decided by the person who has exercised the power in order to rule on the lawfulness of what has occurred. This is not the same as judicial review being an appeal by way of a rehearing, and it is not the same as the court substituting its opinion for that of the administrator. Also, the court, even in *Wednesbury* review, does not rule on the correctness of the decision. As the plurality said in *Li*:

> Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker.[71]

It is possible to examine the substance without entering into the merits, and the courts should so act. Where judicial review is qualitative, it is not concerned with what the repository of the power should have done where there were legally available choices; instead, the concern is with what the repository of the power should not have done.

I accept that federal judicial review involves a relatively limited conception of judicial power reflected in the limits of judicial review.[72] However, I contend that the assessment of a legal error or the gravity of a legal error will often involve qualitative review.

I now come to consider the concept of substantive legitimate expectation. I draw attention to a recent paper by Mark Elliott.[73] Professor Elliott describes substantive legitimate expectations in England as the courts acknowledging that a public authority might be required to deliver to the claimant whatever it was that was legitimately expected as distinct from merely requiring the defendant to undertake some other procedural step before deciding whether to fulfil or frustrate the expectation.

I will not go into the detail because I think it is clear that, at least for the present — no doubt contributed to by the surprising reasoning in *R v North and East Devon Health Authority; Ex parte Coughlan*[74] — that door is closed in Australia.[75]

For England, in *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs*[76] Cranston J has said that the threads of the English doctrine of substantive legitimate expectation could be drawn together in 10 propositions, which he there set out.

What is interesting about Professor Elliott's description of the doctrine in England over the last 20 years is what he calls 'convergence'. The passage is too long to set out in full, but it includes the following:

> Convergence, in contrast, involves not the forcing of the whole of substantive review (or judicial review) into pigeon-holes that can at best accommodate only parts of it, but rather liberating substantive review by means of the removal of the pigeon-holes themselves. On this approach, rigid distinctions are dismantled and replaced with more subtle tools for the purpose of calibrating the nature and intensity of substantive review. … The notion that a particular type of case — such as one entailing frustration of a substantive legitimate expectation — should, *simply because the case is that type of case*, attract a particular form of review, such as *Wednesbury* or proportionality, thus ceases to be meaningful.
>
> On this approach, substantive judicial review converges not upon a single concept (such as proportionality) or lens (such as rights). Rather, it converges in the sense that an holistic understanding is adopted of what substantive review is, and in the sense that its operation is animated by a single, cohesive set of principles and considerations. …
>
> Yet this does not mean that anything goes. It does not, for instance, lead me to the conclusion that *Coughlan* involved no judicial overreach. But it does change the terms of the analysis.[77]

A point for discussion is whether, by a side-wind, being the restriction on resort to the AD(JR) Act achieved by successive governments in the Migration Act field, what Professor Elliott describes, particularly the removal of the pigeonholes and the dismantling of rigid distinctions, is what has happened by the Parliament requiring lawyers to think about jurisdictional error rather than enumerated 'grounds'.

The key point under our constitutional arrangements is that, if there is a statute, it provides both the framework for discerning the jurisdiction, whether or not there has been a jurisdictional error, and the scope of any remedy. It is the statute that has primacy: so much is clear in the context of jurisdictional error and so much should be clear in the context of the AD(JR) Act.

What I have said involves some concepts that are not always going to be easy to apply. The existence of merits review in another independent forum is fundamental to understanding what goes on in federal administrative law. It is also at the heart of whether administrative law makes a difference in the sense of improving public administration and providing administrative justice. It is that structure, and the quality of the work of the Administrative Appeals Tribunal, which frees the court from the need or tendency to embark on merits review in the course of judicial review. The court on judicial review is thus free to stay away from the quality of the outcome. Each arm plays its part in 'administrative justice' — itself not an expression with an absolute meaning.

It may be observed that the constitutional 'necessity' of having a different body to review the merits of administrative decisions is seen as flowing, in turn, from the separation of powers found in the *Constitution* in terms stricter than prevail elsewhere or, indeed, in terms which do not prevail at all elsewhere, such as in England.

Despite this, in relation to judicial review of administrative action I would contend that there is, on judicial review, substantive (qualitative) review of that administrative action, but there are not substantive remedies unless there is only one possible outcome. This in itself maintains the distinction between merits review and judicial review, which in turn reflects that the Parliament has given the powers and the discretions to the Minister or another member of the executive and not to the court. The court's jurisdiction is supervisory. But it operates to decide on the limits of power and whether those limits have been exceeded in a particular case.

Endnotes

1 (1990) 170 CLR 1, 35–6.
2 Mark Elliott, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2016).
3 The theme of the 2016 Australian Institute of Administrative Law National Conference was 'Administrative Law — Making a Difference'.
4 Maurice Sunkin and Varda Bondy, 'The Use and Effects of Judicial Review: Assumptions and the Empirical Evidence' in John Bell, Mark Elliott, Jason Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems* (Hart Publishing, 2015) 327.
5 Robin Creyke and John McMillan, 'The Operation of Judicial Review in Australia' in Mark Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004).
6 Sunkin and Bondy, above n 4, 350.
7 [2015] FCAFC 145; 236 FCR 169,
8 [2007] FCA 1273; 161 FCR 40.
9 *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203; 163 FCR 414.
10 Ibid [139].
11 (1986) 68 ALR 423.
12 Ibid [53] (emphasis added).
13 [1986] FCA 289; 11 FCR 528.
14 Ibid [43], [45] (emphasis added).
15 [2002] HCA 24; 209 CLR 140.
16 Ibid [77] (footnote omitted; emphasis added).
17 Alan Robertson, 'Is Judicial Review Qualitative?' in Bell et al, above n 4, 243.
18 *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1, 36 (Brennan J).
19 [1948] 1 KB 223 (CA).
20 [1990] HCA 21; 170 CLR 1.
21 Ibid [17]–[19].
22 [2016] HCA 29.
23 Ibid [81].
24 Ibid [84].
25 Geoff Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24 *Melbourne University Law Review* 543, 552, citing Ian Yeats, 'Findings of Fact: The Role of the Courts' in Genevra Richardson and Hazel Genn (eds), *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Clarendon Press, 1994) 131, 133.
26 [2015] FCAFC 175; 238 FCR 404.
27 Ibid [38] (emphasis added).
28 [2014] HCA 26; 310 ALR 1.
29 [1999] 2 AC 512 (HL).
30 Ibid 541–2.
31 [2003] NSWCA 388, [46].
32 Sir Anthony Mason, 'Judicial Review: A View from Constitutional and other Perspectives' (2000) 28 *Federal Law Review* 331, 333–4 (citations omitted).
33 (1979) 24 ALR 577, 589.
34 *Waterford v Commonwealth* [1987] HCA 25; 163 CLR 54, 77 (Brennan J).
35 See Jaffe's description of discretion as the power of the administrator to make a choice from among two or more legally valid solutions: Louis Jaffe, *Judicial Control of Administrative Action* (Little, Brown & Company, abridged student edition, 1965) 586.
36 Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 24, 34.
37 See Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2nd ed, 2012) 225.

38 Compare Mark Aronson, 'Process, Quality, and Variable Standards: Responding to An Agent Provocateur' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5, 9–10.
39 *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80.
40 *SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142; 219 FCR 212.
41 See *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77; 228 CLR 470, [9] (Gleeson CJ), [172] (Callinan and Heydon JJ).
42 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1.
43 [2013] UKSC 61; [2014] AC 1115.
44 Ibid 1127–8.
45 *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 [102]–[103] (Lord Hope) (emphasis added).
46 *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531 (HL), 560.
47 *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; 216 CLR 277, [20] (Gleeson CJ). See also *Lo v Chief Commissioner of State Revenue* [2013] NSWCA 180; 85 NSWLR 86, [9] (Basten JA); and, more recently, *Duffy v Da Rin* [2014] NSWCA 270; 312 ALR 340, [53].
48 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24, 41–2 (Mason J).
49 *Weal v Bathurst City Council* [2000] NSWCA 88; 111 LGERA 181, [13], [80].
50 (1987) 14 ALD 291. See also *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164, [32].
51 *Anderson v Director-General of the Department of Environment and Climate Change* [2008] NSWCA 337; 251 ALR 633, [58] (Tobias JA).
52 Paul Craig, *Administrative Law* (Sweet & Maxwell, 7th ed, 2012) [21–002].
53 [2013] HCA 18; 249 CLR 332.
54 [2014] FCAFC 1; 231 FCR 437, [42].
55 [2016] FCAFC 11; 237 FCR 1.
56 Ibid [11]–[12] (emphasis added). The judgment is the subject of an application for special leave to appeal.
57 *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044; *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5; [2003] 2 AC 430, 451 (Lord Hoffmann).
58 [2004] EWCA Civ 49; [2004] QB 1044.
59 [2014] UKSC 6; [2014] 1 WLR 384.
60 *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420.
61 [2004] HCA 32; 207 ALR 12.
62 Ibid [38] (emphasis added).
63 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407, 430 (Latham CJ).
64 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, 5th ed, 2013) 260.
65 [2013] FCA 317; 212 FCR 99.
66 Paul Craig, 'Substance and Procedure in Judicial Review' in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (Oxford University Press, 2009) 73, 74.
67 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 198 ALR 59, [5] (Gleeson CJ).
68 [1987] HCA 25; 163 CLR 54.
69 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).
70 Greg Weeks, 'Litigating Questions of Quality' (2007) 14 *Australian Journal of Administrative Law* 76, 81.
71 [2013] HCA 18; 249 CLR 332, [66].
72 Matthew Groves and Greg Weeks, 'Substantive (Procedural) Review in Australia' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 134.
73 Elliott, above n 2. Note also Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470.
74 [2001] QB 213 (CA).
75 See in particular *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1, [28] (Gleeson CJ), [65]–[77] (McHugh and Gummow JJ), [148] (Callinan J agreeing).
76 [2013] EWHC 1959 (Admin), [92].
77 Elliott, above n 2, pp 241–2.