The Future of the Fettering Rule in Judicial Review

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Abstract

The fettering rule allows administrative decision-makers to refer to policy when making their decision, but prohibits them from strictly following it. This article argues that the rule should be abolished — or in other words, that there is nothing wrong with strictly applying policy guidelines. I argue that the rule lacks a solid doctrinal basis, and that practically there is nothing wrong with a decision being made pursuant to the strict application of a policy. Finally, the cases that examine whether policy can be implied as a mandatory consideration show a general trend of courts being more welcoming of policy playing a role in administrative decision-making. This trend is entirely consistent with an argument that the fettering rule should be abandoned.

Keywords

Administrative Law; Fettering Rule; Mandatory Policy in Decision-Making

I INTRODUCTION

In *Plaintiff M64/2015 v Minister for Immigration and Border Protection*, the High Court recognised that 'policy guidelines' can assist administrative decision-makers by promoting consistency and rationality in decision-making.[1] The importance of consistency in administrative decision was perhaps most famously explained in Brennan J's reasons in *Re Drake v Minister for Immigration and Ethnic Affairs [No 2]* ('*Drake [No 2]*'), who described inconsistency in administrative decision-making as 'not merely inelegant', but also 'suggesting an arbitrariness which is incompatible with commonly accepted notions of justice'.[2] In light of that, His Honour (sitting as president of the Administrative Appeals Tribunal ('AAT')) noted that there were 'powerful considerations' the supported a Minister

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1 (2015) 258 CLR 173, 193 [54] (French CJ, Belle, Keane and Gordon JJ).

2 (1979) 2 ALD 634, 639 ('*Drake [No 2]*').

adopting a guiding policy for delegates to follow when exercising a discretionary power. As such, Brennan J noted that it was appropriate for the AAT to adopt and apply ministerial policy in the absence of 'cogent reasons to the contrary'.[3] In this paper, I use the term 'policy' to refer to a form of quasi-legislation that may practically affect an individual's rights or obligations, but lacks the formalities associated with primary or delegated legislation.[4]

In spite of these benefits, Australian law has long recognised that there are limitations on how policy can be used. There is a well-established rule that any executive policy must be consistent with the underlining statutory discretion that it seeks to condition. As a result, a policy cannot require a decision-maker to consider irrelevant factors in exercising their discretion, nor can it purport to forbid consideration of relevant matters. It can also not require the decision-maker to serve a purpose that is foreign to the purpose for which the discretionary power exists.[5]

A related limitation on the use of policy is that it cannot be applied entirely rigidly, nor can a policy be drafted in a way that requires it to be applied rigidly.[6] Put another way, the rule requires that a decision-maker must always be willing to listen to applicants because there may be good reasons to depart from the policy as it is drafted.[7] A failure to do this can leave a decision subject to challenge on the basis that a decision-maker has not properly exercised the discretionary power that has been reposed in them.[8] This rule, which I will call the 'fettering rule', seems sensibly justified for the reason that decision-makers should consider the particular circumstances of each case before them.[9] However, the rule has come under scrutiny in recent years. In particular, English commentators have focused on whether a cohesive justification can be found for the rule.[10]

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3 Ibid 640.

4 Daniel Greenberg, 'Dangerous Trends in Modern Legislation' [2015] *Public Law* 96, 99.

5 *Minister for Home Affairs v G* [2019] FCAFC 79, [58] (The Court); *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 289 [24] (Gleeson CJ); *Cummeragunga Pty Ltd (in liq) v Aboriginal and Torres Strait Islander Commission* (2004) 139 FCR 73, 92 [159] (Jacobson J); *Drake [No 2]* (n 2) 640 (Brennan J).

6 See, eg, *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, 193 [52] (French CJ, Bell, Keane and Gordon JJ).

7 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, 625 (Lord Reid).

8 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 286–7 [17] (Gleeson CJ).

9 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2016) 300 [5.230].

10 See, eg, William Wade and Christopher F Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014); Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009); Lord Woolf et al, *de Smith's Judicial Review* (Sweet & Maxwell, 7th ed, 2016); Bree Huntley, 'The Rule Against Fettering in the Context of the Prerogative: *R (Sandiford) v Secretary of State for Foreign*

That discourse has been complicated by the reception of substantive legitimate expectations in United Kingdom law, because an applicant may have a legitimate expectation that policy will be followed in assessing their application.[11] In Australia, the position is slightly simpler because the doctrine of legitimate expectations has not received judicial support.[12]

In the Australian context, a number of writers have briefly suggested that the fettering rule should no longer apply as a strict rule.[13] However, there has been a lack of detailed analysis substantiating this position. In this paper, I extend the current debate by arguing that the rule should be abandoned entirely. I do so in three parts. First, I demonstrate that the early case law shows that the fettering rule did not develop out of a solid doctrinal position, but rather finds it origin in a line of cases that lack rigorous analysis and reasoning. This helps explain why attempts by other commentators to find an all-encompassing rationale for the rule have proven elusive. In the second part, I analyse the rule as representing a trade-off between competing administrative ideals. I extend the debate in this regard by questioning why inflexible decision-making is necessarily problematic. Finally, I suggest that abandoning the rule is consistent with current judicial attitudes towards policy. I do this by examining the courts' recent treatment of policy as a mandatory consideration for decision-makers.

In this paper, I only deal with the fettering rule insofar as it applies to the application of policy in administrative decision-making. This issue was recently considered by the New South Wales Court of Appeal in *Searle v Commonwealth of Australia* (*'Searle'*), where it was held that a contract that is not specifically enforced (or specifically enforceable) is unlikely to be a fetter on the exercise of executive discretion unless an award of damages would have that effect.[14] However, there are a number of important distinctions between an decision-maker fettering their discretion

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and Commonwealth Affairs (2015) 20(2) *Judicial Review* 86; Adam Perry, 'The Flexibility Rule in Administrative Law' (2017) 76(2) *Cambridge Law Journal* 375.

11 See, eg, *R v Secretary of State for Transport, ex parte Richmond-upon-Thames London Borough Council* [1994] 1 WLR 74, 93 (Laws LJ); *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 341–6 [301]–[313] (Lord Phillips); Alexander Brown, *A Theory of Legitimate Expectations for Public Administration* (Oxford University Press, 2017) 94ff; Richard Clayton, 'Legitimate Expectations, Policy, and the Principle of Consistency' (2003) 62(1) *Cambridge Law Journal* 93.

12 Aaron Moss, 'Refashioning 'Legitimate Expectations' in Australian Administrative Law: *Minister for Immigration and Border Protection v WZARH*' on Gilbert + Tobin Centre of Public Law, *AUSPUBLAW* (8 December 2015) <https://auspublaw.org/2015/12/refashioning-legitimate-expectations/>.

13 See, eg, Aronson, Groves and Weeks (n 9) 300 [5.230]; Mark Aronson, Submission to Administrative Review Council, *Consultation Paper on Reform of the ADJR Act*, 13 May 2011, 4; John McMillan, 'The Role of Judicial Review in Australian Administrative Law' (2001) 30 *AIAL Forum* 51, 55–6.

14 [2019] NSWCA 127, [145] (Bell P) ('*Searle*'). See also *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

by applying a policy, and the executive fettering their discretion by entering into a contract. The first distinction is that the existence of a contract imposes obligations on the executive, whereas policies do not. In *Searle*, the issue was whether the executive had improperly fettered its discretion by entering into a contract that imposed future obligations.[15] By contrast, the fettering rule in the administrative decision-making context is not enlivened by the mere existence of a policy. Rather, the issue is about how that policy is applied in a particular case. Second, the fettering rule in the context of government contracts is complicated by the issue as to whether the rule operates as public law doctrine that limits the scope of executive power, or as a contract law principle that has the consequence of making an agreement void or unenforceable.[16] Finally, the competing considerations that underpin the fettering rule in relation to contracts are different to the application in policy. In *Searle*, the doctrine was recognised as being in tension with the public interest of enforcing contractual promises,[17] whereas in the policy context, the main tension is between consistent and individualised decision-making.

II THE HISTORICAL BASIS OF THE RULE

A number of writers have recently questioned the doctrinal basis for the fettering rule, with the general conclusion being that there is significant 'confusion' as to the justification for the rule.[18] Whilst the majority of these critiques originate from the United Kingdom, the reasoning is readily applicable in Australia. Therefore, it is sufficient to state that while there have been a number of different justifications advanced for the fettering rule, none have received consensus support.[19] In a recent article, McHarg convincingly argued that there is 'no doctrinal or principled basis on which to justify' the fettering role.[20] To reach that conclusion, she considered a number of justifications for the fettering rule and found them to be unpersuasive.

The first possible justification for the fettering rule is that it manifests the intention of Parliament. This argument proceeds on the basis that by conferring a discretion rather than an explicit power to make rules,

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15 *Searle* (n 14) [63] (Bell P).
16 Ibid [93]–[94] (Bell P).
17 Ibid [108]–[112] (Bell P).
18 Aileen McHarg, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70(1) *Current Legal Problems* 267, 295.
19 See, eg, Wade and Forsyth (n 10) 272; Harlow and Rawlings (n 10) 217; Lord Woolf et al (n 10) [9.005]; Huntley (n 10) 88–9; *R (Sandiford) v Foreign Secretary* [2014] 1 WLR 2697, 2714 [60]–[61] (Lord Carnwath and Lord Mance SCJJ).
20 McHarg (n 18) 292–7.

Parliament must have intended that the discretion be exercised.[21] This rationale has gained traction in a number of Australian cases which have suggested that when Parliament confers a discretionary power on a decision-maker, it requires that discretion to be exercised as the occasion arises.[22] On this view, it would not be appropriate for a decision-maker to abdicate its functions by merely following the relevant government policy. However, this rationale was rejected by McHarg because Parliament may equally have conferred a discretion on the decision-maker as to *how* they make that decision, including whether it is done through rules or on an individualised basis.

Another potential justification is that that the fettering rule assists in avoiding errors in decision-making. The apparent difficulty with this argument is that flexible decision-making does not necessarily reduce the possibility of an error being made, and in fact it might increase errors in certain cases (such as where decisions in question are complex, or the decision-makers involved are inexperienced, negligent, not properly resourced or prone to prejudice). Furthermore, there may in fact be other values (such as efficiency and predictability) that are more valuable than error avoidance.[23] While Australian cases have not directly engaged with this rationale (perhaps because it could be seen as impermissibly bridging the gap between questioning the merits and legality of a decision), there has been a recognition that the consistent exercise of a discretionary power over a high volume of decisions will almost inevitably lead to the formulation of a policy.[24] This suggests that if a policy is not promulgated or does not otherwise crystallise, then high volume decision-making is likely to be inconsistent. That inconsistency is arguably both a feature of poor quality decision-making[25] as well as a hallmark of some decisions being made wrongly (since, if like cases are treated differently, one would expect that at least one of those cases was decided wrongly).

Alternatively, the fettering rule is arguably based on the value of allowing an applicant to participate in the decision-making process.[26] As this argument goes, the right of an applicant to be given a fair hearing (commonly known as the hearing rule) only has practical value if the policy applied by a decision-maker is flexible enough to allow arguments to be

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21 See, eg, *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697, 2714 [61] (Lords Carnwath and Mance), 2719 [81] (Lord Sumption).

22 See, eg, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 286–7 [17] (Gleeson CJ), quoting *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407, 496–7.

23 McHarg (n 18), citing Perry (n 10) 388–91.

24 *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, 206 (French and Drummond JJ) ('*Gray*').

25 Perry (n 10) 389.

26 This was proposed by Perry (n 10) 391–7.

considered. McHarg points out when a statutory discretion is exercised in the absence of any applicable policy, the right to a hearing permits an applicant to argue how that particular statutory rule should be applied, not whether the rule should be applied. However, the fettering rule requires a decision-maker to consider whether they should follow a policy (that is, a non-statutory rule) in the first place. It follows that the hearing rule alone cannot provide a justification because it does not draw a distinction between statutory and administrative rules, whereas the fettering rule itself only applies to administrative policy.

Ultimately, I agree with McHarg's conclusion that the fettering rule lacks a coherent doctrinal foundation. However, in this article, I extend the analysis by examining the early authorities to demonstrate that the rule was a product of its time and therefore is to some degree anachronistic. This is the first reason why the rule should be abandoned.

The modern formulation of the rule was first outlined in *R v London County Council; Ex parte Corrie*.[27] In that case, the London City Council made a by-law that prohibited the sale of articles in public space without a licence. A resolution was later passed revoking any such licences and refusing to grant any more.[28] The King's Bench granted mandamus compelling the Council to hear an application for a licence. The key passage is from the leading judgment of Darling J, who held that:[29]

> This rule must be made absolute. The Court can come to no other decision without infringing the principles governing the hearing of applications for licences to sell intoxicating liquors. It has been laid down that the body on whom is conferred the jurisdiction of granting such licences must hear each application on its merits and cannot come to a general resolution to refuse a licence to everybody who does not conform to some particular requirement.

The rule encapsulated in final sentence is an accurate statement of the law 100 years after its pronouncement.[30] However, the reasoning behind this decision deserves further scrutiny. In particular, it is questionable whether the liquor licensing cases encapsulated a set of principles that resembled an embryonic fettering rule. If that proposition is made out, then it follows that the fettering rule did not develop as a result of rigorous and principled analysis.

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27 [1918] 1 KB 68.
28 Ibid 73 (Darling J).
29 Ibid (emphasis added).
30 Cf *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, 193 [52] (French CJ, Bell, Keane and Gordon JJ).

The liquor licensing cases involved the grant of a licence to sell liquor under the *Alehouse Act 1828*[31] and its successors.[32] Under that Act, appointed Justices of the Peace were empowered to grant licences to persons that they deemed 'fit and proper'.[33] This Act has generated a large amount of litigation, however, for present purposes, the relevant cases are those involving the application of a policy. This analysis focuses on policies that go to the exercise of the Justices' discretion and ignores resolutions regarding ancillary matters, such as the allocation of counties to certain Justices[34] or the appointment of particular solicitors to represent the Justices in the case of an appeal.[35] This leaves a number of reported cases that must be considered.

In *R v Justices for Walsall*,[36] an application for mandamus was brought requiring the Justices to hear an application for a licence. The initial request for a hearing was refused, as the Justices had previously passed a resolution in which they decided not to hear any further applications. In a two sentence judgment, Lord Campbell CJ held that the applicants were entitled to be heard before the matter was determined.[37] It is difficult to determine whether Lord Campbell CJ found a right to a hearing based on the common law hearing rule or some provision in the statute itself.[38] In any case, it appears that the challenge in this case was not directed towards the existence or application of the policy itself, but rather its substance in denying the applicant a hearing.

This case was subsequently cited in argument in *R v Sylvester*.[39] In that decision, the relevant Justices had resolved to not renew the licence of any applicant who did not also take out an equivalent licence for spirits.[40] In an equally short judgment, the Court held that an applicant not taking out a spirits licence was 'not a sufficient legal ground' to refuse a licence under the Act.[41] Again, there appeared to be no problem with the existence of a policy per se. Rather, the issue was that it required the Justices to consider a factor that was completely irrelevant in determining whether an applicant was fit and proper.

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31 9 Geo 4, c 61.
32 *Licensing (Scotland) Act 1903*, 3 Edw 7, c 25.
33 *Alehouse Act 1828*, 9 Geo 4, c 61, s 4.
34 *R v Justices of Worcestershire* [1899] 1 QB 59.
35 *R v West Riding Justice* [1904] 1 KB 545.
36 (1854) 24 LT 111.
37 Ibid 11 (Lord Campbell CJ).
38 *Alehouse Act 1828*, 9 Geo 4, c 61, ss 1, 9.
39 [1862] 121 ER 1093.
40 Ibid 1093.
41 Ibid 1094.

In *Boyle v Wilson*,[42] an applicant challenged a decision to not renew her liquor licence on a number of grounds. One such challenge was that the Justices had prejudged the matter by formulating a policy that there were too many licensed premises and their number should be reduced. However, in the leading judgment, Lord Loreburn LC held that the Justices were entitled to 'use their own judgment' to come to 'conclusions on questions of licensing policy'.[43] Therefore, in that case, the existence of the policy was affirmed.

In light of the actual reasoning in the liquor licensing cases, it appears that Darling J overstated the position in *R v London City Council*. It is true that in all these cases there was a formal policy that limited when an applicant could receive a licence. It is also correct that in *R v Justices for Walsall* and *R v Sylvester*, the conduct of the Justices was held to be unlawful and invalid. However, Darling J put it too highly to claim that a blanket rule against fettering was a necessary conclusion to create consistency with these decisions. Those cases turned very specifically on their facts and the particular kind of conduct that was being engaged in as a result of the policy. The decisions do not seem to be based on the fact that there was a policy per se that was guiding the exercise of the Justices' discretion.

This historical analysis suggests that the fettering rule was not borne out of incremental principled development. Rather, it appears to originate from a limited body of jurisprudence that involved the application of a policy but did not turn on that point. As a result, it is unsurprising that it is difficult to find an all-encompassing rationale for the rule. The rule did not develop from a clear doctrinal foundation — rather, this doctrinal foundation is being retrospectively developed.

III DISCRETION VS CONSISTENCY

As outlined in the previous section, the rule against fettering certainly did not develop from a sound doctrinal position. As a result, it is unsurprising that an all-encompassing rationale for the rule has been elusive.[44] Instead, I suggest that it is more fruitful to analyse the rule as striking a balance between different competing ideals.

The most pertinent debate is between consistent decision-making on the one hand, and incremental decision-making on the other.[45] The well-rehearsed argument is that equality of treatment is a desirable attribute in administrative decision-making. Policy enables this by giving decision-

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42 [1907] AC 45.

43 Ibid 56–7 (Lord Loreburn LC).

44 McHarg (n 18) 295.

45 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 291–3 [5.250]–[5.270]. This passage was not reproduced in the 6th edition.

makers greater guidance in how they exercise their discretion. This creates uniformity by ensuring that decision-makers are singing from the same hymn book. This in turn leads to a number of consequential benefits, for example, expediting decision-making, creating more certainty for applicants, and potential cost savings.[46] The alternative is a model of decision-making on an incremental basis, where each case is decided on its merits.[47] Obviously, there are trade-offs that must be made in selecting one model over the other. The fettering rule represents a compromise between these two positions.

For completeness, I note that this premise of 'policy versus incrementalism' is not universally accepted. Schauer has argued that policies do not necessarily promote consistency in the sense of treating like cases alike, because rules necessarily suppress relevant differences and in turn cause cases that are relevantly different to be treated the same. He gives the example of a sign that says 'no dogs allowed', with the reason behind that being to minimise disturbances. In Schauer's view, the issue with such a rule is that the sign does not distinguish between dogs used as aids for people with visual impairments (which he supposes is likely to be a relevant difference in the achievement of the rule's purpose), and other types of dogs which may be loud and poorly behaved.[48] However, a close examination of Brennan J's reasons in *Drake [No 2]* suggests that the benefits that policy has on consistency may be slightly different to the conception posed by Schauer. Brennan J noted that when a discretionary power is conferred upon more than one agent, there is a tendency for 'inconsistency' to appear, as individual decision-makers will have their own perception of how that discretion should be exercised. As His Honour noted, a policy would promote consistency in those cases by ensuring that all decision-makers have clear guidelines for how they should go about exercising the discretion entrusted to them.[49] In other words, while Schauer may be correct to say that a policy based on rules may not necessarily be internally consistent (in that it may require relevantly different cases to be treated alike), it is also true that a policy promotes consistency amongst truly similar cases when those decisions are made by different agents.[50]

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46 See also Chris Hilson, 'Judicial Review, Policies and the Fettering of Discretion' [2002] *Public Law* 111; McHarg (n 18) and the citations therein.

47 Aronson and Groves (n 45) 291–3 [5.250]–[5.270]; Hilson (n 46) 112–14; McMillan (n 13) 55.

48 Frederick Schauer, *Playing by the Rules* (Oxford University Press, 1991) 135–7.

49 *Drake [No 2]* (n 2) 639.

50 Schauer in fact recognises that one benefit of rules is that they may have this effect, but he describes this as 'the argument from reliance'. The logic, as I understand it, is that rule based decision-making can foster simplification in the decision-making purpose, which provides predictability in how decisions will be made, which in turn allows those subject to the rules to place greater reliance on the actions of those who administer the rules: Schauer (n 49) 137–9. The example that Schauer gives at 139 is that people may differ in their opinion of whether a pet disturbs public peace and causes a nuisance, but

It is beyond the scope of this paper to more fully interrogate Schauer's argument and whether there are in fact different 'types' of consistency. However, I note that the High Court has recently recognised that policy has the important effect of promoting consistency in decision-making, which provides strong support for the argument that policy is seen at least as promoting consistency of some type.[51] Therefore, putting that issue aside, the aim of this section is to more fully explore why the trade-off between 'consistency versus flexibility' should slant towards consistent decision-making, with the fettering rule abolished. It is not my intention to retrace arguments that have already been outlined. Rather, I intend to add two points to the debate. The first is to challenge the premise underlying this trade-off by showing that there is nothing inherently wrong with inflexible decision-making. I argue that in many cases, an administrative decision-maker will make the correct or preferable decision by applying the relevant policy. I then consider the role that the unreasonableness ground of review may play in those cases where the application of a policy leads to an anomalous result. The second point is to show that a move towards the 'consistency' side of the spectrum does not necessarily entail the adoption of a unique ground of review for inconsistent decision-making. This argument seeks to demonstrate that it is entirely consistent to abolish the fettering rule as a way of recognising the importance of consistent decision-making without going so far as to enliven that as a freestanding ground of review.

A *Inflexible Decision-making*

Describing decision-making pursuant to a policy as 'inflexible' is likely to be seen as pejorative. It suggests disregard for the individual case at hand, no matter how meritorious that application may be. In practical terms however, the extent of this problem is likely to be relatively small. A number of cases have recognised that when a matter is considered holistically, often the same result will be reached as if the policy was applied.[52] This is unsurprising, because one of the key purposes of

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it is clear whether a certain animal is a dog or not. This accords with what Brennan J refers to as consistency in *Drake [No 2]* (1979) 2 ALD 634.

51 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, 193 [54] (French CJ, Belle, Keane and Gordon JJ).

52 *R v London County Council* [1918] 1 KB 68, 74 (Avory J); *Da Silva and Minister for Immigration and Citizenship* [2011] AATA 494, [92] (Senior Member Handley); *Linge and Minister for Immigration and Border Protection* [2015] AATA 26, [33] (Deputy President Hotop); *Hong and Minister for Immigration and Citizenship* [2012] AATA 100, [41] (Deputy President Handley); *Kim and Minister for Immigration and Citizenship* [2010] AATA 197, [28] (Deputy President Handley); *Hou and Minister for Immigration and Citizenship* [2011] AATA 107, [51] (Deputy President Handley); *Naeem and Minister for Immigration and Citizenship* [2011] AATA 584, [26] (Deputy President Handley); *Lee and Minister for Immigration and Citizenship* [2010] AATA 906, [19], [36] (Senior Member Redfern); *Cudrea and Minister for Immigration and Citizenship* [2010] AATA 1036, [38] (Deputy President Handley); *Waiba and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] AATA 668, [48]

formulating a policy is to reduce the number of errors by determining an appropriate paradigm for decision-makers to follow.[53] Put another way, if a policy is drafted cogently and rationally, then it is entirely possible that a decision-maker who also acts rationally and reasonably will reach the same conclusion as the policy even if they act independently of it. Therefore, assuming the policy was designed with the purpose of reducing errors and that it was drafted appropriately to achieve that purpose, then often it will cause the correct or preferable decision to be made. Of course, whether a decision was made correctly in the sense that it was lawful and free from jurisdictional error is distinct from whether the outcome itself was correct or preferable.[54] However, because one of the key purposes of policy is to promote efficient and correct decision-making, it is artificial to consider whether this goal is achieved without looking at the outcome of the decision itself.

As a result, the true battleground for the fettering rule is the class of decisions where individual discretion would, or could, lead to a different outcome. This would generally occur where the case itself is exceptional and hence falls outside the normal parameters of the policy. However, the expansion of the unreasonableness doctrine as a result of *Minister for Immigration and Citizenship v Li* ('*Li*') provides an alternative avenue of review for these decisions that does not require the fettering rule.[55] On a simplistic level, if a case is of such an exceptional character that a policy should not have been applied, but the policy is relied upon anyway, it may be that the decision will not have an 'evident and intelligible justification'.[56] It is accepted that the substance of a policy applied by a decision-maker must be lawful.[57] There is no reason why that determination of lawfulness should not include a challenge on the basis of unreasonableness. Indeed, as outlined in the previous part of this paper, the cases that preceded the modern fettering rule seemed to turn on the lawfulness of the particular policy, rather than the lawfulness of policy in general.

At a more nuanced level, the content of the unreasonableness ground of review can mould itself to each particular case. The scope of the unreasonableness ground of review depends on the statutory context in

(Member Isenberg); *Swaminatha and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2008] AATA 712, [9], [16] (Senior Member Hunt); *Mushahwar and Minister for Immigration and Multicultural Affairs* [2000] AATA 1132, [24] (Senior Member Sassella).

53 Robert Baldwin, *Rules and Governments* (Clarendon Press, 1995) 13.

54 *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J).

55 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ('*Li*').

56 Ibid 367 [76] (Hayne, Kiefel and Bell JJ).

57 *Stretton v Minister for Immigration and Border Protection [No 2]* (2015) 231 FCR 36, 53 [49] (Logan J).

which the principle is being applied.[58] This contextual standard of reasonableness plays an important role in moderating the application of this ground of review. By considering the specific statutory provision that a policy purports to give guidance to, a court tasked with deciding whether a decision or policy is unreasonable can consider whether the policy prescribes an outcome that offers no intelligible justification[59] or when it requires the decision-maker to give disproportionate weight to some factor.[60] There is no reason why these principles would differ merely because the decision-maker's reasoning is guided by a policy instrument.

Of course, there are some cases where the unreasonableness ground would not apply even when a different outcome would have been reached if the decision was made in the absence of policy. If this were not the case, the unreasonableness ground set out in *Li* would amount to a merits review claim. However, there are a number of reasons why this on its own is not problematic.

First, decision-making based on a policy often requires the exercise of discretion. The way that many modern policies are drafted means that a decision-maker still has to turn their mind to the question of whether a particular provision in the policy is applicable, and if so, what outcome flows from that. An example of this is the policy published by the Queensland Department of Natural Resources and Mines concerning the meaning of 'exceptional circumstances'.[61] If these circumstances are established, the Minister is granted broader powers in terms of granting exploration and mining permits.[62] This term is not defined in the legislation itself. However, the policy sets out the following indicia of an exceptional circumstance:

> An exceptional circumstance is when the ability to undertake a statutory requirement of the permit applicant or holder is adversely impacted by an event that:
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> - is or was beyond the permit holder or applicant's control, and

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58 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 344 [14] (Hayne, Kiefel and Bell JJ) ('*Li*'); *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 447 [48] (The Court); *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1, 12 [38] (The Court).

59 See, eg, *R v Sylvester* [1862] 121 ER 1093.

60 *Li* (n 55) 366 [72] (Hayne, Kiefel and Bell JJ), as applied by French CJ in that judgment: at 352 [31].

61 Department of Natural Resources and Minerals, 'Operation Policy — Exceptional Circumstances' (Policy No 3/2013, September 2013) <https://www.dnrm.qld.gov.au/online-tools/remote-content?a=109113%3Apolicy_registry%2Foperational-policy-exceptional-circumstance.pdf>.

62 *Mineral Resources Act 1989* (Qld) s 130(2); *Petroleum and Gas (Production and Safety) Act 2004* (Qld) s 728B(6).

- could not have been prevented by a reasonable person in the permit holder of applicant's position.

To be clear, the policy does not infringe the fettering rule because it expressly states it does not limit the discretion of the decision-maker; it only provides guidance.[63] However, even assuming that the policy was intended to be applied strictly, the decision-maker would still have to consider the merits of the particular case to determine whether the application fell within the policy's definition of 'exceptional circumstances'. Indeed, in obiter, the High Court has expressed support for a Minister determining in the abstract the relevant standards to be applied in future cases.[64] A policy is just a formal way of documenting that standard, and ensuring that it is consistently applied.

Second, a policy with firm rules often captures relevant considerations that would be difficult (if not impossible) for a primary decision-maker to fully appreciate. Whilst the author of a centralised policy lacks proximity to the circumstances of the particular applicant, they have the benefit of a high-level overview of the scheme that is being administered. This gives them the ability to ensure that overarching policy considerations are taken into account, when these factors may not necessarily be apparent to the primary decision-maker.[65] One example of this is the decision in *Wetzel v District Court of New South Wales* ('*Wetzel*').[66] Pursuant to the Act in question, a maximum of two mining licences could be granted to a person.[67] However this limit was being circumvented by a process called 'dummying', whereby a miner would apply for a licence under a fictitious name.[68] *Wetzel* considered a policy introduced to minimise this practice, which required all licences and permits to be collected in person.[69] The existence of this practise would not necessarily be apparent to a frontline decision-maker, but was clearly apparent to the Mining Registrar who devised the policy. The fettering rule creates the risk that these conditions are ignored on the basis that they do not seem appropriate in a particular case, when in

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63 Department of Natural Resources and Minerals (n 61).

64 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, 529 [63] (Gleeson CJ and Gummow J), 565 [189] (Hayne J).

65 See, eg, *R v Commonwealth Conciliation and Arbitration Commission and Others* (1969) 122 CLR 546, 553 (Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ); *Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799, 4808 [21] (Lord Reed SCJ); Attorney-General's Department, 'Australian Administrative Law Policy Guide' (Policy Guide, Australian Government, 2011) 9 [3.2]; David Clark, 'Informal Policy and Administrative Law' (1997) 12 *AIAL Forum* 30, 33–4.

66 (1998) 43 NSWLR 687 ('*Wetzel*').

67 *Mining Act 1973* (NSW) s 30(2).

68 A R Hall, *The Stock Exchange of Melbourne and the Victorian Economy 1852–1900* (National University Press, 1968) 76.

69 *Wetzel* (n 66) 689 (Priestly JA).

fact the nature of these high-level considerations means that their relevance is often obscured in an individual case.

Finally, the process by which a decision guided by policy is made can be defended. The most recent argument advanced by Perry in favour of the fettering rule is that it prevents a hearing from being a 'sham', where an applicant advances their position only to have it disregarded by a decision-maker who strictly applies that policy.[70] This is an argument that goes to the vices of an inflexible decision. However, the right to a hearing is not premised on the applicant being able to make a case that is accepted by the decision-maker. This is reflected in the position that, even though an applicant must demonstrate some 'practical injustice' when seeking review of a decision on the basis that they were denied a right to a fair hearing, this is not a high threshold. In particular, it does not require the applicant to show that they could have rebutted the case put against them.[71] By analogy, a decision based on a policy document should not be questioned merely because it meant the applicant had less of a chance of being successful when making representations. Indeed, this argument presupposes that policy always operates adversely to an applicant. By clarifying when or how a discretionary power will be exercised, policy can also create certainty for those who benefit from it.

B *Consistency as a Free Standing Ground of Review*

The previous section questions the unspoken premise in the debate about the fettering rule — that inflexible decision-making is problematic. This section clarifies how high that argument should be taken. Abolishing the fettering rule to promote consistency does not mean that inconsistency should become a free standing ground of review. Inconsistency in and of itself does not form a standalone ground of review in Australia.[72] Aronson, Groves and Weeks suggest that '[j]udicial acknowledgements of the need for administrative consistency, however, are presently not much more than straws in the wind'.[73] However, that statement underestimates the importance attributed to consistent administrative decision-making. There are judicial statements which recognise that consistency in decision-making is desirable and preferable.[74] Where there are mere straws in the

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70 Perry (n 10).

71 *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541, 558 [95] (The Court).

72 See Emily Johnson, 'Should "Inconsistency" of Administrative Decisions Give Rise to Judicial Review' (2013) 72 *AIAL Forum* 50, 50.

73 Aronson, Groves and Weeks (n 9) 304 [5.290].

74 See, eg, *SGBB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 364, 372 [32] (Selway J); *Drake [No 2]* (n 2) 639 (Brennan J); *Apthorpe v Repatriation Commission* (1987) 13 ALD 656, 665 (Davies, Lockhart and Gummow JJ); *SZFYW v Minister for Immigration and Citizenship* [2008] FCA 1259, [11] (Flick J).

wind, however, are assertions that inconsistency alone is a ground for review.

There is nothing problematic with the position that the fettering rule should be abolished without a corresponding 'consistency ground of review' being introduced. As Brennan J remarked in *Quin*, 'the court has no jurisdiction simply to cure administrative injustice or error.'[75] The essential ingredient is the identification of a jurisdictional error on the part of the decision-maker. However, it would be absurd to read that statement as rejecting correct or just administration as desirable goals. On that basis, there is nothing inherently problematic with advocating for a position which promotes consistency through the abolition of the fettering rule, but does not go so far as arguing it should be its own ground of review.

The treatment of delay in making a decision is a useful analogy. It is clear that as a matter of principle, expeditious decision-making is desirable. However, delay on its own does not mean a decision-maker has lapsed into jurisdictional error. It is only reviewable when it occurs in extreme cases where the delay amounts to a denial of procedural fairness (that is, when it causes another ground of review to be made out).[76] Similarly, my thesis is that there should be nothing prima facie unlawful when a decision-maker uniformly applies a policy. However, a challenge would lie when the policy caused the decision-maker to commit some other jurisdictional error.

IV A Rule in Decline

Finally, a move towards abandoning the fettering rule is consistent with the current trend of jurisprudence. To be clear, there are not any firm judicial suggestions that fettering through policy should no longer be a ground of review. However, the cases concerning whether policy should be a mandatory consideration for a decision-maker provide a useful analogue.

A *Early Cases on Policy as a Mandatory Consideration*

The possibility of policy forming a mandatory consideration was first considered in *Drake v Minister for Immigration and Ethnic Affairs* ('*Drake*').[77] In that case, a man was issued with a deportation order. The AAT affirmed the Minister's decision. The man appealed to the Federal Court, who ultimately held that the AAT had failed to properly review the Minister's decision.[78] Of particular interest is the discussion as to whether

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75 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36.

76 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 223 ALR 171, 172 [5] (Gleeson CJ), 181 [43], 184 [55] Gummow J, 196 [102] Kirby J, 213 [163] (Callinan and Heydon JJ), cited in Justice Steven Rares, 'Blind Justice: The Pitfalls for Administrative Decision-Making' (Paper presented to the Council of Australasian Tribunals NSW Chapter Inc, 26 May 2006) [23].

77 (1979) 46 FLR 409 ('*Drake*').

78 Ibid 421–2 (Bowen CJ and Deane J).

the AAT was entitled to refer to the government policy in making deportation orders. The majority concluded as a general principle that 'an administrative officer charged with the exercise of discretionary power *will be entitled*, in the absence of specifically defined criteria or considerations, to take into account government policy.'[79] The language here suggests that decision-makers are permitted (but not bound) to consider government policy. However, their Honours also noted that in some cases, the relevant legislation 'expressly' requires a decision to take into account governmental policy.[80]

Therefore, the decision in *Drake* clarified that decision-makers could take policy into account, and that statute sometimes requires them to do so. The decision in *Minister for Immigration, Local Government and Ethnic Affairs v Gray* ('*Gray*') developed this idea further.[81] The facts are similar, in that the case involved an appeal from a deportation order made against the applicant. However, in *Gray* there was a detailed examination of the role that government policy plays in decision-making. French and Drummond JJ, writing for the majority, accepted the position in *Drake* that policy may be referred to by a decision-maker.[82] Their Honours then noted that whilst policy cannot bind the decision-maker, this does not mean that 'the policy can be ignored'.[83] In other words, their Honours held that governmental policy may constitute a mandatory consideration that cannot be ignored. At first glance, this is identical to the conclusion in *Drake*. However, what is more interesting is the process of reasoning their Honours relied upon to reach that conclusion. In *Drake*, it was held that a statute can expressly designate policy as a mandatory consideration. However in *Gray*, French and Drummond JJ noted that this conclusion may be reached when the relevant power 'involves high volume decision-making', or 'because of its subject matter, [may] be expected to attract policy guidelines'.[84] Therefore, the result of *Gray* is that it is possible, in certain circumstances, to imply into a statutory power an obligation to consider relevant policy.

B *The Modern Approach — Growth of the Concept of Policy as a Mandatory Consideration*

In the years following *Gray*, a number of cases paid lip service to the statement that policy may form a mandatory consideration. Those cases declined to elucidate further the basis upon which a policy may rise to the level of a mandatory consideration.[85] This meant that, although it was clear

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79 Ibid 420 (Bowen CJ and Deane J) (emphasis added).
80 Ibid 420 (Bowen CJ and Deane J).
81 *Gray* (n 24).
82 Ibid 205 (French and Drummond JJ).
83 Ibid 206 (French and Drummond JJ).
84 Ibid.
85 *Cheng v Minister for Immigration and Citizenship* (2013) 213 FCR 362, 367–8 [25] (Cowdroy J); *Walton v Minister for Immigration and Multicultural Affairs* (2001) 115

that policy could be a mandatory factor, it was unclear when precisely this would occur. Determining whether a consideration is mandatory has been described as a process of 'alchemy'.[86] To extend the metaphor, many alchemists claimed that they could turn lead into gold, but none were able to replicate that feat. However, more recent cases have identified additional indicia that suggest that policy is a mandatory consideration for a decision-maker. These factors include:

- The conferral of a broad discretion, in contrast to a very detailed legislative scheme;[87]
- The need for consistency in decision-making in some contexts;[88]
- The decision-maker's stature as an expert body;[89]
- A purpose that the body formulating the policy be responsible for developing administrative practices and procedures;[90] and
- The absence of an express list of mandatory considerations that excludes policy.[91]

I suggest that now that some factors have been identified, there may be a greater ability and willingness to find that policy is a mandatory consideration. Not only do these factors give some clear points of reference to resolve the question, but the first three at least are common in a number of statutory contexts.

With respect to the first factor (that is, the conferral of a broad discretion), there is a general trend towards legislation becoming more skeletal.[92] It is beyond the scope of this paper to interrogate whether this statement is empirically correct. However, in *Australian Prudential Regulation Authority v TMeffect Pty Ltd* ('*TMeffect*'), a detailed legislative scheme was seen as an antithesis to the conferral of a wide discretionary power.[93] Therefore, if legislation is becoming more skeletal, it follows that a wider

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FCR 342, 358–9 [73]-[75] (Merkel J); *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875, [61]–[62] (French J); *Holden Ltd v Chief Executive Officer of Customs* (2005) 141 FCR 571, 582–3 [38] (The Court).

86 Greg Weeks, *Soft Law and Public Authorities — Remedies and Reform* (Hart Publishing, 2016) 134.

87 *BHP Billiton Direct Reduced Iron Pty Ltd v Deputy Commissioner of Taxation* (2007) 67 ATR 578, 605 [103] (French J).

88 *Australian Prudential Regulation Authority v TMeffect Pty Ltd* (2018) ACSR 334, 351 [66] (Perry J) ('*TMeffect*'); *Gray* (n 24) 206 (French and Drummond JJ).

89 *TMeffect* (n 88) 351 [66] (Perry J).

90 Ibid.

91 *Jacob v Save Beeliar Wetlands (Inc)* (2016) 50 WAR 313, 325 [58] (McLure P).

92 Weeks (n 86) 27; Stephen Argument, '"Leaving it to the Regs" — The Pros and Cons of Dealing with Issues in Subordinate Legislation' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26–28 July 2011).

93 *TMeffect* (n 88) 351 [66] (Perry J).

discretion is being granted to decision-makers, as matters of detail are being eschewed. Even though this skeletal approach to drafting often results in the detail being 'left to the regs',[94] the position in Australia seems to be that delegated legislation cannot be used to interpret the primary Act.[95] Since this is ultimately a question of statutory construction, it is arguable that the existence of delegated legislation cannot influence whether policy is found to be a mandatory consideration.

In terms of the second factor (that there be a need for consistent decision making), a number of Acts contain provisions that suggest that consistent decision-making is important. However, it seems that an Act does not have to expressly designate consistent decision-making as an aspiration.[96] Rather, it can be inferred from its subject matter.[97] As one example, the express purpose of the *Migration Act 1958* (Cth) is 'to regulate, in the national interest', the entry and presence of aliens.[98] It can readily be inferred that the set of principles that comprise the 'national interest' must be uniformly applied or they will cease to align with the interests of the collective body politic. The lack of case law suggesting what subject matter is (or is not) amenable to consistent decision leaves considerable scope for this to be clarified in the coming years.

The third factor, the expertise of the decision-maker, is derived from the decision in *TMeffect*. In that case, Perry J concluded that APRA was obliged to take into account its 'Guidelines' when determining whether to permit *TMeffect* to use the word 'bank' in its proposed business name.[99] One factor was the status of APRA as an 'expert regulatory body'. Her Honour did not explain why APRA had that role as an expert body, and its enabling legislation does not expressly give it this role.[100] However, this conclusion may analogously be applied to other administrative schemes. Decision-makers tasked with the exercise of a certain discretion obtain expertise by virtue of exclusively being tasked with carrying out that function.[101] Moreover, when the relevant policy is devised by a government body, they by definition have expertise in taking into account the wide variety of considerations that affect government decision-making. Therefore, it appears that these factors outlined by Perry J are capable of general application, meaning that there are a number of cases where it is likely that policy will be a mandatory consideration. In any case, the

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94 See Argument (n 92).
95 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 133–6 [3.41].
96 *TMeffect* (n 88) 351 [66] (Perry J).
97 *Gray* (n 24) 206 (French and Drummond JJ).
98 *Migration Act 1958* (Cth) s 4(1).
99 *TMeffect* (n 88) 351 [67] (Perry J).
100 See *Australian Prudential Regulation Authority Act 1988* (Cth).
101 Paul Craig, *Administrative Law* (Sweet & Maxwell, 7th ed, 2012) 76–7 [4-002].

explicit identification of these factors may make it easier to establish that policy is a mandatory factor in future cases.

C *Relevance to Fettering*

This begs the question as to how this analysis is relevant to the fettering rule. There are two main implications that are relevant for the broader argument.

First, the reasons identified above that support a finding that policy is a mandatory consideration are similar to the arguments against the fettering rule. For example, consistency and the need for deference to expertly devised policy are also arguments that have been relied upon to attack the fettering rule.[102] If these reasons are relied upon in the future to show that policy is a mandatory consideration, then it will show judicial acceptance of key arguments against the fettering rule, even if the conclusion is not ultimately endorsed. At a high level, it shows a general willingness for courts to formalise policy as part of the administrative decision-making process, as opposed to just endorsing its value in the abstract.

Second, if policy is more frequently designated as a mandatory factor, this chips away at the fettering rule by creating an inverse obligation to consider the policy. As it stands now, decision-makers must consider whether the policy should be departed from.[103] Similarly, decision-makers must give active intellectual consideration to a mandatory factor.[104] In cases where a policy is deemed to be one of those mandatory considerations, there is now a similar obligation to consider the policy before reaching the final decision. In other words, it is no longer enough to just consider whether the policy should be departed from. There may also be increasing recognition of a duty to consider the policy itself (and whether it should be applied) before reaching the final decision. An analogy can be drawn to the doctrine of substantive legitimate expectations in the United Kingdom, which has been described as requiring a decision-maker to follow a published policy unless there are good reasons to depart from it.[105] This is similar to a conclusion that a policy must be considered as a mandatory consideration because it imposes a requirement on the decision-maker that they have regard to the policy. However, commentators have noted that there is a conflict between the fettering rule and the doctrine of substantive legitimate expectations.[106] That logic would similarly support the argument that an

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[102] See, eg, Hilson (n 46) 112.

[103] *British Oxygen Co Ltd v Minister for Technology* [1971] AC 610, 625 (Lord Reid).

[104] *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 175–6 [29]–[30] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[105] *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 254, 265 [26] (Lord Dyson JSC), 344–5 [311]–[312] (Lord Phillips).

[106] Aronson, Groves and Weeks (n 9) 304–5 [5.290].

increasing use of policy as a mandatory consideration may be in tension with the fettering rule.

V CONCLUSION

This paper is ambitious — it argues that a ground of judicial review that has existed for over 100 years should be abandoned, despite no serious judicial misgivings about its existence. Nevertheless, I propose that there are doctrinal and principled issues with the fettering rule. This should prompt further questioning about whether it should continue to be recognised as a ground of review. This discussion may be more relevant in the context of statutory judicial review,[107] where there is a clear legal (if not political) path to abolish the ground through legislative amendment.

In terms of the common law, I suggest that the ongoing search for a clear doctrinal foundation is likely to prove fruitless, because the rule was a historical mutation of legal reasoning. However, the courts are becoming more aware of the importance of policy to administrative decision-making. In my view, the next step is to consider abandoning the fettering rule as a discrete ground of review.

[107] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(2)(f).