

THE CODIFICATION OF *WEDNESBURY* UNREASONABLENESS – A RETARDATION OF THE COMMON LAW GROUND OF JUDICIAL REVIEW IN AUSTRALIA?

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In the 1960s and 1970s, the Federal Government enacted the *Administrative Decisions Judicial Review Act* ('ADJR Act') which codified most if not all of the common law grounds of judicial review under the prerogative writs system. The codification was welcomed at first as it provided a statutory alternative to applicants for judicial review which involved a much simpler application procedure. The benefits of the codification also lay in its simplicity and accessibility for administrators and courts alike.¹

However, it has been suggested that the codification of the grounds of review in the ADJR Act has retarded and arrested the development of the common law grounds of review.² In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*, Kirby J lamented the failure of Australian Courts to develop the common law in the same way and direction as it has been developed in England in more recent years. Consequently, it has been suggested that Australia has lagged behind other jurisdictions in the development of the common law grounds of judicial review.

This article will evaluate this point through the codification of the *Wednesbury* unreasonableness ground of review particularly in relation to its application in the ADJR Act. It will first outline Lord Greene's formulation of 'unreasonableness' and the various criticisms of that formulation. It will then discuss the current Australian position, including any development since the *Wednesbury* decision, in relation to this ground of review and the relative positions and developments in the UK, South Africa and Hong Kong. The article will conclude by an analysis of the consequences of Australia lagging behind.

1. Unreasonableness as a separate ground of review

The concept of unreasonableness as an independent ground of review was defined by Lord Greene in the UK Court of Appeal decision in *Associated Provincial Picture House v Wednesbury* [1948] 1 KB 223. Essentially, it subjects to review, decisions that are 'so unreasonable that no reasonable authority could ever have come to [them]'.³ This ground of review was envisaged by Lord Greene as a safety net, which operated to catch those decisions that were manifestly absurd but might escape review on the other more specific grounds.⁴ Alternatively, it has been suggested that the ground was to serve as an 'umbrella', under which to gather related themes and principles applying in judicial review, or as a 'springboard', from which to define new (or adapted) legal standards to guard against executive abuse.⁵

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1.1 Criticisms of the *Wednesbury* unreasonableness

The concept of *Wednesbury* unreasonableness as a ground of review raises concerns as to the extent to which both constitutional and practical limitations of judicial power are maintained. It has been suggested that the courts, when reviewing decisions under this ground, essentially look at the substance result of the decision rather than the process by which the decision is made. By holding that an actual decision reached by an administrative body is deficient on its face rather than considering the way in which the decision was made, the courts are arguably usurping the power of Parliament.

Moreover, the test has been criticized as not only complex and confusing but also incoherent and circular. Lord Cooke in *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd*⁶ ('ITF') regarded *Wednesbury* as a 'briefly considered' case which might not be decided the same way today and criticized Lord Greene's formulation of 'unreasonableness' as an unnecessary 'admonitory circumlocution' to judges. Consequently, the court adopted a simple test used (for unreasonableness) in *Secretary of State for Education and Science v Tameside Metropolitan Borough*⁷: 'whether the decision in question was one which a reasonable authority could reach'.

This attempt to simplify the *Wednesbury* test was mirrored in the South African decision *Bato Star Fishing (Pty) Ltd v Minister for the Environmental Affairs*⁸ ('*Bato Star*') where O'Regan J held that the reasonableness of a decision depended on the circumstances of each case. Subsequently, his Honour gave a non-exhaustive list of the relevant factors a court may take into account in determining the reasonableness of the decision in question. The list includes 'the nature of the decision, the identity and expertise of the decision-maker, the range of factor relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well being of those affected'.⁹

The *Wednesbury* test has also been criticised for its strictness. Although there is a high volume of cases that have raised and discussed this ground; there are few reported instances of a decision being declared invalid on the basis that it is *Wednesbury* unreasonable. Even where a decision is held to be invalid on this ground, it is usually invalid on other grounds too or the courts will have regard to whether the decision also conflicts with certain substantive principles which exist independent of statute, such as lack of a plausible justification¹⁰ and duty of inquiry¹¹. Consequently, Lord Cooke in *R (Daly) v Secretary of State for the Home Department*¹² has attacked the *Wednesbury* decision as 'unfortunate and retrogressive' due to the narrow scope of the *Wednesbury* test.

2. The development of the *Wednesbury* unreasonableness in Australia

The *Wednesbury* unreasonableness ground of review received statutory recognition through the enactment of s 5(2)(g) of the ADJR Act. Subsequently, while other jurisdictions have attempted to expand or simplify Lord Greene's formulation of unreasonableness, Australian courts have continued to adopt his Lordship's definition by reason of the statutory regime and subjected the ground to a much more limited application than Lord Greene has initially envisaged. In other words, codification has restricted the development of this ground of review in Australia when compared to other Commonwealth jurisdictions.

In *Minister for Immigration and Multi Cultural Affairs v Eshetu*¹³, the Full Federal Court precluded an applicant from seeking judicial review of a decision under the unreasonableness ground of review on the basis that the applicant merely disagreed with the decision-maker's reasoning. In doing so, the Court prescribed limited boundaries for unreasonableness, insisting that it be used only in the most extreme circumstances, such as where the evidence could only indicate one possible conclusion and not be supportive of any

other possible conclusions. The Court's decision was affirmed in *Minister for Immigration and Multi Cultural Affairs; Ex Parte Applicant S20/2002* where Gleeson J held that unreasonableness could not be used merely because there was a divergence of opinion.¹⁴

Thus, the application of *Wednesbury* unreasonableness in Australia is narrow and extremely confined¹⁵ with cases that meet the stringent standard of *Wednesbury* unreasonableness being rare.¹⁶

3. The development of the *Wednesbury* unreasonableness in other common law jurisdictions

Lord Greene's formulation of unreasonableness has not fallen in favour with the UK and the South African courts. Apart from the above-mentioned attempts by the UK and the South African courts to simplify the *Wednesbury* test, there have also been attempts to broaden the scope of the *Wednesbury* test and move away from the language of unreasonableness in an effort to provide greater clarity and consistency in reviewing administrative discretion.

In *ITF* and *Bato Star*, the courts defined unreasonableness in a simpler way, by holding that the reasonableness of a particular decision was to be considered in light of all its circumstances, including the nature of the decisions and the expertise of the decision-maker. This was acknowledged by Lord Cooke in *R (Daly)* in which he considered that the 'depth of the judicial review and the deference due to administrative discretion vary with the subject matter'. Consequently, a mere finding that a decision under review is not capricious or absurd would not necessarily exclude it from being unreasonable in all the circumstances.¹⁷

In Australia the narrow interpretation of the *Wednesbury* unreasonableness and its codification in the ADJR Act has meant that Australian courts must always defer to the decision-maker, save for where the decision is manifestly absurd, regardless of the nature of the subject matter or the qualification and experience of the decision-maker. In other words, a decision will be *Wednesbury* unreasonable only if it is manifestly absurd. Where a decision is not manifestly absurd, its reasonableness is to be determined independent of the subject matter of the decision and the expertise of the decision-maker.

3.1 Principle of proportionality

An attempt to broaden the *Wednesbury* test in other common law jurisdictions has been the introduction of a test of proportionality.¹⁸ The concept of proportionality originated in Europe¹⁹ and was introduced into the English law by Lord Diplock in *Council of Civil Services Unions v Minister for the Civil Service*²⁰. The principle essentially requires the means employed by the decision-maker to be 'no more than is reasonably necessary' to achieve his legitimate aims.²¹ That is, the means adopted by the decision-maker to achieve his legitimate objectives must not be excessive.

Consequently, when applying the principle in judicial review cases, courts are required to engage in a balancing process which involves the courts having regard to both the means adopted and the ends achieved by the decision-maker. This corresponds with O'Regan J's comments in *Bato Star* where his Honour has held that where a power identifies a goal to be achieved but is silent on the route to be followed, courts should pay due respect to the route selected by the decision-maker in determining the reasonableness of the decision.²²

The rationale of this 'broadening' of the *Wednesbury* test is to be found in the increasing influence of human rights in some jurisdictions. The proportionality test acknowledges the central role of the courts in ensuring that administrative discretion cannot be exercised in a way that undermines human rights. It highlights that in reviewing any administrative decision the courts will require the decision maker to accord due weight to human rights

considerations in balancing competing interests. Consequently, following the enactment of the *Human Rights Act 1998* in the UK and the introduction of the *Bill of Rights Ordinance 1990* and Basic Law in Hong Kong, proportionality has been firmly established as the test for cases where human rights are involved.

However, there remains the question of whether proportionality constitutes a ground of review for cases other than those involving human rights. Although at the moment, neither English courts nor Hong Kong courts have accepted this proposition; it is argued that given the support of the Human Rights Acts, it is only a matter of time until proportionality will be accepted in English administrative law.²³

Australia, on the other hand, only sees proportionality as a tool for determining if there has been unreasonableness in the *Wednesbury* sense. In *Prasad*, the court only held the decision to be *Wednesbury* unreasonable because the efforts put in by the decision-maker before making the decision were disproportionate to the grave impact of the decision subsequently made.²⁴ Moreover, the court qualified the application of the principle to strictly limited circumstances.²⁵

It has been suggested that the introduction of *Human Rights Act 2004* (ACT) and the Charter of Human Rights and Responsibilities Bill 2006 (Vic) may force the courts in the future to widen the *Wednesbury* test to incorporate proportionality as a ground of review in light of human rights considerations. However, the effect of the Bill and the Act upon judicial review at the federal level is questionable as both the Act and the Bill are introduced at Territory and State levels.

3.2 Sliding scale of intensity of scrutiny

Another attempt to widen the scope of the *Wednesbury* unreasonableness is the introduction of the sliding scale of intensity of scrutiny concept. This concept essentially recognizes a continuum of intensity of review that is dependent on the nature of the subject matter.²⁶ According to the concept, where the subject matter of an administrative decision impacts upon human rights, the more substantial its inference with human rights, the more intense courts will scrutinise that decision. In other words, more substantial justification is required before the courts can be satisfied that the decision is reasonable in the sense that it is not beyond the range of responses open to a reasonable decision-maker.²⁷

This corresponds with the suggestion that *Wednesbury* unreasonableness should operate as a 'springboard'²⁸ or a 'spring'. That is the more the exercise of public power presses down on the constitutional or fundamental rights, the more the laws' resistance increases, requiring cogent reasons for the limitation before giving way.²⁹

This concept of sliding scale was introduced into English law by Sir Thomas Bingham MR in *R v Ministry of Defence; exp Smith*³⁰. It was picked up by Law LJ in *R (Mahmood) v Secretary of State for the Home Department*³¹ and applied in the UK House of Lords' decision *A and Others v Secretary of State for the Home Department*³² where Lord Bingham of Cornhill held that to defer to the Attorney General's decision would be excessive in a case involving the indefinite detention of individuals, without charge or trial.³³

In Australia, there is no such varying degree of scrutiny by Australian courts with respect to the nature of the subject matter of the decision. Australian courts are required to defer to the decision-maker totally, save for where the decision is manifestly absurd, regardless of the nature of the subject matter or the qualification and experience of the decision-maker.

However, the sliding scale concept faces the same problem as the principle of proportionality in that it is uncertain if the concept applies to decisions outside the human rights context.

However, in two recent cases in Hong Kong the courts³⁴ have shown their willingness to accept the sliding scale of intensity of scrutiny outside the human rights context. The cases concerned a challenge to the decision of the Town Planning Board not to reduce the extent of a proposed reclamation of certain areas of the Harbour along the waterfront from Central to Causeway Bay to provide land for a Central-Wanchai Bypass and to ease traffic congestion in the Central District and to improve the existing waterfront by making it more pedestrian-friendly and easily accessible by the public, after hearing 770 objections to the original plan. The Court in these cases accepted the sliding scale of intensity of scrutiny as a valid approach to determine the standard of judicial review required.

The concept of a sliding scale can also be regarded as an attempt to reconcile the *Wednesbury* unreasonableness test and the principle of proportionality at least in the human rights context. The concept recognises that the degree of intensity could vary from the traditional *Wednesbury* test to the intermediate heightened degree of scrutiny to the more stringent test of proportionality.³⁵ However, under a sliding scale test, the *Wednesbury* test seems to have been accorded a looser application compared with that of the test of proportionality.

4. Consequences of Australia lagging behind

The narrow application of *Wednesbury* unreasonableness in Australia has resulted in Australian courts having to use other review grounds, such as legitimate expectation, to justify their decisions to review unreasonableness decisions rather than relying on the unreasonableness ground in the other common law jurisdictions.

In *Baker v Canada (Minister of Citizenship and Immigration)*³⁶, the Supreme Court of Canada held that the decision to deport the applicant by the Minister pursuant to the *Immigration Act RSC 1985* was unreasonable in light of the expertise of the decision maker, the nature of the decision being made and the language of the empowering provision and the surrounding legislation. L'Heureux-Dube J noted that in reviewing discretionary decisions, courts must give considerable deference to the decision makers' jurisdiction and the manner in which the discretion was exercised.³⁷ This was consistent with the approach adopted by O'Regan J in *Bato Star*.

In *Minister for Immigration and Ethnic Affairs v Teoh*³⁸ the Australian High Court resisted the opportunity to expand the *Wednesbury* unreasonableness test. The court looked to the ground of legitimate expectation to justify its decision to review the administrative panel's decision that the hardship of a deportation order on the applicant's wife and children did not outweigh the policy against serious criminal offending. The Court's decision in *Teoh* is controversial as it essentially forced a legitimate expectation onto the applicant. The court justified this imposition by finding that the act by the Executive government to ratify an international convention was a positive statement by the Executive to the world and to the Australian people that it would act in accordance with the convention, and the applicant need not to have been aware of that convention or have personally entertained the expectation.³⁹ Subsequent case, however, have criticised *Teoh* in this aspect, suggesting the decision in *Teoh* was highly artificial and the extent to which there could be an expectation where it was not actually held by an applicant being very limited.⁴⁰

Conclusion

Based on the recent developments in relation to the *Wednesbury* unreasonableness ground of review, it appears that the codification of the *Wednesbury* test in Australia has potentially restrained the development of this ground of review at common law, despite the fact that the codification was not intended to replace the common law system of prerogative writs in any way. This has resulted in the Australia courts having to look to other grounds of review to

incorporate its obligations under international treaties into the domestic law. This has led to somewhat strained reasoning in achieving similar results that may have been achieved by adopting a more flexible approach to the reasonableness standard currently adopted.

Consequently, in light of the development in other common law countries around the world, it may be time for Australia to move away from its narrow interpretation of the *Wednesbury* unreasonableness and embrace the trend to a broader approach. Perhaps the introduction at the State and Territory levels of *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Bill 2006* (Vic) may encourage the High Court in the future to widen its *Wednesbury* test to in light of human rights considerations.

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