The '*Blue Sky* effect': a repatriation of judicial review grounds or a search for flexibility?

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At the heart of the High Court's 1998 decision in *Project Blue Sky Inc v Australian Broadcasting Authority*[1] (*Blue Sky*), concerning a trans-Tasman stoush over Australian broadcasting standards, is a strong emphasis on specific legislative intention and context. The Court was focused there on the consequences of specific procedural failure. Yet it might be argued that this decision effectively 'picked a winner' (or at least placed a hefty bet) in the lingering contests over the true source and shape of administrative legality, and hence firmly set in motion a conceptual shift away from external, pre-mixed standards in the ongoing refinement of various judicial review principles. At the very least it can be acknowledged that *Blue Sky* exerted a strong 'centripetal force' in Australian administrative law — drawing it inwards towards statutory specifics and statutory intention.[2]

In this article I plan to engage in what might rightly be called 'top-down' reasoning — a term used by some fine international and Australian jurists[3] — in order to re-examine the '*Blue Sky* effect': its permeation through Australian administrative law, its continuing significance and its place in the broader dynamics of Australian public law. 'Top-down' thinking comes with some risk, as would be noted by that statistician who drowned in a lake with an average depth of two feet. However, it is hard for long-term academics to avoid the temptation, given our long attention to quite focused fields of study and the fact that we have the luxury of being annoyingly impractical. Moreover, my top-down thinking has been prompted by what would appear to be some top-down thinking from the top in the recent Australian jurisprudence.

Ultimately, I would like to redirect the wandering but tenacious debate between the 'statutor-ist' and 'common law-ist' views of judicial review. This debate manifested itself most prominently in historical arguments between 'ultra vires theorists' (focused on statutory boundaries) and 'common law theorists' (focused on deeper conceptual legal roots),[4] and (of course) in the formative Australian debate between Justices Mason and Brennan in the 1980s.[5] As will be seen, the latter, at least, would seem to have been settled as a theoretically unproductive draw. Yet the underlying patterns in the Australian legal development have a very real and ongoing practical significance. To jump forward in the analysis, does a Federal Court judge today still reach for the pre-mixed categories of jurisdictional error enshrined in *Craig v South Australia*[6] or to the more internal, statutory-intention focused formulation of the

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1 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

2 Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 169.

3 See eg Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 303 (and the earlier commentators cited there).

4 See further Alan Robertson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 40; D Meyerson, 'State and Federal Privative Clauses: Not So Different After All' (2005) 16 *Public Law Review* 39.

5 See particularly *Kioa v West* (1985) 159 CLR 550 (discussed below).

6 (1995) 184 CLR 163.

concept? Does the state Supreme Court judge still reach for *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[7] (*Wednesbury*) to explain and apply the standard of 'unreasonableness' or does that standard now come from specific statutory context? Is there still anything resembling a single standard of bias or bad faith or fraud? It appears that there has been an incremental 'repatriation' of judicial review grounds — so carefully settled in by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) framework — such that any remaining freestanding administrative law standards are perhaps now to be carefully calibrated to specific statutory context.

It is certainly not proposed here that we return to the old debates between the 'statutor-ists' and the 'common law-ists'. In my view that would in fact distract us from a proper analysis of the important practical evolutions noted above and of other more complex practical dilemmas in modern Australian judicial review. The common law-ists have had visible defeats, and the statutory-ists must perhaps concede that their theory is unsettled by the fact that there have been many drivers for the courts' excavation of statutory intentions and, indeed, conspicuous diversions from that course. I believe the old debate is best left as a dignified draw. My contention is that it is more productive to recognise these 'repatriations' and the closer statutory focus (more generally) as part of a bigger dynamic — namely, a two-part search for flexibility in judicial review principles in response to broad changes in regulatory context, legislative drafting, public expectations and litigation strategy. This search for flexibility certainly builds agility, but it is also somewhat confounding at times — and would appear to come at a cost.

The '*Blue Sky* effect'

In *Blue Sky*,[8] the High Court formally rejected the old (sometimes pre-emptive) labelling of procedural failures as 'mandatory' or 'directory'. According to McHugh, Gummow, Kirby and Hayne JJ, the old classifications had drawn attention away from the real task of determining whether an act done in breach of a relevant legislative provision was valid:

> [The] classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning.[9]

The Court declared that 'a better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid'.[10] The legislative purpose in this regard was to be broadly ascertained by reference to factors such as statutory language, subject matter and the consequences of invalidity.[11]

This decision was thematically important in the evolution of Australian administrative law. The Court's strong focus on the notion of 'essential preconditions' helped to shape the gradually emerging touchstone for jurisdictional error and, indeed, this approach to identifying procedural preconditions shadowed the courts' simultaneous tussles with the

7 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
8 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.
9 Ibid 390.
10 Ibid.
11 Ibid 389 (McHugh, Gummow, Kirby and Hayne JJ).

identification of 'jurisdictional facts'.[12] More broadly, as alluded to above, *Blue Sky* provided momentum and prominence to a strengthening explicit focus on parliamentary intention in the Australian principles and reflected a broader commitment to clear away older generic ideas and standards considered to be somewhat redundant. This trend can be readily (but awkwardly) traced through the recent history of 'jurisdictional error', and its early footprint is, of course, conspicuous in formative natural justice cases. Yet close examination reveals the broader reach of this '*Blue Sky* effect' across a range of judicial review principles. There is evidence of an ongoing repatriation of the outlying judicial review grounds — in a sense returning the remaining freestanding standards of administrative legality to the corral of grounds that have always been calibrated to statutory context. The most prominent example is the ground of 'unreasonableness'; however, similar thinking can be found in the context of 'bias', 'bad faith' and 'fraud'. And this lens allows us to spot some earlier examples of actual or attempted repatriation in the context of the principles relating to delegation and behest.

Jurisdictional error

The *Blue Sky* attention to the gravity of specific procedural errors, and consequent distinction between unlawfulness and invalidity, saw that case having a natural and important influence on the principles of jurisdictional error — which, of course, rests on a similarly poised assessment of the seriousness of error (more generally).[13] Unsurprisingly, the emerging focus on legislative intent — and, indeed, some lingering tension with older methodologies — is clearly on display in the recent history of 'jurisdictional error'.

Plaintiff S157/2002 v Commonwealth[14] (*Plaintiff S157*) ushered in the modern thinking on the nature and function of jurisdictional error in Australia. Most clearly for present purposes, the High Court re-examined the old 'pre-mixed' formula in *The King v Hickman; Ex parte Fox and Clinton*[15] (*Hickman*) for the handling of privative clauses and determined (or perhaps reaffirmed) that *Hickman* was essentially nothing more than an aid to construction; a tool that might assist the court in reconciling provisions which both define powers and seemingly then free them from restriction.[16] The constitutional backdrop was significant in the *Plaintiff S157* reasoning, but at a more basic level so, too, was the concern to dismantle external standards that might distract from an examination of specific statutory intent.

Beyond this relegation of *Hickman*, the reasoning of the judges in *Plaintiff S157* reflected some clear convergence of the search for 'essential' limitations in the specific statute and the notion of jurisdictional error.[17] Yet it was at this point incomplete given the lingering presence of external tools for the identification of jurisdictional error; namely, the pre-mixed formulas

12 See eg *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55; *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

13 See generally in this regard *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

14 (2003) 211 CLR 476.

15 (1945) 70 CLR 598.

16 (2003) 211 CLR 476, 501 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

17 See ibid 504–7 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); cf the implications of Gleeson CJ's comments at 486, 489–90, 493. See also *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627.

from *Craig v South Australia*[18] (*Craig*) and presumptions from other precedents about the status of certain types of error. The joint majority in *Plaintiff S157*, having pressed the idea of a 'reconciliation' of provisions to determine whether some failure constitutes a jurisdictional error (thus outside the privative clause's protection), ultimately quickly classified a breach of natural justice as such an error simply based on earlier precedent.[19] Chief Justice Gleeson proceeded further on the path — apparently resisting presumptions and remaining focused on an internal assessment as he emphasised that the status of a natural justice breach depended on a construction of the statute as a whole (albeit that here it did prove to be a breach of an indispensable condition).[20] The Court in the critical state sequel to *Plaintiff S157* — namely, *Kirk v Industrial Relations Commission (NSW)*[21] — also appeared perhaps to waver between the internal (statute-specific) and external (pre-mixed) conceptualisations of jurisdictional error. The joint majority emphasised that there was no 'bright line test' and that the *Craig* formulas were not a rigid taxonomy but only examples, yet it ultimately did identify jurisdictional errors in the facts of the case with close reference to *Craig* categories.[22]

In recent decisions the 'internal' approach (based on the notion of essential 'preconditions' and 'conditions' under the particular statute) has gained some ascendancy, notably in the decision of *Hossain v Minister for Immigration and Border Protection*.[23] Another variant of the maturing 'statutory intention' focus, in the broader context of privative clauses, is the prominent recent confirmation in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[24] that permissible ouster (for example, of certioriari for 'error of law on the face of the record') need not be by way of an express privative clause but can be drawn from the Act as a whole (text, context and purpose).[25]

Unreasonableness

Perhaps the most prominent of the 'repatriations' of Australian principle explored in this article (albeit not very prominent) is found in the context of 'unreasonableness'. The 2013 decision of *Minister for Immigration and Citizenship v Li*[26] (*Li*) concerned a refusal by the Migration Review Tribunal (MRT) to exercise its power to adjourn review proceedings[27] pending a second skills assessment of the visa applicant by the relevant assessing authority (which was itself delayed by internal review). A straight natural justice challenge was difficult in this context owing to the presence of an 'exhaustive statement' provision as regards the relevant procedural obligations.[28] Some carefully argued attempts to evade this problem were raised (relying on the wording of aspirational provisions often found in tribunal statutes), but Hayne, Kiefel and Bell JJ ultimately focused on the ground of unreasonableness (which they

18 (1995) 184 CLR 163.
19 (2003) 211 CLR 476, 506–8, cf 496.
20 Ibid 490–1, 494.
21 (2010) 239 CLR 531.
22 Ibid 573–5 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
23 (2018) 359 ALR 1, esp [23]–[24] (Kiefel CJ; Gageler and Keane JJ).
24 (2018) 351 ALR 225.
25 Ibid [34] and the analysis following.
26 (2013) 249 CLR 332.
27 *Migration Act 1958* (Cth) s 363(1)(b).
28 Ibid s 357A. Note, however, the approach of French CJ at [18]ff, relying on and perhaps extending the reasoning in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

considered was not displaced by the statutory terms).[29] Importantly, close analysis reveals that their Honours seemed eager to keep this ground of review close to statutory context.[30] Most directly, their Honours stated at one point that '[the] legal standard of reasonableness must be the standard indicated by the true construction of the statute'.[31] They emphasised the formulation of the ground from *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* ('no sensible authority acting with due appreciation of its responsibilities' would have so decided the matter),[32] which arguably itself contains some cross-reference to statutory context. And the focus on statutory context inevitably led Hayne, Kiefel and Bell JJ to the traditional criticism that the *Wednesbury* formulation (a decision must be so unreasonable that no reasonable person could have made it) was perhaps guilty of some 'circularity and vagueness'.[33] Their Honours emphasised that unreasonableness might be inferred from the facts and the matters falling for consideration in the exercise of a particular power: inferred where the decision viewed in that context 'lacks an evident and intelligible justification'.[34]

The idea that the actual standard of 'unreasonableness' to be applied is calibrated to statutory context[35] is potentially a significant advance on the more obvious (and more conventional) point that the assessment of 'reasonableness' will take account of statutory context. Conceivably this was prompted in part by this use of the ground in a space generally occupied by natural justice — a ground very much calibrated to statutory context. Or perhaps this additional call to statute was a natural extension of a growing (on trend[36]) emphasis on the idea that 'the legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably'.[37] But is this extension necessary? It appears possible that the presumed limitation intended by the legislature might simply be the standard established (albeit somewhat opaquely) by the established 'unreasonableness' cases.

The recent decision of *Minister for Immigration and Border Protection v SZVFW* [38] concerned a *Li*-style challenge to the Refugee Review Tribunal's lack of action to facilitate the appearance of the protection visa applicant. The High Court, albeit focused particularly on the nature of the appellate court's role in such a case, rejected the unreasonableness

29 (2013) 249 CLR 332 [70], [86]; cf [14] (French CJ); [92], [94]ff, [99] (Gageler J) (note that his Honour considered the express exclusion of natural justice gave 'added significance' to the implied requirement for reasonableness — which he appeared to consider might itself provide a measure of natural justice).

30 Cf [14], [23], [28]ff (French CJ); [88], [90], [92], [98], [124] (Gageler J) (noting that the statutory context included the general aspirational provisions often used in the tribunal context).

31 (2013) 249 CLR 332 [67]. Cf [92] (Gageler J) (possible variation of the 'default' position).

32 [1977] AC 1014, 1064.

33 (2013) 249 CLR 332 [68].

34 Ibid [76].

35 For a detailed analysis, see Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *Public Law Review* 117.

36 See recently (eg) *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1 [28]–[29] and the discussion above of reasoning in the 'unreasonableness' cases; cf earlier discussion (and cases referred to) in Stephen Gageler QC, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 287; Gageler, above n 3, 307.

37 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [63] (Hayne, Kiefel and Bell JJ) (citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36). See also [28]ff (French CJ); [88]ff (Gageler J) (and the other authorities cited by their Honours).

38 (2018) 357 ALR 408.

challenge.[39] While the difficulty of precise definition of this ground was noted at various points, the broadly facilitative and inferential 'lack of evident or intelligible justification' formulation was emphasised again,[40] as was the traditional stringency of the test.[41] More relevantly for present purposes, the 'presumed legislative intention' approach to the ground continued to grow in prominence.[42] The relevance of statutory context to the assessment was certainly noted at various points;[43] however, clear confirmation of the variable standard idea raised in *Li* was more elusive. Justice Gageler's approach appeared to rest (again) on a 'default' standard that might be varied by the specific statute.[44] Justices Gordon and Nettle ultimately appeared to offer a middle position: '[the] standard of reasonableness is derived from the applicable statute but also from the general law'.[45] Justice Edelman appeared to settle on the proposition that the 'content' of the reasonableness test is 'assessed in light of the terms, scope, purpose, and object of the statute'.[46] Their Honours' ensuing analysis — and, indeed, the analysis in the short succeeding decision of *TTY167 v Republic of Nauru*[47] — reveals that there might be a fine line between context-driven assessment and a context-driven standard. However, as discussed below, there is an important point here, and an underlying pattern, that is central to the ongoing predictability and normative influence[48] of administrative law in Australia.

Bias, bad faith and fraud

Some ostensibly freestanding standards of administrative legality have long resided at the sharper end of decision-making error. Yet in recent years there are signs that these might similarly be drawn into the 'repatriation' of grounds process. In the context of bias, it is, of course, well known that a 'spectrum' of standards approach has been keenly deployed to accommodate the great range of decision-making contexts in which bias challenges might arise.[49] This approach appears to have crystallised in the context of ministerial actions in the migration context in the late 1990s / early 2000s — where close attention was paid to the nature of the decision-making process and the identity of the decision-maker.[50] This thinking

39 Ibid [14] (Kiefel CJ); [70]–[71] (Gageler J); [123] (Gordon and Nettle JJ); [140]–[141] (Edelman J).
40 Ibid [10] (Kiefel CJ); [82] (Nettle and Gordon JJ).
41 Ibid [11]–[13] (Kiefel CJ); [51]–[52] (Gageler J); cf [97] (Nettle and Gordon JJ).
42 Ibid [4] (Kiefel CJ); [51]–[53] (Gageler J); [80], [89] (Gordon and Nettle JJ); [131], [134] (Edelman J).
43 Ibid eg [52], [59] (Gageler J); [79], [90]ff (Gordon and Nettle JJ); [131]ff (Edelman J).
44 Ibid [53]; cf much earlier comments in Gageler QC, above n 36, 287.
45 Ibid [88]. Cf [133]ff (Edelman J).
46 Ibid [135] (referring to *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 5 (Allsop CJ).
47 (2018) 362 ALR 246 (Gageler, Nettle and Edelman JJ). Note particularly the comment at [29]: 'It was not in dispute that the standard of legal unreasonableness imposed as a condition of exercise of the power in the Refugees Convention Act is a demanding standard, *particularly in light of* the concerns of informality and the need for efficiency that that underlie Tribunal hearings and the wide latitude that the Tribunal has in making a decision under s 41(1) to decide the matter in an applicant's absence. Nevertheless, there are six reasons, in combination, why the circumstances of this case were so exceptional that the decision of the Tribunal to proceed … was legally unreasonable.' (Emphasis added and references omitted.)
48 See broadly Bateman and McDonald, above n 2, 155.
49 For a broader discussion, see Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* 928.
50 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 [78], [102] (Gleeson CJ and Gummow J). See also, in a different ministerial context, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 [50] (Gaudron, Gummow and Hayne JJ).

was also quickly applied to tribunal members[51] and has since been applied in various other contexts.[52] The High Court broadly reaffirmed this sensitivity to different decision-making context in the 2015 decision of *Isbester v Knox City Council*.[53] Beyond this, there have been hints of a more granular examination of statutory context in the formulation of bias standards. In the context of a 2012 Federal Court examination of decision-makers' use of 'cut and pasted' reasons (or 'templates') in multiple matters, and the implications as regards both the fair hearing rule and the bias rule, it was noted in passing that a bias challenge might be difficult to make out in this context, as the court weighs contextual factors such as decision-making volume and repetition, the nature of the claims and decisions in question, the *kind and degree of neutrality required*, and the precise nature of the similarity between successive decisions.[54]

In the context of 'bad faith' an example of such calibration might be found in the reasoning in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*,[55] which concerned a challenge to a decision of a construction adjudicator. There was support here for a context and statute-specific approach to the meanings of notions of 'good faith' and 'bad faith'. In the leading judgment of White JA, her Honour ultimately preferred to look to what the particular Act required of the decision-maker rather than 'elusive synonyms', and here it was noted particularly that in the relevant context 'rapid' decision-making was necessary.[56]

In the context of 'fraud', a telling comment is found in the important 2007 decision in *SZFDE v Minister for Immigration and Citizenship*:

> the present appeal should be resolved after close attention to the nature, scope and purpose of the particular system of review by the Tribunal which the Act establishes and the place in that system of registered migration agents. Any application of a principle that 'fraud unravels everything', requires consideration first of that which is to be 'unravelled', and second of *what amounts to 'fraud' in the particular context*. It then is necessary to identify the available curial remedy to effect the 'unravelling'. [57]

Delegation and behest

For completeness, the analysis pursued above might be applied, retrospectively, to some interesting past agitation and evolution in the law relating to delegation and the ground frequently referred to as 'behest'. In the former context we might note the gradual erosion of the old *Carltona* principle, allowing lower governmental officials to act as the 'alter ego' of senior ones, which has recently been described as being of 'uncertain' scope and status in

51 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 esp 138 (Gleeson CJ, McHugh, Gummow and Hayne JJ); *AZAEY v Minister for Immigration and Border Protection* (2015) 238 FCR 341 (North, Besanko and Flick JJ).

52 See eg *Watson v SA* (2010) 278 ALR 168 (Doyle CJ, Anderson J agreeing); *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 (particularly Basten JA); *Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council* (2010) 174 LGERA 67 (particularly Tobias JA); *Duncan v IPP* (2013) 304 ALR 359 (Bathurst CJ, Barrett and Ward JJA agreeing).

53 (2015) 255 CLR 135, esp [22]ff (Kiefel, Bell, Keane and Nettle JJ).

54 *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223, [43]ff.

55 [2012] 1 Qd R 525.

56 Esp [96].

57 (2007) 232 CLR 189 [29] (emphasis added).

Australia.[58] The critical point appears to be that, although courts continue to acknowledge that the scale of administrative decision-making often requires a flexible approach to the rule against delegation,[59] in the contemporary context of more detailed statutory prescription of administrative decision-making structures and roles, the *Carltona* principle in its raw form is of less relevance, and it has become more important closely to examine the scheme and the nature and purpose of any decision-making responsibility conferred on the senior public official.[60] Indeed, the careful inquiry might be directed to which *components* of a function can be handled below.[61] And it appears that in some cases, perhaps where the 'necessity' is less compelling, the courts might look for evidence of a clear authorisation — suggesting some return in these cases to a more traditional search for an implied power to delegate and evidence of its exercise.[62]

In the classic Australian case on 'behest', *Bread Manufacturers of NSW v Evans*[63] (which concerned a challenge to orders made by the New South Wales Prices Commission), Mason and Wilson JJ in their judgment indicated that the extent to which higher views can be taken into account and acted upon will depend on circumstances such as the particular function and character of the decision-maker, the intent of the legislation as to the relationships involved, and the nature of the views expressed.[64] These comments by Mason and Wilson JJ, alluding in part to the possibility of a distinctly variable scale of required independence, appear not to have been closely explored in later decisions on this ground — but they are potentially significant in the context of this exploration in this article. On the facts, Mason and Wilson JJ felt that the Commission could not be expected to operate in a vacuum and was therefore free to take advice from others, including the Minister (in light of the ministerial veto power).[65] They went on to conclude that there was no evidence here that any member of the Commission had forsaken their independence.[66]

Even this brief and esoteric survey of examples reveals that there is a pattern in the recent evolution of Australian administrative law and that it is continuing to influence the trajectory of our incremental doctrinal development. Taking this to its logical end, there is a theoretical possibility that our traditional grounds of judicial review will, over time, be dissolved in principles of statutory interpretation.[67] Yet before we launch into critique, re-enter the theorising of past debates or even innocently ask 'how far should this go', it is important that we look closely at this pattern in broader perspective — to ensure that we are seeing the whole of the picture. Do the examples selected above truly reflect a consistent pattern of thinking? Does it have a coherent rationale? It is argued here that in fact this pattern of statutory focus and repatriation of grounds is better viewed as part of a larger

58 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* (2014) 88 NSWLR 125 [11] (Basten JA).
59 See eg *New South Wales Land and Housing Corporation v Navazi* [2013] NSWCA 431.
60 See eg *Koowarta v Queensland* [2014] FCA 627, [201]ff; *Salia Properties Pty Ltd v Commissioner of Highways* [2012] SASCFC 33; cf *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* [2014] NSWCA 377 [11].
61 See eg *De Angelis v Pepping* [2015] NSWCA 236 [132]ff.
62 See eg ibid [121]ff.
63 (1981) 180 CLR 404.
64 Ibid 429–30.
65 Ibid 428ff.
66 Ibid 439ff.
67 See Gageler, above n 3, 312.

phenomenon — a natural but conceptually fraught search for flexibility in judicial review principle in response to broadening and diversifying regulatory context, evolving legislative drafting, and maturing public expectations and litigation strategy.

Departures from the 'statutory intention' focus

A broader analysis reveals, first, that there have been significant pauses, diversions and even retreats in the repatriation of principles sampled above. In many instances, these saw the courts reaching again for deeper external standards or touchstones in the application of judicial review doctrines. In broad terms, the refurbished but slightly opaque ideas behind the 'principle of legality' — a presumption against legislative interference with fundamental rights and freedoms[68] — allows the court to view legislation through a tinted protective lens[69] that can be difficult for drafters to dislodge.[70] The entwined histories of jurisdictional error and privative clause construction (some of which was recounted above) also illustrate the ongoing influence of external measures in judicial review principles. Whilst *Hickman* may have been firmly returned to the broader toolbox of constructional aids, the influence of the pre-mixed *Craig* classifications of jurisdictional error clearly lingers in contemporary reasoning.[71]

More specifically, in the context of the very principles that gave rise to *Blue Sky*, a recent case also illustrates the ongoing role of external measures in otherwise quite exacting statutory interpretation exercises. In *Forrest & Forrest Pty Ltd v Wilson*,[72] the High Court considered the consequence of non-compliance with Western Australian legislation requiring mining lease applications to be accompanied by certain operations statements and mineralisation reports.[73] The joint majority examined the statutory scheme and carefully considered but distinguished *Blue Sky* in holding that the procedural requirements were 'essential preliminaries' to the grant of leases and that the breaches were effectively invalidating.[74] Notably for present purposes, there was a very conspicuous draw on a 'line of authority' establishing that, where a statutory regime confers power to grant exclusive rights to exploit resources, it will be understood (subject to contrary provision) as 'mandating compliance with the requirements of the regime'.[75] The importance of this to the majority's conclusions was clear from the reasoning: 'Finally, and importantly, *Blue Sky* was not concerned with a statutory regime for the making of grants to exploit the resources of a State.'[76]

68 *AL-Kateb v Godwin* (2004) 219 CLR 562 [18]–[19] (Gleeson CJ).
69 See eg *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 [25]ff (French CJ); *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 [31], [54] (French CJ, Hayne, Kiefel and Nettle JJ).
70 See eg operation of correlative principles in the natural justice context: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204; and most recently *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599.
71 See particularly *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531; and recently (eg) *Hossain v MIBP* (2018) 359 ALR 1 (Edelman J); *MIBP v SZMTA* (2019) 363 ALR 599 (Nettle and Gordon JJ).
72 [2017] HCA 30.
73 *Mining Act 1978* (WA) s 74.
74 [2017] HCA 30 [63] (Kiefel CJ; Bell, Gageler and Keane JJ).
75 Ibid [64]ff.
76 Ibid [63].

The history of natural justice (or 'procedural fairness') is also instructive in this regard. Building on what has been said already, the context-sensitive 'spectrum' approach to bias standards appears to be now sharing ground (at least) with a newer methodology of 'speciation' — with some apparent variation in applicable standards depending on the precise nature of the bias alleged.[77] Obviously, this speciation of bias is somewhat removed from excavations of statutory intention. More directly, much of the steam that has driven the contemporary statute versus common law debates in recent times was, of course, generated by Brennan J's denial (most conspicuously in *Kioa v West*[78] (*Kioa*)) of the existence of a 'free-standing common law right' to natural justice and emphasis upon the centrality of the statutory construction process.[79] While his Honour was broadly concerned in this era to re-mark the boundary between questions of 'legality' and 'merits',[80] his particular target in *Kioa* was the notion of 'legitimate expectations' — which he regarded as being of 'uncertain connotation' and potentially misleading, particularly as regards the initial question of whether natural justice applied. He felt that this question demanded a 'universal answer' for any given statutory power.[81] As noted earlier, the debate over the source of natural justice obligations (later restated as a question of whether the rules of natural justice derive from the common law or are implied in statute by or with reference to the common law)[82] ultimately stalled amidst doubts as to its significance.[83] The notion of 'legitimate expectations', through Brennan J's lens, might now be understood as a failed (lengthy) experiment with external circumstantial considerations in the application of judicial review doctrine.[84] The final demise of this notion is likely to place more pressure upon statutory interpretation exercises — for example, in sorting through licensing/approval type scenarios (where the concept of legitimate expectations had a prominent role). Yet ironically, as will be seen, in a sense external circumstantial considerations do appear to have gained a firm foothold in the natural justice principles via the notion of 'practical injustice' — which reaches into the question of whether in a practical sense a person lost an opportunity to make some material submission.[85]

77 See further discussion of (eg) the ostensibly special position of 'prejudgment' and 'incompatibility' bias: Young, above n 49.

78 (1985) 159 CLR 550.

79 Ibid 609 (although his Honour did acknowledge the relevance of the 'background of common law notions of justice and fairness').

80 As to his Honour's comments in neighbouring cases, see the analysis in Bateman and McDonald, above n 2, 153.

81 (1985) 159 CLR 550, 611–12, 616ff.

82 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 83; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204 [11]–[12] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

83 See particularly *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41 [74]; *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31 [97] (Gummow, Hayne, Crennan and Bell JJ). See also *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 [75], [77], [81], [82]; and recently *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599 [83] (Nettle and Gordon JJ).

84 Its demise can be traced through *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; *NAFF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204; *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41; *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31; *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40.

85 See eg *CSR v Eddy* [2008] NSWCA 83 [40]–[41] (Basten JA, Hodgson and McColl JJA agreeing).

A search for flexibility?

Another difficulty in embracing the 'statutory intention' explanation of Australia's administrative law evolution is the fact that it is difficult to identify a coherent rationale for such an approach. Certainly at key moments this conspicuous and exacting attention to statutory intentions has lent some democratic legitimacy and/or constitutional propriety to difficult decisions reached by the court.[86] Yet close analysis suggests that in most instances the strong focus on statutory intention was a somewhat pragmatic response to varied and difficult modern challenges: to avoid the unpalatable consequences of wholly invalidating existing broad-reaching regulatory frameworks;[87] resurrect some semblance of fairness in the face of an ouster of natural justice;[88] accommodate vastly differing decision-making contexts and responsibilities;[89] and accommodate the complexity of contemporary decision-making hierarchies.[90] In all cases then the careful statutory focus might be viewed as a search for greater flexibility in judicial review principles, to accommodate the significant evolutions in governmental and regulatory context. The democratic legitimacy and constitutional propriety advertised by the strong deference to large-L (legislative) law was certainly a bonus, particularly given that in some of these cases the courts appeared to be excavating deeper statutory intentions to tunnel around specific statutory obstacles. The statutory focus has certainly contributed agility to judicial review — perhaps more than might have seemed possible. *Blue Sky* itself illustrated that an examination of statutory intention might extend to a consideration of the consequences of invalidation for a breach. Similarly, some of the significant diversions and retreats from the statutory intention focus (discussed above) also reflect a search for a new flexibility.

Perhaps then we have tended to miscategorise that true nature of the legal evolution in play. The 'statutory intention' theory might seem to tell only part of the story — and imperfectly. To reconceptualise the challenge as a modern search for flexibility in middle-aged common law doctrine might help us to better understand the trajectory, contribute more in our discussions to the daily efforts of the courts in meeting these big challenges, and more readily spot the attendant risks. I believe the search for flexibility has come in two parts. In the first place, the courts have instinctively and deftly sought a closer connection to governmental and regulatory context — to better respond to a broadening and diversification in legislative subject matter and purpose, and in regulatory style and detail. Much of the contextual change is reflected in the relevant legislation and can be accessed through a closer and more holistic focus on legislative terms and intention. The question we are left with in this context is: does this necessitate a repatriation of all of the remaining freestanding grounds? The second part of the search for flexibility (and perhaps reflexivity) is best understood, I think, as the courts seeking a closer connection to the consequences of administrative error or misdirection — to better respond to more complex administrative decision-making contexts and more sophisticated public expectations and evolving litigation volumes and strategies. This second search takes the courts somewhat beyond statutory terms and is in many respects more challenging.

86 See particularly (eg) *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. And see more generally the valuable discussion in Bateman and McDonald, above n 2.

87 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

88 *Minister for Immigration and Citizenship* (2013) 249 CLR 332.

89 See the cases discussed above on bias, 'bad faith' and 'fraud'.

90 See cases discussed above on delegation and 'behest'.

Second-stage flexibility, as I term it here, is a topic for a succeeding study. However, relevantly for present purposes, some of the diversions and retreats from the statutory intention focus (noted above) might properly be regarded as components of this second-stage evolution of principle. This type of flexibility — calibration to consequence — has long had an inchoate presence in various corners of our judicial review doctrines. It was present in the reference to 'materiality' in the template for the relevancy/irrelevancy grounds of review laid out in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*[91] (*Peko Wallsend*). In the natural justice context it had some influence in the wandering operations of the now discarded notion of 'legitimate expectations', and more clearly in the 'adverse, credible, relevant and significant' trigger for an obligation to disclose material under fair hearing rules,[92] which more recently appears to be evolving into a (possibly more subjective) requirement that the information in question be 'information that the repository of power … might take into account as a reason for coming to a conclusion adverse to the person'.[93] Of course, calibration to the consequences of the breach is also central to the natural justice notion of procedural 'practical injustice' (or 'actual unfairness') that emerged from the decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[94] (*Lam*) and to the older principle in *Stead v State Government Insurance Commission*[95] (*Stead*), focusing on the possibility of a different substantive outcome but for the natural justice error. Conventionally, the *Lam* and *Stead* notions have been kept relatively separate in their operation;[96] however, very recently there has been some possible merger of the two ideas.[97]

Very interestingly for present purposes, the calibration to consequence also found its way into the application of *Blue Sky* principles. In *Attorney General of New South Wales v World Best Holdings Ltd*[98] Spigelman CJ identified a possible ambiguity in the reasoning of *Blue Sky* — as to whether it is necessary to look for a legislative intention that 'any' act done in contravention of the relevant procedure should be invalid or, more specifically, an intention that 'an' act done in contravention should be invalid. In his view the latter approach would generally be applicable in the sense that the court must generally examine what the legislature intended in respect of the particular breach under consideration.[99] This approach appeared to surface in the High Court in the brief 2009 decision of *Minister for Immigration and Citizenship v SZIZO*.[100] There the High Court overturned the Full Federal Court's conclusion[101] that a misdirected notice of hearing was invalidating despite the attendance in

91 (1986) 162 CLR 24.
92 See particularly *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 [14]ff (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).
93 *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 [83]. See also *BRF038 v The Republic of Nauru* [2017 HCA 44 [58].
94 (2003) 214 CLR 1.
95 *Stead v State Government Insurance Commission* (1986) 161 CLR 141; see also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609.
96 See eg the cautions of Basten JA in *CSR v Eddy* [2008] NSWCA 83 [40]–[41] (Hodgson and McColl JJA agreeing).
97 *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599 [3], [38].
98 (2005) 63 NSWLR 557.
99 Ibid 580; cf *Applicant NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 214.
100 [2009] HCA 37.
101 *SZIZO v Minister for Immigration and Citizenship* [2008] FCAFC 122; cf *Le v Minister for Immigration and Citizenship* [2007] FCAFC 20.

any event of the relevant party — emphasising that it was necessary in the case before it to look at the extent and consequences of the particular failure (measured here against basic nature justice standards).[102]

Obviously, there is some correlation here with the notion of procedural 'practical injustice' (or 'actual unfairness') in the natural justice context. More importantly, however, the natural association of the *Blue Sky* principles and the principles relating to 'jurisdictional error'[103] perhaps made it somewhat inevitable that this new attention to (specific) consequences in the former context would lead to further refinements in the latter. Indeed, this likelihood was nudged along, and possible terminology provided, in the 2015 High Court decision of *Wei v Minister for Immigration and Border Protection*[104] (*Wei*). At several points in their judgment Gageler and Keane JJ indicated, although it was not significant in this case, that the search was for a 'material' breach of the imperative requirement identified.[105]

Ultimately, in the 2018 decision of *Hossain v Minister for Immigration and Border Protection*,[106] Kiefel CJ and Gageler and Keane JJ emphasised that, in addition to the search for preconditions and conditions, it was necessary to discern the 'extent' of non-compliance necessary (that is, whether a particular failure was of a magnitude) to take the decision outside of jurisdiction.[107] Interestingly, as per the specific breach extension of the *Blue Sky* principles, this calibration to consequence was itself categorised as an exercise in statutory construction.[108] Their Honours proceeded to state (referring to the *Stead* natural justice cases, the *Peko Wallsend* formulation for relevancy/irrelevancy and comments in *Wei*) that a statute is ordinarily to be interpreted as incorporating a threshold of 'materiality' before denying legal force and effect to a decision made in breach of a condition — which 'ordinarily' would not be met if compliance could have made 'no difference to the decision in the circumstances in which it was made'.[109] Justice Nettle and Edelman J, in separate judgments, were at pains to emphasise that there were exceptions to any requirement that an error must be material in this sense before being classified as a 'jurisdictional error'.[110]

A majority of the High Court (Bell, Gageler and Keane JJ) confirmed this consequence-sensitive approach to jurisdictional error in *Minister for Immigration and Border Protection v SZMTA*[111] (*SZMTA*). The conceptual difficulties attending this second-stage search for flexibility — namely, the attempt to calibrate principles to specific consequence — was evidenced by the strong dissent on the key issues by Nettle and Gordon JJ in *SZMTA*. They considered that the deployment of a 'materiality' inquiry (as part of the identification of jurisdictional error as opposed to the residual remedial discretion) entailed departure from the statutory construction exercise and would lead to uncertainty — as well as involving an inappropriate reversal of the onus in the proceedings.[112] The critical questions we are

102 At [35]ff.
103 See eg *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.
104 [2015] HCA 51.
105 Ibid [28], [32], [33].
106 (2018) 359 ALR 1. See also *Shrestha v MIBP* (2018) 359 ALR 22.
107 (2018) 359 ALR 1 [27].
108 See also [66]–[67] (Edelman J).
109 (2018) 359 ALR 1 [29]–[30]. Cf [72] (Edelman J).
110 Ibid [40] and [72] respectively.
111 (2019) 363 ALR 599.
112 Ibid [88]–[93].

perhaps left with, as regards this stage 2 flexibility, are at what stage has the court descended too far into the substantial reasoning (and hence the task) of the decision-maker below and/or at what point has the objective preventative procedural protection of administrative law standards drifted too far into subjective, situation-specific speculation.

Conclusion: the implications of flexibility

There would seem to be some obvious practical costs attending the evolutions examined in this article. Most simply stated, there is a growing variability in our standards of administrative legality. It is difficult to avoid the reality that with each 'repatriation' or calibration to specific statutory context — or, indeed, with each deferral to the consequences of breach — there is some incremental loss of consistency, predictability and normative influence in Australian administrative law — which perhaps runs counter to some of the basic precepts of the modern iteration of the 'rule of law'.[113] And this in turn has implications for the 'appearance' (and hence perceptions) of administrative law. As a long-term teacher in the field, I am tempted to apply a litmus test of 'teachability' as I consider the implications of these evolutions. Practitioners might apply their test of 'advisability' as they consider these developments in the context of their clients' affairs. And public officials might be asking themselves about the accessibility of these principles in the context of their own, often broad and under-resourced, responsibilities.[114] I suspect we might all anticipate some difficulty engaging with the increasingly complex interpretive and predictive inquiries attending this field of law.

There are further reasonably apparent difficulties with the evolutions we are witnessing. Obviously, a determined calibration to statutory context carries some devaluation and disassembly of the common law of public law in Australia and, given the sophistication of existing judicial review principles, there is some artificiality[115] in attempting to attribute their complex nuances to statutory design or presumed statutory acknowledgment. Even if we embrace the latter theoretical compromise — that is, the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power[116] — this would seem to stultify somewhat the capacity of administrative law principles to continue to adapt and improve. Is the legislature presumed to have anticipated (at the time of drafting) necessary refinement in or clarification of the 'common law principles'? Another very obvious difficulty with this statutory intention focus is that in the context of *non-statutory* powers this is at best conspicuously unhelpful and at worst quite corrosive.

As regards the calibration to consequences of breach, the potential in such a context for judicial overstep (and, indeed, some drift into the merits of the decision under review) has already for some time been the subject of discussion by academics and cautionary comments by senior judges. Courts have been regularly invited retrospectively to ponder procedural hypotheticals (since *Lam*) and the probabilities of different factual findings or outcomes (under the guise of the *Stead*). In the context of the new 'materiality' principles attending jurisdictional error, the High Court recently noted and resisted (in *Nobarani v Moriconte*[117])

113 Bateman and McDonald, above n 2, 176–9.
114 On the position of public officials, see Bateman and McDonald, above n 2, 178–9.
115 Cf Gageler, above n 3, 312.
116 See recently (eg) *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1 [28]–[29].
117 (2018) 359 ALR 31 [48].

a request to conduct a broad hypothetical revisiting of the original decision. Very recently in *SZMTA*[118] the majority also noted but worked around the risks, while Nettle and Gordon JJ (in dissent on the critical issues) posed the hazard of a drift into 'merits' as one of their key objections to the superimposition of a requirement of 'materiality'.[119]

However, there are also some highly complex structural issues in play. It is important to note that the first-stage reach for flexibility (through statutory calibration) was driven particularly by jurisdictional error and the *Blue Sky* principles — in both cases in the context of a consideration of the practical implications of identified error. There was also a significant contribution from natural justice, of course, in the form of some important theoretical debate (in *Kioa*) and an enormous caseload entailing the application of principles that had long been closely calibrated to statute. The influence of the evolution of jurisdictional error, on the approach taken to the more specific grounds, is not just a matter of raw force. There is also a conceptual pull involved. In the first place, as jurisdictional error (in its classification of the gravity of error) has become more firmly and cleanly attached to internal statutory terms and intentions, it might seem to become more difficult to sustain freestanding anterior standards of error in the individual grounds. Can an error identified and articulated by reference to external standards be accommodated by what is becoming a purely internally driven assessment of whether that error is 'jurisdictional'? This might require a further draw on presumptions of legislative acknowledgment of common law standards. Moreover, it must be remembered that 'jurisdictional error' now has a constitutionally privileged place (at both federal and state level), and the new reality is that some repatriation of old freestanding grounds, and their integration with the internally focused jurisdictional error principles, is perhaps the best way to preserve the underlying standards involved in the face of more legally intrusive legislative direction. The battle for freestanding common law principles might be lost in order to win a war over the underlying standards of administrative legality.[120] This, of course, underscores a key premise of my article — namely, that the evolution underway is perhaps more a matter of pragmatism than principle.

It is also interesting to note that the second-stage reach for flexibility (through attention to consequence) has been driven largely by natural justice. The cross-influence in this instance (that is, the spread of various iterations of the idea of 'materiality') *is*, I would suggest, largely a matter of raw force. The natural justice caseload has been extraordinary — and it was somewhat inevitable that transferable principles would be identified and, indeed, transferred.

My sense is that many might applaud the relative clarity of a final complete shift to the internal 'essential preconditions' approach to identifying jurisdictional error but that many might yet be uncomfortable with the broader 'repatriation' of grounds that is possibly taking place. Jurisdictional error is concerned ultimately with the seriousness and *practical implications* of identified error, which might seem to be a quintessentially legal question that the courts might very appropriately answer in a flexible and even somewhat conclusory manner. Yet the sacrifice of the normative influence and predictability of the many separate grounds of review, including where they flag error for the subsequent reflexive application of a jurisdictional error assessment, would seem to be a different matter. It would seem to be important that

118 (2019) 363 ALR 599 [48]–[49].
119 Ibid [95].
120 See Bateman and McDonald, above n 2, 178–9.

we at least seek to maintain the ‘default’ standards reflected in the traditional grounds. And, as to the very latest developments, the foray into ‘materiality’ will no doubt quickly re-enliven debates about the risks of overzealous application of the ‘practical injustice’ notion and the *Stead* principle and, indeed, the risk of blurring the two together.