In defence of unreasonableness:the reasonableness framework of judicial review

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On 8 August 2018, in *Minister for Immigration and Border Protection v SZVFW*[1] *(SZVFW)*, the High Court handed down a judgment that reconsidered the ground of unreasonableness. This is noteworthy due to the ongoing contentiousness of the unreasonableness ground — the 'black sheep' of judicial review. Commentators have joked that '*Wednesbury* unreasonableness is unloved', with 'vultures … circling the *Wednesbury* doctrine' in expectation of the 'Wednesburial'[2]. In SZVFW, the High Court confirmed in the joint judgment of Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li*[3] *(Li)* that the *Wednesbury* test was 'not the starting point for the standard of reasonableness, nor should it be considered the end point'.[4] However, although the test has now changed from the traditional Wednesbury principle, the High Court in SZVFW made it clear that unreasonableness was still a high threshold and a finding that an executive decision is legally unreasonable will not 'be lightly reached'.[5] In contrast to the Federal Circuit Court and the Full Federal Court decisions, the High Court unanimously found (in four separate judgments) that the executive decision in SZVFW did not meet the high threshold for legal unreasonableness.[6]

However, the unreasonableness ground still remains 'controversial and ill-defined' for the following two main reasons:[7] first, it challenges the traditional distinction between merits review and judicial review; and, secondly, even after SZVFW, there is limited guidance on what will make an executive decision legally unreasonable.[8]

In *SZVFW*, each of the separate judgments emphasised that a court cannot substitute its own view of 'reasonableness' for the view of the executive agency in the instance that the agency has genuinely free discretion.[9] However, there are no clear guidelines that separate a 'legally' unreasonable decision from a decision in which reasonable minds may differ.

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1 (2018) 92 ALJR 713 (*SZVFW*).

2 Michael Taggart, 'Proportionality, Defence, Wednesbury' (2008) *New Zealand Law Review* 423, 426.

3 (2013) 249 CLR 332 (Li).

4 Ibid 364 [64].

5 SZVFW (2018) 92 ALJR 713, 438 [135] (Edelman J). Justice Gageler held that the new unreasonableness test is as strict as *Wednesbury*, although Hayne, Kiefel and Bell JJ held that it was broader: see Grant Hooper, '*Minister for Immigration and Border Protection v SZVFW*: The High Court on Unreasonableness and The Role of the Judicial Review', *Australian Public Law: Gilbert + Tobin Centre of Public Law* (Blog post, 5 September 2018) <https://auspublaw.org/2018/09/minister-v-szvfw-the-high-court-on-unreasonableness-and-the-role-of-judicial-review/>.

6 Hooper, above n 5.

7 Ibid

9 Ibid; SZVFW (2018) 92 ALJR 713 [15]–[17] (Kiefel CJ); [67] (Gageler J); [118]–[122] (Nettle and Gordon JJ); [140] (Edelman J). See also *Minister for Aboriginal Affairs* v *Peko-Wallsend Ltd* (1986) 162 CLR 24, 40; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 599; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 266–7.

The unreasonableness ground also challenges the traditional view of administrative law because it allows courts to infer that the *outcome* is legally unreasonable.[10] The process of inferring breaches of law from the outcome seems to undermine the divide between merits review and judicial review, because it arguably allows courts to 'fix upon the quality of the decision-making and thus the merits of the outcome'.[11] Justices Hayne, Kiefel and Bell in Li considered case law that stated that executive decisions that are 'manifestly unjust' would be legally unreasonable.[12] This also clashes with the traditional view that courts have 'no jurisdiction simply to cure administrative injustice'.[13]

However, this article will argue that, quite contrary to the traditional view, assessing the reasonableness of a decision is pivotal to determining the proper role of judges in reviewing executive decisions. This is because an analysis based on reasonableness is required to delineate the boundary between merits review and judicial review. The second section of the article will consider the age-old argument that the unreasonableness ground allows courts to trespass onto the merits of the executive decision and is therefore inconsistent with the judiciary's proper role in reviewing administrative action. However, the third section will argue that the problems outlined in the second section are not unique to the unreasonableness ground but, rather, are always present when courts review executive decisions. The reason for this is that, regardless of the ground of review, the pivotal distinction between merits and law is, itself, determined by an assessment of the reasonableness of the decision, or what might be considered a 'common sense' analysis.

This article will argue that it is part of the judicial role to consider the reasonableness of the outcome or, in other words, how the facts of a case apply to the law (although judges do not express what they are doing in these terms). The article will conclude that the unreasonableness ground is consistent with the judicial task, despite historical aversion to the unreasonableness ground in Australian administrative law.

Problems with unreasonableness

This section of the article will first outline the principle in *Attorney-General (NSW) v Quin*[14] *(Quin)* that the proper scope of judicial review prohibits courts from trespassing on the merits of an executive decision. It will consider the relationship between the *Quin* dicta and the unreasonableness ground. Secondly, it will consider the current status of the unreasonableness test. Thirdly, it will outline why the test for legal unreasonableness is 'controversial and ill-defined'.[15]

10 Li (2013) 249 CLR 332, 369 [85]: 'It is not possible to say which of these errors was made, but *the result itself bespeaks error.*… Because error must be inferred, it follows that the Tribunal did not discharge its function (of deciding whether to adjourn the review) according to law'.

11 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23–4 [73], [76].

12 Li (2013) 249 CLR 332, 365 [70] (Hayne, Kiefel and Bell JJ) citing *Kruse v Johnson* [1898] 2 QB 91, 99–100 (Lord Russell of Killowen CJ): '[U]nreasonableness was found where delegated laws were "partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; [or] if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men".'

13 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J) (*Quin*).

14 (1990) 170 CLR 1.

15 Hooper, above n 5.

The distinction between merits review and judicial review

The general principles of Australian administrative law envisage a 'limited role of the courts in reviewing administrative error'.[16] The distinction between merits review and judicial review is critical in determining the judiciary's proper functions, because courts cannot trespass on the merits of a decision.[17] Justice Brennan outlined these limits in *Quin*, in dicta that has 'attained seminal status':[18]

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law … The merits of administrative action … are for the repository of the relevant power and, subject to political control, for the repository alone.[19]

However, uncertainty exists when attempting to reconcile Brennan J's proposition and the unreasonableness ground. In *SZVFW*, Gageler J discusses the statements in Quin and its relationship to unreasonableness:

> Having expounded the … proposition that '[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law …', Brennan J in *Attorney-General (NSW) v Quin* immediately explained how '"*Wednesbury* unreasonableness" …' was consistent with that proposition: '… [W]ithin the bounds of legal reasonableness …' the repository has 'genuinely free discretion'; 'if it passes those bounds, [the repository] acts ultra vires'. [20]

Justice Gageler then states that 'the nature of legal unreasonableness should be taken to be settled by the explanation of it in *Quin*'.[21] However, Brennan J himself was unable to reconcile the unreasonableness ground with his definition of judicial review. Rather, Brennan J described *Wednesbury* unreasonableness as a 'limitation' on his definition of the proper scope of judicial review, that courts cannot undertake merits review, rather than consistent with it:

> There is *one limitation*, '*Wednesbury* unreasonableness' … which may appear to open the gate to judicial review of the merits of a decision … Properly applied, *Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power. … *The limitation is extremely confined.*[22]

16 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 174 [23].
17 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 287 (Neaves, French and Cooper JJ); *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272.
18 See, eg, *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 [43]–[44]; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 29, 272; *NAIS v Minister for Immigration and Multicultural Affairs* (2005) 228 CLR 470, 477–88 (Gummow J); 510 (Hayne J); Li (2013) 249 CLR 332, 370 (Gageler J); Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 279–80; William Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) *Federal Law Review* 153, 168; Peter Cane, Leighton McDonald and Kristen Rundle, *Cases for Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 3; Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Texts, Cases & Commentary* (LexisNexis, 4th ed, 2015) 404–6.
19 *Quin* (1990) 170 CLR 1, 36 (Brennan J).
20 *SZVFW* (2018) 92 ALJR 713, 727–8 [51] (Gageler J) (emphasis added).
21 Ibid 728 [53] (Gageler J).
22 *Quin* (1990) 170 CLR 1, 36 (Brennan J) (emphasis added).

A response to this is that Brennan J did not define what constitutes 'law' and therefore 'begged the question of the character or content of the law'.[23] In this light, Gageler J's interpretation of Brennan J's statements seems sensible; 'declaring law' is *deemed* to include the unreasonableness ground, as an implied statutory inference.[24] However, conversely, it can be argued that Brennan J *did* provide guidance on what constitutes declaring law: that is, merits review is not declaring and enforcing law.

The conclusions that we can draw from this discussion about the relationship between unreasonableness and judicial power are, first, that the unreasonableness ground is deemed to be within the proper scope of judicial power. However, secondly, it may simultaneously be concluded that the unreasonableness ground is inconsistent with Brennan J's definition of the proper scope of judicial review. Rather, the ground of unreasonableness appears to be a limitation on Brennan J's clear distinction between merits review and judicial review.

The unreasonableness test

In *SZVFW*, Kiefel CJ found that a decision is legally unreasonable when 'the exercise of statutory power … lacks an evident and intelligible justification'.[25] She emphasised that this test is still 'necessarily stringent'.[26] Justice Gageler underscored that the boundary exists at the 'zone of discretion committed to the administrator'.[27] The court cannot trespass on the administrator's zone of discretion, as to do so exceeds the court's judicial review jurisdiction under Ch III of the Constitution. Despite attempts to clarify the test, *SZVFW* still left ambiguity in how the test is applied in practice or, in other words, where the 'zone of discretion' lies.

In *SZVFW*, Kiefel CJ and Gageler J both drew a distinction between what is 'rational' and what is 'reasonable', where rationality is a lower threshold to reasonableness.[28] A decision may concurrently be not rational and legally reasonable.[29] Conversely, Nettle and Gordon JJ used the term 'irrational' to describe legal unreasonableness.[30] As a result, there appears to be some uncertainty around distinguishing 'unreasonableness' from 'irrationality'. For clarity's sake, this article will not enter into a discussion about the difference in the meaning of these words and will use them interchangeably.

The ambiguity in the unreasonableness test

Haritos v Federal Commissioner of Taxation[31] *(Haritos)* may be used to show how the unreasonableness test is ambiguous and poses problems for the merits and law distinction.[32]

23 Bateman and McDonald, above n 18, 167; Matthew Groves 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 507: Brennan J in *Quin* 'did not provide guidance on what the law might be in any particular case'.
24 *SZVFW* (2018) 92 ALJR 713, 728 [53] (Gageler J).
25 Ibid 720 [10].
26 Ibid 720 [11].
27 Ibid 729 [58].
28 Ibid 720 [10] (Kiefel J); 729 [59] (Gageler J); French CJ has also found that the definition of 'reasonableness' and 'rationality' are different: see *Li* (2013) 249 CLR 332 [30].
29 Ibid.
30 *SZVFW* (2018) 92 ALJR 713, 733 [82] (Nettle and Gordon JJ).
31 (2015) 233 FCR 315 (*Haritos*).
32 Ibid [52].

Mr Haritos and Mr Kyritsis (the applicants) appealed on a 'question of law' against their income tax assessment.[33] Mr Adrian and Mr Dalla Costa were accountants called as expert witnesses by the applicants.[34] In its decision, the Tribunal chose to place no weight on Mr Dalla Costa's evidence because it found that his evidence was based on Mr Adrian's assertions, and Mr Adrian's assertions were based on the applicants' conclusions or on unverifiable material.[35] The primary judge dismissed the appeal, finding that the appellants sought merits review:[36]

> The taxpayers' case was, at best, that there must have been an error of law because they ought to have succeeded on the evidence. …The taxpayer may be unhappy about the weight given to the evidence … but *the weight which may be given to evidence is a matter within the Tribunal's domain*.[37]

Conversely, the Full Court of the Federal Court unanimously upheld the appeal. The Court characterised the question as one of law, finding that 'the drawing of a conclusion about the nature or character of Mr Dalla Costa's evidence … was irrational, illogical and not based on findings or inferences supported by logical grounds'.[38] The Federal Court found that the Tribunal's finding that Mr Dalla Costa's evidence did not take the matter any further was legally unreasonable, as the material did not lawfully allow the Tribunal to conclude that Mr Dalla Costa's evidence was based on the applicant's assertions or unverifiable material.[39] The Federal Court held that this process 'is not to enter into the field of merits review or fact finding. It is to supervise the legality of the fact-finding process of the Tribunal'.[40]

This example illustrates how 'legal unreasonableness' requires that courts distinguish between, on the one hand, decisions that are *legally* unreasonable and, on the other, courts having a 'mere preference for a different result, … [where] reasonable minds may come to different conclusions'.[41] The former is fit for judicial review, but the latter is not.[42] However, it is unclear when the weight that is given to the evidence is sufficiently modest for the question to be one of merits, and when the weight given to evidence is so irrational that it is 'legally unreasonable' and thereby a question of law. There is a logical argument that the Tribunal's finding that Mr Dalla Costa's evidence did not take the matter further was open to be made, the weight given to this evidence for the Tribunal's determination. There is large scope for judicial discretion regarding what constitutes 'reasonableness'. Therefore, it is difficult to know when judges have intruded on the 'zone of discretion committed to the administrator'. Consequently, the unreasonableness test is ambiguous and undermines the clear distinction between merits review and judicial review.

33 Ibid 311 [2]; *Administrative Appeals Tribunal Act 1975* (Cth), s 44: 'A party to a proceeding before the Tribunal may appeal … on a question of law'.
34 *Haritos* (2015) 233 FCR 315, 335 [36].
35 Ibid 388 [216].
36 Ibid 338 [52]; 339 [53].
37 Ibid [53]; *Haritos v Federal Commissioner of Taxation* (2014) 62 AAR 467 [27] (citations omitted) (emphasis added).
38 *Haritos* (2015) 233 FCR 315, 388 [217].
39 Ibid 388 [216].
40 Ibid 388 [218].
41 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 48, quoted with approval in *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 [23]; *Minister for Immigration v Eshetu* (1999) 197 CLR 611, 626 [40] (Gleeson CJ and McHugh J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 [5].
42 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 [23].

Conclusion

The unreasonableness ground is problematic for two reasons. First, the test for legal unreasonableness is so ambiguous as to confuse the proper scope of judicial power. Secondly, the ground of unreasonableness requires the consideration of the quality of the executive decision, which seems to 'open the gate into the forbidden field of the merits' of the executive decision.[43] However, as will be seen, these problems are not unique to the ground of unreasonableness but pervade the task of judicial review.

The reasonableness framework

This section argues that the distinction between merits review and judicial review will always require consideration of the concept of reasonableness. This is because common sense or 'reasonableness' is the only means of determining the difference between question of fact and questions of law. As outlined, the proper scope of judicial review hinges on the distinction between merits review and judicial review. Therefore, in each review analysis, the judiciary are required to characterise an analysis as either arising from a question of fact (and, therefore, the question is for the administrative body to determine) or as a question of law (and therefore for the court to determine).

The idea that 'reasonableness' permeates all grounds of judicial review was suggested by French CJ in *Li*:[44]

> The rationality required by 'the rules of reason' is an essential element of lawfulness in decision-making. A decision made for a *purpose not authorised by statute*, or by reference to *considerations irrelevant* to the statutory purpose or beyond its scope, or in disregard of *mandatory relevant considerations*, is beyond power. It falls outside the framework of rationality provided by the statute.
>
> To that framework … [there] may be *express statutory conditions* or, in the case of the *requirements of procedural fairness*, implied conditions. Vitiating unreasonableness may be characterised in more than one way susceptible of judicial review. A decision affected by actual bias may lead to a discretion being exercised for an improper purpose or by reference to *irrelevant considerations*. A failure to accord, to a person to be affected by a decision, a *reasonable opportunity to be heard* may contravene a statutory requirement to accord such a hearing. It may also have the consequence that *relevant material which the decision-maker is bound to take into account* is not taken into account.[45]

In the emphasised parts of this quotation, French CJ is seen listing the grounds of review and linking each one to 'vitiating unreasonableness'. In this way, he seems to suggest that all grounds of judicial review fall under the broader umbrella of reasonableness.

This section will first consider why questions of fact and questions of law are important to distinguishing judicial review from merits review. Secondly, it will consider the difficulties involved in determining the difference between questions of fact and question of law. Thirdly, it will discuss the attempts that have been made to create a test that distinguishes when a question is one of fact and when it is one of law. Finally, it will propose that the solution to the categorisation process, and therefore the test that defines the proper scope of judicial power, is found in the concept of reasonableness.

43 *Quin* (1990) 170 CLR 1, 38 (Brennan J).
44 *Li* (2013) 249 CLR 332, 350 [26].
45 Ibid (emphasis added).

Questions of fact and questions of law

The categorisation of an analysis process as either judicial review or merits review is vital, because it acts as a means of allocating decision-making power to the different arms of government.[46] Most importantly, this means that it is an underlying question of every analysis in judicial review, as required by *Quin*.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (Applicant S20/2002)*[47], there was some shift away from defining judicial review with reference to errors of fact and law.[48] Justices Gummow and McHugh found that jurisdictional errors under s 75(v) of the *Constitution* are not confined to errors of law.[49] They rejected the Minister's submissions that illogicality in finding primary facts was not an error of law, and that jurisdictional errors under s 75(v) are confined to errors of law.[50] Their Honours held that the distinction between errors of law and fact in the constitutional context does not 'supplant or exhaust the field of reference of jurisdictional error'.[51] They considered *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*,[52] a jurisdictional fact case, to demonstrate that courts can reach a conclusion under s 75(v) 'without recourse to distinctions between errors of law and those of fact'.[53] The rejection of the Minister's argument seems to undermine *Quin*, as *Quin* requires a workable boundary between merits and law. However, it is unclear how far *Applicant S20/2002* principles extend. Justices Gummow and McHugh did not suggest that these principles extended to grounds of review that do not usually involve judicial interference with errors of facts. These principles are likely to be limited to grounds where courts characterise interference with the facts as within judicial power, such as the no evidence ground, jurisdictional facts and unreasonableness, to avoid conflict with *Quin*.[54]

This article will proceed on the basis that the distinction between errors of law and errors of fact are important in judicial review in relation to those grounds that do not usually involve judicial interference with errors of fact (for example, simple ultra vires, failure to follow statutory procedure, irrelevant and relevant considerations and so on).

In this framework, if a question is one of fact then findings about that question are ordinarily determinations about the facts leading to the substantive decision. If courts make determinations about the facts underpinning the executive decision then they have assessed the merits of that decision and exercised non-judicial power, in breach of the separation of powers pursuant to Ch III of the *Constitution*. On the other hand, if the process is deemed to be an assessment of the law underlying the executive decision then the judiciary have not overstepped their constitutional role.

46 Stephen Gageler, 'What is a Question of Law?' (2014) 43 *AT Rev* 68, 68.
47 (2003) 77 ALJR 1165 [53]–[60] (*Applicant S20/2002*).
48 The Court contrasted this with the statutory appeals only for 'questions of law': see, eg, *Administrative Appeals Tribunal Act 1975* (Cth), s 44.
49 *Applicant* S20/2002 (2003) 77 ALJR 1165 [56].
50 Ibid 1175 [53].
51 Ibid 1175 [54].
52 (1953) 88 CLR 100; *Applicant S20/2002* (2003) 77 ALJR 1165, 1175 [54] (McHugh and Gummow JJ).
53 *Applicant S20/2002* (2003) 77 ALJR 1165, 1175 [54] (McHugh and Gummow JJ).
54 It has also been suggested that the procedural fairness ground is not an 'error of law': Aronson, Groves and Weeks, above n 9, 206.

Some commentators deem this critical distinction between questions of fact and law to be 'somewhat blurred'.[55] However, it is the contention of this article that the answer to defining the distinction between questions of fact and law is found in the notion of reasonableness.

Problems with the distinction

In principle, questions of fact and law are distinguished with reasonable ease. The former asks whether an event or thing occurred or will occur, while the latter requires consideration of the legal effect of this past or future occurrence.[56] However, these principles are difficult to apply in practice when the question requires application of the facts to the law.[57] Consider the following example: it was the eve of the 'Kevin 07' election[58] and Mr Horn brought an action in the Federal Court.[59] He argued that the federal election polling booths breached requirements of the *Commonwealth Electoral Act 1918* (Cth). He argued that they lacked a door, curtain or screen and therefore did not allow him to vote privately.[60] The analysis process may be broken down into three questions:

1. How are the polling booths constructed?
2. How does the legislation require the polling booths to be constructed?
3. Does the structure of the polling booths, in fact, adhere to the legislative requirements?

The first two questions are unlikely to cause problems. The first is a question of fact, as it asks whether a thing occurred: on these facts, it asks how the polling booths have been constructed. The answer will state whether or how the fact occurred: the booths lacked a door, screen or curtain covering their entrances but were separated on both sides by cardboard walls.[61] The second question is a question of law and can be answered by turning to the relevant statute — s 206 of the *Commonwealth Electoral Act 1918* (Cth): 'Polling booths shall have separate voting compartments, constructed so as to screen the voters from observation while they are marking their ballot papers'.[62]

However, it is the third question (the 'question of application') that raises difficulties: whether the polling booths' structure, in fact, adheres to the legislative requirements. This is not clearly a question of law or fact; Endicott queries whether such questions are 'some other animal'.[63] The question of application may be deemed to be either a question of law or a question of fact depending on how the question is characterised.

55 Gageler, above n 18, 280.
56 Aronson, Groves and Weeks, above n 9, 203.
57 The example in this paragraph borrows the discussion from *Brutus v Cozens* [1973] AC 854, the anti-apartheid activist, where the only question that was raised was whether Brutus' behaviour was insulting. This example was used in Timothy Endicott, 'Questions of Law' (1998) 114 LQR 292, 293 and discussed in *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439, 451 [25].
58 The 2007 federal parliamentary election.
59 Facts taken from *Australian Electoral Commission v Horn* (2007) 163 FCR 585.
60 Ibid 587.
61 Ibid 592 [29].
62 Ibid 587 [2].
63 Endicott, above n 57, 293; Aronson, Groves and Weeks, above n 9, 204.

On the one hand, if focus is placed on the legal components of the question, it could be described as a question of law. For example, the court may determine that 'screen' must be interpreted by the court, as it takes on particular meaning in the legislation:[64] there could be a question of whether the legislative meaning of the word 'screen' is its meaning as a verb, to screen, or its meaning as a noun, a physical screen (where Mr Horn may argue that a physical screen or curtain is required by law). It may be argued that, to screen '*voters* from observation', the actual voter must be concealed, therefore requiring a curtain or screen. In this way, the question may ask whether the legal effect of the facts 'fully found',[65] these facts being that the booths separated by walls but no curtain, is to screen the voter as required by law. When characterised in this way, it appears to be question of law under the definition above: 'consideration of the legal effect of this past or future occurrence'.[66]

On the other hand, the question of application may be characterised as one of fact if its factual components are emphasised. It may be held that the situation requires determination of whether the practical effect of this booth construction is that the booth, in fact, screens the voter, using the ordinary meaning of the word 'screen'. This appears to be a question of fact, as per the definition above: 'whether an event or thing occurred or will occur'[67] — that is, whether the polling booth screens the voter.

Ultimately, both ways of conceiving of the question ask whether the polling booths, separated by walls but without a door or curtain, screen the voter as required by the law. However, the first way may be considered a question of law and the second way a question of fact. As a result of this ambiguity, commentators and judges have remarked that the distinction between questions of fact and law are 'categories of meaningless reference';[68] or, in other words, the categorisation process does not have a logical bearing on the court's final decision.[69] However, in administrative law, this categorisation process is pivotal in determining whether courts have jurisdiction.

Attempts to categorise 'questions of application'

There are two approaches to categorising questions of application: the pragmatic approach and the analytical approach.[70] The pragmatic approach asks whether it is helpful to label a question of application as a question of law.[71] It argues that questions of application cannot be logically classified as either questions of law or fact, and the decision to classify questions

64 When statutory words take on further meaning beyond natural meaning, it has been held to be a 'question of law': see, eg, *Coles Myer Finance Ltd v Commissioner of State Revenue (*1998) 14 VAR 474; Jason Pizer, Pizer's Annotated VCAT Act (JNL Nominees, 3rd ed, 2007) 601.

65 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 287; Gageler, above n 46, 69.

66 Aronson, Groves and Weeks, above n 9, 203.

67 Ibid.

68 Gageler, above n 46, 68; Da Costa v The Queen (1968) 118 CLR 186, 194–5 (Windeyer J) — Windeyer J finds that every question which arises for lawyers can be called either a question of fact or a question of law; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315, 355 [111]; see also *FCT v Roberts* (1992) 37 FCR 246, 252 (Hill J); *Nizich* v FCT (1991) 91 ATC 4747, 4752 (French J).

69 Gageler, above n 46, 68, 70: 'The need to introduce the qualification to the qualification might be thought to call into question not only the expression of the underlying principle but *also the utility of the overall exercise* of which the distillation of that principle forms part.'

70 Endicott, above n 57, 292; Mark Aronson 'Unreasonableness and Error of Law' (2001) 24 UNSW *Law Journal* 315, 327–8.

71 Ibid.

either way is a policy decision. Conversely, the analytical approach argues that there is a logical basis for categorising questions of application.[72]

The courts have tried to outline principles that analytically determine whether questions of application are to be deemed questions of law or fact. In *Collector of Customs v Pozzolanic*[73] *(Pozzolanic)*, the Federal Court provided five tests to this end:

1. 'whether a [statutory] word or phrase … is to be given its ordinary [or technical] meaning' is a *question of law.*
2. The ordinary or 'non-legal technical meaning' of words is a *question of fact.*
3. 'The meaning of a technical legal term is a *question of law.'*
4. 'The effect or construction of a term whose meaning or interpretation is established is a *question of law*.'
5. Whether 'facts fully found fall within' statute 'properly construed' is usually a question of law. However, this is qualified 'when a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words. Where it is reasonably open to hold that they do, then the question whether they do or not' is a *question of fact.*[74]

These tests were considered by the High Court in *Collector of Customs v Agfa-Gevaert Ltd*[75] *(Agfa-Gevaert)*, which held that 'such general expositions of the law are helpful in many circumstances'.[76] However, they were unhelpful in *Agfa-Gevaert*, as 'the term in issue [was] complex'.[77] After Agfa-Gevaert, the High Court considered the fact and law distinction in *Vetter v Lake Macquarie City Council*[78] *(Vetter)* but outlined the principles only to the extent necessary on the facts,[79] finding that questions are of law 'if, on the facts found, only one conclusion is open'.[80] The courts, in some instances, have also tried to reconceive the problem by developing the concept of 'mixed' questions of law and fact. However, 'mixed questions of fact and law' have been described as a 'baffling gadget' with no clear utility.[81] All questions of application involve a factual and legal component.[82]

More recently, in *Kostas v HIA Insurance Services Pty Ltd*[83] *(Kostas)*, the High Court held 'it is not useful to attempt to chart the metes and bounds [of questions of law] …[and] to do so is

72 Ibid.
73 (1993) 43 FCR 280, 287; Gageler, above n 46, 69.
74 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 287 (emphasis added and citations omitted); *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126, 137–8; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 395 (Agfa-Gevaert); Aronson, above n 70, 332; Gageler, above n 46, 69.
75 (1996) 186 CLR 389.
76 Ibid 396.
77 Ibid.
78 (2001) 202 CLR 439.
79 Gageler, above n 46, 71.
80 Ibid; *Vetter v Macquarie Lake Council* (2001) 202 CLR 439 [27]; *Hope v Bathurst City Council* (1980) 144 CLR 1, 8.
81 Endicott, above n 57, 300; see also Gageler, above n 46, 72; *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315, 373–5 [164], [166]; Aronson, Groves and Weeks, above n 9, 203; John Laws, 'Law and Fact' (1999) *British Tax Review* 159.
82 Aronson, Groves and Weeks, above n 9, 211 [4.150].
83 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390.

dangerous'.[84] The High Court in Kostas rejected Basten JA's attempts in the Court of Appeal to create clear principles, finding that 'a taxonomy would lead to error'.[85] The High Court's current approach appears analytical, as it infers that there is a logical distinction but there is no 'universal' test because the distinction is context dependent.[86] Stephen Gageler, writing extra-judicially, notes that many of the tests formulated after *Pozzolanic* effectively fall into the *Pozzolanic* categories, notwithstanding that *Pozzolanic* is not expressly referenced.[87]

These tests indicate that whether a question of application is deemed to be a question of fact or law depends on the particular scenario.[88] However, contrary to the High Court's assertions in *Agfa-Gevaert, the Pozzolanic* tests are not 'helpful in many circumstances' because they are merely descriptive, not prescriptive.[89] The tests are conclusory in nature, because they leave questions like when do words hold 'ordinary' meaning or 'technical' meaning[90] and when does legislation leave one conclusion open.

For example, the first and second tests require that courts distinguish between the 'ordinary meaning' and the 'technical' meaning of words, the implication being that such a distinction is self-evident. Even with context, the task is vexed. This is seen in *Agfa-Gevaert* itself,[91] where the High Court was tasked with defining the phrase 'silver dye bleach reversal process'. The issue was whether the phrase held a technical meaning, or whether only 'silver dye bleach process' had a technical meaning and 'reversal' held its 'ordinary' meaning.[92] In such cases, the context of the legislation does not clearly point to either interpretation being clearly correct.

Similarly, the test confirmed in *Vetter*, that a question is one of law when 'only one conclusion is open', does not explain how to determine *when* only one conclusion is open. As a final example, the fifth test sheds no light on the difference between statutory words 'properly construed' (deemed a question of law) and statutory words which are to be read 'according to their ordinary meaning' (deemed a question of fact). The test merely states that these situations are different, without explaining how they are different: we are not told *when* courts are required to 'properly construe' statute. The fifth test is also described with another 'qualification': when it is the case that applying the facts requires 'a value judgment about the range of the act', this is a question of law.[93] Again, *when* will it be the case that the court will

84 Ibid 417 [88].

85 Ibid 418 [89]; see also *Agfa-Gevaert* (1996) 186 CLR 389, 394; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315, 355 [111].

86 Aronson, Groves and Weeks, above n 9, 203; *Agfa-Gevaert* (1996) 186 CLR 389, 394; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315, 355 [111]: 'no satisfactory test of universal application has yet been formulated'. Although, note that some construe the High Court's approach as partly analytical and pragmatic: see Aronson, above n 70, 332.

87 Gageler, above n 46, 70.

88 Aronson, Groves and Weeks, above n 9, 203.

89 Conversely, Stephen Gageler argues that the High Court in *Agfa-Gevaert* gave the *Pozzolanic* tests 'at best muted endorsement': Gageler, above n 46, 70. However, the High Court did not overturn the test and, as noted, described the tests as sometimes helpful but not helpful for the matter at hand: see *Agfa-Gevaert* (1996) 186 CLR 389, 396.

90 See examples of this problem in Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 161.

91 (1996) 186 CLR 389.

92 Ibid.

93 Gageler, above n 46, 70; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1980) 43 FCR 280, 288–9.

be required to make a 'value judgment about the range of the act'? The many qualifications and descriptive nature of the tests only creates confusion in differentiating questions of law from those of fact. To this end, Stephen Gageler muses that 'a qualification to a qualification to the fifth of five principles is enough to make even a tax lawyer blush'.[94] Similarly, Professor Endicott commences his article titled 'Questions of Law' by comparing statements of Katherine in *The Taming of the Shrew*[95] to Lord Denning's approach to identifying a question of law:

> And be it moon, or sun, or what you please: And if you please to call it a rush-candle, Henceforth I vow it shall be so for me — Katharine to Petruchio.
>
> Lord Denning did not take an analytical approach to identifying questions of law, any more than Katharine took an analytical approach to identifying the moon.[96]

It has been often quoted that 'no satisfactory test of universal application has yet been formulated' to determine the distinction between questions of fact and law.[97] This is because all questions of application involve a factual and legal component.[98]

The answer: reasonableness

The boundary between questions of fact and questions of law exists in the concept of reasonableness. Consider the following example: the law states that 'the Council must grant accommodation to people who do not have any accommodation'.[99] The Council rejects an application for accommodation, as the applicant lives on the street in a barrel and, according to the Council, the barrel constitutes 'accommodation', making him or her ineligible for a grant of accommodation (the Barrel Case).[100]

The Barrel Case appears to give rise to a question of law. The court may find that the facts 'fully found', that the applicant lives in the barrel, do not fall under the meaning of 'accommodation' under the statute. The court may find that 'accommodation' has a statutory meaning of the right to privately use land. However, why does this test apply? Why is this not a question of fact? The current principles alone would validly allow a court to find that 'accommodation' is to be given its ordinary meaning, being a room or space where a person may live or stay. If this is the case, it is therefore a question of fact for the Council to determine. A large variety of different spaces may constitute 'accommodation' and it is for the Council to decide whether any given space constitutes accommodation.

The distinction between 'ordinary meaning' and 'statutory meaning' is found in the concept of common sense. The reason that 'accommodation' is not a question of fact in this instance is because of 'reasonableness' informed by societal values. It is due to a shared understanding

94 Gageler, above n 46, 70.
95 William Shakespeare (1564–1616), *The Taming of the Shrew*.
96 Endicott, above n 57, 292.
97 *Agfa-Gevaert* (1996) 186 CLR 389, 394; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315, 355 [111].
98 Aronson, Groves and Weeks, above n 9, 211.
99 This example is loosely based on the facts and examples in *R v Hillingdon London Borough Council*; *Ex Parte Puhlhofer* [1986] AC 484; Endicott, above n 57, 298–9.
100 Endicott, above n 57, 298–9.

that accommodation, in the context of legislation that seeks to provide housing for homeless people, means an apartment or a house, but not a barrel. It is not the principles themselves that provide direction in relation to when they are applied. It is common sense and the notion of reasonableness that provides direction — or, in other words, it is the ludicrous outcome that the Council would be denying housing to a person living in a barrel that seems to direct when a question is one of fact or law. The word 'accommodation' takes on a 'legal' meaning because reasonableness dictates that a barrel does not constitute accommodation.

The grounds of review, statutory interpretation and reasonableness

The Barrel Case may be conceptualised under two grounds of review — namely, under the simple ultra vires ground or under the irrelevant consideration ground. First, under the simple ultra vires ground, a proper interpretation of 'accommodation' does not include a barrel. Therefore, it is beyond power for the Council to deny the applicant's claim because he or she had accommodation, because a barrel does not fall under the statutory meaning of the word 'accommodation'. Secondly, the Barrel Case may be understood in the context of irrelevant considerations: the consideration, that the applicant lives in a barrel, is impliedly irrelevant to the Council's decision to grant accommodation because this consideration has no bearing on whether the person has current accommodation pursuant to the statute.

Every ground of review is grounded in statutory interpretation, with 'common sense' at the heart of statutory interpretation. A trend can now be seen in the tests that judges have used to distinguish questions of fact and questions of law. The tests that describe the statutory interpretation process are considered 'questions of law' (for example, whether the facts fully found fall under the statute 'properly construed', the meaning of a technical legal term, and so on); and the tests that describe a process that requires no particular judicial skill to interpret statute (for example, words construed according to their 'ordinary meaning') are questions of fact.

To this end, French CJ explains how each ground of review is underpinned by the statutory interpretation process and therefore the concept of reasonableness:

> To that framework … [there] may be express statutory conditions or, in the case of the requirements of procedural fairness, implied conditions. Vitiating unreasonableness may be characterised in more than one way susceptible of judicial review.[101]

The 'reasonableness' framework and the statutory interpretation process underlying judicial review are evident when reconsidering *Quin. Quin* concerned the abolition of the Courts of Petty Sessions (the old Courts), which were replaced by Local Courts.[102] All magistrates from the old Courts who applied were appointed to the new Local Courts, except for Mr Quin and four others.[103] Initially, the Attorney-General recommended appointment on the basis that a magistrate from the old Courts was 'not unfit' for office. This was determined without competition from other applicants (the old policy).[104] In an earlier case, the Attorney-General's initial decision to not recommend Mr Quin for appointment under the old

101 *Li* (2013) 249 CLR 332, 350 [26] (French CJ).
102 *Quin* (1990) 170 CLR 3, 2.
103 Ibid 2, 8.
104 Ibid 5, 12.

policy was declared void, as it was held to be procedurally unfair.[105] After this judgment, the Attorney-General adopted a new policy that 'the most suitable persons to fill any vacancies' would be appointed and therefore Mr Quin would have to compete against other applicants.[106] Mr Quin issued new proceedings, asking the Court to issue a declaration that the Attorney-General must consider Mr Quin's application on the basis of the old policy.[107]

The majority judges, Mason CJ, Brennan and Dawson JJ, held in separate judgments that the Attorney-General was not required to consider Mr Quin's application under the old policy.[108] Justice Brennan found that:

> the court must stop short of compelling the fulfilment of the promise … *unless the statute so requires* or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power.[109]

The Court did not have the power to compel the executive to decide Mr Quin's application pursuant to the old policy, as it was held that the old policy was not law.[110] If the Court compelled the executive to make the decision on the basis of the old policy, the Court would be dictating that the executive must consider factors beyond conditions found in law: the court would be making determinations about the merits of the decision.

However, if, hypothetically speaking, the old policy were a fetter on power *founded in law*[111] — for example, a statutory implication — then it would be Parliament that is dictating the fetters on the power to appoint magistrates. The Court would be declaring the law. The executive would be bound to decide Mr Quin's application using the old policy, because Parliament's law (the statute), as declared by the courts through statutory interpretation, requires it.

This shows that it is ultimately the statutory interpretation process that determines the boundary between merits and law. It was open for the courts to find that there were legal fetters on the power to appoint and, in fact, the dissenting judges did find that there was an implied legal fetter on the power to appoint.[112] It may be held that s 12(1) of the *Local Courts Act 1982* (NSW) must be interpreted in light of the pivotal rule in our legal system concerning security of judicial tenure: 'a member of the judiciary should not be compulsorily removed from office during the term of his or her appointment otherwise than on the ground of proved misbehaviour'[113] — or it may be found, as Toohey J held, that the fetter found in law was a

'legitimate expectation that [Mr Quin's] application would be dealt with as the applications of other former stipendiary magistrates had been dealt with'.[114]

105 *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268.
106 *Quin* (1990) 170 CLR 3.
107 Ibid 2.
108 Ibid.
109 Ibid 40; *Lam* (2003) 214 CLR 1, 9 [27] (emphasis added).
110 *Quin* (1990) 170 CLR 1, 39 (emphasis added).
111 This is what the dissenting judges found: *Quin* (1990) 170 CLR 1, 47–9 (Deane J); 68–9 (Toohey JJ); Groves, above n 23, 498.
112 Ibid.
113 *Quin* (1990) 170 CLR 1, 48–9 (Deane J).
114 Ibid 68 (Toohey J).

Ultimately, the principle that courts cannot trespass on the merits of the decision is only a label. It is the statutory interpretation process, which is informed by 'common sense' and shared values, that is where the substance of judicial decision-making lies.

Conclusion

The ground of unreasonableness is often characterised as undermining the distinction between merits review and judicial review. This article has shown the contrary — that the concept of unreasonableness is, in fact, integral to determining the distinction between merits review and judicial review and therefore integral to determining the scope of the judiciary's power under the *Constitution*. This is because the distinction between merits and law is determined by statutory interpretation, which requires that courts apply standards of common sense or 'reasonableness' when interpreting words in statute. In the Barrel Case, it was the ludicrous outcome that determined the point at which the judiciary was able to interfere. Although the Barrel Case could be characterised as simple ultra vires or as an irrelevant consideration, the underlying reason for vitiating the decision was on the basis of unreasonableness. The ambiguity of the unreasonableness test is due to the ambiguity of language — an unavoidable part of statutory interpretation.

This article has argued that determining what is 'unreasonable' is essential in judicial review. As a result, judicial enforcement of a statutory presumption that an executive decision-maker cannot exercise his or her powers unreasonably is consistent with the judicial task.