

[Print Page](#)[Close Window](#)

## Australian Administrative Law

A PAPER PRESENTED BY JUSTICE PETER McCLELLAN  
CHIEF JUDGE AT COMMON LAW  
SUPREME COURT OF NEW SOUTH WALES

TO THE INTERNATIONAL SYMPOSIUM  
HANGZHOU, PEOPLE'S REPUBLIC OF CHINA

31 OCTOBER TO 4 NOVEMBER 2006

Australian Administrative Law

### [INTRODUCTION](#)

#### [THE DISTINCTION BETWEEN JUDICIAL REVIEW AND MERITS REVIEW](#)

Merits Review Defined

Who Can Review the Merits of Administrative Decisions?

The AAT and the ADT

The NSW Land and Environment Court

Judicial Review Defined

Who Can Review the Legality of Administrative Decisions?

Judicial Review at a State Level

Judicial Review at a Federal Level

### [GROUNDS OF JUDICIAL REVIEW](#)

Jurisdictional Facts

Other Reviewable Errors of Fact

Procedural Error

Bad Faith and Improper Purposes

Failure to Exercise a Discretion and the Role of Policy

Procedural Fairness

Impartiality

The Right to be Heard

Wednesbury Unreasonableness

The Meaning of Wednesbury Unreasonableness

Wednesbury Unreasonableness: The Border Between Legality and Merits

Types of Wednesbury Unreasonableness

The Duty to Inquire

### [JUDICIAL REVIEW ON THE MERITS? – THE DIVERGENCE OF AUSTRALIAN AND ENGLISH JUDICIAL REVIEW](#)

Merits Review as a Constraint on the Scope of Judicial Review

Proportionality as an Independent Ground of Review

What is Proportionality?

The Position in England

The Position in Australia

Future Directions for Proportionality in Australia, England and China

Substantive Legitimate Expectations?

### [THE INTERACTION BETWEEN AUSTRALIA'S INTERNATIONAL TRADE OBLIGATIONS AND AUSTRALIAN DOMESTIC LAW](#)

Domestic Operation of International Treaties

Challenging Decisions that Conflict with Australia's International Obligations

The WTO's Dispute Settlement Body

Domestic Implementation of Australia's WTO Obligations

## CONCLUSION

### **INTRODUCTION**

China and Australia have had radically different histories, which have resulted in different forms of government. Australia, as a federal nation-state, is less than 120 years old. It has drawn heavily on the experiences of other nations – particularly England and the United States – in shaping its constitutional structure and legal system. Both the underlying philosophical basis of many aspects of the law and the practical response of law-makers often have origins in other countries.

The Chief Justice of the Australian High Court, the Honourable AM Gleeson, recently quoted from an article written by the present Chief Justice of Canada in 1998 where he exposed an underlying philosophy of administrative law. The Chief Justice said:

“Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*. Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unacceptable. But these standards do not just stand as abstract rules. Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their *right*, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law.” [1] (Emphasis in original).

No matter how fair and efficient a bureaucracy is, it will always require supervision. Abuses of power can never be entirely eliminated. Legitimate differences of opinion are bound to arise between honest bureaucrats and honest citizens. Moreover, the mere possibility of review helps ensure that first-instance decisions are considered and rational.

Judicial review of administrative decisions is regarded as an “option of last resort.”[2] Resort to the law should only be necessary when the administrative decision-making process has failed in some way. The potential for failure must be recognised and addressed. Appropriate legislation can reduce the potential for broad discretions to be abused by either not conferring such discretions, or by laying down directions as to the manner in which a discretion is to be exercised. Similarly, dissemination of the law so that both administrators and the public have effective knowledge of it can decrease much of the friction and frustration that can be involved in dealing with seemingly opaque bureaucracies. Changes in the culture of administrative departments can sometimes be as effective – if not more so – than changes in law at bringing about better and fairer decision-making. Where an administrative system is working effectively and efficiently, administrative law operates at the margins and need only be resorted to in hard or extreme cases.

In a paper presented at the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication held in Xian earlier this year, Justice Beazley of the New South Wales Court of Appeal noted that in Australia judicial review is just one of a suite of ways through which an administrative decision can be challenged. Some of the other mechanisms include:

- “internal administrative review by superior officers;
- external administrative review by tribunals;
- external scrutiny and recommendations by Ombudsmen and Parliamentary Commissioners;
- access to information under Freedom of Information legislation or statutory requirements for the provision of documents;
- protection of information under privacy legislation;
- statutory rights to reasons by Tribunals and Courts; and
- protection against breaches of human rights or discriminatory conduct by human rights and anti-discrimination legislation.” [3]

Most of these mechanisms were only introduced through legislation in Australia from the 1970s. They are in part a product of the perceived inadequacies of common law judicial review and they reflect a suspicion of government that had become more prevalent since the decline of consensus politics in the 1960s. They were designed to improve the quality of administrative decision-making by providing

effective accountability mechanisms that reached beyond the remedies available at common law.

## THE DISTINCTION BETWEEN JUDICIAL REVIEW AND MERITS REVIEW

There are two fundamental elements in Australian administrative law - judicial review and merits review. [4] Judicial review is concerned with the *legality* of administrative decisions, and is the sole province of the courts. Merits review is concerned with the substance of a decision and is carried out by various review bodies. The distinction between judicial review and merits review is the consequence of the doctrine of the separation of powers, which is enforced more strictly in Australia than in most other common law jurisdictions. [5] The doctrine of the separation of powers is entrenched within the federal Constitution, which vests the judicial power of the Commonwealth solely within the courts, the legislative power of the Commonwealth solely in the Federal Parliament, and the executive power of the Commonwealth in the head of state (who acts on the advice of the executive government).

### Merits Review Defined

Review on the merits is concerned with whether a legally sound decision was the “correct and preferable” one. [6] Merits review is the sole responsibility of the executive, because the person or tribunal conducting the review “stands in the shoes” of the original administrative decision-maker. Administrative tribunals are not bound by strict rules of evidence and seek to provide a less formal atmosphere than the courts. If the reviewing body would have made a different decision, then that decision will be substituted for the original decision.

### Who Can Review the Merits of Administrative Decisions?

Merits review is usually performed by tribunals set up explicitly for that purpose. The Federal tribunal is known as the Administrative Appeals Tribunal (the AAT) and its equivalent in NSW is the Administrative Decisions Tribunal (the ADT). Victoria also has an administrative tribunal, known as the Victorian Civil and Administrative Tribunal (VCAT).

### The AAT and the ADT

The following passage from the AAT’s website gives a broad outline of the Tribunal’s jurisdiction and structure:

“The Tribunal does not have a general power to review any decision made under Commonwealth legislation. The Tribunal can only review a decision if an Act, regulation or other legislative instrument provides specifically that the decision is subject to review by the Tribunal. Jurisdiction is generally conferred by the enactment under which the original decision was made.

The Tribunal has jurisdiction to review decisions made under more than 400 separate Acts and legislative instruments. The Tribunal’s jurisdiction includes areas such as Commonwealth employees’ compensation, social security, taxation, veterans’ entitlements, bankruptcy, civil aviation, corporations law, customs, freedom of information, immigration and citizenship, industry assistance and security assessments undertaken by the Australian Security Intelligence Organisation.

...

The Tribunal consists of a President, presidential members (including Judges and Deputy Presidents), Senior Members and Members. The President must be a judge of the Federal Court of Australia. Some presidential members are judges of the Federal Court or Family Court of Australia. All Deputy Presidents must be lawyers. Senior Members may be lawyers or have special knowledge or skills relevant to the duties of a Senior Member.

Members have expertise in areas such as accountancy, actuarial work, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, social welfare, taxation and valuation.” [7]

The NSW ADT has a similar structure and purpose, but it is concerned with government decisions made at a state rather than a federal level. The expertise of non-judicial Members can be of

considerable value, particularly in technical areas where lawyers might not be the most appropriate decision-makers. Lawyers and judicial officers who sit on a tribunal are not performing a judicial role.

### ***The NSW Land and Environment Court***

The NSW Land and Environment Court is a unique body which performs both merits and judicial review. The Court consists of judges and Commissioners. However, the distinct role of each is maintained. Commissioners do not conduct judicial review. Commissioners are appointed on the basis of their specialised knowledge and expertise in areas relevant to the court's jurisdiction, such as town planning and environmental science.

### **Judicial Review Defined**

Judicial review has been described in the following terms: [8]

“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 error or injustice, so be it; but the court has no jurisdiction simply to cure administrative injustice or 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.”

The fundamental principle of judicial review is that “all power has its limits,” [9] and when administrative decision-makers act outside of those limits they may be restrained by the judiciary. Judicial review does not prevent wrong decisions, it instead prevents them from being made unjustly. It does not matter whether the judge who is reviewing the decision would him or herself have arrived at a different conclusion to the administrative decision-maker. The decision will only be interfered with if there was some illegality in the process by which it was made. The jurisdiction of the court is confined to quashing the decision and remitting the matter back to the original decision-maker for determination in accordance with the law. This may not always be satisfying – either for individual judges or for the party seeking relief – but it is often the unfairness in the making of a decision, rather than the decision itself, that causes people the greatest distress.

### **Who Can Review the Legality of Administrative Decisions?**

Judicial review of administrative decisions is performed solely by the courts. In NSW the Supreme Court's review jurisdiction arises from its inherent power as a superior court of record, whereas at a Federal level the power to review the legality of administrative decisions is conferred by statute and the Australian Constitution.

### ***Judicial Review at a State Level***

At common law, the prerogative writs are the instruments of judicial review. These writs, which of old were issued in the name of the monarch, were used by superior English courts to supervise the actions of justices of the peace, who were entrusted with many governmental functions. The prerogative writs – the writs of certiorari, mandamus and prohibition – “were notorious for their complexity,” [10] and have been simplified to some extent by legislation. These writs allow the courts to quash a decision, to compel the performance of a duty or to forbid a specified act or omission. Injunctions and declarations may also be sought in judicial review applications. Judicial review in the Supreme Court of NSW is still carried out via prerogative writs, injunctions and declarations.

### ***Judicial Review at a Federal Level***

At a federal level in Australia judicial review is usually carried out under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act). Although the ADJR Act preserves the *grounds* of common law judicial review, “both the procedure and the remedies available under the ADJR Act are far simpler than at common law.” [11]

In addition to codifying the common law grounds of review, the ADJR Act ensures that reasons can be obtained for almost any decision to which the Act applies (s 13). There is no equivalent common law duty for administrators to provide reasons for their decisions. With few exceptions, the grounds of review under the ADJR Act and the common law are the same.

The grounds of judicial review provided in s 5 of the ADJR Act include:

- a breach of the rules of natural justice;

- a failure to observe the procedures that were required by law to be observed in connection with the making of the decision;
- the person who purported to make the decision did not have jurisdiction to make the decision;
- the decision was not authorized by the enactment in pursuance of which it was purported to be made;
- the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made. An exercise of power may be improper if the relevant conduct involves:
  - taking an irrelevant consideration into account in the exercise of a power;
  - failing to take a relevant consideration into account in the exercise of a power;
  - an exercise of a power for a purpose other than a purpose for which the power is conferred;
  - an exercise of a discretionary power in bad faith;
  - an exercise of a personal discretionary power at the direction or behest of another person;
  - an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
  - an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
  - an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
  - any other exercise of a power in a way that constitutes abuse of the power;
- an error of law;
- the decision was induced or affected by fraud;
- there was no evidence or other material to justify the making of the decision, but only if:
  - the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or
  - the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist;
- the decision was otherwise contrary to law.

## GROUNDS OF JUDICIAL REVIEW

The contents of the many grounds of judicial review require separate consideration. However, before looking at them it is necessary to first consider errors going to the jurisdiction of the decision-maker. I will then consider the other grounds before looking in greater depth at procedural fairness and *Wednesbury* unreasonableness.

### Jurisdictional Facts

As a general rule, errors of fact made by the primary decision-maker cannot be corrected by a court. They are accepted as errors within the jurisdiction of the administrative decision-maker, and as such he or she is entitled to make them. Factual issues are typically issues that go to the merits of a decision, not to its legality. Jurisdictional facts are different. Whether or not a decision-maker does or does not have jurisdiction to make a decision is a question of law and open to judicial review. In this context, Gleeson CJ, Gummow, Kirby and Hayne JJ have defined a jurisdictional fact as a criterion the "satisfaction of which enlivens the power of the decision-maker to exercise a discretion." [12]

Since a jurisdictional fact is a fact which must exist objectively in order for it to enliven jurisdiction, a court carrying out judicial review may have regard to evidence that was not before the initial decision-maker when deciding upon the existence of a jurisdictional fact. This inquiry resembles merits review, but it is not a review on the merits. Rather it is an inquiry directed to determining whether the decision-maker had the legal power to exercise the discretion at all.

A guide for the identification of jurisdictional facts was provided by Spigelman CJ in *Timbarra*:

"The issue of jurisdictional fact turns, and turns only, on the proper

construction of the statute: see, eg, *Ex parte Redgrave; Re Bennett* (1946) 46 SR (NSW) 122 at 125; 63 WN (NSW) 31 at 33. The parliament can make any fact a jurisdictional fact, in the relevant sense: that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality): *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 72 ALJR 841 at 859-861; 153 ALR 490 at 515-517.

...

Any statutory formulation which contains a factual reference must be construed so as to determine the meaning of the words chosen by parliament, having regard to the context of that statutory formulation and the purpose or object underlying the legislation...

Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts." [13]

*Timbarra* involved a decision to grant development consent to an extension to a mine. If the development was "likely to significantly affect" a threatened species, a Species Impact Statement was required before consent could be granted. The court held that the question of whether a development was "likely to significantly affect" a threatened species was a jurisdictional fact. If an applicant could satisfy the court that a development is likely to have a significant effect on a threatened species, any consent granted in respect of an application that is not accompanied by a Species Impact Statement would be invalid. The provision of the Species Impact Statement, in such circumstances, was a necessary prerequisite to the exercise of the jurisdiction to grant consent.

#### **Other Reviewable Errors of Fact**

Jurisdictional facts are not the only errors of fact that may be subject to judicial review. It is an error of law to make a finding of fact that is not supported by any evidence, [14] or to make a finding inconsistent with the facts when the facts will only admit of one conclusion. [15] Any decision based on such errors will be reviewable by the courts.

#### **Procedural Error**

A procedural error is an administrative failure to meet all the procedural requirements laid down by a statute that condition the exercise of a discretion. A procedural error may or may not be an error of law, depending on the statutory context. Having found an error the Court considers whether, having regard to the terms of the legislation, the Parliament intended that the particular error would result in the invalidity of the decision: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

The decision in *Project Blue Sky* emphasises the primacy of the terms of the statute in question. The importance of statutory context and the need to consider the practical consequences that would flow if the court were to decide that breach of the requirement in question should result in invalidity were also emphasised. The majority said: [16]

"An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is to be ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue."

#### **Bad Faith and Improper Purposes**

The law imposes a duty upon administrators to make their decisions in good faith and for proper

purposes. A public body exercising statutory powers “must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first.” [17] *Thompson v Randwick Municipal Council* (1950) 81 CLR 87 involved a challenge to a council’s decision to resume land. Ostensibly, the purpose was to improve and embellish the area by constructing a new road and pathway. However, the council decided to resume more land than was necessary, adopting the report of an engineer that pointed out that by doing so the council could subdivide the land and sell it to offset the expenses of building the road and pathway. The Court resolved the question in the following manner: [18]

“In our opinion...the *Local Government Act* does not authorize the defendant Council to implement the scheme approved at the meeting of 20th January 1948. If it does, we are of opinion that the Council, in attempting to resume more land than is required to construct the road, is not acting in good faith. By that we do not mean that the Council is acting dishonestly. All that we mean is that the Council is not exercising its powers for the purpose for which they were granted but for what is in law an ulterior purpose. It is not necessary that this ulterior purpose should be the sole purpose...[T]he evidence establishes that one purpose at least of the Council in attempting to acquire the land not required to construct the new road is to appropriate the betterments arising from its construction...But in our opinion it is still an abuse of the Council’s powers if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its re-sale.”

It may be harder to prove bad faith than it is to show that a decision was made for improper purposes. Current authority suggests that dishonesty is a necessary element of bad faith. This concept has emerged from many cases involving decisions with respect to migrants and refugees. One commonly quoted definition of bad faith is the “lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker.” [19] Examples include “a decision-maker exercising a power for an improper purpose where the lack of proper purpose is deliberate or where the decision-maker deliberately makes no attempt to conform to the statutory duty.” [20]

Review for bad faith or improper purposes is not concerned with the merits of the decision, and is all about how it was made. Indeed, if bad faith or an improper purpose is shown, it does not matter if the decision that is actually made is the best possible decision that could have been arrived at in the absence of bad faith or an improper purpose.

#### **Failure to Exercise a Discretion and the Role of Policy**

Another error of law that may be a ground for judicial review is the failure to exercise a discretion. Justice Preston notes the types of cases where this can arise:

“A decision-maker must not delegate the exercise of discretionary power or performance of duty to another decision-maker unless there is express or implied power to delegate. A decision-maker must not allow another decision-maker to dictate how the discretionary power should be exercised. Finally, the decision-maker must not fetter the future exercise of the discretionary power by inflexibility [sic] applying a rule or policy without regard to the individual merits of the case or by entering a binding undertaking.” [21]

Flexibility in the application of government or ministerial policy is an important aspect of the proper exercise of a discretion. The first question, of course, will always be whether the policy is a consideration that is relevant to the decision being made. If the policy is irrelevant, the decision will be reviewable on this ground if the decision-maker takes it into account. Usually, though, “an administrative officer charged with the exercise of discretionary powers will be entitled, in the absence of specifically defined criteria or considerations, to take into account governmental policy.” [22] Indeed, the adoption of a policy can and often does lead to better decision-making by reducing inconsistency. It has been observed that:

“Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which otherwise might appear in a series

of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.” [23]

Nevertheless, a policy should not be applied as if it were a rigid rule. Where a decision-maker has a discretion, a mechanistic application of policy constitutes a failure to exercise that discretion. This does not mean that occasionally a decision-maker must decide not to apply the policy for appearance's sake. All it means is that a decision-maker must consider each case as it comes, and must be willing, if appropriate, to depart from the policy if the circumstances of an individual case warrant it. This does not dictate any specific outcome or spread of outcomes in substantive terms. “There can be no challenge to a decision merely because a decision was made in accordance with a policy. To ensure consistency of administrative decision-making, it will often be appropriate for a policy to be issued containing guidelines...However, a decision-maker must take care to ensure that he does not slavishly follow a policy and disregard the particular circumstances of a case.” [24]

### **Procedural Fairness**

A denial of procedural fairness (formerly known as a denial of natural justice) is an error of law that will justify judicial interference with an administrative decision. Justice Beazley has pointed out that “procedural fairness traditionally involves two elements; namely, the right to be heard and impartiality.” [25] It is convenient to deal first with the issue of impartiality.

### **Impartiality**

The importance of an independent judiciary in ensuring the impartiality of administrative decisions cannot be overstated. Indeed, the effectiveness of judicial review – which is concerned with ensuring the legality of government action – depends upon the capacity of the judiciary to express opinions that might not always accord with the practices, policies and interests of government. That is not to say that administrators and reviewing authorities must necessarily be entirely separate for review to be effective. In the French system, for instance, the effectiveness of review is said to be a result of the *close connection* between first-instance decision-makers and the reviewing authority. A former President of the Conseil d'Etat has said:

“If administrative judges were isolated from the active administration, if they ceased to be in constant contact with the needs and constraints of administrative life, they would lose their specific character. Instead of building a law adapted to the necessities of the public service, they would be inspired by fossilized law bearing no relationship to the realities of the active administration. Administrative judges must have an administrative training, and they have to sustain it to retain an understanding of administrative life.” [26]

The rationale underlying the various administrative tribunals that perform merits review in Australia is similar. However, initial decisions and decisions on review (be it merits review or judicial review) must be made by an impartial decision-maker if they are to be accepted as legitimate. If they are not, it will not be possible to inspire public confidence in either the decision-making process or the review procedures.

Justice Beazley notes that:

“Two types of bias are recognised for the purposes of the law, including judicial review. There is actual bias, where the judge or other decision-maker is directly biased against a particular individual. There is also apprehended bias, where, because of a decision-maker's personal associations, or interests, or the manner in which the decision-making process is carried out, it may appear to an objective observer that the affected person will not be given a fair hearing or a decision will not be made objectively or fairly.” [27]

A well-known example of apprehended (as opposed to actual) bias occurred in the Pinochet case (*R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119), where the House of Lords set aside one of its own decisions because a judge sitting on the impugned case (Lord Hoffman) had ties to Amnesty International, an organisation renowned for its stance against brutal dictators. A more mundane example occurs when, for instance, a party comes before the court with whom the presiding judge shares regular games of golf. A professional judge would almost certainly be able to decide such a case impartially, but that may not be the point. To the objective observer, the fairness of the trial may be compromised. It is an axiom of the common law that justice must not only be done, it must also be



seen to be done (see eg *SZDCJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 212 ALR 581; *Brakenreg v Comcare Australia* (1995) 56 FCR 335).

### **The Right to be Heard**

Unless excluded by legislation, a right to be heard exists where an administrator proposes to make a decision that will deprive a person of a right or interest, or, in some cases, a legitimate expectation of a benefit. The right is the common law right to be afforded procedural fairness and will only be displaced by a clear manifestation in a statute of a contrary intention. [28] The content of the common law duty to act fairly differs depending on the context in which it arises. "Fairness is not an abstract concept. It is essentially practical." [29] What is required might extend to:

- giving a person notice of the intention to make a particular decision that affects them;
- giving a person access to communications between the decision-maker and a third party where the communications relate to a decision that affects them;
- the disclosure of the material to be relied upon by the decision-maker;
- a reasonable opportunity to make submissions;
- a reasonable opportunity to appear before the decision-maker;
- an extension of time to make submissions or gather evidence;
- giving a person notice of the time, place and date when a decision is to be made;
- giving a person notice of the subject matter of a decision. [30]

Ultimately, "the concern of the law is to avoid practical injustice." [31]

The existence of a right to be heard is uncontroversial where the interest that gives rise to the right is a legal right or interest. For instance, if a decision-maker proposes to compulsorily acquire a house to which someone holds the legal title, in the absence of a statutory intention to the contrary there may be no difficulty in implying a common law duty for the decision-maker to consult with the legal owner before a final decision is made to compulsorily acquire the property. The position is different where the relevant interest is a legitimate expectation. To use the same example: when, if ever, should the law require a decision-maker to consult with a person before deciding to compulsorily acquire a house in which that person has no equitable or legal interest?

The concept of a "legitimate expectation" was first introduced into the common law of England by Lord Denning in 1969 [32] and has proved to be problematic ever since. In 1977 Barwick CJ said:

"I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than a meaning which expresses the concept of entitlement or recognition by law. So understood, the expression ['legitimate expectation'] probably adds little, if anything, to the concept of a right." [33]

Elsewhere it has been said that there is no need to resort to the doctrine of legitimate expectations at all if it is accepted that the rules of procedural fairness presumptively apply to all administrative decisions, because fairness (rather than any notion of pre-existing entitlement) then becomes the criterion that dictates what is required in the circumstances. [34] Nevertheless, the doctrine of legitimate expectations has gained a foothold in Australian law, and when rights and interests that fall short of strict legal rights or interests have been held to give rise to a duty to accord procedural fairness such rights and interests have been called "legitimate expectations." Examples of actions that can give rise to legitimate expectations include "undertakings and representations; policy statements and rules; regular practice; satisfaction of statutory preconditions to the exercise of discretion; and the effect of a decision upon a person." [35]

The High Court decision in *Teoh* added the ratification by the Australian government of an international treaty to the list of sources from which a legitimate expectation could arise. That case involved a decision to deport a non-citizen who had been convicted of a drug offence. He had married an Australian citizen and had three Australian children. It was held that the decision-maker failed to give adequate consideration to the interests of the children when deciding to deny the non-citizen's application for permanent resident status. This was contrary to Australia's obligations under the *Convention of the Rights on the Child*. It was held that the rules of procedural fairness required the decision-maker to give notice to the affected person before departing from Australia's obligations under the treaty.

The decision in *Teoh* was criticised by a majority of the High Court in *Lam*, [36] leading to doubts about “whether ratification should ever be treated as giving rise to a legitimate expectation.” [37] Nevertheless, *Teoh* was not explicitly overruled and advocates continue to rely on it.

In *Distilled Spirits Industry Council of Australia v Food Standards Australia New Zealand* (2003) 133 FCR 19 (which was decided some months after *Lam*), the applicants sought to rely (at 37) on Australia’s WTO obligations as the basis of a legitimate expectation that they had a right to be heard before Food Standards Australia New Zealand departed from the provisions of the relevant international agreements. Since Madgwick J decided (at 47-48) that in any event the applicants had in fact been accorded procedural fairness, it was unnecessary for his Honour to consider whether Australia’s WTO obligations could be the source of a legitimate expectation.

As far as I am aware, no other case has dealt with this issue. If and when such a case arises, there will be a real question as to whether or not the decision in *Teoh* (if it is still good law) should be confined to cases where the treaty relied upon relates to fundamental human rights, such as the *Convention on the Rights of the Child* which was the treaty under consideration in *Teoh* itself. This idea was raised by Callinan J in *Sanders v Snell* (1998) 196 CLR 329 at 351 and considered by McHugh and Gummow JJ in *Lam* at 32. GATT and other WTO conventions are unlikely to fall within the category of treaties relating to fundamental human rights. Even if – as is likely given the current state of opinion in the High Court – ratification of a treaty, of itself, cannot give rise to a legitimate expectation, it is at least arguable that Australia’s treaty obligations may nevertheless be a relevant consideration for administrative decision-makers. This is particularly so in the area of international trade law, where the decided cases often reveal that Australia’s WTO obligations were in fact taken into account by administrative decision-makers. [38] This issue is considered in more detail later in this paper.

### **Wednesbury Unreasonableness**

*Wednesbury* unreasonableness is the ground of judicial review where the distinction between merits and legality is most obviously blurred, and as such it has been described as “a constant source of judicial torment.” [39]

### **The Meaning of Wednesbury Unreasonableness**

*Wednesbury* itself was a case involving a decision to deny access to a movie theatre to youngsters on a Sunday, presumably to preserve their moral health. In refusing to interfere with the decision, Lord Greene MR noted that there was considerable overlap between many of the grounds of review that fell within the rubric of “unreasonableness.” In words which have been repeated by countless judges on many occasions his Lordship said:

“It is true that the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably.’ Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the power of the authority. Warrington LJ in *Short v Poole Corporation* [1926] Ch 66 at 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it may be described as being done in bad faith; and, in fact, all these things run into one another.” [40]

This ground came to be known as *Wednesbury* unreasonableness. It is important to emphasise Lord Greene’s words “something so absurd that no sensible person could ever dream that it lay within the power of the authority.” He added further: [41]

“It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; *but to prove a case of that kind would require something overwhelming...*” (emphasis added).

### **Wednesbury Unreasonableness: The Border Between Legality and Merits**

Courts have repeatedly emphasised that the “unreasonableness” ground “must not be allowed to open the gate to judicial review of the merits of a decision or action taken within power.” [42] The requirement of “something overwhelming” has by and large been taken seriously by judicial decision-makers, so that a decision cannot be interfered with unless it is so unreasonable that it is “obvious” that the decision-maker “is acting perversely,” [43] or it is so unreasonable that the decision is one “for which no logical basis can be discerned” [44] or one that “amount[s] to an abuse of power.” [45] In *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 Mason J said that a decision may fail the *Wednesbury* test if the decision-maker failed to give appropriate weight to a relevant consideration. [46]

In a later case, Gleeson CJ and McHugh J emphasised that the *Wednesbury* threshold is high one:

“Someone who disagrees strongly with someone else’s process of reasoning on an issue of fact may express such disagreement by describing the reasoning as ‘illogical’ or ‘unreasonable,’ or even ‘so unreasonable that no reasonable person could adopt it.’ If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.” [47]

### **Types of *Wednesbury* Unreasonableness**

Aside from cases where inappropriate weight has been given to a relevant consideration, Justice Beazley has listed the other types of cases where administrative decisions have been set aside for *Wednesbury* unreasonableness:

- Where a decision is devoid of plausible justification.
- Where a decision-maker has made an erroneous finding of fact on a point that is fundamentally important in the case.
- Where the decision-maker has failed to have regard to departmental policy or representation.
- When the effect of the decision is unnecessarily harsh.
- When the decision-maker has failed to give genuine, proper or realistic consideration to a matter.
- Where there are demonstrable inconsistencies with other decisions.
- Where there is discrimination without a rational distinction. [48]

These cases could be divided into three broader categories, namely where *Wednesbury* unreasonableness has been inferred on the basis of “irrationality,” “discrimination” or “disproportionality.” [49] An example of the first category is *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381, where a fisheries management plan was declared invalid for unreasonableness because it contained a statistical fallacy. An example of “discrimination” based unreasonableness is *Parramatta City Council v Pestell* (1972) 128 CLR 305, where it was held that it was unreasonable to impose a “betterment rate” on industrial buildings but not on cottages, even though the value of both would increase as a result of the works in respect of which the rate was imposed. In relation to the third category, Spigelman CJ has noted that “it can be accepted that a complete lack of proportion between the consequences of a decision and the conduct upon which it operates may manifest unreasonableness in [the *Wednesbury*] sense.” [50]

### **The Duty to Inquire**

Justice Beazley notes that “another example of *Wednesbury* unreasonableness is where a decision-maker has not attempted to obtain information relevant to the matter when it is obvious that there is material readily available which is centrally relevant to the decision to be made.” [51] The principle was defined by Wilcox J in the following terms:

“power is exercised in an improper manner if the decision-maker makes his decision – which perhaps in itself, reasonably reflects the material before him – in a manner so devoid of any plausible justification that no reasonable person could have taken this course, for example by unreasonably failing to ascertain relevant facts which he knew to be readily available to him...[I]n a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable

that no reasonable person could have so exercised it.” [52]

It may be that the administrative decision in that case could have been categorised as one made in bad faith, but as Lord Greene MR noted in *Wednesbury* the grounds of judicial review quite often overlap.

## **JUDICIAL REVIEW ON THE MERITS? – THE DIVERGENCE OF AUSTRALIAN AND ENGLISH JUDICIAL REVIEW**

### **Merits Review as a Constraint on the Scope of Judicial Review**

Under s 123 of the *Administrative Decisions Tribunal Act 1997* the Supreme Court of NSW may refuse to hear an application for judicial review of a decision if the court is satisfied that adequate provision is made under the Act for the applicant to seek merits review in the ADT. This is an indication of the concern to confine judicial review in Australia within narrow limits. Many cases where the original decision may be questionable on its merits (and hence more likely to entice a judge to push the boundaries of judicial review in search of a “better” result) are dealt with on the merits by a tribunal rather than reviewed for legal error by the courts.

Apart from its role in making individual primary decisions, merits review makes a contribution to the development of effective administrative decision-making on a systemic level. On another occasion, I said:

“...Apart from the role which administrative review can play in ameliorating individual disputes within the community it has an equally valuable role in providing a body of informed decisions accompanied by considered reasons which can not only inform future decisions of that tribunal but also the decisions of primary decision-makers. Unless the opportunity is taken by the tribunal to state its reasons by reference to a body of evolving principles a significant opportunity is lost; diminishing the legitimacy of the review process and reducing the quality of those future primary decisions. And if the merit review process is not effective the pressure for judges to use the tools of judicial review increases.” [53]

In recent years, Australian and English judicial review have moved in different directions. While Australian jurisdictions have maintained a strict distinction between the legality of a decision and its merits, English courts are becoming increasingly willing to consider the substance of a decision. This is due in part to the significant influence that European jurisprudence now has over English domestic law following the enactment of the *Human Rights Act*, but it is also likely to be due to the lack of an effective system of merits review in England. [54]

### **Proportionality as an Independent Ground of Review**

#### ***What is Proportionality?***

The concept of proportionality has its origins in the civil law of continental Europe. It asks whether:

- "(i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective are rationally connected to it;
- and
- (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective." [55]

#### ***The Position in England***

Proportionality was first adopted in England as an independent ground of judicial review in *R v Home Secretary; Ex parte Daly* [2001] 2 AC 532. It was accepted in that case that while there was considerable overlap between proportionality and the traditional grounds of judicial review (especially *Wednesbury* unreasonableness), the test of proportionality led to a “greater intensity of review” than the traditional grounds. What this means in practice is that considerations of the substantive merits of a decision play a much greater role.

There are three significant differences between proportionality and the traditional grounds of review that may lead to different outcomes in some cases:

“First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly...the intensity of the review...is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.” [56]

The adoption in England of proportionality as an independent ground of review, and the shift towards examining the merits that this involves, represents a significant departure from the strict observance of the distinction between legality and merits that still prevails in Australia.

### ***The Position in Australia***

Proportionality has been accepted by the High Court of Australia as a test of constitutional validity in relation to certain heads of power. [57] However, it has not been endorsed as an independent test for the validity of subordinate legislation. [58] The role of proportionality in the context of judicial review of administrative decisions in NSW was explained by Spigelman CJ in the following terms: [59]

“It can be accepted that a complete lack of proportion between the consequences of a decision and the conduct upon which it operates may manifest unreasonableness in [the *Wednesbury*] sense. However, the plaintiff also invoked “proportionality” as a new and separate ground of review.

...

Proportionality has not been adopted as a separate ground for review in the context of judicial review of administrative action, notwithstanding a considerable body of advocacy that it be adopted.

The concept of proportionality is plainly more susceptible of permitting a court to trammel upon the merits of a decision than *Wednesbury* unreasonableness. This is not the occasion to take such a step in the development [of] administrative law, if it is to be taken at all.”

Chief Justice Spigelman has noted in an article published 6 years after this decision that proportionality still has not been recognised by Australian courts as a separate ground of review of administrative decisions, and that it is not likely to be so recognised. [60]

### ***Future Directions for Proportionality in Australia, England and China***

It may be that Australian law cannot move in a similar direction to English law, because of the Constitutionally-mandated strict application of the doctrine of the separation of powers. There may be other explanations for the reluctance of Australian courts to adopt the doctrine of proportionality. One reason may be the fact that Australia does not have an equivalent piece of legislation to the *Human Rights Act 1998* (UK), which enacts the European Convention on Human Rights into English domestic law. This is a real obstacle to the adoption of proportionality as a separate ground of review in Australia because:

“The notion that, to be lawful, a government decision must be proportionate has little meaning until you can answer the question: proportionate to what? The answer has to be some ascertainable standard or value. The common law, it is quite true, has for centuries possessed certain values, though apart from the sanctity of property they have tended to be reflections of larger societal values, like freedom of speech. But the bringing into [English] law of the written Convention rights scheduled to the *Human Rights Act* has given us for the first time textually fixed points of reference to which a test of proportionality can be geared.” [61]

In Australia, the only fixed point of reference in existing law by which the principle of proportionality can operate is the *Wednesbury* standard of unreasonableness. As Chief Justice Spigelman has written, “much of what, in the future, is likely to be expressed in English administrative law in terms of proportionality, will fall to be analysed in Australia under [the traditional grounds of judicial review]. The *Human Rights Act* will, in this regard, lead to a divergence of our common law traditions.” [62]

The divergence between English and Australian law, and the debate and commentary that has arisen from it, is relevant to the “standard of judicial review” in China. Article 54 of the Administrative Litigation Law of 1989 provides that

“After hearing a case, a people’s court shall make the following judgments according to the varying conditions:

(1) If the evidence of undertaking a specific administrative act is conclusive, the application of the law and regulations to the act is correct, and the legal procedure complied with, the specific administrative act shall be sustained by judgment.

(2) If a specific administrative act has been undertaken in one of the following circumstances, the act shall be annulled or partially annulled by judgment, or the defendant may be required by judgment to undertake a specific administrative act anew:

- (a) inadequacy of essential evidence;
- (b) erroneous application of the law or regulations;
- (c) violation of legal procedure;
- (d) exceeding authority; or
- (e) abuse of powers.

(3) If a defendant fails to perform or delays the performance of his statutory duty, a fixed time shall be set by judgment for his performance of duty.

(4) If an administrative sanction is obviously unfair, it may be amended by judgment.”

Article 5 states that in administrative cases the people’s courts shall examine the legality of administrative acts. There has been debate in China [63] about whether the grounds of review specified in Art 54 (specifically the grounds of “abuse of powers” and “obviously unfair” administrative sanction) are inconsistent with the standard of judicial review which is laid down by Art 5. There has been concern that the specific grounds just mentioned go to the merits of a decision rather than to its legality. It is arguable that there could be an equivalence between “obvious unfairness” and “manifest unreasonableness” in the *Wednesbury* sense. Moreover, an “abuse of power” has in the past been held to supply the “something overwhelming” that can make a decision fall foul of the *Wednesbury* test. If the problematic grounds of review contained in Art 54 were interpreted in this way, there may be no inconsistency between those grounds and the standard of review that is set by Art 5.

### **Substantive Legitimate Expectations?**

In Australia, a legitimate expectation is only capable of grounding a procedural right [64] e.g. by insisting the decision-maker apply the rules of procedural fairness. However, it has been held in England that in certain circumstances a legitimate expectation can be the basis for a substantive right leading to an order that the decision-maker exercise its discretion in a particular manner. [65]

The concept of a legitimate expectation has its origins outside of the common law. It is usually attributed to the European principle of “legal certainty” which “has for years been deployed to prevent governments from abandoning or amending policies at the expense of those who have depended upon them.” [66] Justice Kiefel identifies the origins of the concept in a more specific way, pointing to “the German principle, of protection of trust, [which] is applied to ensure that the administration achieves its objectives, whilst protecting the individual’s expectations as far as possible.” [67] In Australian law the protection has fallen short of conferring substantive rights, but this is no longer the case in England since the decision in *Coughlan*. [68] European jurisprudence made a significant contribution to the English Court of Appeal’s decision in that case. The Court drew upon the “common law of the European Union” in which full review for fairness was well established. There is no indication that

Australia will move in the same direction.

It may be that the problems posed by “legitimate expectations” will not emerge in the Chinese context. This is because under the Administrative Litigation Law standing to bring an action is only conferred in respect of rights of the person and of property. There does not appear to be scope for the recognition of a “quasi” right such as a legitimate expectation.

## **THE INTERACTION BETWEEN AUSTRALIA’S INTERNATIONAL TRADE OBLIGATIONS AND AUSTRALIAN DOMESTIC LAW**

### **Domestic Operation of International Treaties**

As a member of the WTO, Australia has entered various multilateral treaties that bind it at an international level. Although binding in the international sphere, these treaties have no effect domestically unless and until they are implemented by domestic legislation at either a state or federal level. This contrasts with countries such as the USA, where treaties can be self-executing, although “in US law, multilateral trade agreements such as the GATT have never been held to be self-executing, and leading scholars concur that the GATT is a non self-executing agreement.” [69]

### **Challenging Decisions that Conflict with Australia’s International Obligations**

When a foreign state, entity or individual is aggrieved by an administrative decision that has been made contrary to Australia’s WTO obligations, the first and most obvious place to challenge such a decision is in either a domestic tribunal or court, depending on whether the primary grievance concerns the decision itself or the process by which it was made. Surprisingly, Jeffrey Waincymer has suggested that Australia’s elaborate system of administrative law might on occasions work *against* the effective implementation of Australia’s WTO obligations. He states that:

“In Australia, customs laws are within the administrative law framework which includes substantial merits review, comprehensive judicial review and an ombudsman. The philosophy of this is to give government broad powers over trade, subject to certain standards of behaviour such as the right to natural justice. This philosophy, valuable in itself, may at times operate counter to one of the aims of GATT/WTO, namely, to constrain governments and encourage them to make only economically efficient policy choices. Administrative courts do not pursue this except indirectly in extreme cases of ultra vires or in cases where internal ambiguities are resolved by choosing the most purposive approach to interpretation.” [70]

Waincymer may or may not be correct, but he makes the valid point that regulatory overkill and multiple review mechanisms may lead to inefficiency. All countries must be mindful of this potential when implementing their WTO obligations.

### **The WTO’s Dispute Settlement Body**

An important element of the WTO is its Dispute Settlement Body. Australia has been very active in this body, which appears to be more effective than most other international dispute resolution mechanisms because it “actually has the ability to enforce members’ obligations and authorize the suspension of concessions in an effort to effectuate compliance.” [71] Gavin Goh highlighted the relevance of the WTO’s dispute resolution process at the level of domestic governance. He writes:

“More so than any other international legal regime, WTO rules have direct relevance to the day-to-day decisions of Australian governments – at Commonwealth, state, territory and local level – and cover not just traditional areas of customs and tariffs, but also industry development, agriculture, environmental protection, food safety, quarantine protection and intellectual property. Potentially any Australian government measure with an impact on international trade can be subject to WTO scrutiny.” [72]

### **Domestic Implementation of Australia’s WTO Obligations**

There has been a substantial volume of domestic legislation aimed at implementing Australia’s WTO obligations. In response to the Uruguay Round of GATT negotiations the Commonwealth enacted the following pieces of legislation:

- *Customs Tariff (World Trade Organization Amendments) Act 1994;*
- *Customs Tariff (Anti-Dumping) (World Trade Organization Amendments) Act 1994;*

- *Patents (World Trade Organization Amendments) Act 1994*;
- *Trademarks Act 1994*;
- *Dairy Produce (World Trade Organization Amendments) 1994*;
- *Sales Tax (World Trade Organization Amendments) 1994*;
- *Copyright (World Trade Organization Amendments) 1994*.

*Pilkington (Australia) Ltd v Minister for Justice and Customs* [2002] FCA 770 at [41] and *Inglewood Olive Processors Ltd v Chief Executive Officer of Customs* (2004) 214 ALR 289 at 299 are examples of cases where Australia's WTO obligations have been taken into account in the interpretation of the anti-dumping provisions of the *Customs Act 1901* (Cth). This is consistent with numerous judicial statements such as those of Gummow and Hayne JJ that: [73]

“a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is not in conflict with the established rules of international law.”

A similar principle arguably exists in relation to the common law. In the landmark case of *Mabo v Queensland (No 2)* (1992) 175 CLR 1, Brennan J (as he then was) noted that international law “is a legitimate and important influence on the development of the common law.” [74]

## CONCLUSION

Under its Protocol of accession to the WTO, China has committed itself to establishing or designating impartial and independent mechanisms for the prompt review of certain administrative actions. These mechanisms must include an opportunity to appeal, including an opportunity to appeal to a judicial body. It is apparent that one of the principles underlying these requirements is the Anglo-American concept of the separation of powers. Judicial review is a manifestation of this concept, and is an important aspect of the notion of the rule of law. In Australia, judicial review is fundamentally concerned with the legality of the decision-making process. The assumption is that decisions are more likely to be substantively correct and accepted by the community when they are made in accordance with the law. Unless there is a clear legislative intention to the contrary, people who may be adversely affected by a decision must be provided with the opportunity to be heard before that decision is made, even when the decision only infringes an inchoate “right” such as a legitimate expectation rather than a legal right or interest in the strict sense.

The distinction between judicial review and merits review is fundamental in Australian administrative law, even though under some grounds of judicial review the line between legality and merit is sometimes blurred. In this regard, Chief Justice Gleeson has stated that

“The difference is not always clear cut; but neither is the difference between night and day. Twilight does not invalidate the distinction between night and day and *Wednesbury* unreasonableness does not invalidate the difference between full merits review and judicial review of administrative action.” [75]

Sir Anthony Mason noted that, in contrast to recent English authority, “the strict approach to *Wednesbury* unreasonableness is as close as the Australian principles get to substantive fairness.” [76] Although *Wednesbury* unreasonableness is not a unifying concept in Australian administrative law, it at least marks the outer boundaries of judicial review. It marks the point – amorphous though it might be – beyond which the other grounds of review may not go.

## END NOTES

1. McLachlan, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law,” 12 *CJALP* 171 at 174, quoted in: A. M. Gleeson, “Outcome, Process and the Rule of Law,” Paper presented at the Administrative Appeals Tribunal 30th Anniversary, Canberra, 2 August 2005.
2. R. Douglas, *Douglas and Jones's Administrative Law*, 4th Ed, Federation Press, Sydney, 2002, p. 1.
3. M. J. Beazley, “The Scope of Judicial Review,” Paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006.
4. J. J. Spigelman, “The integrity branch of government” (2004) 78 *ALJ* 724 at 730.
5. J. J. Spigelman, “The integrity branch of government” (2004) 78 *ALJ* 724 at 731.
6. J. J. Spigelman, “The integrity branch of government” (2004) 78 *ALJ* 724 at 730.



7. See the AAT's website at <http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm>. Viewed 16 October 2006.
8. *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J.
9. M. Aronson, B. Dyer and M Groves, *Judicial Review of Administrative Action*, 3rd Ed, Law Book Co, 2004, p. 85; quoted in: B. J. Preston, "Judicial review of illegality and irrationality of administrative decisions in Australia," Paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006.
10. R. Douglas, *Douglas and Jones's Administrative Law*, 4th Ed, Federation Press, Sydney, 2002, p. 55.
11. R. Douglas, *Douglas and Jones's Administrative Law*, 4th Ed, Federation Press, Sydney, 2002, p. 57.
12. *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 148.
13. *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at 63-64.
14. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321
15. *Hope v Bathurst City Council* (1980) 144 CLR 1.
16. At 388-389.
17. *Westminster Corporation v London and North Western Railway Co* [1905] AC at 430
18. Williams, Webb and Kitto JJ at 105-106.
19. This was adopted by the Full Federal Court in *SCAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 397 at [19]:
20. M. Aronson, B. Dyer, and M. Groves, *Judicial Review of Administrative Action*, 3rd Ed, Lawbook Co, Sydney, 2004, pp. 292-293 (references omitted).
21. B. J. Preston, "Judicial review of illegality and irrationality of administrative decisions in Australia," Paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006.
22. *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 590 per Bowen CJ and Deane J.
23. Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640 per Brennan J.
24. See *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87 at 98.
25. M. J. Beazley, "The Scope of Judicial Review," Paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006.
26. Odent, *Contentieux administratif* (1981), pp 746-747, translated in Brown and Bell, *French Administrative Law*, 5th ed, 1998, p. 288: quoted by McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex Parte Lam* (2003) 214 CLR 1 at 24.
27. M. J. Beazley, "The Scope of Judicial Review," Paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006.
28. *Kioa v West* (1985) 159 CLR 550 at 584
29. *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex Parte Lam* (2003) 214 CLR 1 at 14 per Gleeson CJ.
30. I listed many of these matters in my judgment in *Hall v University of NSW* [2003] NSWSC 669 at [68].
31. *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex Parte Lam* (2003) 214 CLR 1 at 14 per Gleeson CJ.
32. *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.
33. *Salemi v McKellar [No 2]* (1977) 137 CLR 396 at 404.
34. *Teoh*, per McHugh J at 311-312; *Lam* per McHugh and Gummow JJ at 27.
35. M. Aronson, B. Dyer, and M. Groves, *Judicial Review of Administrative Action*, 3rd Ed, Lawbook Co, Sydney, 2004, p. 401.
36. *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex Parte Lam* (2003) 214 CLR 1
37. M. Aronson, B. Dyer, and M. Groves, *Judicial Review of Administrative Action*, 3rd Ed, Lawbook Co, Sydney, 2004, p. 402 (emphasis added).
38. See, eg, *Director of Animal and Plant Quarantine v Australian Port Ltd* (2005) 224 ALR 103 at 111; and *Inglewood Olive Processors Ltd v Chief Executive Officer of Customs* (2004) 214 ALR 289 at 290-291.
39. R. Panetta, "Wednesbury Unreasonableness: Judicial or Merits Review?" (2002) 9 *Australian Journal of Administrative Law* 191 at 191.
40. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.
41. At 230.
42. *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 42.
43. *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518.
44. *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 640.
45. *Attorney-General v Quin* (1990) 170 CLR 1 at 36.

46. At 40-41.
47. *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626.
48. M. J. Beazley, "The Scope of Judicial Review," Paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006.
49. R. Douglas, *Douglas and Jones's Administrative Law*, 4th Ed, Federation Press, Sydney, 2002, p. 564.
50. *Bruce v Cole* (1998) 45 NSWLR 163 at 185.
51. M. J. Beazley, "The Scope of Judicial Review," Paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006.
52. *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170.
53. P. McClellan, "The Executive and the judiciary: A potential for conflict" (2006) 80 *ALJ* 97 at 102.
54. A.M. Gleeson, "Outcome, Process and the Rule of Law," Paper presented at the Administrative Appeals Tribunal 30th Anniversary, Canberra, 2 August 2005.
55. *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80
56. See *R v Home Secretary; Ex parte Daly* [2001] 2 AC 532 per Lord Steyn, especially at 546-548.
57. See eg the *Tasmanian Dam case: Commonwealth v Tasmania* (1983) 158 CLR 1.
58. *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31.
59. *Bruce v Cole and Ors* (1998) 45 NSWLR 163 at 185 (references omitted).
60. J. J. Spigelman, "The integrity branch of government" (2004) 78 *ALJ* 724 at 734.
61. Lord Sedley, "The last ten years' development of English public law" (2004) 12 *Australian Journal of Administrative Law* 9 at 16.
62. J. J. Spigelman, "The integrity branch of government" (2004) 78 *ALJ* 724 at 734-735.
63. Zhu Xinli, *Report: Three Domestic Workshops under the TA on Enforcement of World Trade Organization Rules by the Judicial system*, June 2006, pp. 14-16.
64. *Quin* (1990) 170 CLR 1.
65. *R v North and East Devon Health Authority; Ex parte Coughlan* [2000] 2 WLR 622.
66. Lord Sedley, "The last 10 years' development of English public law" (2004) 12 *Australian Journal of Administrative Law* 9 at 19.
67. S. Kiefel, "English, European and Australian law: Convergence or divergence?" (2005) 79 *ALJ* 220 at 223.
68. *R v North and East Devon Health Authority; Ex parte Coughlan* [2000] 2 WLR 622.
69. M. Matsushita, T. J. Schoenbaum, and P. C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, OUP, Oxford, 2003, p. 101.
70. J. Waincymer, "Implementation of the WTO Agreement in Australia," in: J. H. Jackson and A. O. Sykes (eds), *Implementing the Uruguay Round*, Clarendon Press, Oxford, 1997, p. 288.
71. B. Mercurio, "The Australian Contribution to the Jurisprudence of the WTO Dispute Settlement Process" (2003) 12 *Currents International Trade Law Journal* 43 at 43.
72. G. Goh, "Australia's Participation in the WTO Dispute Settlement System" (2002) 30 *Federal Law Review* 203 at 203.
73. *Kartinyeri v The Commonwealth* (1998) 152 ALR 540 at 599.
74. At 42.
75. A.M. Gleeson, "Judicial Legitimacy," (2000) 20 *Australian Bar Review* 4 at 11.
76. A.Mason, "Australian Administrative Law Compared with Overseas Models of Administrative Law," Paper presented to the Australian Institute of Administrative Law, 2003.