FACT-FINDING IN THE 21ST CENTURY AND BEYOND

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The social, cultural and legal contexts in which findings of fact are made in Australia (and the potential for challenging those findings in a superior court) have changed significantly since 1985, when Glass JA of the New South Wales Court of Appeal confidently asserted in *Azzopardi v Tasman UEB Industries Ltd*[1] (*Azzopardi*), with Samuels JA's agreement, that factual finding which is 'perverse' 'unreasonable' or 'contrary to the overwhelming weight of the evidence' does not ever disclose an error of law for the purposes of judicial review (see also *Bruce v Cole*[2]).

Fact-finding is now informed by contemporary research which casts doubt on the reliability of demeanour as an indication of truth-telling and which suggests that judges (and others) cannot reliably distinguish truth from falsehood on the basis of appearances and manner. Further, the vagaries of human memory are now better understood. Fact-finding now occurs in a context where data proliferates, particularly in electronic form, and where technology produces an overwhelming amount of evidence, from DNA to data and metadata, about a person's location, habits and social media histories.

Legal challenges to fact-finding have also evolved. There is now greater potential for errors to be challenged in judicial review on the grounds of irrationality, legal unreasonableness and breach of procedural fairness. This paper examines these issues which are faced by administrators, tribunal members and judges in making and challenging findings of fact in the 21st century.

Technology and the internet have transformed the world into a place where facts abound and are readily available and accessible. We have seen the rise of social media and a manifest increase in visual as well as verbal information. Any teenager with a smartphone is now able to produce and exchange a vast amount of information daily (and generally does). Commercial and governmental transactions have become more complex and more document driven.

The rise of technology has begotten mega-litigation, where quantities of evidence which were once unthinkable are put before a court for the purpose of 'assisting' the court to make factual findings.

The human body may now be conceived of as another form of data. The Human Genome Project produced the first complete sequences of individual human genomes at the start of the 21st century, in 2001. Much more is now understood about our DNA, which stores our genetic data. Memory is increasingly being understood in terms of the physical workings of the human brain, and evidence-based psychological research has now provided us with a

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much more accurate understanding of how human memory works. Much of this new learning is contrary to commonly and long-held assumptions, including those of many judges.

In the world of administrative law, government has expanded exponentially, and administrators are now making a much larger range and volume of factual administrative decisions than they once did. These have a direct and often significant impact on people's lives, including in relation to social security entitlements, occupational licences, migration decisions and access to information and privacy. Tribunals now play a much greater role in fact-finding when reviewing administrative factual findings, as governments give tribunals power to review an ever-increasing quantity of administrative decisions almost as a matter of course.

Further, the rise of the 'super tribunal' in the states and territories and in the Commonwealth has given tribunals some of the jurisdiction formerly exercised by the courts.

The law has taken some steps to respond to these very significant changes in the circumstances in which administrators and courts are required to find facts and in our understanding of what facts are and how the human mind can ascertain them. However, it is helpful to consider the ongoing relevance of historical approaches to factual findings and the extent to which legal doctrines have become out of step with contemporary scientific knowledge.

Electronic data explosion

The explosion in the availability of data, mainly electronic, has transformed the task of making findings of fact. First, the internet provides a ready source of information which the fact-finder may seek to consult. Secondly, there is much more material to consider when determining facts. In the area of refugee law, for example, the amount of 'country information' available is simply vast (stored only on a large networks of computers) — see, for example, *Muin v Refugee Review Tribunal*.[3] Making a finding of fact where information so proliferates can be a very challenging task and it requires skills of sorting, prioritising and limiting this information. Access is also an issue.

The vast quantities of data made possible by electronic modes of capturing, creating, storing and transmitting information has fostered what has been called 'mega-litigation'. In *Seven Network Limited v News Limited*[4] (*C7*), Sackville J commented that discovery had given rise to an electronic database containing 85 653 documents, comprising 589 392 pages, and that 12 849 documents, comprising 115 586 pages, were admitted into evidence. Sackville J noted the limitations of human memory[5] and preferred to rely for his factual findings on the large volume of available documentary evidence rather than oral testimony.[6] Administrators generally do not have to deal with such a vast amount of material; nevertheless, they are increasingly making factual decisions on the basis of a greater quantity of material.

The huge amount of available data changes the scope and nature of fact-finding, with human recall becoming less important and contemporary documentary evidence (such as emails and email chains) or scientific evidence (such as DNA) gaining in importance.

Such findings on appeal

Advances in the study of human psychology have cast doubt on the validity of appellate courts' traditional reluctance to overturn factual findings based upon a witness's

demeanour. Some of the relevant studies are discussed by Justice Peter McClellan in his article 'Who is telling the truth? Psychology, common sense and the law'.[7]

Justice Ipp has expressed the view, extrajudicially, that demeanour findings are intuitive and that '[i]t is the absence of rationality that makes demeanour findings so arbitrary, so ephemeral, so uncertain, so personal and subjective, so susceptible to subconscious prejudice, so susceptible to error'.[8] Similarly, Justice McClellan's view is that '[d]emeanour will only reveal incompetent liars'.[9]

Judicial restraint in overturning factual findings on the basis that the trial judge has had the advantage of having seen and heard the oral evidence may therefore need to be reconsidered. Justice Virginia Bell has referred to the 'psychological research casting doubt on the ability to discern truthfulness from an individual's physical presentation', although her Honour did not consider restraint in overturning facts as found by a primary judge to be misplaced.[10] However, in some cases, an appellate court may have the advantage in not seeing the witness, in that an individual's physical presentation could positively mislead a primary judge as to that person's veracity, particularly where the individual is of a different cultural/language background from that of the judge.

The insights of psychological research on the human ability to discern truth from a person's demeanour have had some impact on judicial decision-making. Contrary to popular belief, confidence is not a reliable indicator of truth, and the perception that it is means that particular social groups, such as white males, are more likely to be believed than others.[11] Similarly, research shows that liars often deliberately control supposed deception cues such as fidgeting and postural shifts,[12] so that these are unreliable signs of a person's veracity.

In *Fox v Percy*,[13] Callinan J doubted whether the traditional appellate treatment of challenged findings of fact with a 'very high degree of sanctity' was warranted. Similarly, in *CSR Ltd v Della Maddalena*,[14] Kirby J cautioned against returning to an era in which appellate relief might be denied in deference to 'the subtle influence of demeanour' which may have affected the primary judge's factual findings.[15]

Memory: the data of the mind

Memory is another form of data, but it is a form which contemporary scientific research has shown to function in ways which do not accord with community or 'common sense' assumptions. Judges and other decision-makers who make factual findings on the basis of erroneous assumptions about memory are therefore likely to make factual errors. Judicial appreciation of this has led some judges to place greater reliance upon documentary material.[16]

In *Gestmin SGPS SA v Credit Suisse (UK) Limited*,[17] Leggatt J expressed the view[18] that the legal system has not 'sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony'. Identifying some common errors about memory, his Honour continued:

> Underlying … these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved.[19]

Having reviewed other limitations of human memory, his Honour concluded[20] that 'the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little

if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts'.

The Australian Royal Commission into Institutional Responses to Child Sexual Abuse at one stage commissioned a detailed report on the effects of child sexual abuse on memory and complainants' evidence. The 2017 report concluded that 'the criminal justice system's expectations about, and understanding of, the operation of human memory, and of children's memory in particular, are at odds with contemporary scientific psychological research'.[21] The authors commented that 'contemporary research has revealed the presence of numerous and extensive disparities between common-sense beliefs and scientific findings about human memory'.[22] These included a lack of awareness that 'errors of omission, such as gaps and missing information, and errors of commission, such as self-contradictions, are fundamental features of human memory'.[23] Similarly, it was an error to think that recall of specific details was a hallmark of an accurate memory.[24] These misunderstandings about human memory can have significant legal effects, because when a person is not regarded as credible on the basis that the person does not recall specific details of an event, or there are some contradictions in the account of an event, this may lead a prosecutor to decide not to prosecute or a jury not to convict.

The difficulties of assessing whether a person is recalling an event accurately are particularly acute in the administrative law context where that person is an asylum seeker.[25] In that context, the asylum seeker is likely to have suffered trauma — a factor affecting memory. The asylum seeker may also be from a non-English speaking background and need an interpreter. Finally, the asylum seeker is likely to be of a different cultural background from that of the departmental officer or tribunal member who assesses his or her claim. These factors present great challenges to the fact-finding process, particularly when it is recognised that demeanour is often an unreliable indicator of truth-telling and that memory is more unreliable than is generally believed. Notwithstanding all this, refugee and migration decisions based on credit abound.

Awareness of evidence-based research about memory and perceptions of demeanour may warrant an altogether different approach to fact-finding from that traditionally adopted by courts and tribunals.

Relying solely on documents in administrative decision-making

Notwithstanding the now identified problems of the frailty of human memories, reliance on documentation alone, particularly contemporaneous documentation, is also fraught with difficulties. There is a line of cases in New South Wales, for example, that establishes that (statutory) medical assessors and their review panels in motor accident personal injury cases must not treat an alleged lack of contemporaneous documentary evidence as supporting a causal connection between a car accident and a claimant's injury as being determinative of whether that causal connection exists. The medical decision-makers must also have regard to and deal with the claimant's evidence (written, oral or both) — see, for example, *Owen v Motor Accidents Authority*,[26] *Bugat v Fox*,[27] *Francica v Allianz Australia Insurance Ltd*[28] and *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen*.[29]

The errors identified in these cases are also characterised alternatively by the courts as a denial of procedural fairness (to the claimant, the injured motor accident victim).

The rise and rise of metadata

In addition to the rise of our reliance on increasing numbers of electronic documents and databases is the existence of a growing awareness of the information buried in those documents, styled as metadata.

Metadata is found buried in most MS Word documents, emails and PDF documents. It often contains a wealth of information and enables much more than the document itself to be identified and (possibly) explained. Metadata is everywhere.

Our legal system has demonstrated to date very little capacity for identifying and dealing with this new species of information. Generally, it is not produced as a matter of course when discovery of documents is ordered by the courts, although this may be changing in the United States.[30]

Findings of fact: the traditional approach

There is generally no error in a decision-maker making a wrong finding of fact (*Waterford v Commonwealth*,[31] *Bruce v Cole*[32]).

A wrong finding of fact made on the way to an ultimate determination is not reviewable (*Australian Broadcasting Tribunal v Bond*[33] (*Bond*)).

The law on disturbing findings of fact in judicial review proceedings is set out in the judgement of Jordan CJ in *The Australian Gaslight Co v The Valuer-General*,[34] which in summary is that a finding of fact by a tribunal of fact cannot be disturbed if the facts referred to by the tribunal on which the finding is based are capable of supporting its finding and there is evidence capable of supporting its inferences; such a finding can only be disturbed if (a) there is no evidence to support its inferences, (b) the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based on those inferences, and (c) the tribunal of fact had misdirected itself in law — see also *Azzopardi*[35] and *Bond*.[36] In *Bond*, the Court said:

> a finding of fact will then be reviewable on the ground that there is no probative evidence to support it and an inference will be reviewable on the ground that it was not reasonably open on the facts, which amounts to the same thing.[37]

A finding of fact that was made in the absence of supporting evidence is an error of law (*Kostas v HIA Insurance Services Pty Ltd*;[38] see also *Minister for Immigration & Ethnic Affairs v Pochi*).[39] The position that findings of fact must be supported by logically probative evidence is again developed in the judgement of Deane J in *Bond*.[40]

In *Bond*, Mason CJ[41] said that a finding of fact can amount to a reviewable decision if 'the statute requires or authorizes the decision-maker to determine an issue of fact as an essential preliminary to the taking of ultimate action or the making of an ultimate order'. However, his Honour went on to say that 'in ordinary circumstances, a finding of fact, including an inference drawn from primary facts, will not constitute a reviewable decision because it will be no more than a step along the way to an ultimate determination'. One of the reasons was that to expose all findings of fact 'to judicial review would expose the steps in administrative decision-making to comprehensive review by the courts and thus bring about a radical change in the relationship between the executive and judicial branches of government'.

In *Bond* the Chief Justice made the following comments about when factual questions may give rise to an error of law:

> The question whether there is any evidence of a particular fact is a question of law: *McPhee v S Bennett Ltd*; *Australian Gas Light Co v Valuer-General*. Likewise, the question whether a particular inference can be drawn from facts found or agreed is a question of law: *Australian Gas Light*; *Hope v Bathurst City Council*. This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions: *Federal Commissioner of Taxation v Broken Hill South Ltd*. So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v Maryborough Mining Warden*.
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> But it is said that '[t]here is no error of law simply in making a wrong finding of fact': *Waterford v The Commonwealth*, per Brennan J. Similarly, Menzies J observed in *Reg v District Court; Ex parte White*:
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> > 'Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (eg illogical) inference of fact would not disclose an error of law.'
>
> Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.[42]

As this passage makes clear, the issue in *Bond* as to when a factual error might amount to an error of law arose in the context of judicial review proceedings. Glass JA's comments in *Azzopardi*,[43] referred to at the beginning of this article, were about what constitutes an error of law for the purposes of an appeal (on a point of law). In the passage from *Bond* cited above, Mason CJ drew on the reasoning from appeals concerning errors of law, when considering the circumstances in which factual findings were judicially reviewable.

While both *Azzopardi* and *Bond* might still be good law in Australia, a number of judicial developments in Australia have, in essence, overtaken them and ameliorated some of the harshness in finding of facts and judicial review.

This is so principally arising from the High Court of Australia's decision in *Minister for Immigration & Citizenship v Li*[44] (*Li*). That case established essentially a new ground of judicial review that has come to be known as 'legal unreasonableness'. There is also within that ground a collection of other available grounds of judicial review, including a suggestion that the ground of 'proportionality' might eventually take a foothold in Australian jurisprudence.[45]

The High Court's decision in *Li*[46] significantly extended the capacity of superior courts in Australia to review an administrative decision and to determine whether it was legally 'reasonable'.

Finally released from the 'absurdity' of the high standard of outcome articulated in *Associated Provincial Picture Houses v Wednesbury Corporation*[47] (*Wednesbury*), Australian courts now have a broader jurisdiction to determine whether the outcome of an exercise of discretion has an evident and intelligible justification by reference to the terms, scope and purpose of the statute conferring the power. However, the point at which the outcome of a discretionary decision cannot be said to be justified by reference to the statute conferring the power can sometimes be no more than a matter of impression.

We suggest that in this particular context, the doctrine of proportionality might well emerge so as to provide a principled approach to a court in determining whether a discretionary administrative decision is justified and lawful.

The rationality grounds of review

Australian courts are constrained from considering the merits of administrative decision making because of the constitutional separation of judicial from legislative and executive power (*Re Minister for Immigration & Multicultural Affairs; Ex Part Lam*[48]). One exception to this constraint has been the ground of judicial review styled as 'unreasonableness' first articulated in *Wednesbury*,[49] which focused on the outcome of the decision, rather than on the process or procedure for making the decision.

In England and Wales, the test of *Wednesbury* unreasonableness has been stated in these terms. The impugned decision must be 'objectively [so] devoid of any plausible justification that no reasonable body of persons could have reached [it]';[50] and the impugned decision had to be 'verging on absurdity' in order for it to be vitiated.[51]

That stringent test was applied in Australia. In *Prasad v Minister for Immigration*,[52] the Federal Court of Australia considered the ground, now codified in s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Court held that, in order for invalidity to be determined, the decision must be one which no reasonable person could have reached[53] and that to prove such a case required 'something overwhelming'.[54] It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when 'looked at objectively … was so devoid of any plausible justification that no reasonable body of persons could have reached them'.[55]

A decision which fails to give proper weight to a relevant factor may also be challenged as being unreasonable.[56] But the ground of judicial review is generally considered one of last resort, as courts are reluctant to embark on an exercise which could seem to come close to reviewing a decision on its merits. In *Li*, Gaegler J said that judicial determinations of *Wednesbury* unreasonableness have been 'rare',[57] although statistically the *Wednesbury* unreasonableness ground has been taken in Australia fairly frequently (in 19 per cent of cases).[58] However, almost all the cases were determined on another ground of judicial review.

The 'illogical and irrational ground' of judicial review was also initially treated with suspicion by Australian courts. In *Minister for Immigration and Multicultural Affairs v Eshetu*[59] the plurality suggested that the ground might be no more than an emphatic way of expressing disagreement with the decision. However, in *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002*,[60] in circumstances where the then bifurcated *Migration Act 1958* (Cth) (temporarily) expressly forbade reliance on *Wednesbury* unreasonableness as a ground of judicial review to challenge a migration decision, the High Court accepted a plea of illogicality and irrationality as constituting an independent ground of judicial review, although it found the ground was not made out on the facts of that case. In *Minister for Immigration & Multicultural Affairs v SLGB*,[61] in which the appellant was successful, the Court extended the application of that ground to a decision-maker's satisfaction as to the existence of a jurisdictional fact. In *WAHP v Minister for Immigration & Multicultural & Indigenous Affairs*,[62] although dissenting as to the result, Lee J fairly stated the principle in these terms:

> A determination that is based on illogical or irrational findings or inferences of fact may be shown to have no better foundation than an arbitrary decision and accordingly the review process will be unfair and will not have been conducted according to law … Illogical or irrational findings or inferences of fact upon which a determination is based become examinable as part of the matter that is subject to judicial review pursuant to the application for a prerogative or constitutional writ.[63]

At this point, a principled difference between *Wednesbury* unreasonableness on the one hand and illogicality and irrationality on the other appeared to remain in that, in the former, the Court exercised supervision of the quality of the discretionary outcome of the decision-maker, whereas in the latter the Court supervised the quality of the procedure.[64]

In *Minister for Immigration & Citizenship v SZMDS*[65] (*SZMDS*), the High Court again considered the ground of illogicality and irrationality in respect of a jurisdictional fact. However, the Court split on the question of whether a remedy sounded for procedural irrationality and illogicality, or irrationality and illogicality of outcome. The view of Heydon J and the joint judgement of Crennan and Bell JJ[66] was that a remedy should be given for serious irrationality in procedure, regardless of the outcome. However, the view of Gummow ACJ and Kiefel J (as her Honour then was) was that, whether or not there was irrationality in the procedure, no remedy sounded if the outcome was reasonable.[67]

The significance of the decision was that, despite the effort of Gummow ACJ and Kiefel J to fashion a careful distinction between fact review and review of jurisdictional facts, they appeared to suggest that a remedy for an illogical and irrational decision may also be conditioned only by its outcome.

The legal unreasonableness ground of review

The High Court has long held that a decision-maker must exercise a discretionary power reasonably, either because the legislature is taken to intend that the discretion must be exercised reasonably[68] or because of the necessary construction of the statute giving the discretionary power.[69]

In *Li*,[70] the migration applicant's entitlement to an Australian visa turned on the assessment of her skills as a cook. The applicant had undertaken two assessments of her ability. The second assessment was unfavourable and, before the tribunal hearing, the applicant had lodged a challenge of that assessment for error. The Migration Review Tribunal decided that the applicant had had sufficient time to demonstrate compliance with the conditions of her visa and it refused a two-week adjournment to wait for the result of that review of her skills assessment. It rejected her application for a visa, relying on the second unfavourable assessment.

The plurality in *Li*[71] confirmed that, in the case of a discretionary decision, there is a presumption of law that discretionary power will be exercised reasonably and added that the legal standard of unreasonableness in discretionary matters was not limited to *Wednesbury* unreasonableness.

The plurality discussed the notion of proportionality in the context of judicial review in the following terms:

> In the present case, regard might be had to the scope and purpose of the power to adjourn in s 363(1)(b), as connected to the purpose of s 360(1) (170). With that in mind, consideration could be given to whether the Tribunal gave excessive weight — more than was reasonably necessary — to the fact that Ms Li had had an opportunity to present her case. So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached. However, the submissions in this case do not draw upon such an analysis.[72]

French CJ said:

> A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable. It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to

> bridge a propounded gap between the two concepts. Be that as it may, a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves.[73]

Accordingly, the notion of proportionality was squarely raised by the High Court as a potential ground of judicial review, perhaps in its own right or perhaps as a part of the collection of grounds that make up legal unreasonableness.

Even where reasons have been provided, they may lead to a conclusion that a decision lacks an inevitable and intelligible justification. The plurality also said, agreeing with Mason J in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*,[74] that there was a close analogy between judicial review of administrative action and appellate review of judicial discretion:

> It was said in *House v The King* [(1936) 55 CLR 499] that an appellate court may infer that in some way there has been a failure to properly exercise the discretion 'if upon the facts the result is unreasonable and plainly unjust'. The same reasoning might apply to the review of the exercise of a statutory discretion where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power.[75]

Gageler J agreed:

> Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law.[76]

French CJ held[77] that the decision of the Tribunal was infected by jurisdictional error because, despite the Migration Act codifying the requirements of procedural fairness applying to decisions made under the Act, the Tribunal failed to afford procedural fairness at common law by not granting an adjournment, and the decision was also *Wednesbury* unreasonable because the statutory grant of decisional freedom could not be construed as sanctioning a decision that was arbitrary or capricious or lacked common sense.[78]

Ultimately, the plurality in *Li* held that the Tribunal's decision involved legal error and should be quashed. It was not possible for the Court to ascribe an established ground of judicial review to the error because no one ground seemed to fit. The Court finally held that the 'result itself bespeaks error' and a remedy was granted.

The decision in *Li* has been explained and followed in several decisions of the Full Court of the Federal Court, a few of which are of particular significance. In *Minister for Immigration and Border Protection v Singh*[79] (*Singh*) the Court held that the legal unreasonableness ground is invariably fact dependent and can attach to the unreasonableness of the process or to the unreasonableness of the result. The Court explained this last conclusion, which appears to reconcile the views expressed in *SZMDS*, by considering the administrative reality that some decisions are supported by reasons and some are not. The Court said:

> legal unreasonableness can be a conclusion reached by a supervising court after the identification of an underlying jurisdictional error in the decision-making process … However legal unreasonableness can also be outcome focused, without necessarily identifying another underlying jurisdictional error … In circumstances where no reasons for the exercise of power, or for a decision, are produced, all a supervising court can do is focus on the outcome of the exercise of power in the factual context presented, and assess, for itself, its justification or intelligibility … Where there are reasons, and especially where a discretion is being reviewed, the court is able to follow the reasoning process of the decision-maker through and identify the divergence, or the factors, in the reasons said to make the decision legally unreasonable … Although it is not necessary for the purposes of this appeal to resolve the question whether those should be seen as two different kinds of review and what might flow from

> that, we are inclined to the opinion that, where there are reasons for the exercise of a power, it is those reasons to which a supervising court should look in order to understand why the power was exercised as it was … [U]nlike some other grounds for review of the exercise of power, the reasoning process in review for legal unreasonableness will inevitably be fact dependent… any analysis which involves concepts such as 'intelligible justification' must involve scrutiny of the factual circumstances in which the power comes to be exercised …[80]

In *Minister for Immigration and Border Protection v Stretton*,[81] the Full Court summarised the principles expressed in *Singh* and expressly rejected the view that the ground of legal unreasonableness was unprincipled. The Court said:

> the Court's role [remains] strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision … or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently.[82]

Despite the Full Court's insistence that there was a principled basis on which the outcome of a decision may be characterised as reasonable or not, the point at which the outcome of a discretionary decision cannot be said to be justified by reference to the statute conferring the power remains (at least to some extent) a matter of impression.

The question of whether the legal unreasonableness recognised in *Li* is confined strictly to the exercise of discretion, or whether it may extend to the making of factual findings, was considered by the Full Court of the Federal Court in *Muggeridge v Minister for Immigration and Border Protection*.[83] Charlesworth J (with whom Flick and Perry JJ agreed) indicated that, for a decision to be legally unreasonable, the error affecting the process of reasoning adopted by the decision-maker must occur in the exercise of a discretionary power.[84] However, such an error could be an error of fact-finding. Her Honour quoted, with approval, the following passage from the judgment of Wigney J in *Minister for Immigration and Border Protection v SZUXN*:

> allegations of illogical or irrational reasoning or findings of fact must be considered against the framework of the inquiry being whether or not there has been jurisdictional error on the part of the Tribunal: *SZRKT* at 137 [148]. The overarching question is whether the Tribunal's decision was affected by jurisdictional error: *SZRKT* at [151]. Even if an aspect of reasoning, or a particular factual finding, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result: *Minister for Immigration and Citizenship v SZOCT* (2010) 189 FCR 577 at [83]–[84] (Nicholas J); *SZNKO v Minister for Immigration and Citizenship* (2013) 140 ALD 78 at [113]. Where the impugned finding is but one of a number of findings that independently may have led to the Tribunal's ultimate conclusion, jurisdictional error will generally not be made out: *SZRLQ v Minister for Immigration and Citizenship* (2013) 135 ALD 276 at [66]; *SZWCO* at [64]–[67].[85]

Thus, where a factual finding is irrational or illogical, and it is critical to a decision-maker's ultimate conclusion, the ensuing decision may be set aside on the ground of legal unreasonableness.

Proportionality

In *McCloy v New South Wales*[86] (*McCloy*), the Court considered the question of whether New South Wales legislation capping political donations, prohibiting political donations from property developers and restricting indirect campaign donations was invalid for infringing the freedom of political communication implied in the Commonwealth *Constitution*. The majority applied a proportionality test of 'suitable', 'necessary' and 'adequate in its balance'

to determine whether the impugned legislation was reasonably appropriate and adapted to advance its object. The majority's approach was cautious:

> proportionality in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative acts *or administrative acts* within the constitutional or legislative grant of power under which they purport to be done. … [C]riteria have been applied to purposive powers; to constitutional legislative powers … to incidental powers …; and to powers exercised for a purpose authorised by the constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication … [But this] does not involve a general acceptance of the applicability to the Australian constitutional context of similar criteria as applied in the courts of other jurisdictions. It does not involve the acceptance of the application of proportionality analysis by other courts as methodologically correct.[87]

Nevertheless, the majority's express reference to 'administrative acts' suggests a potential for the doctrine of proportionality to play an independent role in judicial review.

The majority in *McCloy* propounded 'at least a three stage test' of proportionality,[88] although it referenced decisions of the Supreme Courts of the United Kingdom and Canada (*Bank Mellat v Her Majesty's Treasury (No 2)*[89] and *R v Oakes*[90] respectively) as authority for the proposition that there might be a four-stage test. The test of 'structured proportionality' is, first, whether the impugned decision is in pursuit of a legitimate object ('legitimacy'); second, whether the means for pursuing the legitimate object are rational, fair and not arbitrary ('suitability'); third, whether alternative strategies could and should have been chosen which would intrude less on the affected individuals rights ('necessity'); and fourth whether even a minimally intrusive limitation is permissible in pursuit of the legitimate end ('balance').[91]

Proportionality review is now well established in the United Kingdom to the extent that administrative decisions are challenged for breach of the Human Rights Act. It is apparent that proportionality is a more intrusive general standard than the currently available common law grounds of review impugning the outcome of a decision. This is demonstrated in the United Kingdom decision of *R v Ministry of Defence; Ex parte Smith*,[92] in which Smith challenged her dismissal from the Royal Air Force on the basis of her sexuality. Smith failed at common law on a plea of irrationality but succeeded in the European Court of Human Rights, which allowed her appeal on a test of proportionality under the human rights legislation.

In Australia, as articulated by the majority in *McCloy*, proportionality analysis has so far been generally confined to questions of constitutional law (and, even then, only to 'purposive powers' in the *Constitution*).[93] It is applied to gauge the sufficiency of connection between the purpose of a head of constitutional power and a law, not the extent to which a law may affect individual rights,[94] although the High Court has left open the possibility that proportionality analysis might extend to human rights law.[95]

In Australia, the doctrine of proportionality remains 'at the boundaries' of administrative law.[96] However, the more expansive comment made by the majority in *McCloy* recognises that a number of decisions over the years have left open the possibility that proportionality might play a greater role in the determination of administrative law decisions. In *Fares Rural Meat & Livestock Pty Ltd v Australian Meat & Livestock Corporation*[97] (*Fares Rural Meat*), Gummow J, sitting as a Federal Court judge, suggested that one of the three 'paradigms' of *Wednesbury* unreasonableness was that the exercise of the power was out of proportion in relation to the scope of power.[98] In *New South Wales v Macquarie Bank Ltd*,[99] Kirby J once held a regulation invalid for not being proportional to the object of the enabling Act, although his Honour's view was not part of the ratio of the decision.

In *Li*, French CJ referred to proportionality in the context of the decision-maker's area of 'decisional freedom' and stated that 'not every rational reason is reasonable. There may be scope for proportionality analysis to bridge the gap between the two concepts'.[100] The plurality in *Li* also referred to *Fares Rural Meat*, observing that the application of a proportionality analysis by reference to the scope of the power was the type of unreasonableness under consideration: 'an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached'.[101]

Further, in *Singh*, the Full Court held:

> If a proportionality analysis were undertaken … it could be said that the exercise of power to refuse a short adjournment in these circumstances was disproportionate to the Tribunal's conduct of the review to that point, to what was at stake for the first respondent, and what he might reasonably have hoped to secure through a re-mark.[102]

Proportionality as a test of legal unreasonableness?

Proportionality is derived from the civil law. Writing extrajudicially, Bathurst CJ summed up the tension involved in incorporating a civil law doctrine into the common law:

> Civil law principles are thought to derive from natural law and in that sense to be static and inflexible, while common law principles have been described as working hypotheses and kaleidoscopic, in the sense that they are in a constant state of change in minute particulars. The concern associated with foreign intrusions of principle has been aptly summarised by Justice Douglas of the Queensland Supreme Court [as] 'is the genius of the common law expressed in its propensity for bottom-up reasoning in danger of being replaced by a form of procrustean top-down reasoning?'[103]

Hooper describes the difficulties English courts have experienced in transitioning structured proportionality, from its application to European rights legislation to the common law more generally.[104] Hooper acknowledges that structured proportionality may appear to systematise a court's approach to determining whether the substance of an administrative decision is lawful but suggests that, when looked at closely, the stages of structured proportionality, particularly the last stage, involve the court in making a 'multitude of policy decisions'.[105] Further, Boughey makes the point that the application of proportionality in common law jurisdictions is best adapted to resolving questions of whether individual rights have been infringed by reference to written bills of rights, and that it is only subsequent to the *Human Rights Act 1998* in the UK, which required courts to have regard to Strasbourg jurisprudence when a Convention right was engaged, and human rights legislation in Canada and New Zealand, that courts in these jurisdictions have begun engaging in proportionality review.[106] Australia, lacking a bill of rights against which administrative action can be measured, provides infertile ground for the application of the doctrine of proportionality.

Conclusion

It would be wrong to suggest that proportionality analysis is, at this moment, an accepted or established tool of Australian administrative law jurisprudence. In *Gaynor v Chief of the Defence Force (No 3)*,[107] for instance, rule 85 of the *Defence (Personnel) Regulations 2002* (Cth) provided that an army officer's service could be terminated if the relevant commanding officer was satisfied that the retention of the officer was not in the interests of the Defence Force or the service. The Chief of the Defence Force terminated Gaynor's service because he had published statements concerning his private views about political matters. Buchanan J at first instance held that, where the exercise of discretion was not reasonably and appropriately adapted to serve a legitimate end, it was an exercise of discretion in excess of the statutory grant of power. However, on appeal, the Full Court held that Buchanan J's analysis had impermissibly converted the limitation on legislative power

to an individual right. If the implied freedom was to be protected at the administrative review level, it could only be through the traditional grounds — for instance, by characterising the implied freedom as a relevant consideration that the decision-maker had failed to take into account.

Nevertheless, there is some evidence that proportionality is making inroads into Australian legal thinking:

> Where proportionality analysis is applied in one area of public law it is prone to leaking into other areas in order to maintain consistency in legal reasoning. In the Australian context, the question of consistently applying structured proportionality analysis arises right at the intersection of constitutional and administrative law, namely: when legislation confers a wide discretion on an administrator, which is not itself necessarily inconsistent with the constitutional limitation, but can be exercised in a way which is inconsistent …[108]

Australian courts have long confined themselves to reviewing the procedure of administrative decisions, not their substance. The High Court's decision in *Li* has significantly increased the jurisdiction of Australian courts to inquire into the substance and as to fact-finding. The courts, in conformity with their constitutional limits, should only exercise this enlarged jurisdiction according to principle. However, the question of whether the substance of an administrative decision and findings of critical or ultimate facts can be justified by reference to the statute conferring the power remains in part (for now) a matter of impression.

The doctrine of proportionality offers a principled approach. It is no objection that proportionality is a civil law concept. The common law has always adapted civil law doctrines to supply common law deficiencies. The development of the law of frustration of contract is just one example. It is also no objection that proportionality may involve the courts in making policy or value judgement decisions. There is a distinction between the civil doctrine of proportionality used to characterise the relationship between the state and the individual as a matter of substantial justice, and the adoption by the common law of the analytical tool of structured proportionality to aid in the determination of the reasonableness of legislation infringing on freedoms. It is also no real objection that Australia, unlike other common law jurisdictions, has not legislated for human rights. While it might be true to say that proportionality analysis arose in the UK, Canada and New Zealand because of the introduction of human rights legislation in these jurisdictions, it is not true to say that, as a consequence, human rights legislation is a necessary precondition of the emergence of proportionality in administrative law. French CJ, as well as Kirby P and the Full Court of the Federal Court (in obiter remarks), all contemplate the application of the principle of proportionality to facts not giving rise to questions of human rights.

The true objection to structured proportionality is the absence of an overarching standard in Australia against which to test the proportionality of an impugned decision. However, this does not mean that structured proportionality cannot be used to test the proportionality of a decision where such a standard exists. Both *Li* and *Singh* were decisions in which a decision-maker failed to grant an adjournment. The obvious standard against which the proportionality of the refusal could be tested was procedural fairness, or fairness more generally. Kirby P, in *New South Wales v Macquarie Bank Ltd*,[109] found that the Act under which the impugned decision had been made itself provided the standard against which the proportionality of the decision could be tested. These examples indicate that structured proportionality analysis might, on a case-by-case basis, provide a principled and transparent approach to assessing the legal reasonableness of a decision where a standard against which the proportionality of the decision can be measured can be identified.

Where to from here?

The position taken in *Azzopardi* that a perverse factual finding does not give rise to an error of law has its corollary in judicial review proceedings in the principle that the court's role is not to engage in merits review. The drawback of this position is that it effectively gives administrative decision-makers free rein to make decisions which ignore the probative force of the evidence which is all one way, or to find facts using reasoning which is demonstrably unsound. As Kirby P (as his Honour then was) said in his dissenting judgement in *Azzopardi*, '[i]t should be no part of our system of justice to condone perverse and completely unreasonable decisions'.[110]

This observation has even greater force now, over 30 years later, in the judicial review context, given that the state and Commonwealth legislatures have greatly expanded the range of areas in which they make decisions affecting citizens' lives. Many of these decisions are reviewable by 'super tribunals', which are empowered to substitute their own administrative decisions for those of government officials. Such super tribunals have been created to provide, amongst other things, cheap and effective merits review. Where a tribunal itself makes a perverse factual decision, it would be a strange result if that decision was not amenable to correction. The High Court's decision in *Li* and the Federal Court cases which follow and explain it are symptomatic of a greater willingness on the part of courts to intervene where discretionary decisions and findings of fact are irrational or illogical. To this extent, the law appears to be moving in a direction which accords with community expectations, albeit courts are still careful not to trespass on the 'area of decisional freedom' of the administrator.

The law is still struggling to adapt to many of the other changes pertinent to fact-finding in the 21st century: the evidence-based research about the working of human memory and the human ability to detect untruths from demeanour; the explosion of electronic and other data; and the advent of previously unknown forms of data, such as DNA and metadata.

Particular judges have acknowledged the validity of research that indicates that widely-held assumptions about the way memory works, and the reliability of demeanour as an indicator of veracity, are simply erroneous. This has influenced the way those judges have decided cases, and their comments (both judicial and extra-judicial) are likely to have a more widespread effect on other judicial officers and administrative decision-makers over time. However, we know of no case in which a decision-maker who has come to conclusions about the reliability or credibility of a witness, on the basis of erroneous assumptions about memory, has been found to have made an error of law. There is no legal principle requiring decision-makers (whether judicial or administrative) to consult recent research about memory before determining that a witness's self-contradictions when recalling an event indicate that the witness is lying. In fact, if a decision-maker were to rely upon such research without first informing the parties, this might itself constitute a breach of procedural fairness. The current system thus tends to entrench error in this particular aspect of fact-finding.

Another concern is the law's approach to factual findings as to a person's credibility, given what we now know about the human ability (or lack of ability) to detect falsehood. Decision-makers who make findings about the credibility of people from different cultural backgrounds, such as in the refugee area, are thus likely to make factual errors if they are not educated about the relevant psychological research.[111] Making credibility findings is particularly problematic if the party or witness is from a non-English speaking background and using an interpreter. In asylum seeker cases, a decision-maker must often rely solely or primarily on the asylum seeker's own testimony, and thus must deal with constraints upon the reliability of personal, uncorroborated memories (and missing documentation), the

intervention of an interpreter, the effect of trauma, and the difficulties of assessing credibility from the demeanour of a person of another cultural background. A legal approach which does not put any boundaries around the making of adverse credit findings in this context could be seen to be wanting.

The law with respect to reviewing factual findings will no doubt continue to evolve. We consider that there is scope for greater judicial intervention in the context of fact-finding which is made on unscientific and erroneous assumptions about human behaviour, and fact-finding which is legally unreasonable. Both are examples of irrational decision-making — an area where the courts have recently expressed a greater willingness to identify and set aside erroneous factual decisions.

Endnotes

1 (1985) 4 NSWLR 139, 155–156.
2 (1998) 45 NSWLR 163, [187E]–[189E].
3 (2002) 76 ALJR 966.
4 [2007] FCA 1062.
5 [2007] FCA 1062, 374.
6 [2007] FCA 1062, [375].
7 (2006) 80 *Australian Law Journal* 655.
8 Justice David Ipp, 'Problems with fact-finding' (2006) 80 *Australian Law Journal* 667, 670.
9 Justice Peter McClellan, 'Who is telling the truth? Psychology, common sense and the law' (2006) 80 *Australian Law Journal* 655, 658.
10 Justice Virginia Bell, 'Appellate review of the facts' (2014) 39 *Australian Bar Review* 132.
11 The Hon Justice Peter McClellan, 'Who is telling the truth? Psychology, common sense and the law' (2006) 80 *Australian Law Journal* 655, 658.
12 Ibid.
13 (2003) 214 CLR 118, 163 [145].
14 (2006) 80 ALJR 458, 466 [23].
15 The reference is to McHugh J's judgement in *Abalos v Australian Postal Commission* (1990) 171 CLR 167, 179.
16 See, for example, *Seven Network Limited v News Limited* [2007] FCA 1062, [374]–[375].
17 [2013] EWHC 3560.
18 [2013] EWHC 3560, [16].
19 [2013] EWHC 3560, [17].
20 [2013] EWHC 3560, [22].
21 Jane Goodman-Delahunty, Mark A Nolan and Evianne L van Gijn-Grosvenor, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2017) 8.
22 Ibid 18.
23 Ibid 22.
24 Ibid.
25 Douglas McDonald-Norman, 'Young's "Fact Finding Made Easy" in Refugee Law: A Former Practitioner's Perspective' (2018) 92 *Australian Law Journal* 349.
26 (NSW) (2012) 61 MVR 245, [52], [55].
27 (2014) 67 MVR 150; [2014] NSWSC 888 [31].
28 [2015] NSWSC 1140 [39], [84]–[85], [99], [103], [109]–[110].
29 (2016) 77 MVR 348, [63]–[95].
30 See Justice Brian Tamberlin and Lucan Bastin, 'Metadata and the Discovery of Electronic Evidence,' (2008) 36 *Australian Business Law Review* 457.
31 (1987) 163 CLR 54, 77 (Brennan J).
32 (1998) 45 NSWLR 163, 187F–190E (Spigelman CJ; Mason P, Sheller and Powell JJA agreeing).
33 (1990) 170 CLR 321, 340–341.
34 (1940) 40 SR (NSW) 126, 137–138.
35 (1985) 4 NSWLR 139.
36 (1990) 170 CLR 321.
37 (1990) 170 CLR 321, 359–360 (Mason CJ).
38 (2010) 241 CLR 390.
39 (1980) 44 FLR 41, 62–68 (Deane J; Evatt J agreeing).
40 (1990) 170 CLR 321, 367 (compare the decision of Mason CJ at 356).
41 (1990) 170 CLR 321, 340.
42 (1990) 170 CLR 321, 355 (citations omitted).

43 (1985) 4 NSWLR 139.
44 (2013) 249 CLR 332.
45 This was explored in a paper by Mark Robinson SC and Dr Simon Blount, 'The New Judicial Review — Legal Unreasonableness', for the Law Society of NSW Government Solicitors Conference on 5 September 2017, and it is partly reproduced here.
46 (2013) 249 CLR 332.
47 [1948] 1 KB 223.
48 (2003) 214 CLR 1, [76] (McHugh and Gummow JJ).
49 [1948] 1 KB 223.
50 *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768, [821].
51 *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.
52 (1985) 6 FCR 155.
53 (1985) 6 FCR 155, 167.
54 (1985) 6 FCR 155, 168.
55 (1985) 6 FCR 155, 168.
56 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J)
57 (2010) 240 CLR 611, [113].
58 Roger Douglas, *Douglas and Jones's Administrative Law* (Federation Press, 5th ed, 2006) 470.
59 (1999) 197 CLR 611, [40].
60 (2003) 77 ALJR 1165.
61 (2004) 78 ALJR 992, [37]–[38] (Gummow and Hayne JJ).
62 [2004] FCAFC 87.
63 [2004] FCAFC 87, [7].
64 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomas Reuters (Professional) Australia Limited, 6th ed, 2017) 264 [4.710].
65 (2010) 240 CLR 611.
66 (2010) 240 CLR 611, [131].
67 (2010) 240 CLR 611, [27].
68 *Kruger v Commonwealth* (1997) 190 CLR 1, [36] (Brennan CJ); *Attorney General (New South Wales) v Quin* (1990) 170 CLR 1, [36] (Brennan J).
69 *Abebe v The Commonwealth* (1999) 197 CLR 510, [116] (Gaudron J).
70 (2013) 249 CLR 332.
71 (2013) 249 CLR 332, [63], [68].
72 (2013) 249 CLR 332, [74].
73 (2013) 249 CLR 332, [28] (citations omitted).
74 (1986) 162 CLR 24, 41–42.
75 (2013) 249 CLR 332, [76].
76 (2013) 249 CLR 332, [105].
77 (2013) 249 CLR 332, [19], [28].
78 See A Naylor, 'Recent Decisions Regarding Unreasonableness, Irrationality and Other Grounds for Judicial Review' (Paper presented at Administrative Law in Action, UNSW CBD Campus, 20 November 2013) [53].
79 (2014) 231 FCR 437.
80 (2013) 249 CLR 332, [44]–[48].
81 (2016) 237 FCR 1.
82 (2016) 237 FCR 1, [92].
83 (2017) 255 FCR 81.
84 (2017) 255 FCR 81, [35].
85 (2016) 69 AAR 210, [55].
86 (2015) 257 CLR 178.
87 (2015) 257 CLR 178, [3]–[4] (emphasis added).
88 (2015) 257 CLR 178, [79].
89 [2014] AC 700.
90 [1986] 1 SCR 103.
91 *McCloy v New South Wales* (2015) 357 CLR 178, [79]–[93]; see also Aronson, Groves and Weeks, above n 64, 377 [6.510]; J Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43 *Federal Law Review* 59, [72]; the Hon TF Bathurst, 'On to Strasbourg or Back to the Temple? The Future of European Law in Australia Post Brexit' (Paper presented at Sydney CPD Conference, Sydney, 25 March 2017) 8 [20].
92 [1996] QB 517.
93 See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [131], [458] (Kiefel J); and *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, [26]–[36].
94 Bathurst, above n 91, 8–9 [21]–[22].
95 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [198] (Gleeson CJ).
96 *Bruce v Cole* (1998) 45 NSWLR 163, 185 (Spigelman CJ).
97 (1990) 96 ALR 153.
98 (1990) 96 ALR 153, [50].
99 (1992) 30 NSWLR 307, [321]–[325].

100 (2013) 249 CLR 332, [28].
101 (2013) 249 CLR 332, [74].
102 (2014) 231 FCR 437 (obiter at [77]).
103 (2014) 231 FCR 437, 5 [12].
104 Dr G Hooper, 'Judicial Review and Proportionality: Making a Far Reaching Difference to Administrative Law in Australia or a Misplaced and Injudicious Search for Administrative Justice?' (2017) 88 *AIAL Forum* 29–47, 38–41.
105 Ibid 40.
106 Boughey, above n 91, [50]; Hooper, above n 104, 6 [16].
107 (2015) 237 FCR 188.
108 Bathurst, above n 91, 22 [64].
109 (1992) 30 NSWLR 307.
110 (1985) 4 NSWLR 139, 151.
111 See McDonald-Norman, above n 25, 349.