

Some reflections on *Li*'s case: a new concept of "legal unreasonableness"?

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Introduction.

The High Court case of *Minister for Immigration and Citizenship and Li*¹ is an important contribution to the development of the law relating to the judicial review of administrative decisions on "unreasonableness" grounds in Australia.

In the following paper, I will first, put *Li* in context, second outline the facts and key aspects of the various judgments, third, offer some comments on the leading judgment of Hayne, Kiefel, and Bell JJ², fourth, consider how *Li* might affect "unreasonableness" review in Australia, and fifth, offer some practical tips about how to characterise "legal unreasonableness".

I - *Li* in context; the legality/merits distinction.

The first principle of Australian administrative law is that judicial review of administrative action is limited to the legality of decisions, not the merits.

Parliament marks out the metes and bounds of the decision-maker's power, and within those boundaries, the decision-maker is free to reason and determine matters as he or she likes.

As His Honour Justice Brennan put it in *Attorney-General v Quin*³:

"The duty and jurisdiction of the court to review administrative action does 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

¹ [2013] HCA 18; (2013) 297 ALR 225; (2013) 87 ALJR 618.

² *op. cit.* from [31].

³ (1990) 170 CLR 1, at p36.

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

In other words, the role of the court is simply to ensure that the decision-maker acts within the power given to the decision-maker by parliament. It is not the role of the court to substitute its own view about the correct or preferable decision.

His Honour even went on in *Quin* to suggest that if the court were to engage in merits review it would put its own legitimacy in risk⁴, and several judges have said it would alter the balance between the legislature and the judiciary, and thus undermine the balance of power between them⁵.

“Unreasonableness” – how does judicial review avoid crossing the legality/merits boundary?

An area where the risk of trespassing upon the merits is particularly acute is in the area of judicial review of discretionary decisions on the grounds of “unreasonableness”.

The dilemma can be simply put.

On the one hand, parliament could not have intended that powers would be exercised in a manner which is arbitrary, capricious, or totally devoid of reason. Therefore, there must be a limit beyond which a decision-maker is acting outside the power given to them under the empowering Act, a point at which they act beyond jurisdiction, and therefore, a point at which the court is entitled to intervene.

On the other hand, to call something “unreasonable”, “capricious” or “arbitrary” is to make a subjective judgment; what is reasonable to one person is not to another, as Lord Greene observed in *Wednesbury*⁶.

⁴ *op. cit.*, at p38.

⁵ *Judicial Review of Administrative Action*, Fifth Edition (2013), Aronson, Dyer and Groves, at [2.05] who cite, amongst others, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341 and 357; *Attorney General v Quin*, *op. cit.* at 23, 53-54 and 66.

⁶ [1948] 1 K.B. p223, at p230.

If a decision is to be set aside simply because the court does not agree with the reasoning or the outcome, and therefore considers it “unreasonable”, the court risks substituting its own judgment for that of the decision-maker.

As Gleeson CJ and McHugh J said in *Eshetu*⁷, to characterise a decision-maker’s reasoning as illogical or unreasonable may be no more than an emphatic way of expressing disagreement with it, and it may have “no particular legal consequence”.

The *Wednesbury* test; a very high threshold.

That is why, perhaps, the threshold for intervention on this ground was set so high in *Wednesbury*.

The short-hand form of the test in *Wednesbury* which you will all be familiar with is that the decision-maker has come to a conclusion so unreasonable that no reasonable decision-maker could come to it⁸.

It has generally come to be understood as the defining, underlying test for this ground in Australia, and the ground is routinely referred to as “*Wednesbury* unreasonableness”.

The difficulty of the hurdle which has to be overcome with this test is obvious; implicit in a successful challenge is the conclusion that the decision-maker has been held up against a reasonable decision-maker, and found wanting.

In other words, it effectively passes judgment upon the decision-maker. As the case law attests, it is a ground that is rarely successful.

Indeed, Aronson went as far as to suggest that the *Wednesbury* ground “is successfully invoked only where the decision-maker needs to be scheduled under the mental health legislation”⁹!

⁷ (1999) 162 CLR 577, at [40].

⁸ *op. cit.*, at p234.

⁹ Aronson, *op. cit.*, at [6.235].

II - *Li*; a new test to be known as “legal unreasonableness”?

Li, and the plurality judgment of Hayne, Kiefel, and Bell JJ in particular, may have significantly shifted the emphasis and development of this area of the law in Australia, suggesting a new way of looking at “legal unreasonableness” which has the potential to significantly open up and significantly expand the operation of this ground of review.

Most significantly, they appear to have rejected the requirement that a decision be so unreasonable that no reasonable person could make it, and thus significantly lowered the impediment to success on “unreasonableness” grounds.

After outlining the facts in order to provide the context in which the principles were analysed, I will describe key aspects the plurality’s judgment, before addressing the judgment of Chief Justice French, and the judgment of Justice Gageler.

The facts in *Li*.

Mrs Li was a chef who sought a skilled student residence visa. In order to be granted her visa, Mrs Li had to have, amongst other things, a positive skills assessment by an assessing authority, which had not been found to have been based upon false or misleading information.

The positive skills assessment was a “time of decision” requirement; in other words, it was not necessary to have the assessment until the point at which the decision-maker made a decision about whether to grant or refuse to grant the visa.

Though she received a positive skills assessment, the Minister refused her application, because her migration agent had submitted a history of employment to the assessing authority which included a claim that Mrs Li had worked as a chef at a restaurant where she had not worked; in other words, the positive skills assessment had been based in part upon false information.

Mrs Li obtained a new migration agent, and applied for review of the decision in the Migration Review Tribunal. She also applied for a further assessment by the assessing authority, this time based on correct information about her employment history.

Following a hearing, the Tribunal allowed Mrs Li a further short period of time while the assessing authority completed its assessment.

Unfortunately, the assessing authority did not give a favourable assessment. Mrs Li's agent wrote to the Tribunal, told them what had happened, and said that they had applied for review of the decision.

The agent pointed to errors in the approach of the assessing authority, explained why it was confident a favourable assessment would be made on review, and asked that the Tribunal delay making its decision until the review of the assessment was complete.

Without further communication, the Tribunal made its decision without waiting for the outcome of the review. As there was no untainted favourable skills assessment at the time of decision, the Tribunal refused the visa.

The reason that it gave for refusing the agent's request for an adjournment was that:

"The Tribunal considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further...."

The review of the assessing authority's decision was successful, but this was of little use to Mrs Li, who had now been refused her visa, and was thus barred from reapplying.

Mrs Li's appeal to the Federal Magistrates Court (now the Federal Circuit Court) was successful. FM Barnes held that the decision was unreasonable in the Wednesbury sense.

That decision was upheld by the Federal Court on appeal, for slightly different reasons.

The Minister appealed to the High Court, and special leave was granted.

The High Court unanimously accept that the refusal to grant an adjournment was sufficiently "unreasonable" to be beyond the Tribunal's power.

All five justices of the High Court agreed with both the Federal Magistrates Court and the Federal Court that the decision to refuse an adjournment was not a valid decision, and that therefore, the final decision was invalid, and each judgment found that the decision was so "unreasonable" that it was not a valid exercise of power.

The decision of Hayne, Kiefel and Bell JJ.

All of the judgments are interesting for one reason or another. The most adventurous is that of the plurality, Hayne, Kiefel and Bell JJ.

The plurality started by putting *Wednesbury* in its place. The requirement of “reasonableness” had been around long before *Wednesbury*, they said. Indeed, the plurality referred to authority for the proposition that discretionary powers had to be exercised reasonably dating back to 1598.

Determining “the true standard” of reasonableness to be applied requires careful consideration of the statute, and identifying its “real object”.

The plurality then signaled their intention clearly when they observed (at [68]) that:

“Lord Greene MR’s oft-quoted formulation of unreasonableness in Wednesbury has been criticised for “circularity and vagueness”, as have subsequent attempts to clarify it. However, as has been noted, Wednesbury is not the starting point for the standard of reasonableness, nor should it be considered its end-point...”

The plurality then drew upon a series of authorities to support not an over-arching principle, but a number of categories of error which would fit within the concept of “legal unreasonableness”, an expression they used on a number of occasions in the course of the judgment.

First, drawing on observations of Mason J (as His Honour then was) in *Peko-Wallsend*¹⁰ which have always interested me, the plurality (at [72]) argued that “*legal unreasonableness*” would be demonstrated where the decision-maker, by reference to the scope and purpose of the statute, has:

“committed a particular error in reasoning, given disproportionate weight to some factor, or reasoned illogically or irrationally.”

¹⁰ (1986) 162 CLR 24, at [15] (d).

From the context, it appears that the reference to “disproportionate weight” is a reference to Mason J’s examples of giving excessive weight to a factor of little importance, or inadequate weight to a matter of great importance.

The plurality then drew upon Australian case law with respect to the misuse of fiduciary powers, singling out the principle that an administrative decision must involve an exercise of power which is proportionate to the scope of the power.

The plurality suggested the Tribunal’s giving of excessive weight to the fact that Ms Li had had an opportunity to present her case may amount to a disproportionate response which would lead to a conclusion of unreasonableness.

Finally, the plurality drew upon the High Court’s analysis of the exercise of *judicial* discretion in *House v King*¹¹, for the proposition that it may be possible to infer error “*if upon the facts [the result] is unreasonable or plainly unjust*”.

“*Unreasonableness*”, the plurality said (at [76]), “*is a conclusion which may be applied to decision which lacks an evident and intelligible justification*”.

The plurality then applied their analysis to the facts (from [77]).

Their Honours construed the purpose of the power (at [80] and [83]). The purpose of the review which the Tribunal was performing was to give the applicant the opportunity “*to present evidence and arguments relating to the issues arising in relation to the decision under review*”.

They also discussed the decision of the Tribunal with reference to that purpose (at [80], and [83]-[84]).

After considering the possibility that several of the categories of unreasonableness they had identified had occurred when reference to the purpose of the power was made (at [85]), they concluded that it was not possible to say what specific error had been made, “*but the result itself bespeaks error*”; if the decision had been reached according to law, the Tribunal would not have refused the adjournment.

¹¹ (1936) 55 CLR 499, at 504-5.

In other words, the plurality effectively concluded that the decision was “unreasonable” because upon the facts, the result was unreasonable or unjust, the last of their bases for rejecting an application.

It is to be observed that on this analysis, though the discretion rested with the decision-maker, the only way that the discretion could have been exercised lawfully would have been to allow the adjournment; in that respect, the Tribunal did not really have a discretion at all, on the facts.

The decision of French CJ.

Chief Justice French, just as the plurality did, reviewed a number of authorities dealing with the question of “reasonableness”.

His Honour began his discussion with reference to the *Wednesbury* unreasonableness test, and His Honour emphasised that the basis upon which the Court intervened was that the decision was so far outside the bounds of reason and rationality that the court could say “*that parliament never intended to authorise that kind of decision*”.

Perhaps the most obvious point of departure from the plurality was His Honour’s statement, which would generally be considered orthodox (at [30]), that:

“The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters.....”

You will remember that this was one of the plurality’s stated “sub-species” of judicial unreasonableness, and it drew upon remarks by Justice Mason in *Peko-Wallsend*.

Interestingly, in the course of his discussion of the authorities, His Honour raised the distinction between an irrational decision and an unreasonable one. His Honour concluded, interestingly (at [30]), that:

“a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves.”

This raises the possibility of “*proportionality review*”, a concept I will return to later in the paper.

In disposing of the appeal, His Honour referred to the Tribunal’s apparent failure to consider anything but “*the asserted sufficiency of the opportunities provided to the first respondent to put her case*”, the failure to deal with the substance of the migration agent’s reasons for requesting an adjournment, and the Tribunal’s failure to refer to the statutory provision outlining the manner in which the Tribunal was to conduct the review.

His Honour concluded that “*in the circumstances*”, there was “*an arbitrariness about the decision, which rendered it unreasonable in the limiting sense explained above*” (at [31]).

The “limiting sense explained above” appears to be a reference to his discussion of *Wednesbury* and judicial deference to the legality/merits distinction (from [28] - [30]).

The decision of Gageler J.

His Honour, Justice Gageler’s approach was, on the whole, orthodox. His Honour was content to retain, in broad terms, the *Wednesbury* test, stressed that it was a rare case in which it would be satisfied (at [113]), and emphasised that it was to be determined with reference to the statutory context in which the discretion was exercised (in this case, a statutory context in which powers were to be exercised in a way which was “*fair and just*” and “*according to the substantial merits of the case*” (at [123]).

His Honour concluded, in essence, that no reasonable tribunal, acting as required under the statutory regime it was operating under, would have refused the adjournment.

His Honour’s judgment was the only one which dealt explicitly with the implications of the fact that the decision was interlocutory, not final.

His Honour explicitly stated that “*Wednesbury* unreasonableness” in failing to adjourn a hearing would invalidate a final decision *if* that failure was material to the outcome.

His Honour's express statement of this requirement is necessarily implied in the other judgments; error only leads to invalidity where the exercise of power is affected as a consequence¹².

III - Discussion of the plurality's decision.

Rather uncharitably, the first two of my three observations about the plurality's decision could be interpreted as critical.

The first observation; the basis upon which the case was resolved.

The first observation relates to the basis upon which the plurality actually resolved the case.

The plurality appear keen to develop an approach that is different from "*Wednesbury* unreasonableness", and keen to avoid the vagueness and uncertainty that follows from the subjective nature of that test.

However, unlike the other categories of error their Honours identify, the principle they apply in resolving *this* particular matter (that "the result bespeaks error") is ultimately similar to the *Wednesbury* test, because it focuses upon the outcome, not the reasoning, and it requires the same sort of "circular and vague" judgment which the plurality seek to avoid.

Second observation: the plurality went much further than Mason J.

A further observation springs from the fact that their Honours drew upon *obiter* observations of Justice Mason in *Peko-Wallsend*¹³ for the proposition that "legal unreasonableness" may be made out where little weight is given to matters of great importance, or great weight to matters of little importance.

The suggestion that this forms a separate test upon which "legal unreasonableness" may be established, without reference to the *Wednesbury* test, if that is what the plurality are saying, is one of the most adventurous aspects of their decision; the relative weight to be given to relevant considerations is generally considered the role of the decision-maker, and

¹² *Craig v South Australia* (1995) 184 CLR 163, at [14].

¹³ *op. cit.*

it is easy to see how judicial review on the basis that weight has been wrongly assigned could be seen as trespassing upon the merits, if it sits as an independent basis of review.

Yet when Justice Mason's remarks are placed in their context, it is clear that His Honour was not departing from the *Wednesbury* test, but merely observing one situation in which it might be satisfied.

In other words, the plurality appear to have gone far further than Justice Mason.

What His Honour said in *Peko Wallsend*¹⁴ (at [15] (d)) was this:

(d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned (Wednesbury Corporation, at p.228). It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power. I say "generally" because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene M.R. in Wednesbury Corporation, at pp.230, 233-234, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it.

I've highlighted the observations about "relative weight" that the plurality referred to in *Li*'s case because they are so heavily surrounded by references to the *Wednesbury* test and warnings against intruding upon the merits that you could easily miss them.

¹⁴ *op. cit.*

Unlike the plurality in *Li*, Justice Mason tied his reference to failing to give adequate weight to a relevant consideration or giving excessive weight to a relevant consideration to the *Wednesbury* test.

In other words, in order for a decision to be quashed, His Honour's position was that the way in which relevant factors are balanced must be so unreasonable that the resulting decision is a decision so unreasonable no reasonable person could reach it.

Unlike the plurality, His Honour was not proposing an alternative test, or a different question which could be asked in order to establish "legal unreasonableness". Rather, he was demonstrating one way in which the *Wednesbury* conclusion may arise.

I tend to think that the plurality quite deliberately untethered "legal unreasonableness" from the *Wednesbury* test and created a lower threshold, but it is at least possible that their Honours will pull back from this position in a future case.

Third observation: *Li* invites "proportionality review" of administrative decisions.

A further interesting fact about the decision is that both the plurality and Chief Justice French raise the possibility of "proportionality" review in the course of the decision. It is beyond the scope of this paper to discuss this interesting concept in any detail, which has its origins in European law, and is now firmly entrenched in the United Kingdom.

However, the bare bones of the ground is that the decision must represent a proportionate and reasonably adapted response to the ends it seeks to achieve¹⁵.

The fundamentally different task that this represents is reflected in Lord Steyne's statement that, when reviewing an administrative decision for proportionality, the Court assesses:

*"the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions"*¹⁶.

¹⁵ See also the discussion in *Judicial Review of Administrative Action (4th Edition)*, *op. cit.* at p379.

¹⁶ See *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 at 446 [27], per Lord Steyne.

In *Li*, it could be said that the refusal to adjourn was a disproportionate response to the Tribunal's concern to proceed to a decision, or that disproportionate weight was given to the fact that Mrs Li had "*had enough opportunities to present her case*".

IV - How will *Li* affect "reasonableness" review?

What is also not clear is whether the *Li*'s opening up of "unreasonableness" review will apply only to unreasonableness in the exercise of a discretion, or whether it will extend to attacks on reasoning with respect to administrative finding of facts.

Often, a decision-maker's task is to determine whether certain facts are made out, which determines the outcome of an application, rather than to exercise a discretion.

The exercise of the power is often to be exercised upon the decision-maker's "satisfaction" that the facts are made out (either expressly or implicitly), which will have to be reached "logically" or "rationally"¹⁷.

In *SZMDS*, Crennan and Bell JJ effectively applied a modified version of the *Wednesbury* test to fact-finding; the state of satisfaction to which the Tribunal came must be one to which "*no rational or logical decision maker could arrive on the same evidence*"¹⁸.

In other words, though the language of irrationality and logicity were used, rather than "unreasonableness", the test applies an otherwise identical formula to the *Wednesbury* formula.

Even though the plurality were dealing with the exercise of a discretion in *Li*, there is no reason in principle why the categories of error they identify in *Li* could not be developed with respect to non-discretionary decisions, perhaps in slightly modified form.

Two cases where *Li* has been considered.

¹⁷ See, for instance, *SZMDS* (2010) 240 CLR 611, at [128] ff. The use of the words "irrational" and "illogical" are a consequence of the Court's earlier decision in *s20*, where the Court stated that this was the basis upon which fact-finding, as opposed to exercises of discretion, was to be challenged; there were pragmatic reasons for that approach in that case, the distinction is not overly important, and *Li* may help to bring an end to that limitation.

¹⁸ *SZMDS*, *op. cit.* at [130].

It remains to be seen whether first instance and intermediate courts apply a narrow or a wide approach to the application of the principles articulated by the plurality in *Li*.

In that respect, two cases are worth mentioning, one relating to the exercise of discretionary power, and the other relating to fact-finding.

In the first case, *Minister for Immigration and Border Protection v Singh*¹⁹, the Full Court of the Federal Court considered the MRT's refusal to grant an adjournment in very similar circumstances to the circumstances in *Li*'s case. Their Honours, relying upon *Li*, applied a proportionality analysis to the refusal to adjourn, and concluded that "*the refusal cannot be said to be a legally reasonable exercise of power*"²⁰.

His Honour, Justice Greenwood, considering a challenge to findings of fact made by the AAT with respect to liability to pay Commonwealth workers' compensation payments, was happy to accept that to give inadequate weight to matters of great importance or excessive weight to a matter of little importance could result in error of law²¹, and he referred to the plurality's judgment in *Li* in the course of his judgment.

V- Some practical tips from the plurality's judgment.

From a practical point of view, the plurality's judgment opens up a number of ways in which you can allege error on the part of a decision-maker, if either the reasoning or the outcome appears to be unreasonable.

First (and this proposition emerges from all judgments), "legal unreasonableness" in an interlocutory process may vitiate a final decision.

Second, you may choose to avoid making the rather adventurous allegation that a decision-maker (who one imagines is a quiet, sensibly dressed individual sitting at a desk, or presiding quietly over a Tribunal) has made a decision which is so unreasonable no reasonable decision maker could have made it.

Instead, you can express it a little more politely.

¹⁹ [2014] FCAFC 1

²⁰ At [73].

²¹ *Kelk v Australian Postal Corporation* [2014] FCA 147, at [208].

A decision may be “legally unreasonable” for any of the following reasons (always with reference to the scope and purpose of the power granted to the decision-maker);

- 1.) A particular error was committed in reasoning (presumably suggestive or unreasonableness);
- 2.) Great weight was given to a matter of little importance;
- 3.) Little weight was given to a matter of great importance;
- 4.) The reasoning is illogical or irrational;
- 5.) While the precise nature of the error is not apparent, the outcome “bespeaks error”, because it is “unreasonable, plainly unjust”, or lacks an evident and intelligible justification.

Conclusion.

In conclusion, it appears that the plurality have significantly expanded the ways in which a discretionary decision may be challenged on the grounds of “unreasonableness”, and arguably expanded the bases upon which administrative fact-finding can be impugned at the same time.

While the decision may trouble the purists, it is consistent with the direction which the Court is heading in judicial review, which is to maximise the flexibility which courts have to police the boundaries of decision-makers’ powers in a manner adapted to each case.

As the High Court said in *Kirk*²², “[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error”.

For those of you charged with identifying reviewable error, take that as your challenge to go out there and contribute, through your advocacy, to the development of the concept of “legal unreasonableness” which *Li* promises.

²² *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, at [71].