

# THE RISE OF JUDICIAL POWER IN AUSTRALIA: IS THERE NOW A CULTURE OF JUSTIFICATION?

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## I INTRODUCTION

Modern judicial review in Australia has been characterised by a significant increase in the judiciary's willingness to constrain the actions of both the executive and the legislature. Indeed, such has been the expansion of the judicial role that a respected jurist has observed that 'it is only a slight exaggeration to suggest that Australians are now living in an age of judicial hegemony'.<sup>1</sup>

How has this increase in judicial power come about? The obvious doctrinal answer is that with some initial legislative assistance, the judiciary has simply extended incrementally the reach of a number of very traditional common law principles designed to ameliorate the risk of arbitrary governmental decision-making. Yet despite judicial protestations that the judiciary only makes decisions on a case by case basis and that little is to be gained by resorting to overarching values and theories,<sup>2</sup> it seems far too naive to accept that the judiciary's increased power is the consequence of a coincidental confluence of individual cases.<sup>3</sup> A more satisfying explanation, and one taken up in this article, is that there has been an underlying shift in the role that the judiciary sees for itself. More specifically, there has been a shift in the judiciary's understanding of what the rule of law now requires of it, for as Brennan J once observed, '[j]udicial review is neither more nor less than the enforcement of the rule of law over executive action'.<sup>4</sup>

In the absence of the judiciary articulating with any particularity what the rule of law actually means, it is suggested that the rise of judicial power in Australia can be usefully viewed as an attempt by the judiciary to impose upon the executive and legislature standards akin to those underlying what has been termed a 'culture of

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1 Ronald Sackville, 'An Age of Judicial Hegemony', *The Australian Financial Review* (Melbourne), 13 December 2012, 47.

2 *SGH Limited v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 (McHugh and Gummow JJ); *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 303 ALR 64, 76 [45] (French CJ, Crennan, Bell, Gageler and Keane JJ) ('*Wingfoot*'); *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 455 [14] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

3 Writing before his appointment to the High Court but while Solicitor General of Australia, Stephen Gageler observed that there had been a fundamental change in administrative law and implied that its normative underpinnings were not adequately explained and that in the future both courts and commentators should seek to do so: Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 105.

4 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70.

justification'. However, in making this claim, two qualifications need to be made. First, the use of the word 'culture' can suggest an all-pervasive societal acceptance that would include the legislature, executive and judiciary. This is not how it is used here; rather it is a medium internal to the judiciary and through which it shares values that shape how it interprets legal rules and principles. Second, judicial review (and the common law system generally) 'has *always*, at some level, been about justification',<sup>5</sup> it is just that now, there is a richer, more demanding standard.

This article will be divided into three main parts. First, in Part II there will be an examination of what a culture of justification entails and, because it is often used in a very generalised manner, particular attention will be paid to its democratic foundations and practical and theoretical origins in South Africa. Second, in Part III developments in Australia will be examined that support the proposition that there has been a substantial shift in power to the judiciary consistent with it taking on the role envisaged for it by a culture of justification. This examination will begin with legislative initiatives in the 1970s that increased access to judicial review. It will then proceed to consider the judicial expansion of natural justice, legislative and judicial requirements for reasons, the recent judicial emphasis on the quality of administrative decisions, and finally, two examples of just how determined the judiciary has become to uphold this role. Third, in Part IV it will be concluded that an understanding of the shift that has taken place and its limitations is useful, but that administrative law (including judicial review) is shaped by many competing demands. Therefore any shift will be far from linear. Further, it is the judiciary, not the legislature and executive, that has championed this shift. Consequently, rather than a shift toward a culture of justification which is suggestive of an all-pervasive change, it is more helpful to talk of an evolution in which the judiciary is seeking to impose a justificatory account of the rule of law. It is an account of the rule of law that provides a more nuanced (while at the same time demanding) approach to the promotion of traditional administrative values such as the protection of the individual from arbitrary government power and the quest for good administration.

## II A CULTURE OF JUSTIFICATION

### A *Étienne Mureinik*

On the international stage it is becoming topical to speak of the need for governments, and in turn administrative law, to be subject to a culture of justification.<sup>6</sup> This is perfectly understandable as it offers an alluring vision, in

5 Mark Elliott, 'Justification, Calibration and Substantive Judicial Review: Putting Doctrine in Its Place' (Research Paper Series No 33, University of Cambridge Faculty of Law, September 2013) 2 (emphasis in original).

6 David Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 234; Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463.

which the government will explain in a rational manner why it took the action that it did — it will justify its decisions. But a vision may be stymied if it cannot be articulated at a sufficiently detailed level to provide guidance to those seeking to implement it. Étienne Mureinik strove to provide such detail.

Étienne Mureinik coined the term ‘culture of justification’.<sup>7</sup> He was a South African scholar and vocal opponent of what he saw as either judicial compliance with, or timidity during, South Africa’s apartheid era.<sup>8</sup> He argued that the judiciary’s failure could be explained by its acceptance of a culture of authority. He believed that for a true democracy to rise, prevail and thrive in South Africa the pre-existing culture of authority had to be abandoned and in its place the government needed to embrace a culture of justification.<sup>9</sup> Mureinik’s ideals have been most famously built upon by his one time student, and then colleague, David Dyzenhaus.

Étienne Mureinik described a culture of justification as:

a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.<sup>10</sup>

It is a culture where those that govern must be willing and able to justify their decisions to those they govern, especially those most directly affected by their actions. Such a culture was to be contrasted with the prevailing apartheid era ‘culture of authority’, which was based on an overly simplistic but alluringly straightforward understanding of democracy. In essence, this understanding was that the elected legislature had the power to make any law and empower the executive to implement it. The judiciary was charged with simply determining within what boundaries the legislature had authorised the executive to act. It was not the judiciary’s concern if a literal reading of a legislative enactment left these boundaries so broad that they allowed the executive to make arbitrary and unfair decisions. Rather, it was for the governed to reprimand their elected representatives and, if still unsatisfied, to vote them out of office at the next

7 See his call to arms in Étienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31. Although this article was concerned with South Africa’s post-apartheid Constitution and in particular the need for it to ‘spearhead the effort to bring about a ‘culture of justification’, he did not see a Bill of Rights as a prerequisite to judicial implementation of a culture of justification: at 32.

8 See especially Étienne Mureinik, ‘Pursuing Principle: The Appellate Division and Review under the State of Emergency’ (1989) 5 *South African Journal on Human Rights* 60; Étienne Mureinik, ‘Law and Morality in South Africa’ (1988) 105 *South African Law Journal* 457.

9 Mureinik, ‘A Bridge to Where?’, above n 7, 32.

10 *Ibid.*

election. Supporters of apartheid argued that in this way, a culture of authority promoted both democracy<sup>11</sup> and the rule of law.<sup>12</sup>

Equating a culture of authority with democracy confuses cause and effect. A culture of authority reflects what Dyzenhaus has described as a '*transmission account* of the rule of law' (or rule by law rather than rule of law) in that it simply acts as a vehicle for enforcing the law made by those with authority to make it.<sup>13</sup> Although couched in terms of democracy, it serves the interests of those in power. A culture of authority is equally, if not more, at home in a totalitarian regime. Similarly, under apartheid it was utilised by the minority in government to perpetuate and increase the disenfranchisement of the majority. Conversely, it offers no protection to a repressed or mistreated minority with insufficient numbers to have any electoral clout. None of these scenarios present an aspirational vision of government and illustrate that while a culture of authority may operate acceptably in a healthy democracy, it is not the reason for the democracy's health.

On the other hand, while a culture of justification also accepts that the legislature is the primary lawmaker,<sup>14</sup> it rejects the proposition that electoral pressure alone is enough to ensure a democracy's continued health. It requires increased legislative and executive accountability as well as the ability for the governed to participate in a timely fashion when affected by the legislature's laws and the decisions of the executive under those laws. It aims to facilitate better decision-making by those in power in the interests of those it governs. It encourages a representative democracy to also be a responsive democracy. Representative in that government is elected, and responsive in that the elected government 'acknowledges a responsibility to justify its decisions'.<sup>15</sup>

While the promotion of a culture of justification is the joint responsibility of the legislature, executive and judiciary, Mureinik believed that judicial review was the key to ensuring the accountability of the legislature and executive through timely participation (actual or threatened) by the governed. However, for judicial review to play this role in South Africa, the judiciary had to undergo a fundamental change in attitude. It had to discard the cloak of subservience that it had donned in favour of the legislature. Mureinik believed the judiciary could do so, not by a judicial revolution, but through the much more mundane and traditional judicial method of interpretation. However, to justify ignoring the mass of precedents that confirmed and perpetuated judicial subservience to the legislature, he looked to the quality of previous decisions as judged against a Dworkinian understanding of

11 See David Dyzenhaus, 'Law as Justification: Étienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal on Human Rights* 11, 33.

12 See John Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, 1978) 42.

13 David Dyzenhaus, 'The Legitimacy of the Rule of Law' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 33, 41 (emphasis in original).

14 Dyzenhaus, 'Law as Justification', above n 11, 34.

15 Étienne Mureinik, 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35, 40.

the rule of law.<sup>16</sup> This meant that judges, in interpreting legislation and reviewing executive action conducted under that legislation, were not to be automatons adopting a strict literal meaning of the words used by the legislature. Instead, they were to ascribe a meaning to the words that was consistent with common law legal principles chosen on the basis that they cast a legislative enactment in its best light by treating (and assuming the legislature intended to treat) each individual with equal concern and respect.<sup>17</sup> This approach had many consequences including the birth of the ‘principle of legality’, whereby a ‘fundamental right’ recognised by the common law could not be excluded or over-ridden by the legislator other than in ‘the clearest possible language’.<sup>18</sup> For the judiciary to hold otherwise would allow the legislature to conceal its true motives and thereby avoid the need to justify them.<sup>19</sup> Consequently, the justification for the principle’s existence in Mureinik’s own words:

does not depend at all upon the actual intention of the legislature: it is imputed to the legislature. ... The particular content of the statute operates only negatively: it is relevant so far only as it discloses an actual intention incompatible with the imputed intention. Where it does that, the imputed intention is displaced; but where the statute has no relevant particular content — that is, where it is silent — the imputed intention must prevail.<sup>20</sup>

Similarly, the legislature was not to circumvent the principle of legality by a broad grant of power to the executive. In the absence of clear and specific wording, the judiciary was to assume that the legislature intended executive decision-makers to act in accordance with common law requirements designed to protect the governed.<sup>21</sup>

Mureinik was not advocating judicial supremacy over the legislature. His culture of justification made it more difficult for the legislature or executive to encroach upon fundamental rights but not impossible.<sup>22</sup> The legislature was still to rein supreme but the judiciary was to assume it intended to treat the governed equally and fairly and to insist on complete transparency if it did not.

16 See, eg. Mureinik’s acknowledgement that his approach was ‘derived from or inspired by’ Professor Ronald Dworkin: Mureinik, ‘Law and Morality in South Africa’, above n 8, 458. See also the observations of Dyzenhaus: Dyzenhaus, ‘Law as Justification’, above n 11, 15.

17 For a more detailed explanation of Dworkin’s theory and a comparison with positivist theories (which support a culture of authority) see Dyzenhaus, ‘The Legitimacy of the Rule of Law’, above n 13; David Dyzenhaus, ‘The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law’ in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 21, 25–31, 36–44.

18 Étienne Mureinik, ‘Fundamental Rights and Delegated Legislation’ (1985) 1 *South African Journal on Human Rights* 111, 113.

19 Mureinik, ‘Pursuing Principle’, above n 8, 67.

20 Mureinik, ‘Fundamental Rights and Delegated Legislation’, above n 18, 116.

21 *Ibid* 120.

22 This is where Mureinik can be said to diverge from Dworkin. As Dyzenhaus has pointed out, it is one of the most significant features differentiating a culture of justification from ‘the liberal attempt to use law to preserve a realm of principles safe from democracy’ like that espoused by John Rawls: Dyzenhaus, ‘The Justice of the Common Law’, above n 17, 37 n 37.

While the principle of legality was a vital component of Mureinik's culture of justification, he was too practical a lawyer to only rely on a theory of statutory interpretation. In an enlightening article, Mureinik addressed the minimum practical requirements that the judiciary needed to implement.<sup>23</sup> While he did not actually use the term 'a culture of justification', it was clear that these minimum requirements were seen as very important, if not vital, to its achievement. They will be referred to as the 'practical trilogy':

1. before a decision is made, the provision of an expanded right to be heard (that is a broad obligation to afford natural justice);
2. once the decision is made, a requirement that reasons be provided; and
3. after the decision and reasons are provided, judicial review, which includes review for rationality and unreasonableness. Unreasonableness in the sense that there is no evident or plausible explanation for how the ultimate decision was reached.<sup>24</sup> In Mureinik's own words, this meant that the judiciary was to look at whether:
  - (a) the decision-maker has considered all the serious objections to the decision taken, and has answers which plausibly meet them;
  - (b) the decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and
  - (c) there is a rational connection between premises and conclusion: between the information (evidence and argument) before the decision-maker and the decision that it reached.<sup>25</sup>

In advocating rationality or unreasonableness review, Mureinik still incorporated the traditional administrative approach with its concern for the procedures that the decision-maker adopted. However this approach was expanded to take on a more substantive dimension by also considering the decision-maker's reasoning process. It was this reasoning process that needed to be reasonable. If the reasoning process was reasonable, the judiciary was not to substitute its own decision on the merits, even if the decision-maker's conclusion was thought to be wrong.<sup>26</sup> Whilst he acknowledged that the use of the term 'reasonableness' might confuse the boundaries between process and merits, this confusion was due to a misconceived tendency to equate administrative principles with the development in private (tort) law whereby 'the standard of the reasonable man' was approaching 'the apotheosis of rectitude'.<sup>27</sup> In administrative law, reasonableness, while taking on a substantive aspect, did not require perfection, it simply 'marks off the outer

23 Mureinik, 'Reconsidering Review', above n 15.

24 Ibid 41.

25 Ibid.

26 Étienne Mureinik and Jonathan Klaaren, 'Administrative Law' (1993) *Annual Survey of South African Law* 42, 43; Mureinik, 'A Bridge to Where?', above n 7, 41.

27 Étienne Mureinik, 'Administrative Law in South Africa' (1986) 103 *South African Law Journal* 615, 631.

bounds of the spectrum of decisions that are tolerable even where wrong: tolerable because defensible; tolerable because justifiable'.<sup>28</sup>

In setting up his culture of justification in direct opposition to a culture of authority, Mureinik framed the discussion as a clash of opposing versions of the rule of law.<sup>29</sup> A culture of authority representing a thin, transmission account of the rule of law and a culture of justification representing a thicker substantively more complex account. In their pure forms there is a stark difference between the cultures. However, and while Mureinik did not have reason to acknowledge it, in reality the choice of a culture is not starkly binary of authority or justification. There is 'no clear dichotomy'.<sup>30</sup> Rather, there is a spectrum within which a system of law may sit. A spectrum that may be dependent upon the extent or quality of the justification required or the number and type of decisions for which justification must be given. In the latter instance for example, it could be that government interference with traditional property rights must be justified while a decision not to provide a type of welfare payment need not be.<sup>31</sup>

## **B Proportionality**

The conceptual attractiveness of a culture of justification has seen it engaged in quite recent times by proponents of human rights proportionality review.<sup>32</sup> In this context it is seen as supporting the proposition that the judiciary is entitled to look at whether administrative decision-makers have justified the weight attributed to each factor they took into consideration (and those they should have taken into consideration). For example, it has been said that:

At its core, a culture of justification requires that governments should provide substantive justification for all their actions, by which we mean justification in terms of the rationality and reasonableness of every action and the trade-offs that every action necessarily involves, i.e., in terms of proportionality.<sup>33</sup>

Yet in an Australian context, this statement must be viewed with some caution as it generally applies when a Bill or Charter of Rights is in operation or alternatively where a civil, as opposed to common law, system of law exists. In a common law system without a Bill or Charter of Rights, the proportionality review represented by the above quotation went beyond the role Mureinik envisaged for the judiciary. As already touched upon, he ascribed to the separation of powers between the

28 Ibid.

29 He went as far as to observe that 'the deepest divide in South African culture generally may well be between people who are content with authority and people who aspire to justification': Étienne Mureinik, 'Emerging From Emergency: Human Rights in South Africa' (1994) 92 *Michigan Law Review* 1977, 1983–4.

30 Cohen-Eliya and Porat, above n 6, 475.

31 Another example of an incomplete culture of justification would be where a citizen is entitled to a justified decision while a non-citizen, such as a refugee or potential immigrant, is not.

32 Its application from a constitutional perspective will be considered below.

33 Cohen-Eliya and Porat, above n 6, 463.

legislature, executive and judiciary and the distinct role each was to play in a democratic society. This distinction meant that the decision-maker retained a significant area in which to exercise discretion and that policy decisions were rightfully within the decision-maker's purview. Indeed, to mollify those that feared a judicial usurpation of executive policymaking he was willing to suggest that the South African post-apartheid Bill of Rights contains a clause to the effect that executive policy choices were not to be second-guessed by the judiciary.<sup>34</sup>

### III AUSTRALIA AND THE RISE OF VALUES CONSISTENT WITH A CULTURE OF JUSTIFICATION

#### A Overview

The *Constitution*, or a law made under it, is the authoritative source of all legislative, executive or judicial power.<sup>35</sup> It is also doctrinally accepted that the *Constitution* is framed in accordance with traditional values such as the separation of powers and that one of its underlying assumptions is the rule of law.<sup>36</sup> However, unlike the extreme conditions under South African apartheid and then the dramatic change heralded in with its abandonment, the relatively benign legal landscape of Australia has not seen the same pressing need for the rule of law to be radically re-conceptualised to effect change.<sup>37</sup> As a result, its use by the judiciary has generally been more aspirational than practical. Indeed, in one instance when the High Court can be said to have clearly flexed its muscles by declaring that it had an entrenched jurisdiction to review executive decision-making,<sup>38</sup> it was only two weeks later that two High Court Justices felt compelled to warn that while 'the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government ... it would be going much further to give those values an immediate normative operation in applying the *Constitution*'.<sup>39</sup>

34 Mureinik, 'A Bridge to Where?', above n 7, 40 n 34: 'In deciding whether a decision is justifiable, the [designated authority] shall not usurp the prerogative of the decisionmaker to make such policy choices as the decisionmaker considers desirable in the interests of good governance, and it shall respect and uphold every such choice'.

35 Chief Justice Robert S French, 'Administrative Law In Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 28.

36 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157/2002*'). Of course, the English experience shows us that a written constitution is not a necessary precursor for such values to have a lasting and definitive effect on the judicial and legislative relationship.

37 This is not to suggest that the court's duty to undertake judicial review was always uncontentious. In colonial Australia it was highly contentious although by the time of Federation it was generally accepted: James A Thomson, *Judicial Review in Australia: The Courts and the Constitution* (SJD Thesis, Harvard University, 1979) 2-3.

38 *Plaintiff S157/2002* (2003) 211 CLR 476.

39 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 (McHugh and Gummow JJ).



Their Honours instead reverted to the ‘text and structure’ of the *Constitution* to find that a practical aspect (and by implication, a defining aspect) of the ‘rule of law’ in Australia was the separation of powers, which in turn meant the judiciary could only interfere in executive decision-making where there was a jurisdictional as opposed to non-jurisdictional error.<sup>40</sup> The two forms of errors were distinguished, by quoting with approval Justice Bradley Selway:

Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles.<sup>41</sup>

A similar approach focusing on jurisdictional error underlies almost every significant judicial review case since, leading Justice Stephen Gageler to observe that there is now a ‘seemingly singular and elegant constitutional scheme; a new paradigm’.<sup>42</sup> It is an approach which has resulted in one theme being consistently repeated: the emphasis on procedure rather than substance, in the sense that the judiciary is concerned with the legality of how an executive decision is reached, not the factual merits of the actual decision.<sup>43</sup> Or put another way, the Court’s role is not to question the decision made but rather to ensure that the decision-maker made their decision within jurisdiction. That is, they did not commit a jurisdictional error in reaching the decision.

Australian courts have justified their focus on jurisdictional error on several grounds including repeated assertions that ‘[j]urisdiction is the authority to decide’.<sup>44</sup> It follows that jurisdictional error connotes, among other things, a fundamental lack of authority on the part of a decision-maker.<sup>45</sup> Such rhetoric could be said to support a strong culture of authority, at least if it were taken at face value. However, it is important to look behind such general rhetoric as on closer examination it is apparent that the new ‘paradigm’ has created many ‘ambiguities and challenges’.<sup>46</sup> One such ambiguity being that it is not necessarily inconsistent with Mureinik’s culture of justification as he too emphasised that

40 Ibid 24–5 (McHugh and Gummow JJ).

41 Ibid 25, quoting Justice Bradley Selway, ‘The Principle Behind Common Law Judicial Review of Administrative Action — The Search Continues’ (2002) 30 *Federal Law Review* 217, 234.

42 Justice Stephen Gageler, ‘The Constitutional Dimension’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 165, 175.

43 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 84 [114] (Kirby J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40–1 (Mason J); *A-G (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 619; *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 174 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

44 *Abebe v Commonwealth* (1999) 197 CLR 510, 524, citing *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142; *Commonwealth v New South Wales* (1923) 32 CLR 200, 206; *Johnstone v Commonwealth* (1979) 143 CLR 398, 404.

45 The concept of jurisdictional error is of course far more complex: Mark Aronson, ‘Jurisdictional Error and Beyond’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 248.

46 Gageler, ‘The Constitutional Dimension’, above n 42, 175.

the legislature's primary lawmaking role or the executive's decision-making role was not to be usurped. Further, as discussed above, there is a spectrum of choice. While Australian rhetoric can be interpreted as being at the 'authority' end of the spectrum, the judiciary in exercising its power of review still looks to see whether a decision is justified by the actual power granted by the statute. This is not just a review of the statutory text that would take place under a complete culture of authority. It will ordinarily include a requirement that the executive comply with certain rules developed by the judiciary, such as natural justice. It will also include a requirement that executive action be referable to the context, purpose, scope and subject matter of the relevant Act. These are limits that are often implied by the judiciary and as such increase the judiciary's power to question the executive's actions,<sup>47</sup> which in turn places an onus on the executive to justify itself. The legislature cannot 'confer absolute power' on the executive.<sup>48</sup>

At least two former High Court justices writing extra-judicially have endorsed a culture of justification as a significant democratic value.<sup>49</sup> Indeed, Chief Justice Murray Gleeson observed that it 'pervades modern liberal democracies' and warned 'unless both merits review, and judicial review, of administrative action are understood against the background of a culture of justification, they are not seen in their full context'.<sup>50</sup> Yet there are very few references to a culture of justification in Australian case law.<sup>51</sup> This is not surprising when viewed in context. It has generally been acknowledged that Australian judicial review develops by the judiciary building incrementally upon already established rules.<sup>52</sup> This is an approach that tends to discourage the use of general theories to reason down to specific rules.<sup>53</sup>

Consequently, to explore whether a culture of justification is in fact 'in the background' it is necessary to look beyond the specific labels and rhetoric utilised by the judiciary. It is necessary to see whether, viewed as a whole, the incremental evolution of judicial review rules is consistent with the core elements of a culture of justification as envisaged by Mureinik. In doing so, this article will, in an Australian context, look at some legislative initiatives, consider the reach of the principle of legality, address each of Mureinik's practical trilogy, briefly address proportionality review and examine two instances where legislative efforts to limit judicial power were repulsed.

47 See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) ch 3; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 368; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40.

48 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, 504 (Kirby and Callinan JJ).

49 Chief Justice Murray Gleeson, 'Outcome, Process and the Rule of Law' (Speech delivered at the Administrative Appeals Tribunal 30th Anniversary, Canberra, 2 August 2006); Sir Anthony Mason, 'Reply to David Dyzenhaus' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 52.

50 Gleeson, above n 49, 18–19.

51 *Wingfoot* (2013) 303 ALR 64 and *PJB v Melbourne Health* (2011) 39 VR 373 being the most obvious, albeit limited, exceptions.

52 Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 303–4.

53 See Aronson and Groves, above n 47, 168, 240 n 382.

## B Legislative Initiatives

While it will become evident that the push for greater justification is largely court centric, it is important to realise that the legislature has also played an important role, albeit a smaller and, over time, less committed one.

The initiation of a move requiring greater executive justification is evident in legislative enactments at the Commonwealth level in the 1970s and early 1980s. Initiatives that have to one degree or another spread to the Australian states. These initiatives placed a greater onus on the executive to justify a general range of decisions and have been credited with recasting the relationship between ‘citizen and government’ and being evidence of the ‘maturation of the legal and political system’.<sup>54</sup> They included:

- the establishment of the Administrative Appeals Tribunal to undertake merits review and therefore provide direct scrutiny of both how and why a decision was reached;<sup>55</sup>
- the establishment of an Ombudsman to investigate complaints of maladministration by the executive;<sup>56</sup>
- the passing of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) with its removal of many of the prior complexities that hindered individuals from seeking judicial review of executive decisions and, in reform terms, its requirement for reasons which was easily the most important section of the *Act*;<sup>57</sup> and
- the introduction of the *Freedom of Information Act 1982* (Cth), that was aimed at increasing transparency through a system designed to allow the public access to governmental documents.

While these initiatives were not designed to change the underlying principles of judicial review as applied by the judiciary,<sup>58</sup> they self-evidently proclaimed at least

54 John McMillan, ‘Parliament and Administrative Law’ (Research Paper No 13 2000–01, Parliamentary Library, Parliament of Australia, 2000) 1.

55 The federal tribunal was established by the *Administrative Appeals Tribunal Act 1975* (Cth). Broadly similar tribunals exist at a state level: *Civil and Administrative Tribunal Act 2013* (NSW); *Queensland Civil and Administrative Tribunal Act 2009* (Qld); *Victorian Civil and Administrative Tribunal Act 1998* (Vic); *State Administrative Tribunal Act 2004* (WA).

56 The federal Ombudsman was established by *Ombudsman Act 1976* (Cth). All Australian jurisdictions now have an Ombudsman. See Anita Stuhmcke, ‘The Ombudsman’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 326.

57 *ADJR Act* s 13.

58 The *ADJR Act* itemised the grounds of review available but it codified rather than changed what existed at common law: *Kioa v West* (1985) 159 CLR 550, 576; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. There has nevertheless been some debate over the indirect effect of the *ADJR Act* on the common law: Mark Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (2005) 12 *Australian Journal of Administrative Law* 79; Matthew Groves, ‘Should We Follow the Gospel of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?’ (2010) 34 *Melbourne University Law Review* 736, 756–7.

the start of a shift towards a greater level of administrative justification.<sup>59</sup> They did so at the most rudimentary level by introducing a system that removed the anonymity previously enjoyed in judicial review proceedings by many executive decision-makers and which had allowed them to avoid personal responsibility for, and hence the need to justify, their decisions. Decision-makers now had a 'direct responsibility for their conduct, not merely a derivative responsibility, through their Minister and Parliament'.<sup>60</sup> It was also a system that fostered an explosion of administrative law cases, increasing the judiciary's ability to join in and promote change.

### C Principle of Legality

In Australia, approaches similar to that afforded by the principle of legality can be seen in many statutory interpretation cases dating back as far as the 1908 case of *Potter v Minahan*.<sup>61</sup> It is an approach perfectly consistent with the forceful statement in *Coco v The Queen* that:

The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.<sup>62</sup>

Traditionally the judiciary applied this type of reasoning where legislative action affected an individual's freedom or property rights.<sup>63</sup> It is only in recent times that its application has become more widespread, indeed so widespread that it now seems somewhat surprising that the term 'principle of legality' as an overarching principle was only first used by the High Court in 2004.<sup>64</sup> Nevertheless, since then

59 Values at the forefront of the legislative consciousness would have been the more traditional ones of protection from arbitrary decision-making, good administration and perhaps even dignity.

60 Justice James Spigelman, 'Foundations of Administrative Law' (1999) 4 *The Judicial Review* 69, 80.

61 (1908) 7 CLR 277; and also the decision of *Ex parte Walsh; Re Yates* (1925) 37 CLR 36. A detailed consideration of the development of the principle of legality in Australia is provided in Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

62 (1994) 179 CLR 427, 437.

63 Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' (1992) *Public Law* 397; Meagher, above n 61, 452–5.

64 *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ); *Electrolux Home Products Pty Ltd v The Australian Workers Union* (2004) 221 CLR 309, 329 (Gleeson CJ). See Justice James Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 774, who also attributes the first use of the term in Australia to Chief Justice Murray Gleeson in his Boyer Lectures in 2000.

its rise to prominence has been dramatic<sup>65</sup> and in 2013 it featured in a number of important High Court decisions.<sup>66</sup> These decisions make it clear that it is not a mechanism to help choose between two or more possible meanings. Whether there is or is not ambiguity in the legislative text is not to the point. Similar to Mureinik's formulation, it is a protection that applies where the legislative wording is of a general, non-specific nature.<sup>67</sup> As repeatedly emphasised by the judiciary, a primary reason for its existence is to ensure that the legislature cannot covertly take away common law protections — 'Parliament must squarely confront what it is doing and accept the political cost'.<sup>68</sup>

Whether due to its relatively youthful status as an overarching principle or simply the common law's inherently flexible and often aspirational rather than prescriptive nature, the full reach and scope of the principle of legality cannot yet be confidently predicted.<sup>69</sup> Nevertheless, the number of 'rights' it protects underlines its practical significance. In 2012, Australia's current Chief Justice listed extra-judicially the following protected rights:

- the right of access to the courts;
- immunity from deprivation of property without compensation;
- immunity from deprivation of liberty, except by law;
- legal professional privilege;
- privilege against self-incrimination;
- immunity from the extension of the scope of a penal statute by a court;
- freedom from extension of governmental immunity by a court;
- immunity from interference with vested property rights;
- immunity from interference with equality of religion;
- the right to access legal counsel when accused of a serious crime;
- the right to procedural fairness [natural justice] when affected by the exercise of public power; and

65 See Simon Thornton, 'The Principle of Legality — Some History and Two Recent Decisions' (Paper presented at Constitutional Law Forum: The Changing of the Guard, Canberra, 22 November 2013) 3–6.

66 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; *A-G (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *Monis v The Queen* (2013) 249 CLR 92.

67 Mureinik, 'Fundamental Rights and Delegated Legislation', above n 18.

68 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman) which has been cited on many occasions including: *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 417 (French J); *Plaintiff S157/2002* (2003) 211 CLR 476, 492 (Gleeson CJ); *A-G (WA) v Marquet* (2003) 217 CLR 545, 605–6 (Kirby J); *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 444 (Black CJ, French and Wienberg JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 (French J); *Lee v Crime Commission (NSW)* (2013) 251 CLR 196, 309 [311] (Gageler and Keane JJ); *A-G (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J).

69 Meagher, above n 61, 463; Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 296.

- freedom of speech and movement.<sup>70</sup>

Based on particular judicial decisions, Professor Dennis Pearce also believes the principle of legality will apply to any attempt by the legislature to:

- restrict the right to assemble;
- limit a citizen's right to re-enter Australia;
- expand the liability for deportation;
- restrict trial by jury;
- permit an appeal from an acquittal;
- remove mistaken belief as a defence to a criminal charge;
- remove the right of refusal of a blood test;
- stop a person going about lawful business;
- limit the bringing of an action for mental injury;
- require the making of statutory declaration; and
- allow the use of information obtained by telephone interception.<sup>71</sup>

Gageler and Keane JJ summed up the modern importance of the principle when they observed that it applied not only to chosen common law rights but also to 'fundamental principles and systemic values' important to Australia's 'system of representative and responsible government under the rule of law'.<sup>72</sup> Yet they also observed that it is not an entrenched constitutional protection,<sup>73</sup> but a statutory mode of interpretation that is displaced if the legislature uses sufficiently clear and specific wording. This must be correct given the number of 'rights' that are now said to be protected by the principle.<sup>74</sup> If the judiciary is entitled to, why shouldn't the legislature also be entitled to add and subtract rights from the list that will be protected by the principle?

Just how the judiciary can add to but also vary the protection that the principle of legality offers is illustrated by its treatment of natural justice in administrative

70 Chief Justice Robert S French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons' (Speech delivered at Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012), 19–20.

71 Dennis Pearce, 'Principle of Legality and Human Rights: Seeking the Hymn Sheet' (Paper presented at Public Law Weekend Administrative Law Conference, Australian National University, 15 November 2013), Appendix. See also Heydon J's list in *Momcilovic v The Queen* (2011) 245 CLR 1, 177–8 [444]–[445].

72 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313].

73 Some of the 'rights' listed may find constitutional protection on other grounds. For example, it is arguable that natural justice (and certainly an obligation to provide reasons) is an inherent characteristic of the judicial function and thus in court proceedings protected by the *Constitution: Wainohu v New South Wales* (2011) 243 CLR 181. French CJ has also hinted at the possibility that some rights may be so fundamentally entrenched by Australia's 'democratic system of government and the common law' that they have constitutional protection: *South Australia v Totani* (2010) 242 CLR 1, 29.

74 See McHugh J's explanation in *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298–9.

decision-making. Natural justice, or procedural fairness, is now recognised as one of the very important rights protected by the principle of legality.

One of the most frequently cited Australian decisions specifying what the legislature is required to do to exclude natural justice is the 1958 decision of *Commissioner of Police v Tanos* ('*Tanos*').<sup>75</sup> In that decision it was stated that an intention to exclude the hearing rule of natural justice 'is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intentment'.<sup>76</sup>

However, at the time of *Tanos*, the strength of this test was ameliorated by the fact that natural justice was only required in judicial and quasi-judicial hearings or where property rights were being directly affected. In 1963 this limitation on natural justice's reach was lifted,<sup>77</sup> but for a time the fairly tough test in *Tanos* continued to be restricted to the traditional judicial and quasi-judicial hearings or protection of property rights.<sup>78</sup> In other administrative contexts it was only if the relevant statute was silent that common law natural justice filled the void.<sup>79</sup> To exclude natural justice, words of necessary intentment were not necessary as it was instead a matter of determining what was 'fair, having regard to the subject matter and to the provisions of the statute'.<sup>80</sup> With time, and consistent with the increased importance being placed upon natural justice by the judiciary, tests closer to that in *Tanos* began to gain favour in general administrative contexts. By 1985 in the decision of *Kioa v West*,<sup>81</sup> the relevant test was said to be 'strong manifestation of contrary statutory intention',<sup>82</sup> 'clear intent to exclude',<sup>83</sup> and 'clear contrary legislative intent'.<sup>84</sup> By 1992,<sup>85</sup> if not before,<sup>86</sup> the stricter test in *Tanos* was adopted for ordinary administrative decisions.

That the principle of legality in the form of the *Tanos* test can set a very 'high bar' if the judiciary is so inclined was made abundantly clear in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* ('*Miah*').<sup>87</sup> In that decision the majority of the High Court (Gaudron, McHugh and Kirby JJ) found that even

75 (1958) 98 CLR 383.

76 Ibid 396 (Dixon CJ and Webb J).

77 *Ridge v Baldwin* [1964] AC 40.

78 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 dealt with property rights. Barwick J held that if the legislature sought to exclude natural justice it must make it 'unambiguously clear': at 110.

79 *Brettingham-Moore v St Leonards Corporation* (1969) 121 CLR 509, 524.

80 *R v Mackellar; Ex parte Ratu* (1977) 137 CLR 461, 476.

81 (1985) 159 CLR 550.

82 Ibid 585 (Mason J).

83 Ibid 593 (Wilson J).

84 Ibid 632 (Deane J). Deane J used the more traditional terminology of 'clear intentment' not long after in *South Australia v O'Shea* (1987) 163 CLR 378, 416.

85 In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 574–6, the test applied by the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ was that there will be an 'implied general requirement of procedural fairness, save to the extent of clear contrary provision' and that the rules of natural justice 'can only be excluded by "plain words of necessary intentment"'.<sup>86</sup>

86 *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 660.

87 (2001) 206 CLR 57.

placing in an Act a sub-division setting out procedures to be followed in reaching a decision and then giving it a heading ‘Code of Procedure for dealing fairly, efficiently and quickly with visa applications’ was not enough to exclude natural justice.<sup>88</sup> It did not even cause sufficient doubt in the majority’s mind to warrant recourse to the relevant explanatory memorandum, which was particularly clear, stating that the intention was to ‘replace the uncodified principles of natural justice with clear and fixed procedures’.<sup>89</sup>

Since *Miah* it is possible to suggest that the test to exclude natural justice has become even more difficult requiring wording of ‘irresistible clearness’,<sup>90</sup> although the phrase ‘plain words of necessary intendment’ remains in favour.<sup>91</sup> Regardless of which formula now applies, the history shows just how formidable the principle of legality, as a form of statutory construction, can be.<sup>92</sup>

The rise of the principle of legality’s importance, its use by the judiciary to protect an increasing number of rights and the very real impact it had in *Miah*, illustrate at the very least that the rule of law, as applied by the judiciary in Australia, is not the transmission account which Mureinik railed against in apartheid South Africa.

## D Natural Justice

The Australian High Court has never linked or associated natural justice with the promotion of a culture of justification. Nevertheless, the High Court, while being somewhat circumspect as to the ultimate purpose of natural justice, has repeatedly emphasised its role in ensuring that the governed are treated fairly by those governing them and in particular that they are not subjected to arbitrary decision-making. Heydon J said that the provision of natural justice ‘respects human dignity and individuality’.<sup>93</sup> This emphasis on fairness and dignity sits neatly with a culture of justification.

It is implicit in Mureinik’s writings, and explicit in his abhorrence of apartheid, that his culture of justification was founded on the proposition that all people are created equally. However, Mureinik was also conscious of the fact that

88 Ibid 83 (Gaudron J), 93–5 (McHugh J), 107 (Kirby J).

89 Explanatory Memorandum, Migration Reform Bill 1992 (Cth) 23, 51.

90 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 284, quoting *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J).

91 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352, quoting *Annetts v McCann* (1990) 170 CLR 596, 598.

92 It could be suggested that the High Court’s decision of *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (*‘S10/2011’*) goes against this trend but, somewhat consistent with one theme of this article, the underlying detail suggests a much more nuanced answer. While greater consideration will need to take place at another time, the High Court’s willingness in *S10/2011* to accept that the applicants were not entitled to natural justice must be viewed in light of the entire process. The applicants had already entered and completed appearances before tribunals and the courts, and they had been afforded natural justice and ultimately received reasons (and hence justification) for why their respective visa applications were rejected.

93 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 381 [144].



governments needed to be able to make discriminatory choices, and that many decisions would result in some individuals receiving a benefit, or alternatively being subjected to a disadvantage, while others would not. Consequently, equality did not mean equal treatment but rather a universal entitlement *not* to be treated differently without justification,<sup>94</sup> which in turn imposed a positive obligation on the governing to treat the governed fairly and with dignity. For Mureinik, an individual's 'right to be heard and the right to proper consideration' of their claim — that is, a right to natural justice — served a vital and self-explanatory role in ensuring this occurred.<sup>95</sup>

Mureinik considered natural justice to be so important that while he respected judicial attempts to expand its reach from government decisions that affected traditional legal rights to those that also affected a person's 'legitimate expectations', he did not believe this went far enough.<sup>96</sup> Rather, he proposed that anyone affected by a decision determining his or her rights<sup>97</sup> should have a 'prima facie entitlement to participate in the decision-making process; an entitlement, that is, which may be defeated by some cogent case to the contrary, but which cannot so be defeated unless the government discharges the burden of justifying that defeat'.<sup>98</sup>

The evolution of the reach of natural justice in Australia, and in particular the use of, and then abandonment of, the term 'legitimate expectations', has striking similarities to that which Mureinik envisaged, and will be considered in some detail.

It is generally accepted that as early as 1863, the judicial obligation to afford a person natural justice was extended to some administrative decision-making.<sup>99</sup> Yet beginning with *Laffer v Gillen*<sup>100</sup> in 1927, the English Privy Council (then Australia's highest court) began to restrict the reach of natural justice. The reasoning of the Privy Council in that instance was centred on the proposition that the relevant Minister was 'responsible to Parliament for his conduct'.<sup>101</sup> In other words, the relevant check on the Minister was the principle of responsible government. The judiciary's intervention was not required, as the Minister would be held accountable by Parliament, which in turn would be held accountable by its electorates. Accordingly, the application of natural justice was to be limited to forms of judicial or quasi-judicial style enquiries, and not to what it categorised

94 Mureinik, 'Emerging From Emergency', above n 29, 1984.

95 *Ibid* 1984–5:

[the aspiration of ever better justification of decisions] is also why the law, in court, insists upon the right to be heard and the right to proper consideration and why, in South Africa and elsewhere, the law has for some time been engaged in extending these rights to new spheres of extracurial governmental decisionmaking, for they are rights in service of the better justification of decisions.

96 Mureinik, 'Reconsidering Review', above n 15, 37.

97 *Ibid*. 'Rights' being used in a very broad sense, being something that has a 'decisive effect on your future'.

98 *Ibid* 38.

99 *Cooper v The Board of Works for the Wandsworth District* (1863) 143 ER 414.

100 (1927) 40 CLR 86.

101 *Ibid* 94.

as ‘a merely administrative function’ where the Minister ‘is entitled to form an opinion on such materials as he himself thinks sufficient’.<sup>102</sup> This treatment of natural justice typified two of the key elements of judicial review that Carol Harlow identified as prevailing in England up to the 1960s, being: restricted grounds of review combined with a strict adherence to precedent, and marked judicial constraint.<sup>103</sup>

While Australia did not see the reach of natural justice retreat to the same extent as it did in England,<sup>104</sup> the effect of English decisions for the next 36 years was to reverse and retard the growth of natural justice in so far as it applied to the executive.<sup>105</sup> A culture of authority could be said to have prevailed because judicial review did not generally extend to review of a denial of natural justice for administrative decisions. That changed in 1963 with the House of Lord’s decision in *Ridge v Baldwin*.<sup>106</sup> The Australian judiciary again had cause to look at the underlying principles of natural justice in an administrative context. Typical of the common law, there was an initial reluctance to discard the notion that an inquiry of a judicial nature was required,<sup>107</sup> and instead the reach of natural justice was tentatively increased by first redefining ‘judicial’ as including an administrative task, where the decision-maker ‘looks to facts and determines whether they answer a particular statutory description’.<sup>108</sup> It was only in the mid 1970s when the Commonwealth legislature was also seeking to modernise judicial review,<sup>109</sup> that the High Court finally jettisoned the restrictive judicial and quasi-judicial terminology.<sup>110</sup> Nevertheless, the older notions inherent in a culture of authority still held some sway creating a perceived need to fashion a reasoned rationale for natural justice’s continued growth.

In 1985, the decision of *Kioa v West*<sup>111</sup> (which dealt with an immigration administrative decision), and particularly the judgment of Mason J,<sup>112</sup> used legitimate expectation as a doctrinal rationale to entrench natural justice as a

102 Ibid 95.

103 Carol Harlow, ‘A Special Relationship? American Influences on Judicial Review in England’ in Ian Loveland (ed), *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press, 1995) 79, 83.

104 For a detailed discussion of the ‘twilight period’ of natural justice in English law see Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate, 2002) ch 3.

105 See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) 415; H W R Wade, ‘The Twilight of Natural Justice?’ (1951) 67 *The Law Quarterly Review* 103, 109.

106 [1964] AC 40.

107 *Testro v Tait* (1963) 109 CLR 353, 363.

108 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 398.

109 See above Part III(B).

110 *Salemi v Minister for Immigration and Ethnic Affairs (No 2)* (1977) 137 CLR 396: see especially 419 (Gibbs J), 451 (Jacobs J). If there was any doubt, Aickin J reinforced this general position shortly afterwards in *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487, 498.

111 (1985) 159 CLR 550.

112 Ibid 563, 632. Gibbs CJ and Deane J also accepted that legitimate expectation was a central concept in determining whether natural justice applied.

foundational principle of judicial review in Australia.<sup>113</sup> Interestingly for present purposes, Brennan J also found that natural justice was owed but warned against the use of legitimate expectations.<sup>114</sup> He believed it was unnecessary as it was not the particular type of interest that counted but whether the particular decision was ‘apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large’.<sup>115</sup> These are sentiments that were repeated only 2 years later by Deane J in *South Australia v O’Shea*.<sup>116</sup> At the core of Brennan J’s objections was his uncompromising adherence to the underlying constitutional value of the separation of powers. An individual’s expectation could not affect how the judiciary was to interpret the relevant statute as the judiciary was enforcing the legislature’s will only.<sup>117</sup> Despite the emphasis on legislative will, the practical effect of his formulation (a universal judicial presumption that natural justice applies to administrative decision-making) can with hindsight be viewed as a shift towards a culture of justification in that it assumed the best of the legislature.

The controversy surrounding the use of legitimate expectations has now turned to ambivalence, with a general acceptance that it serves little useful purpose.<sup>118</sup> As such, its role can be seen as historical, a doctrinal development that allowed the High Court to expand the reach of natural justice to the point where it could more comfortably declare (as Mureinik proposed) that in a statutory context there will almost always be a strong initial assumption that natural justice applies to executive decision-making.

The elevation of natural justice in Australia is far too significant to be explained away simply as the judiciary correcting some doctrinal ‘wrong turns’. At the very least it points to a judicial recognition that the restraints of ‘responsible government’, which played such an important role in *Laffer v Gillen*,<sup>119</sup> have been substantially loosened by today’s modern form of government, and that if it does not take up the slack then the short term interests of the current government will consume the procedural rights of the individual. Of course the paradox is that despite the judiciary’s misgivings, it is still very conscious of the fact that the legislature is the elected branch of government and, accordingly, should be the primary lawmaker in any theory of a democratically elected society and certainly one based on a separation of powers. It is constrained by the larger judicial review

113 See Holloway, above n 104, 163–4. Legitimate expectation has its origins in a decision of Lord Denning in 1969 when the reach of natural justice was still being constrained by the precedents set immediately before *Ridge v Baldwin* [1964] AC 40. Lord Denning sought to sweep this fixation on precedent away by holding that individuals were entitled to natural justice, not only if they had a legally recognised ‘right or interest’, but also if they had a ‘legitimate expectation’. This was a term unimbued by precedent and one that, due to its potentially wide range of meanings, was initially of almost unlimited scope: *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170.

114 *Kioa v West* (1985) 159 CLR 550, 617.

115 *Ibid* 619.

116 (1987) 163 CLR 378, 417.

117 *Kioa v West* (1985) 159 CLR 550, 617.

118 See, eg, *S10/2011* (2012) 246 CLR 636, 658 (Gummow, Hayne, Crennan and Bell JJ). Cf French CJ and Kiefel J, who continued to use the term without feeling the need to comment upon it: at 642.

119 (1927) 40 CLR 86.

merits/legality matrix in which it sits. Natural justice, viewed as a component of a culture of justification, helps address this concern.

## **E Right to Reasons**

### **1 No Common Law Right**

This section is briefer than may otherwise have been required as much of the groundwork has already been set out in an article written by Matthew Groves (in anticipation of the High Court's decision in *Wingfoot*).<sup>120</sup> That article succinctly canvasses the history of, rationale behind, extent of and theoretical benefits and disadvantages (including promotion of a culture of justification) of a right to reasons in Australia.<sup>121</sup>

Although, as the last section shows, the judiciary has facilitated increased participation through the expansion of natural justice to general administrative decisions, the High Court in the 1986 decision of *Public Service Board (NSW) v Osmond* ('*Osmond*')<sup>122</sup> declared that it would not impose an obligation on decision-makers to provide reasons. It did so on the basis that no such right had previously existed at common law and any change was for the legislature to make, not it. Although the judiciary has since been willing in many instances to imply from the legislative text an obligation to provide reasons,<sup>123</sup> the High Court in *Wingfoot* confirmed that *Osmond* remains good law.<sup>124</sup> As Sir Anthony Mason has observed, the judicial failure to require reasons 'does not sit well with the culture of justification as a democratic value'.<sup>125</sup>

However, judicial review is not only about the common law and Australia is not in the same position faced by the legal community in South Africa during apartheid. In the case of a right to reasons, the legislature has intervened. As already discussed, when the judiciary was starting to expand natural justice's reach in the late 1970s, the Commonwealth legislature made its own extremely important contribution with the *Administrative Appeals Tribunal Act 1975* (Cth), the *ADJR Act* and, in particular, their right to reasons. Since the introduction of these Acts, and especially since the judiciary showed its unwillingness to require reasons in *Osmond*, there has been what could almost be described as an explosion of statutory avenues to obtain reasons.<sup>126</sup> It is now a rare case where an individual cannot obtain some form of reasons, although the right to do so may

120 (2013) 303 ALR 64.

121 Matthew Groves, 'Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*' (2013) 35 *Sydney Law Review* 627.

122 (1986) 159 CLR 656.

123 To the extent that it has been observed that *Osmond* 'has been honoured more in the breach than in the observance': *L&B Linings Pty Ltd v WorkCover Authority (NSW)* [2011] NSWSC 474 (24 May 2011) [109] (Rothman J).

124 *Wingfoot* (2013) 303 ALR 64, 76 [43].

125 Mason, above n 49, 54.

126 See Aronson and Groves, above n 47, 597–8; Groves, 'Reviewing Reasons for Administrative Decisions', above n 121, 644–5.

be subject to limitations.<sup>127</sup> Even in the politically charged arena of immigration, where the legislature has sought to replace common law notions of natural justice with a statutory code, it has, with only some exceptions,<sup>128</sup> continued to require the provision of written reasons.

In these circumstances, while the High Court's unwillingness to impose a general duty to give reasons may not live up to Mureinik's expectations of the judiciary, it is ameliorated by legislative proactivity, the legislation discussed in *Wingfoot* below being an excellent example.<sup>129</sup> It is in this light that the legislature's willingness to act saw Matthew Groves pose the question:

How can courts rely upon a principle with a democratic rationale [a culture of justification] to change the common law if that change appears at odds with decisions taken [to make reasons available after the courts have said they are not available at common law] by democratically elected Parliaments?<sup>130</sup>

The question was somewhat rhetorical and the obvious answer (they should not!) is quite reasonable when the legislature has been proactive and facilitated participation and accountability through the provision of reasons. Where the legislature has been less forthcoming, the answer may instead be that the judiciary can rely upon a culture of justification if it adequately articulates the much richer and compelling vision of democracy that it embodies.

## 2 The Content of Reasons

A right to reasons will be of little value if the actual reasons contain little useful content. For example, an applicant or reviewing court is unlikely to obtain much assistance from reasons that simply state that the applicant was not believed, and as a result the application was rejected.

The legislature has recognised the need for reasons to include substantive content. The most common legislative formula is based on the *ADJR Act*. It provides that reasons will be 'a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision'.<sup>131</sup> Such a formula is far from superficial but does not require perfection. In a migration decision dealing with a statutory requirement that was in substance quite similar to the *ADJR Act*,<sup>132</sup> the High Court observed that such an obligation does not require

127 For example, in New South Wales it may be necessary to commence judicial review proceedings so that reasons can be obtained through the *Uniform Civil Procedure Rules 2005* (NSW).

128 Although there is an inability to obtain reasons for adverse security findings by ASIO, which may mean a visa applicant is denied a visa: *Australian Security Intelligence Organisation Act 1979* (Cth) s 36.

129 The specific statutory obligation to provide reasons was introduced after the Victorian Court of Appeal found that reasons were not required: *Sherlock v Lloyd* (2010) 27 VR 434.

130 Groves, 'Reviewing Reasons for Administrative Decisions', above n 121, 654.

131 *ADJR Act* s 13(1).

132 *Migration Act 1958* (Cth) s 430.

the setting out of a finding on ‘any and every matter of fact objectively material to the decision’, rather:

A requirement to set out findings and reasons focuses upon the subjective thought processes of the decision-maker. All that [the provision] obliges the Tribunal to do is set out its findings on those questions of fact which it considered to be material to the decision which it made and to the reasons it had for reaching that decision.<sup>133</sup>

Despite the *ADJR Act* being the most common formula, not all legislation sets out what the required reasons should include. In *Wingfoot*, the relevant legislation under consideration simply stated that the decision-maker must provide ‘a written statement of reasons for [its] opinion’.<sup>134</sup> The High Court accordingly had no explicit legislative guidance as to what the reasons needed to include and it was in this context that it questioned the utility of a concept such as the culture of justification.<sup>135</sup>

In *Wingfoot*, the decision-maker was a medical panel made up of a musculoskeletal physician, a neurosurgeon and an orthopaedic surgeon. It was required to provide a medical opinion for the purposes of a workers compensation claim. The panel met with the worker, took a medical history from him and conducted a physical examination.<sup>136</sup> The panel’s opinion was in essence that the worker had suffered a temporary injury at work that did not have an ongoing impact on his physical condition. The written statement supporting the opinion was six pages long. The worker sought to quash the panel’s decision on the ground that the reasons it provided were inadequate. The primary judge dismissed the application but on appeal the Victorian Court of Appeal found the reasons were inadequate, primarily because they did not address why the panel had reached a different decision to the worker’s doctors (whose reports were submitted to and acknowledged by the panel). On further appeal, the High Court found that the reasons were adequate as:

The statement of reasons must explain the actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. ... A Medical Panel explaining in a statement of reasons the path of reasoning by which it arrived at the opinion it formed is under no obligation to explain why it did not reach an opinion it did not form, even if that different opinion is shown by material before it to have been formed by someone else.<sup>137</sup>

133 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 346 (emphasis altered).

134 *Accident Compensation Act 1985* (Vic) s 68, as repealed by *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 627(3).

135 Section 10 of the *Administrative Law Act 1978* (Vic) made the tribunal’s reasons part of the record for the purpose of judicial review, so if they did not ‘[meet] the standard required’ by the Act then there was an error of law and the legal effect of the panel’s opinion and reasons could be removed: *Wingfoot* (2013) 303 ALR 64, 82 [67]. Consequently it was not necessary for the High Court to consider whether inadequate reasons would also give rise to a jurisdictional error: at 73 [29].

136 *Wingfoot* (2013) 303 ALR 64, 70 [17].

137 *Ibid* 79–80 [55]–[56].

Although the High Court's formulation was less demanding than the Court of Appeal, by requiring the panel to set out its own 'path of reasoning' it was still requiring it to explain how it reached its opinion. It left open the possibility that in an appropriate case the failure to address a known and different opinion might sometimes mean the reasons were inadequate.

It is understandable that some may prefer the more demanding standard for reasons imposed by the Court of Appeal.<sup>138</sup> However, the High Court's formulation should not be viewed as a rejection of, or even a backward step in, the advance of the themes underlying a culture of justification. It is evident that substantive content was still required. The panel could not simply go through the motions or tick a box. By requiring the panel to set out its 'path of reasoning', the essential vision of Mureinik was met while recognising the practical realities of administrative decision-making, including the need for efficiency and the desire to delegate technical questions to administrators that have specialist expertise. Realities that can weigh against the over-judicialisation of a particular administrative decision-making process<sup>139</sup> can be clearly discerned in the legislative decision in *Wingfoot* to:

- adopt a non-adjudicative process;
- seek the opinion of the expert medical panel that is the focus of the medical board's opinion, not another doctor who examined the worker;<sup>140</sup> and
- direct that the opinion (on a medical matter) was to be adopted, and accepted as conclusive, by the judiciary.<sup>141</sup> While such a direction could not exclude the judiciary's right to review the panel's decision for jurisdictional error,<sup>142</sup> it made it clear that the legislature did not want the judiciary second guessing the expert panel on medical issues.

As so often happens in administrative law, in this instance one value was modified slightly in deference to another. This modification may not be so desirable in another setting. Many administrators will be deciding whether the circumstances of an individual fit within much more defined legislative criteria. They may not be undertaking their own examination within an area of expertise for which they have undertaken years of theoretical and practical training. In such circumstances their reasons may have to address other alternative opinions. Either way the administrator will still have to justify how they reached their ultimate decision.

138 Foremost among them the desire for increased quality control when a decision can so drastically affect an individual.

139 *Wingfoot* (2013) 303 ALR 64, 77.

140 *Ibid.*

141 *Accident Compensation Act 1985* (Vic) s 68(4).

142 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

## F Unreasonableness Review

Until the recent decision of *Minister for Immigration and Citizenship v Li* ('Li')<sup>143</sup> judicial review for unreasonableness in Australia fell well short of the standard proposed by Mureinik. This is because it was thought to be severely limited in its application to instances of *Wednesbury* unreasonableness.<sup>144</sup> *Wednesbury* unreasonableness is where the decision-maker acted so unreasonably that no reasonable decision-maker could have exercised their decision-making power in that way.<sup>145</sup>

However, over the last decade, a fixation on the label of unreasonableness has been likely to mislead. This is because in 2003 the High Court, for very practical reasons,<sup>146</sup> sidelined unreasonableness review so that it only applied to completely discretionary decision-making choices. Since then, for all other executive judgments or fact finding,<sup>147</sup> the judiciary began to develop other tests that subtly expanded the grounds used to determine whether executive decisions were what could be considered colloquially (although not legally) as reasonable.<sup>148</sup> It did so by looking to the quality of the decision by requiring the decision-maker to:

1. honestly and genuinely undertake the decision-making task;<sup>149</sup>
2. avoid impairing their ability to consider an applicant's arguments;<sup>150</sup>
3. deal with the substantial arguments presented and give 'proper, genuine and realistic consideration' to the evidence;<sup>151</sup>

143 (2013) 249 CLR 332.

144 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223 ('*Wednesbury*').

145 A test that the legislature expressly adopted as a ground of review in ss 5(2)(g) and 6(2)(g) of the *ADJR Act*.

146 Mark Aronson, 'Process, Quality and Variable Standards: Responding to an Agent Provocateur' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5. See the discussion in Part III(H) below of the *Migration Reform Act 1992* (Cth).

147 This distinction between 'pure discretion' and 'judgments' is used by Aronson: *ibid* 12. The distinction between 'pure discretion' and 'fact finding' is used by Greg Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *Australian Journal of Administrative Law* 100. While the distinctions are similar, 'judgments' may imply something more than 'fact finding', although how much more is debatable.

148 An expansion in the sense that it is arguably an extension of the logic underpinning *Wednesbury* unreasonableness.

149 *NAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 805 (26 June 2002) [41] (Hely J).

150 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 476 (Gleeson CJ), 484 (Gummow J), 502 (Kirby J), 509 (Hayne J), 526 (Callinan and Heydon JJ); Aronson and Groves, above n 47, 268.

151 *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292 (Gummow J). Wilson J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 398 in discussing what natural justice would require observed that 'fairness would no doubt require that such material be honestly considered'. See also *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389, 394; *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164.



4. base critical findings of fact on the information before them<sup>152</sup> and only make findings that are available on the evidence;<sup>153</sup>
5. not be irrational;<sup>154</sup> and
6. adopt a ‘process of reasoning’ consistent with the ‘logical framework’ imposed upon them<sup>155</sup> or alternatively avoid following a materially flawed ‘path’ in reaching their conclusion.<sup>156</sup>

As with the development of natural justice, continued adherence to the separation of powers has meant that the judiciary has cautioned that ‘[t]aken out of context and without understanding their original provenance, these [tests] are apt to encourage a slide into impermissible merit review’.<sup>157</sup> Yet it is impossible not to conclude that taken together these tests represent a stark increase in the reach of judicial review. The tests look strikingly like Mureinik’s conception of unreasonableness review. While the determination of the merits is left to the decision-maker, it not only asks whether the decision-maker has justified the processes implemented on the way to making a decision but also whether the thought process was reasonable. It is in this context that the recent High Court decision of *Li* is particularly significant as it places a greater onus on the decision-maker to show the thought process adopted was reasonable.

*Li* was an immigration case in which the Migration Review Tribunal (‘MRT’) affirmed a decision to refuse the applicant a skilled visa. A mandatory criterion for the issuing of the visa was a favourable skills assessment (made by a third party), which the applicant did not have. The applicant’s review application before the MRT had a substantial history and it is fair to say that the MRT had taken numerous steps to afford her natural justice, including the provision of further time in which to obtain a second skills assessment. When the second skills assessment was unfavourable, the MRT made its decision despite the applicant seeking a further adjournment. The basis for the adjournment application was that she had asked for a review of the second skills assessment as it contained two fundamental errors. In rejecting the adjournment, the MRT did not address the reasons provided by the applicant, simply observing that ‘the applicant has been provided with enough opportunities to present her case and [it] is not prepared

152 *Soliman v University of Technology, Sydney* (2012) 296 ALR 32, 38, citing *Minister for Immigration and Multicultural and Indigenous Affairs v VOA* [2005] FCAFC 50 (1 April 2005) [5], [13] (Wilcox, French and Finkelstein JJ); *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 402, 407 (Mansfield, Selway and Bennett JJ); *SZMWQ v Minister for Immigration and Citizenship* (2010) 187 FCR 109, 142 (Flick J, Besanko J agreeing).

153 *Soliman v University of Technology, Sydney* (2012) 296 ALR 32, 38, citing *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 396 (French CJ).

154 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; *Minister for Immigration and Multicultural and Indigenous Affairs v Eshetu* (1999) 197 CLR 611.

155 *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1, 9 (French CJ and Gageler J).

156 *Ibid* 25 (Crennan and Bell JJ).

157 *Swift v SAS Trustee Corporation* [2010] NSWCA 182 (3 August 2010) [45], quoted in *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 175–6. See also *Minister for Immigration and Citizenship v CZAX* (2012) 130 ALD 489; *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222, 232–3 (Gleeson CJ).

to delay any further'.<sup>158</sup> The issue before the High Court was whether the failure to accede to the adjournment was a jurisdictional error, which the court found it was.

Given that at the time of the MRT's decision the applicant did not meet the mandatory criteria, failing to grant the adjournment meant that the claim for the visa had to fail. As the joint judgment of Hayne, Keifel and Bell JJ observed, a failure 'to accede to a reasonable request for an adjournment can constitute procedural unfairness'<sup>159</sup> (natural justice) or result in a breach of the statutory obligation to invite the applicant to a 'meaningful' hearing.<sup>160</sup> Yet to avoid a direct confrontation with the legislature which had gone to considerable lengths to exclude common law natural justice,<sup>161</sup> the court focused on the reasonableness of the decision-maker's actual decision. In doing so it not only brought unreasonableness off the doctrinal sidelines but also increased its importance.

In determining what was reasonable, the court looked beyond the specific power to adjourn a hearing and read it in the context of the statute as a whole. This meant it was able to balance what seemed an unfettered power to grant or refuse an adjournment against the statutory obligation to invite the applicant to a hearing<sup>162</sup> and a general exhortation to undertake a fair and just review.<sup>163</sup> While, on a plain literal reading, neither of these obligations created a right to an adjournment, they did allow the Court to read into the adjournment power an element of substance. This was an approach that was reminiscent of Mureinik's appeal for the judiciary in apartheid South Africa to adopt a Dworkinian conception of the law.<sup>164</sup> Ultimately it was an approach which allowed the court to find that the decision to adjourn must be exercised reasonably and in this case it had not been. While relying on their perception of what was reasonable, Hayne, Keifel and Bell JJ were clearly swayed by the fact that the MRT had not provided any substantive justification for its decision, stating that, '[o]f course it may decide, in an appropriate case, that "enough is enough", but it is not apparent how that conclusion was reached in the present case, having regard to the facts and to the statutory purpose to which the discretion to adjourn is directed'.<sup>165</sup> The influence of the themes underlying a culture of justification is even more evident in the

158 *Li* (2013) 249 CLR 332, 339.

159 *Ibid* 357. French CJ was less reticent and made a specific finding that there had been a breach of procedural fairness.

160 *Ibid* 362. 'Meaningful' does not appear in the statutory wording of the *Migration Act 1958* (Cth) s 360, but has been implied.

161 *Migration Reform Act 1992* (Cth); *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).

162 *Migration Act 1958* (Cth).

163 *Ibid* s 353.

164 As already touched upon, there were still very real differences between Mureinik and Dworkinian: see above n 22.

165 *Li* (2013) 249 CLR 332, 368.

decision of Gageler J. His Honour cited the Canadian case of *Dunsmuir v New Brunswick*<sup>166</sup> in support of the proposition that:

Review by a court of the reasonableness of a 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 in respect of the facts and law'.<sup>167</sup>

Gageler J suggested that his new formulation for unreasonableness review was as stringent as the *Wednesbury* test<sup>168</sup> but the joint judgment of Hayne, Keifel and Bell JJ indicates otherwise.<sup>169</sup> What is now clear is that unreasonableness is not necessarily tied to the traditional *Wednesbury* test; it is to be variable depending upon the statutory context.<sup>170</sup> Further, the court has rejected a strict reading of the particular power in issue for a more global approach that will allow it to balance any decision made under a specific power against other requirements in the Act. This raises the possibility of a more substantive approach being taken to judicial review, albeit that it must still be tied to obligations within the legislation itself. Unreasonableness review in Australia now looks very much like that envisaged by Mureinik when he said it simply meant that:

the decision is so bad that no reasonable decisionmaker could have taken it. That is equivalent to saying that it is indefensible: that it cannot be justified. And if it is indefensible, what explanation can be given of it other than that the decisionmaker was guilty of some abuse of his discretion, in one of its recognized forms?<sup>171</sup>

## G Proportionality

Proportionality review has a generally recognised place in Australian constitutional interpretation<sup>172</sup> and came into play on a number of occasions in 2013.<sup>173</sup> However, its role is limited<sup>174</sup> and its focus in the constitutional context

166 *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 220–1, which in turn relied upon the writings of David Dyzenhaus. Dyzenhaus believed that while the Canadian court 'explicitly' accepted his 'position' (in respect of the deference the judiciary should afford to the legislature) it did not do so wholeheartedly and consequently did not live up to his version of the rule of law and in turn a culture of justification: David Dyzenhaus, 'Dignity in Administrative Law: Judicial Deference in a Culture of Justification' (Speech delivered at the 23rd McDonald Lecture, Faculty of Law, University of Toronto, 6 October 2011) 17.

167 *Li* (2013) 249 CLR 332, 375, quoting *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 220–1.

168 *Li* (2013) 249 CLR 332, 377–8.

169 *Ibid* 364 (Hayne, Kiefel and Bell JJ).

170 *Ibid*.

171 Mureinik, 'Administrative Law in South Africa', above n 27, 629–30.

172 See generally Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85; *Theophanous v Commonwealth* (2006) 225 CLR 101; *Leask v Commonwealth* (1996) 187 CLR 579.

173 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1; *Unions NSW v New South Wales* (2013) 304 ALR 266; *Monis v The Queen* (2013) 249 CLR 92.

174 *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1.

is not the protection of human rights or the individual from arbitrary decision-making. Even the constitutionally implied freedom of political communication with its human rights connotations<sup>175</sup> is not a personal right.<sup>176</sup> Rather, its role is to protect democracy and responsible government by limiting the legislature's ability to restrict 'political communication' generally. A proportionality analysis becomes relevant as it is not an absolute right but one that will only lead to legislation being held invalid where it 'so burdens the freedom that it may be taken to affect the system of government for which the *Constitution* provides and which depends for its existence upon the freedom'.<sup>177</sup>

Traditionally, proportionality is not a concept that has been applied by the Australian judiciary when reviewing ordinary administrative decisions. The Hon James Spigelman observed 15 years ago that:

It can be accepted that a complete lack of proportion between the consequences of a decision and the conduct upon which it operates may manifest unreasonableness [as set out in *Wednesbury*<sup>178</sup>]. However, the plaintiff also invoked 'proportionality' as a new and separate ground of review.

...

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

The concept of proportionality is plainly more susceptible of permitting a court to trammel upon the merits of a decision than *Wednesbury* unreasonableness. This is not the occasion to take such a step in the development [of] administrative law, if it is to be taken at all.<sup>179</sup>

Despite the High Court handing down a significant number of very important administrative law decisions, until *Li* in 2013 these comments remained as equally true as they did when they were made. In *Li*, however, both French CJ and Hayne, Kiefel and Bell JJ in their joint judgment made statements that can be seen as raising the possibility of a proportionality (or more correctly disproportionate) review of ordinary administrative decisions.<sup>180</sup> It is not yet clear whether these

175 The most obvious example being the First Amendment to the United States Constitution.

176 *Unions NSW v New South Wales* (2013) 304 ALR 266, 276, 290.

177 *Ibid* 273.

178 (1948) 1 KB 223.

179 *Bruce v Cole* (1998) 45 NSWLR 163, 185.

180 French CJ raised the prospect of a proportionality analysis taking place to distinguish between what may be a rational but not a reasonable decision but found it unnecessary to consider it further as he found the particular conduct both irrational and unreasonable: *Li* (2013) 249 CLR 332, 351–2. Hayne, Kiefel and Bell JJ raised the possibility that a disproportionate emphasis on one statutory power to the exclusion of another could lead to the conclusion that a decision was unreasonable but did not have to explore this possibility further: at 365–6.

references will give rise to a ground of review in its own right<sup>181</sup> or simply be one way of determining whether a decision-maker has acted reasonably.

If proportionality review is to develop further, the continued focus on the separation of powers suggests it will develop in a similar fashion to the approach taken at the constitutional level. It is therefore important to remember that in constitutional cases the balancing that takes place is limited to constitutional values in, or implied from, the *Constitution*. It does not otherwise involve the balancing of what may be more generally considered as individual human rights or freedoms. Consequently, care should be taken to avoid the seduction of the rich and complex principles associated with human rights law. If such self-restraint is exercised, then it is suggested that the balancing that French CJ and the joint judgment were referring to is better understood as a balancing of statutory powers and obligations imposed by the Act in question. This means that the decision-maker needs to show that any action (such as the refusal of the adjournment) is undertaken after a consideration of their overall obligations (such as the obligation to provide a meaningful hearing). In *Li*, it was the failure of the administrator to do just that, which allowed the court to find it was an unreasonable decision and alternatively to suggest that it was a disproportionate response. Viewed in this light, proportionality review of ordinary administrative decisions is not an invitation to evaluate the weight of each and every matter that a decision-maker may take into account. The court is only to examine what can be said to be legal standards derived from the relevant statute and then what each standard means for the other.<sup>182</sup> In this way the legality and merits divide continues, however the High Court has redefined the boundary; a redefinition that creates a rational foundation from which it can seek to ensure that administrators have justified their decisions in accordance with the presumed meaning of the empowering statute.<sup>183</sup>

181 In *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280, 295, the Full Federal Court of Allsop CJ, Robertson and Mortimer JJ treated it as a separate ground although the fact it did so in only one short paragraph indicates it was only addressed for completeness, having already found that the decision-maker's decision was unreasonable.

182 Even in Charter of Rights cases where human rights proportionality is at issue, English cases have grappled with how to frame their analysis so as to not unduly trespass into questions of policy better suited to the executive and legislature. Recently in *R v Secretary of State for Business, Innovation and Skills* [2014] EWHC 232 (Admin) the issues that the court would consider in its proportionality analysis were limited to where 'there is a specific legal standard imposed on the Defendant from which the Defendant's decisions derogate' [63]. It was only if there was such a standard that the 'court then has to address the question as to whether there is a legally justifiable basis for so derogating' [62]. Even more recently in *Miranda v Secretary of State for the Home Department* [2014] EWHC 255 (Admin), Laws LJ observed that the proposition that the judiciary is to look at a decision to ensure a 'fair balance' is achieved between private rights and the public interest (which was the fourth proportionality step proposed by Sumption LJ in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39) is only acceptable in an obviously plain case, as the striking of such a balance is a political decision for the elected government.

183 It is suggested that the emphasis on 'disproportionate' in the judgments should be maintained as it does not carry with it the additional baggage of 'proportionality'.

## H Legislative Resistance

Although the legislature has contributed positively as identified above, there have been very obvious legislative attempts to weaken the themes underlying Mureinik's culture of justification. In this regard, two legislative changes in the migration arena will be considered. These two examples have been chosen as the judicial reaction was particularly decisive and the migration arena is where the legislature and judiciary have most consistently and publicly clashed.

In December 1992, the legislature passed the *Migration Reform Act 1992* (Cth) (*Reform Act*) with the aim of coherently and comprehensively codifying most migration decision-making processes under the *Migration Act 1958* (Cth) (*Migration Act*). It was a code aimed both at decision-makers and the judiciary. Of the changes introduced none was more significant than the new regime in pt 8 dealing with judicial review by the Federal Court. It was a regime that no longer allowed applicants to use the *ADJR Act* but instead provided for far more limited grounds in the *Migration Act* itself. Natural justice (unless actual bias could be demonstrated)<sup>184</sup> and review for unreasonableness were specifically excluded.<sup>185</sup> Not only were two of Mureinik's practical trilogy no longer available but, as Mary Crock observed, it 'reflect[ed] a narrow view of judicial review, with the role of the courts restricted to ensuring adherence to rules laid down by Parliament'.<sup>186</sup>

While there were a great many decisions, the cumulative effect of three High Court decisions — *Abebe v Commonwealth*,<sup>187</sup> *Re Refugee Review Tribunal; Ex parte Aala*<sup>188</sup> and *Miah*<sup>189</sup> — meant the *Reform Act* and its attempt to enforce a narrow view of judicial review more consistent with a culture of authority was an abject failure. All it did was create a bifurcated system of review which limited the Federal Court but left the High Court's original jurisdiction unaffected. The High Court could still set aside a decision for a breach of natural justice or unreasonableness. Further, and somewhat ironically, the legislature's attempt to limit the judiciary actually turned attention to, and invigorated, judicial interest in s 75 of the *Constitution*. This was to lead to what was insightfully described as 'the "new common law" of Constitutional judicial review'.<sup>190</sup> One consequence was, as discussed above, that the High Court made jurisdictional error the centrepiece of judicial review in Australia, emphasising its flexible, malleable and chameleon-like nature. Characteristics that forever weakened, if not neutered,

184 As explained in the Explanatory Memorandum, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992 (Cth), para 25, 'the common law rules of natural justice' were to be replaced by the 'code for decision-making'.

185 *Reform Act* s 33.

186 Mary Crock, 'Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?' (1996) 18 *Sydney Law Review* 267, 272.

187 (1999) 197 CLR 510.

188 (2000) 204 CLR 82.

189 (2001) 206 CLR 57.

190 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 131. See also D F Jackson, 'Development of Judicial Review in Australia over the Last 10 Years: The Growth of the Constitutional Writs' (2004) 12 *Australian Journal of Administrative Law* 22.

the ability of a code such as pt 8 to exclude the underlying obligations imposed by common law concepts such as natural justice. This was so as although a code could explicitly exclude natural justice or unreasonableness, there remained a judicial ability to find that its underlying obligations still persisted if they could be reclassified under another ground of review,<sup>191</sup> or if they could be found in an obligation imposed by the relevant Act itself.<sup>192</sup>

The failure of the *Reform Act* led to the second legislative act that will be considered here, the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). This Act abandoned the old pt 8 regime for a completely new approach. The key to the new scheme was a privative clause.<sup>193</sup> A privative clause is designed to restrict judicial review. Due to its broad definition,<sup>194</sup> the privative clause sought to make almost all decisions under the *Migration Act*, including decisions of the MRT and RRT ‘final and conclusive’<sup>195</sup> so that the judiciary could only intervene if the decision-maker had not acted bona fide.<sup>196</sup>

The initial judicial response to the privative clause varied between judges but it nevertheless had the effect of bringing the fact of its existence into the public domain, culminating in a very public clash between the Full Federal Court and the Minister for Immigration<sup>197</sup> — public awareness being a pivotal concern of Mureinik’s culture of justification. Ultimately however, the High Court in *Plaintiff S157/2002* read the clause out of existence by finding that it only applied to ‘decision[s] ... made under this Act.’<sup>198</sup> If the judiciary decided that a decision was invalid then legally the decision was not one that was authorised by, and consequently made under, the *Migration Act*. A decision would not be valid if

191 See the new grounds of reviewing going to the quality of a decision in the discussion in Part III(F) above about unreasonableness review.

192 See particularly *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351.

193 *Migration Act 1958* (Cth) s 474. A privative clause is also known as an ouster clause.

194 See *Migration Act 1958* (Cth) ss 474(2), (3).

195 *Ibid* s 474(1)(a).

196 Strictly speaking it was believed that a judicial review application would only be successful if it could be shown that:

- the decision-maker had not acted bona fide, that is, in good faith;
- the decision did not relate to the subject matter of the legislation;
- the decision-maker did not have the power to make the decision, that is, they did not have the appropriate authorisation to make the decision; or
- constitutional limits were exceeded.

However, of these criteria only the first, bona fide, was ever really likely to arise. This was because the major purpose of the *Migration Act* was to create and specify who was entitled to a visa. Given the structured nature of the *Migration Act*, all decision-makers could be appropriately authorised if a little care was exercised and under the *Constitution* ‘immigration’ and ‘aliens’ were a Commonwealth responsibility.

197 Benjamin Haslem and Amanda Keenan, ‘Butt Out, Ruddock Tells Judges’, *The Australian* (Canberra), 4 June 2002, 1; Kirsten Lawson, ‘Ruddock denies interfering with judicial system’, *The Canberra Times* (Canberra), 5 June 2002, 3; Michael Millett, ‘Ruddock denies pressuring judges’, *Sydney Morning Herald* (Sydney), 5 June 2002, 7; Benjamin Haslem, Barclay Crawford and Sophie Morris, ‘Ruddock regrets but party applauds’, *The Australian*, (Canberra), 5 June 2002, 2; ICF Spry, ‘Should Chief Justice Black Resign?’ (2002) 53 *National Observer* 59.

198 (2003) 211 CLR 476, 506.

there had been a jurisdictional error.<sup>199</sup> Whether there was a jurisdictional error required ‘an examination of limitations and restraints found in the Act’,<sup>200</sup> an examination that was to be undertaken by the judiciary. Common law natural justice was one such restraint and if breached there was a jurisdictional error which meant that s 474 did not prevent the judiciary from setting the decision aside.<sup>201</sup> In reaching this conclusion the majority judgment famously stated that ‘[s 75], and specifically s 75(v), introduces into the *Constitution* of the Commonwealth an entrenched minimum provision of judicial review’.<sup>202</sup>

Judicial review was said to be entrenched because one of the underlying assumptions of the *Constitution* was the ‘rule of law’ requiring the judiciary to ensure that all ‘officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them’.<sup>203</sup> Of course, as earlier highlighted, the rule of law is a protean concept and by itself *Plaintiff S157/2002* could, but does not necessarily, suggest a judicial desire to impose a culture of justification. It can however be said with much more confidence that it rejects a pure form of the culture of authority.

There are other examples of Acts which show the legislature is willing to sacrifice many of the values underlying a culture of justification in the pursuit of what are seen as conflicting or more important priorities (national security<sup>204</sup> and the control of organised crime<sup>205</sup> being obvious examples). The same could no doubt be said of some judicial decisions.<sup>206</sup> Yet experience tells us that exceptions can be reflective of the fact that progress towards a certain state of affairs is often punctuated by some regression; there is rarely a lineal shift. In any event, exceptions do not detract from the point that since the 1970s, and particularly since the turn of the century, the Australian judiciary has handed down a number of very important decisions that have confirmed, entrenched and strengthened its ability to hold the executive (and sometimes even Parliament) to account. Indeed, over and above the cases already considered, there is also the comprehensively dissected decision of *Kirk v Industrial Court of New South Wales*,<sup>207</sup> where, based on implications drawn from the structure of the *Constitution* rather than any direct textual reference itself, the High Court essentially extended its own entrenched jurisdiction to review executive action for jurisdictional error to the

199 Ibid. The proposition that a decision affected by jurisdictional error was not a decision under the *Migration Act* had been the reason for the earlier decision of *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

200 *Plaintiff S157/2002* (2003) 211 CLR 476, 506.

201 Ibid 508.

202 Ibid 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

203 Ibid 514.

204 *Australian Security Intelligence Organisation Act 1979* (Cth) s 36.

205 *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Criminal Organisation Act 2009* (Qld); *Serious Crime Control Act 2009* (NT); *Serious and Organised Crime (Control) Act 2008* (SA).

206 Ben Saul, ‘Dark Justice: Australia’s Indefinite Detention of Refugees on Security Grounds Under International Human Rights Law’ (2012) 13 *Melbourne Journal of International Law* 685, 724–8; Ben Saul, ‘Fair Shake of The Sauce Bottle: Fairer ASIO Security Assessment of Refugees’ (2012) 37 *Alternative Law Journal* 221, 224.

207 (2010) 239 CLR 531.



State Supreme Courts.<sup>208</sup> It is a decision which has been described as effecting a ‘radical change to constitutional arrangements’<sup>209</sup> in Australia and in doing so ‘bolstering [the judiciary’s] own independence and authority to review the activities of the political branches of government’.<sup>210</sup> It is a radical change consistent with a judicial desire to impose upon the executive and legislature the values found in Mureinik’s culture of justification.

#### IV A JUSTIFICATORY ACCOUNT OF THE RULE OF LAW

An aim of this article has been to show that there has been significant expansion in the Australian judiciary’s approach to judicial review that can be seen through the framework offered by Mureinik’s culture of justification. Indeed, it can now be said that Mureinik’s framework has greater explanatory power in Australia as a result of the legislature’s move to compel the provision of reasons, the increasing importance placed upon natural justice by the judiciary, and more recently the judicial focus on the quality of administrative decision-making processes, unreasonableness, and the principle of legality. Importantly, it is also a framework that accommodates the judiciary’s constitutional axiom that while it is responsible for determining whether executive decision-making was or was not undertaken legally, it will not trespass upon the merits of the decision itself.

It is in this context that while the notion of an all-pervasive culture overreaches, it can be confidently asserted that the Australian judiciary has sought to impose upon the legislature and executive values akin to those underlying a culture of justification. This in turn provides some guidance as to what the vitally important, but incredibly protean, constitutionally assumed rule of law actually means, and consequently what its normative effect will be. At the very least, it reveals a thicker justificatory account of the rule of law than that provided by an outdated transmission account.

Given the complexity of administrative law and the countless number and type of government decisions made each year, it is understandable that the judiciary will revert to the paramount importance of the statutory setting and the larger context in which the administrative decision is made without examining its own internal assumptions. Nevertheless, this does not detract from the fact that when undertaking judicial review a judicial choice (or choices) will normally be made as to what evaluative principles should be deployed in determining the impact of a particular piece of legislation or whether a decision-maker’s actions satisfy the legal criteria set out in it. These choices will to a significant extent (as many of the examples examined show) depend upon whether there is a belief that

208 See Oscar I Roos, ‘Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*’ (2013) 35 *Sydney Law Review* 781, 804–5.

209 Jeffrey Goldsworthy, ‘The Limits of Judicial Fidelity to Law: The Coxford Lecture’ (2011) 24 *Canadian Journal of Law and Jurisprudence* 305, 305.

210 *Ibid* 316.

administrative decision-makers need to justify their decisions and if so how they need to justify them and why.<sup>211</sup>

If the judiciary over time imposes higher standards of justification upon the executive and legislature, as it has, but continually bypasses a discussion of the evaluative choices it has made along the way, it gives credibility to claims of judicial hegemony and with it accusations that judicial review undermines democracy. The judiciary should hold itself to similarly exacting standards and identify and seek to justify its choices. Greater articulation of the underlying principles will then serve to reinforce the legitimacy of judicial review.

211 Dyzenhaus, 'Law as Justification', above n 11, 37.