REASONS, REASONABLENESS AND RATIONALITY

Chris Bleby SC*

In 1995, Professor Paul Finn was appointed a Justice of the Federal Court of Australia, South Australian Solicitor-General John Doyle QC was appointed Chief Justice of South Australia and the Hon Justice W M C Gummow of the Federal Court of Australia was appointed to the High Court of Australia. That year, the Law Book Company published a volume of essays that had emerged from a seminar held at the Australian National University in 1994. The essayists and participants in the seminar read as a who's who of eminence in the legal profession and judiciary of that time and of the two decades yet to come — including the three eminent jurists I have mentioned. The editor of the book, Paul Finn, described the essays that were produced as being concerned 'with principles and values which do — or should — inform both our law and our system of government'.[1] The book was entitled *Essays on Law and Government, Volume 1, Principles and Values*. It remains compelling reading for any student of public law.

Twenty years later we can look back at the constitutionalisation of Australian administrative law that was yet to develop, heralded with such force by the decision of the High Court in *Plaintiff S157/2002 v The Commonwealth*[2] and still taking such strides in 2010 in *Kirk v Industrial Court of New South Wales*[3] (*Kirk*). If we think back to 1995, what clues were there of such upheavals to come?

John Doyle, in his contribution to the volume, observed a change in approach by the High Court 'from one which emphasises its function as that of determining the balance between Commonwealth and State powers, to one which emphasises its function as determining the balance between governmental powers and individual rights'.[4] This observation was made in the context of the decision of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth (No 2)*[5] (*Australian Capital Television*), the herald of the then relatively newly conceived implied freedom of political communication. Doyle wrote:

> More recently, the protection of basic rights has taken a new form. Rights have been given a new emphasis in limiting the scope of the powers conferred on parliament by the Constitution. That development is significant because, by virtue of the role of judicial review in our system, parliamentary supremacy is subordinated to the rights protected in this way.
>
> It is probably no coincidence that this approach has been taken in judgments, some of which have emphasised that sovereign power resides in the people, and that in parliament their elected representatives 'exercise sovereign power on behalf of the Australian people'.[6]

From this, Doyle developed a thesis of common law rights, which built in the observation that parliamentary supremacy is itself a common law doctrine, and speculated on the prospect that such rights 'will be used more and more as a limit on government power' as an interpretive device. He observed of the development of common law rights as a limit on some aspects of Commonwealth legislative power: 'The issue is now whether they will become a general limit on its power.'[7]

* *Dr Chris Bleby SC is the Crown Advocate for South Australia.*

This approach, he suggested, was based not on the text of the *Constitution* or ascertaining the intention of the Parliament; rather, it intruded a new element into the system of constitutional law — that is, 'an intention to limit legislative powers imputed to those who originally gave the *Constitution* its legal force'.[8]

This development of the theme of popular sovereignty in constitutional jurisprudence was, of course, a banner of the Mason court, observed in such judgments as that of Deane J in *Breavington v Godleman*,[9] Deane and Toohey JJ in *Nationwide News v Wills*[10] (*Nationwide News*) and, as mentioned, Mason CJ in *Australian Capital Television.* So too, then, in his own contribution to the book, did Paul Finn take up the task of prediction in his chapter entitled 'A Sovereign People, A Public Trust'.[11]

Finn's thesis was particularly concerned with the idea that 'government is a trust'; that its officers are trustees for the people and accountable to them, akin to the relationship of a fiduciary. He considered the historical unacceptability of this argument in the context of the historical dominance of Australian constitutional thought by parliamentary sovereignty. But he was able to observe, in broad brush, a turning of the tide,[12] by which the emergent recognition of popular sovereignty was an indicator of recognition of this public trusteeship, practically expressed as the obligations of the government to act in the public interest, noting that the interests of government are not synonymous with the public interest.[13] This idea of public trusteeship continues to resonate in a number of areas of practical application, such as freedom of information.[14]

Finn also saw the declaration by members of the High Court in *Australian Capital Television* and *Nationwide News* that 'sovereign power resides in the people' as a harbinger of this recognition of a relationship of trust — a harbinger that called into question the doctrine of parliamentary supremacy.[15] He then turned to a series of illustrative observations of the principle, noting as he did so the implications of sovereignty for the courts and referring to the extrajudicial statement of Sir Anthony Mason that the courts 'are institutions which belong to the people and … the judges exercise their powers for the people'.[16]

I will address one of those examples in a moment, but it is timely to remind ourselves of this period when popular sovereignty was emerging as such a focal point for constitutional jurisprudence when considering the recent decision of the High Court in *McCloy v New South Wales*[17] (*McCloy*). The plurality in this case has reformulated the test articulated in *Lange v Australian Broadcasting Corporation*[18] (*Lange*) and *Coleman v Power*[19] as to whether a law infringes the constitutionally implied freedom of political communication. It does so in a way that may test the resolve of the courts in the years to come. However usefully the test has been articulated, the plurality in *McCloy* has asserted unequivocally the underlying doctrine of popular sovereignty as a source of Australian constitutional jurisprudence. This assertion, in the context of the same implication that focused the question in *Australian Capital Television*, looks to be squarely a response to the decision of the Supreme Court of the United States in *Citizens United v Federal Election Commission*,[20] which the plurality in *McCloy* described as articulating the view 'that an attempt by the legislature to level the playing field to ensure that all voices may be heard is, prima facie, illegitimate'.[21]

The High Court was having none of this, and its response is rooted firmly in the doctrine of popular sovereignty that has emerged as a foundation stone of constitutional jurisprudence over the last 25 years or so:

> That is not the case with respect to the Australian *Constitution*. As this Court said in *Lange*[22], ss 7, 24, 64 and 128 of the *Constitution*, and related provisions, necessarily imply a limitation on legislative and executive power in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors.' Sections 7 and 24 contemplate legislative action to implement the

> enfranchisement of electors, to establish an electoral system for the ascertainment of the electors' choice of representatives[23] and to regulate the conduct of elections 'to secure freedom of choice to the electors.'[24] Legislative regulation of the electoral process directed to the protection of the integrity of the process is, therefore, prima facie, legitimate.[25]

The plurality went on to ground this conclusion firmly in the decision of Mason CJ in *Australian Capital Television*, noting, in that case:

> The legitimacy of the concerns that the electoral process be protected from the corrupting influence of money and to place 'all in the community on an equal footing so far as the use of the public airwaves is concerned' was accepted.[26] The legislation struck down in that case did not give equality of access to television and radio to all candidates and parties. The constitutional vice identified by Mason CJ was that the regulatory regime severely restricted freedom of speech by favouring the established political parties and their candidates. It also excluded from the electoral process action groups who wished to present their views to the community without putting forward candidates.[27] [28]

So, having been given such a timely reminder of the strength of the concept of popular sovereignty in the very area of constitutional jurisprudence in which it first received such precise endorsement, let us go back to Paul Finn's observations and predictions in 1995, and to one in particular. This was something that he saw to be quite the anomaly in the context of this emerging jurisprudence, which he had framed in the context of the idea of the public trust — the 1986 decision of *Public Service Board of New South Wales v Osmond*[29] (*Osmond*). In that case, it was held that:

> [There is] no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which may have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons.[30]

Finn's particular observation of this conclusion was that it seemed discordant in the common law, even then, as:

> [i]n several quite diverse fields the courts have been prepared on grounds of democratic principle to preserve and to facilitate public discussion, review and criticism of governmental action.[31] Considered from the perspective of the individual citizen, that facility would seem the most necessary at the point of the individual's greatest vulnerability to government, that is when he or she is affected by an administrative decision, and necessary both on grounds of democratic entitlement and public accountability.[32]

He called for reconsideration of *Osmond* on this basis. That call has been repeated over time, with the decision being subject to the occasional assault — so far unsuccessful. In the event, questions of whether reasons are required tend to devolve to whether special circumstances require the giving of reasons (as contemplated by Gibbs CJ in *Osmond*)[33] or whether the particular statutory scheme in question gives rise to an implication of an obligation to require reasons.[34]

Mike Wait, in a paper delivered to the AIAL National Conference in 2011, approached *Osmond* in the light of two steps in High Court reasoning on s 73 of the *Constitution*. The first was the discussion of French CJ and Kiefel J in *Wainohu v New South Wales*[35] (*Wainohu*) of the duty of judges to give reasons, which they characterised as necessary for the Supreme Court to examine judicial decisions. Chief Justice French and Kiefel J saw the duty as having a constitutional characteristic by reason of s 73 of the *Constitution*. The second was the reliance on s 73 in *Kirk* to invalidate a privative clause preventing the Supreme Court of New South Wales from judicially reviewing a decision of the Industrial Relations Commission.[36]

Wait has asked, in light of these cases, whether s 73 might not also confer a duty on administrators to provide reasons in order to facilitate the supervisory function conferred on state supreme courts. However, as he pointed out, in *Wainohu* the plurality of Gummow, Hayne, Crennan and Bell JJ, in confirming the giving of reasons as a hallmark of the judicial function, did not rely on s 73 but on a rationale of fairness, drawing on the decision of McHugh J in *Soulemezis v Dudley (Holdings) Pty Ltd*.[37] We should also acknowledge Heydon J's comment in his dissenting opinion forcefully reiterating that there is no common law duty on an administrative decision-maker to give reasons.[38]

A version of Wait's mooted thesis was argued by the first respondent in *Minister for Home Affairs of the Commonwealth v Zentai*.[39] This was to the effect that, in the Commonwealth sphere of administrative decision-making, to confer a power to make a decision without giving reasons was to confer a power to make an unreasoned decision, which is unexaminable and therefore contrary to the implication in s 75(v).

Justice Heydon was the only one to consider this argument and he rejected it, holding that making a decision without giving reasons does not make the decision unreasoned or unexaminable. He accepted the ease of challenge that reasons facilitated but said that reasons were not essential to a challenge. Then, in a passage that is important to the theme that I wish to develop but which can only cause the blood of every trial judge hearing an application for judicial review to run cold, he said:

> A decision-maker can be compelled to produce documents revealing the reasons for a given decision, whether by subpoena duces tecum or a notice to produce. That decision-maker can be compelled by interrogatories to reveal those reasons in writing, and by a subpoena ad testificandum to reveal those reasons in the witness box. It is true that judicial review proceedings cannot be commenced on an entirely speculative basis. But non-speculative inferences can be drawn from the nature of the decision and from the dealings between the decision-maker and the affected person before the decision was made. It is also true that it would be difficult for a person challenging the decision to frame non-leading questions capable of eliciting answers that would reveal the decision-maker's reasons. But the person challenging the decision can question the decision-maker as though on cross-examination where the decision-maker is not making a genuine attempt to give evidence on a matter of which that decision-maker may reasonably be supposed to have knowledge: *Evidence Act* 1995 (Cth), s 38(1)(b). Reluctance on the decision-maker's part to give reasons would support an inference that there were no reasons, or no convincing reasons. It would be likely to stimulate close scrutiny. That is particularly so of adherence to a code of *omerta* in the witness box[40].[41]

Leaving aside the unlikelihood of a code of omerta residing in modern administrative decision-makers, this rationale minimises genuine difficulties in trial processes on judicial review.

More fundamentally, Heydon J appears to be coming close to saying that reasons need not be given because they can ultimately be squeezed out of the decision-maker in the trial process, with adverse inferences to be drawn in the absence of an ability to do so. That begins to look a lot like a duty to give reasons or at least an effective obligation ultimately to disgorge them.

Apart from the question of the utility of taking this position but still denying a common law obligation to give reasons, the difficulties mount where the decision-maker is a panel: if there is no duty to give reasons, but the panel members can be subpoenaed and effectively cross-examined on the reasons of the panel in any case. There is good reason to think that panel members may be able to claim public interest immunity in respect of the deliberations that passed between them,[42] yet, in the absence of an obligation to give reasons, every question at trial would need to be parsed as to whether it goes to the reasons of the panel or its internal deliberations.

The jurisprudence that has emerged on s 75(v) and s 73 of the *Constitution* in the last 15 years or so is consistent with John Doyle's observation in 1995 of the emerging emphasis given to rights in limiting the scope of the powers conferred on Parliament by the *Constitution* and the significance of that development in subordinating parliamentary supremacy to such rights by virtue of the role of judicial review. The vehicle of that emphasis has been the particular position of the courts in ch III — specifically, the inviolability of their supervisory role. For the moment, this constitutional approach has not extended to requiring a rethink of an obligation on administrative decision-makers to give reasons.

Nevertheless, the theoretical underpinning that is capable of supporting the idea continues to have influence, as we have most recently seen in *McCloy*. There are further strains of it in the High Court's decision in *Minister for Immigration v Li*[43] (*Li*) — strains that appear to put further pressure on the *ratio* of *Osmond*.

Wednesbury unreasonabless

Li, it is to be recalled, concerned a refusal by the Migration Review Tribunal (MRT) to exercise a statutory power of adjournment on its review of a decision by the Minister to refuse to grant a skilled overseas student residence visa. The application had been supported by a skills assessment by Trades Recognition Australia (TRA), which is an assessing authority. That assessment was found to be based on false information submitted by the applicant's former migration agent, and the application was refused. The applicant applied to the MRT for review and submitted to TRA a fresh application for a new skills assessment. That application to TRA was refused. The migration agent wrote to the MRT requesting an extension of time so as to be able to pursue a review of that refusal, identifying errors in the TRA's assessment. The MRT went ahead and affirmed the delegate's decision without waiting for advice as to the outcome of the migration agent's representations to the TRA.

The High Court determined that the failure to grant the adjournment was unreasonable such as to amount to jurisdictional error. It has now been remarked on in various commentaries[44] that the approach that the Court took in this case rejected the narrow and traditionally understood conception of unreasonableness derived from Lord Greene's statement in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[45] (*Wednesbury*) and articulated a test that requires consideration of the discretion in question in the context of the statutory purpose.[46]

The Court noted that the decision to refuse the request for the adjournment was explained by the MRT on the bases that Ms Li had had sufficient opportunity to present her case and that it was not prepared to delay the matter any longer.[47] What was missing was an explanation of its treatment of the substance of the reasons that Ms Li had put forward in support of the adjournment. Thus French CJ said:

> The MRT did not in terms or by implication accept or reject the substance of the reasons for a deferment put to it by the first respondent's migration agent. It did not suggest that the first respondent's request for a deferment was due to any fault on her part or on the part of the migration agent. It did not suggest that its decision was based on any balancing of the legislative objectives set out in s 53. Its decision was fatal to the first respondent's application. There was in the circumstances, including the already long history of the matter, an arbitrariness about the decision, which rendered it unreasonable in the limiting sense explained above.[48]

Similarly, the plurality found arbitrariness in the refusal when measured against the statutory context:

> The purpose of s 60(1) has already been referred to. It is to provide an applicant for review the opportunity to present evidence and arguments 'relating to the issues arising in relation to the decision under review'. The question which remained in issue when the Tribunal made its decision was the satisfaction of a visa criterion by a complying skills assessment. Although the Tribunal could not be expected to assume that the second skills assessment, when reviewed, would favour Ms Li, it did not suggest that there was no prospect of the second skills assessment being obtained, or that the outcome could not be known, in the near future. In these circumstances it is not apparent why the Tribunal decided, abruptly, to conclude the review.[49]

There are probably several ways of looking at this shift in thinking from the traditionally narrow characterisation of *Wednesbury* unreasonableness. One way is to note that, while the traditional formulation was that no reasonable decision-maker could have made the decision, this formulation was that in light of the statutory context there was nothing to suggest that this decision was anything other than arbitrary. As the plurality put it, unreasonableness may be concluded where a decision 'lacks an evident and intelligible justification'.[50]

The conclusion in *Li* was a function of the analysis of the reasons of the MRT — an analysis simply not necessary on the traditional formulation. Where reasons are given, and especially where they are required, it is entirely orthodox to analyse them critically. Further, there will be cases where the lack of an evident and intelligible justification will be inferred from a decision where reasons are not obliged to be given. However, to restate the test for unreasonableness in the exercise of a discretion with specific reference to the statutory context for the exercise of the discretion does two things: it puts a greater focus on the public interest that is served by the exercise of the statutory power; and, in doing so, it puts further pressure on the common law position that reasons are not required.

That pressure is not always evident, as reasons are often required by statute. Neither does this pressure necessarily lead to an intolerable tension — it is comparable with that which exists on account of the tests for failure to take into account a relevant consideration and taking into account irrelevant considerations — grounds of review that are located deeply in the statutory context. The plurality was alive to this.[51] Nonetheless, it adds to the pressure that Finn observed 20 years ago. Unperturbed, however, the plurality noted the well-understood comparison with appellate review, referring to the principles in *House v The King*,[52] to the effect that it is not enough that the appellate court would have decided the matter differently:

> What must be evident is that some error has been made in exercising the discretion, such as where a judge acts on a wrong principle or takes irrelevant matters into consideration. The analogy with the approach taken in an administrative law context is apparent.[53]

Justice John Basten, writing extrajudicially, has observed that 'this principle is well-understood in the area of judicial review of administrative action, especially in cases where no reasons are available'.[54] Thus, in *Avon Downs v Federal Commissioner of Taxation*,[55] to which Basten J here made reference, Dixon J said of the Commissioner of Taxation as decision-maker:

> The fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough

> that you can see that in some way he must have failed in the discharge of his exact function according to law.[56]

To broaden the scope of unreasonableness review as appears to have occurred in *Li*, however, does warrant questioning of the continued common law rule that administrative decision-makers do not give reasons. The availability of an inference of unreasonableness under the formulation in *Li* would appear to demand the giving of reasons far more acutely than does the traditionally understood *Wednesbury* formulation, narrow as that formulation is. That narrower formulation makes it considerably easier to 'know it when you see it', even without reasons.

Rationality

Li came three years after *Minister for Immigration and Citizenship v SZMDS*[57] (*SZMDS*), in which a majority of the Court confirmed that illogicality or irrationality in the finding of a jurisdictional fact constituted a distinct ground of judicial review. That ground had emerged not fully formed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[58] and was reiterated as a potential ground in *Minister for Immigration and Multicultural Affairs v SGLB*.[59] In *SZMDS*, the separate joint judgments of each of Crennan and Bell JJ and Gummow ACJ and Kiefel J developed the idea of illogicality and irrationality tainting a public officer's state of satisfaction as to a jurisdictional fact — in this case, the Minister's state of satisfaction under s 65 of the *Migration Act 1958* (Cth).

Justices Crennan and Bell emphasised the origins of this distinct type of error in *Wednesbury* unreasonableness, now confirmed as applicable to the exercise of discretions, and identified situations in which illogicality or irrationality may be found.[60] Such situations are where only one conclusion was open on the evidence and that conclusion was not drawn; where the decision was simply not open on the evidence; and 'if there is no logical connection between the evidence and the inferences or conclusions drawn'.[61]

Similarly, Gummow ACJ and Kiefel J, in the minority in the result, found that the Refugee Review Tribunal had made 'a critical finding by inference not supported on logical grounds'.[62]

The necessity for the existence of a logical connection between evidence and inference going to a state of satisfaction as jurisdictional fact self-evidently demands, I suggest, an understanding of the reasoning process by which the conclusion as to the jurisdictional fact was reached.

Theresa Baw has suggested that, given the emphasis that Crennan and Bell JJ gave in *SZMDS* to the origins of the irrationality ground in *Wednesbury* unreasonableness, the process aspect of the findings of illogicality and irrationality as identified in *SZMDS* are particularly important, as opposed to the question whether the decision was self-evidently illogical, observing:

> it is not sufficient to simply consider the possibility that another rational person would have come to the same decision, rather the decision-maker's process of deliberation and justification in arriving at his or her decision becomes paramount. Therefore, the focus on the process of reasoning is similar to the Gummow ACJ and Kiefel J test of illogicality and irrationality in SZMDS.[63]

If that is the case — and we probably need only note that the process of reasoning must necessarily be able to be scrutinised for the purpose of questioning rationality — then, as Basten J has identified, 'It would seem to follow that effective judicial review requires a duty on all decision-makers to give reasons'.[64]

This is, I think, a different way of characterising what I have described as the 'pressure' on the still-standing *ratio* of *Osmond*: under either description, what is in question is the continuing coherence of this area of judicial supervision.

Conclusion

However we describe the difficulty, be it one of practical effectiveness or doctrinal coherence, one useful and I think extremely important opportunity lies in taking up the underlying themes that have developed in order to locate both the common law and constitutional role of the courts. Twenty years ago, Doyle and Finn identified particular emphases in the jurisprudence on individual rights and the public trust of government, respectively, both of which arose from the tectonic shift in thinking to the role of popular sovereignty as a core constitutional premise.

These critiques remain important. Both *SZMDS* and *Li* extend judicial review grounds by which decision-makers are more closely called to account for their reasoning processes, placing pressure on the common law position that reasons are not required. *SZMDS*, in its insistence on rational processes of reasoning, promotes a theme of individual rights placed in opposition to executive power. *Li*, in its focus on assessing reasonableness in the statutory context, develops the exercise of executive power specifically as a vehicle of furthering the public interest.

Viewed from the perspective of these underling doctrinal themes but also from the immediate experience of unifying coherence, we might well ask: for how much longer can *Osmond* remain defensible? As the cases continue to give content to the constitutional premise of popular sovereignty, it will be an increasing struggle, I suggest, to find a way.

Endnotes

1 Paul Finn, 'Preface', in Paul Finn (ed), *Essays on Law and Government, Volume 1, Principles and Values* (Law Book Company Ltd, 1995) v.
2 (2003) 211 CLR 476.
3 (2010) 239 CLR 531.
4 John Doyle QC, 'Common Law Rights and Democratic Rights' in Finn, above n 1, 145.
5 (1992) 177 CLR 106.
6 Doyle, above n 4, 144–5, quoting *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106, 137–8 (Mason CJ). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 71–3.
7 Doyle, above n 4, 167.
8 Ibid 166.
9 (1988) 169 CLR 41, 123.
10 (1992) 177 CLR 1, 69, 72.
11 Paul Finn, 'A Sovereign People, A Public Trust' in Finn, above n 1, 1.
12 Ibid 12–13.
13 Ibid 14–15.
14 See, for example, *Department of Planning and Local Government v Chapman* [2012] SADC 120, [45]–[46] (Cole DCJ).
15 Finn, above n 11, 4.
16 Ibid, quoting Sir Anthony Mason, 'The Role of the Judge at the Turn of the Century' (Speech delivered at the Fifth Annual AIJA Oration in Judicial Administration, Melbourne, 5 November 1993).
17 [2015] HCA 34.
18 (1997) 189 CLR 520.
19 (2004) 220 CLR 1.
20 558 US 310, 365, 469 (2010).
21 [2015] HCA 34, [41] (French CJ; Kiefel, Bell and Keane JJ).
22 (1997) 189 CLR 520, 560.
23 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 56; [1975] HCA 53; *McGinty v Western Australia* (1996) 186 CLR 140, 182; [1996] HCA 48.
24 *Smith v Oldham* (1912) 15 CLR 355, 358; [1912] HCA 61.

25 [2015] HCA 34, [42] (French CJ; Kiefel, Bell and Keane JJ).
26 *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 177 CLR 106, 130; see also 161, 175, 189, 239.
27 Ibid 132, 145–6; see also 171–3 (Deane and Toohey JJ), 220–1 (Gaudron J), 236–7, 239 (McHugh J).
28 Ibid [43] (French CJ; Kiefel, Bell and Keane JJ).
29 (1986) 159 CLR 656.
30 Ibid 662 (Gibbs CJ), 675 (Brennan J), 676 (Deane J), 678 (Dawson J).
31 Compare *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Ltd v Commonwealth (No 2)* (1992) 177 CLR 106.
32 Finn, above n 11, 16.
33 See, for example, *Watson v South Australia* (2010) 208 A Crim R 1; 278 ALR 168; [2010] SASCFC 69, [114]–[125] (Doyle CJ), [130]–[142] (Peek J).
34 See, for example, *T v Medical Board of South Australia* (1992) 58 SASR 382, 394 (Matheson J), 409 (Olsson J).
35 (2011) 243 CLR 181.
36 Michael Wait, 'When is an administrative decision maker required to give reasons? From *Osmond* to *Wainohu*' (Paper presented at the AIAL National Conference, Canberra, July 2011).
37 (1987) 10 NSWLR 247, 278–9.
38 (2011) 243 CLR 181, [155].
39 246 CLR 213.
40 *Wainohu v New South Wales* (2011) 243 CLR 181, 239 [149].
41 246 CLR 213, 248–9 [94].
42 See, for example, *Keogh v Medical Board of South Australia* (2007) 99 SASR 327, 352 [140]–[145] (Doyle CJ).
43 (2013) 249 CLR 332.
44 See, for example, Leighton McDonald, 'Rethinking unreasonableness review' (2014) *Public Law Review* 117.
45 [1948] 1 KB 223.
46 (2013) 249 CLR 332, [23]–[26], [31] (French CJ), [79] (Hayne, Kiefel and Bell JJ).
47 Ibid [31] (French CJ), [80] (Hayne, Kiefel and Bell JJ).
48 Ibid [31] (French CJ).
49 Ibid [83].
50 Ibid [76] (Hayne, Kiefel and Bell JJ).
51 Ibid [72] (Hayne, Kiefel and Bell JJ).
52 (1936) 55 CLR 499.
53 (2013) 249 CLR 332, [75] (Hayne, Kiefel and Bell JJ).
54 The Hon John Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 44.
55 (1949) 78 CLR 353.
56 Ibid 353.
57 (2010) 240 CLR 611.
58 (2003) 77 ALJR 1165, [34], [37] (McHugh and Gummow JJ).
59 (2004) 78 ALJR 992, [38] (Gummow and Hayne JJ).
60 (2010) 240 CLR 611, [123].
61 Ibid [135].
62 Ibid [53].
63 Theresa Baw, 'Illogicality, Irrationality and Unreasonableness in Judicial Review' in Williams, above n 54, 77.
64 Basten, above n 54, 40.