



**Crown
Solicitor's
Office**

"Reasonableness and Reasons - Lessons for Good Decision-making"

**COAT NSW Annual Conference
12 September 2014**

www.cso.nsw.gov.au

**Presented by Kiri Mattes
A/Special Counsel
Administrative Law
Crown Solicitor's Office NSW**

REASONABLENESS AND REASONS – LESSONS FOR GOOD DECISION-MAKING

In preparing this update on tribunal law, I was influenced by the theme of this year's conference, the "Modern Member's Guide to Decision-making". I've decided to focus on two issues in administrative law that have been the subject of some judicial consideration in the last 18 months: reasonableness and reason-giving. Not only is there a neat congruence between these two topics, but from them it is possible to derive a number of practical principles of broad application to guide the administrative decision-maker

I. LEGAL REASONABLENESS IN THE WAKE OF *MINISTER FOR IMMIGRATION AND CITIZENSHIP V LI*

In May of last year, the High Court handed down its decision in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, finding that a refusal by the Migration Review Tribunal ("the MRT") to grant an adjournment was unreasonable and resulted in jurisdictional error. The first part of this paper considers the High Court's decision and its subsequent application by state and federal courts.

I am mindful that the decision in *Li* was handed down over a year ago, and that it was addressed in some detail at last year's conference.¹ The reason I have decided to revisit it is that it is, in my view, one of the most significant administrative law decisions of recent times, particularly for tribunals. It is too early to judge whether it has, in fact, "revitalized" the doctrine of unreasonableness (as some have predicted)². What is clear, however, from a review of the body of post-*Li* case law, is that the High Court has articulated a modern formulation of "legal reasonableness" for the Australian context. In doing so, it has brought some much-needed clarity to a doctrine that has confounded law students, practitioners and decision-makers for decades.

The High Court's decision in *Li*

Facts

Ms Li applied for a skilled independent overseas student residence visa. It was a requirement for grant of this visa that she have a successful skills assessment from Trade Recognition Australia ("TRA"). Ms Li's application was refused by a delegate of the Minister, as some of the information that had been provided to TRA was not genuine (it was later explained to the MRT that Ms Li was the victim of fraud by the migration agent acting for her at that time). She applied to the MRT for review of the delegate's decision in January 2009.

In November 2009, prior to her hearing, Ms Li applied to TRA for a second skills assessment which she wished to rely on before the Tribunal. At the time of the hearing in December 2009, the results of the second skill assessment had not yet been received. Following the hearing, the Tribunal invited further comment from Ms Li. In January 2010, Ms Li's agent advised the Tribunal that she had received an unfavourable second skills assessment, but that she had applied for review of that assessment. The agent asked that the Tribunal hold off making a

¹ Morris S, "Tribunal Law update" COAT NSW Annual Conference, 13 September 2013

² Lane B, Dickens E, "The revitalization of *Wednesbury* unreasonableness: the decision in *Minister for Immigration and Citizenship and Li* [2013] HCA 18" (2013) 33 Qld Lawyer 168; Sibley C, "High Court revives *Wednesbury* Unreasonableness" *Law Society Journal*, September 2013.

decision until this review had been finalised. The Tribunal refused the request to delay its decision any further and affirmed the delegate's refusal.

Ms Li applied for judicial review of the Tribunal's decision by the Federal Magistrates Court. The Court found that the Tribunal's decision to refuse the applicant's request for an adjournment was so unreasonable as to constitute jurisdictional error, and remitted the application to the Tribunal for rehearing. This decision was affirmed on appeal by the Federal Court, on the basis that the Tribunal had not given Ms Li an adequate opportunity to present her case.

The High Court's consideration of "unreasonableness"

The Court unanimously dismissed the Minister's appeal on the basis that the decision of the Tribunal was unreasonable in the *Wednesbury* sense. While the judgments of the Chief Justice and Gageler J are broadly consistent with that of the plurality (comprised of Hayne, Kiefel and Bell JJ), there are some differences in emphasis in the three sets of reasons.

Their Honours all had a common starting point: that the doctrine of "reasonableness", in the legal sense, is founded in the common law presumption that the "legislature is taken to intend that a discretionary power, statutorily conferred, will be reasonably exercised."³ Justice Gageler referred to the:

"general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to reason within limits set by the subject matter, scope and purpose of the statute".⁴

It follows that the standard of reasonableness governing the exercise of a particular discretion is to be determined by reference to the statute under which it is conferred.⁵

The plurality held that "*Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point"⁶. Their Honours described a broader conception of unreasonableness than the classic *Wednesbury* formulation, a decision so unreasonable that no reasonable decision-maker could come to it.⁷ Indeed, Lorde Greene MR in *Wednesbury* recognised that there were various grounds upon which an exercise of power may be abused, corresponding with other more specific categories of jurisdictional error. The plurality considered that his Honour's "decision so unreasonable..." formulation simply recognised that, in some cases, an inference of unreasonableness may be objectively drawn, even where a particular error in reasoning can not be identified. Accordingly, the Court described two ways in which a decision may be found to be unreasonable:

- i. Where the decision-maker has made an identifiable error in its reasoning, for example, failure to consider a mandatory relevant consideration, taking into account a mandatory irrelevant consideration⁸; and also

³ *Li*, Hayne, Kiefel and Bell JJ at [63] 362.

⁴ *Li*, Gageler J at [90], 370-371.

⁵ *Li*, French CJ at [23] 348; Hayne, Kiefel and Bell JJ at [67] 363-364; Gageler J at [90] 371.

⁶ *Li*, Hayne, Kiefel and Bell JJ at [68] 364

⁷ Which they recognised has often been criticised for its "circularity and vagueness": *Li*, Hayne, Kiefel and Bell JJ at [68] 364

⁸ *Li*, French CJ at [27] 350; Hayne, Kiefel and Bell JJ at [71]-[72] 365-366

- ii. where no specific error can be identified in the underlying reasoning but the decision-maker has, nevertheless, “come to a conclusion so unreasonable that no reasonable authority could ever come to it.”⁹

The High Court’s reasons bring some clarity to this second branch of unreasonableness, which has since been described as “outcome focused.”¹⁰ As the Chief Justice explained, where all the requirements attending the the exercise of a discretion have been met (such that no underlying error in reasoning can be identified), there is an “area of decisional freedom” available to the decision-maker, and within that area, reasonable minds may differ as to what is the correct and preferable decision. This freedom cannot, however, be construed as attracting a “legislative sanction to be arbitrary or capricious or to abandon common sense”.¹¹

The plurality drew an analogy with the ground of appellate review of judicial decisions described in *House v King* (1936) 55 CLR 499, that it may be inferred that there has been a failure to properly exercise a discretion “if upon the facts [the result] is unreasonable or plainly unjust”¹². Similarly, in the context of judicial review of administrative decisions, unreasonableness is an inference that may be drawn from the facts and the matters falling for consideration in the exercise of the statutory power. Even if reasons have been provided, it may not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is, therefore, a conclusion which may be reached where a decision “lacks evident and intelligible justification.”¹³

Notably, both the Chief Justice and the plurality considered that a disproportionate exercise of a discretion may lead a finding of unreasonableness¹⁴.

The Court included the usual warnings about ensuring that judicial review not stray into the merits of a decision. The Chief Justice reinforced that the requirement of reasonableness is not a vehicle for challenging a decision where the decision-maker has reached “an evaluative judgment with which a court disagrees” where that judgment is one that is “rationally open to the decision-maker”.¹⁵

Justice Gageler, in particular, sought to emphasise that the test of unreasonableness was a stringent one, and that *Li* was a rare case.¹⁶ He identified two considerations that constrain the application of unreasonableness: “the stringency of the test” that a purported exercise of power is so unreasonable that no reasonable repository of power could have so-exercised it; and the practical difficulty of a court being satisfied the test has been met where the exercise is “legitimately informed by considerations of policy”¹⁷. His Honour cautioned that nothing in the Court’s reasons should be taken as “encouragement to greater frequency” of findings of legal unreasonableness¹⁸

⁹ *Li*, French CJ at [28] 351; Hayne, Kiefel and Bell JJ at [76] 367.

¹⁰ *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 208 at [44]

¹¹ French CJ at [28] 351.

¹² *Li* at [75] 368.

¹³ *Li*, At [76] 367

¹⁴ *Li*, French CJ at [30] 352, Hayne, Kiefel and Bell JJ at [74] 366.

¹⁵ French CJ at [30] 351. See also Hayne, Kiefel and Bell JJ at [66] 363.

¹⁶ *Li*, Gageler J at [113] 377-378.

¹⁷ *Li*, Gageler J at [108] 376.

¹⁸ *Li*, Gageler J at [113] 377-378.

Post-*Li* consideration of legal unreasonableness

As might be expected, *Li* has been regularly invoked in cases involving the *Migration Act*, particularly in circumstances where the applicant seeks to challenge a refusal to grant an adjournment. Largely these challenges have been unsuccessful,¹⁹ however the Full Federal Court did find another refusal to adjourn to be unreasonable in *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280.

The decision in *Singh* provides a useful summary of the current state of Australian law regarding unreasonableness, in the wake of the decision in *Li*. Their Honours cautioned that *Li* is not to be taken as a “factual checklist” for determining whether there has been a legally unreasonable exercise of discretionary power. Rather, legal reasonableness is “fact dependent” and requires a Court to undertake a “careful evaluation of the evidence, including any inferences which may be drawn.”²⁰ In this case, Mr Singh had sought an adjournment to allow review of the results of an English proficiency test, in which he had failed to obtain the score required for grant of a visa. The MRT had previously indicated to Mr Singh that it would not be allowing him any further adjournments. It did not appear to have given any further independent, active consideration of Mr Singh’s later request on its merits and in context. Accordingly, the Court concluded that the refusal was not a legally reasonable exercise of power.²¹

Both state and federal courts have had regard to *Li* in a number of other diverse contexts, including review of a refusal to grant an exemption from land tax by the Chief Commissioner of State Revenue²²; findings of corrupt conduct by the Independent Commission Against Corruption (“ICAC”)²³; refusal of an application for early release by a delegate of the Attorney General²⁴; a decision to suspend certain orders made in the context of police disciplinary proceedings²⁵; a decision of the Australian Information Commissioner to decline to undertake a further investigation²⁶; the exercise of power under a local by-law to exclude someone from certain public places²⁷; and a decision to refuse to allow a further assessment of impairment for the purpose of MVA legislation²⁸.

A review of these cases reveals that a new formulation of unreasonableness has emerged from the decision of *Li*. Legal unreasonableness may be inferred from the outcome of an exercise of statutory discretion where:

- the resulting decision is arbitrary, capricious or without common sense; and/or

¹⁹ See, for example, *Chava v Minister for Immigration and Border Protection* [2014] FCA 313; *Minister for Immigration and Border Protection v Pandey* [2014] FCA 640.

²⁰ *Singh*, the Court at [42].

²¹ *Singh*, the Court at [65]-[66].

²² *Lo v Chief Commissioner of State Revenue* (2013) 85 NSWLR 86 (NSW Court of Appeal).

²³ *D’Amore v Independent Commission Against Corruption* (2013) 30 ALR 242 (NSW Court of Appeal).

²⁴ *Hasim v Attorney General (Cth)* [2013] FCA 1433.

²⁵ *Flegg v Crime and Misconduct Commission* [2014] QCA 42.

²⁶ *Jones v Office of the Australian Information Commissioner* [2014] FCA 285.

²⁷ *Toupozakis v Greater Geelong City Council* [2014] VSC 87.

²⁸ *El Kazzi v Allianz Australia Insurance Limited* [2014] NSWSC 927.

- the decision lacks evident or intelligible justification.

The doctrine of unreasonableness is usually framed as a principle applying to an exercise of statutory discretion. However, in *D'Amore v Independent Commission Against Corruption* (2013) 303 ALR 242, the President agreed with Gageler J's opinion²⁹ that the condition of reasonableness applies not just to an exercise of statutory discretion, but in circumstances where a decision-maker is required to reach a state of satisfaction as a prerequisite to the exercise of a statutory function. Accordingly, ICAC's state of satisfaction that the appellant had engaged in corrupt conduct had to be reasonable "in the sense that it was a state of satisfaction that could be reached by a person with an understanding of the nature of the statutory function being performed". It had to be "based upon facts or inferences supported by logical grounds."³⁰ Similarly in *Jones v Office of the Australian Information Commissioner* [2014] FCA 285, the Court considered whether the Information Commissioner had reached a state of satisfaction "according to the rules of reason". Relevantly, the Commissioner could decline to investigate a complaint further if the Commissioner was satisfied that the disclosure was made in the reasonable belief that it was necessary for the detection, investigation, prosecution, or punishment of a criminal offence by an enforcement body. The Court considered whether this state of satisfaction was reasonably reached by reference to the material before the Information Commissioner.

The cases in which unreasonableness has been made out do remain relatively rare, and courts have remained mindful of the need to limit themselves to review of the legality of decisions, not their merits. Accordingly, even in "borderline" cases, where the supervising courts have found that reasonable minds may differ with the decision that has been reached, decisions have ultimately been found to be reasonable in the legal sense.³¹

Lessons for decision-making

From the High Court's decision in *Li*, and its subsequent application in a variety of contexts, it is possible to derive a number of lessons to guide administrative decision-making, particularly in Tribunals.

Lesson 1: It's all about the legislation

The High Court's decision in *Li* reinforces the importance of decision-makers having a thorough understanding of instruments under which they act and, in particular, the purpose for which statutory discretions have been conferred in the context of the broader legislative scheme. Notably, the plurality cited Lord Diplock's opinion in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 that unreasonableness will be shown where "no sensible authority acting with due appreciation of its responsibilities" would have reached a particular decision. This statement reflects the "requirement of law that a decision-maker understand his or her statutory powers and obligations."³²

²⁹ *Li*, Gageler J at [90].

³⁰ *D'Amore*, the Court at [90]-[91].

³¹ See, for example, *Minister for Immigration and Border Protection v Pandey* [2014] FCA 640 and *Agar v McCabe* [2014] VSC 309.

³² *Li*, Hayne, Kiefel and Bell JJ at [71] 365.

What is required by the legal standard of reasonableness will be determined, in each case, by reference to the legislation under which the discretion is exercised. Reinforcing the notion of reasonableness as a common law presumption of legislative intent, the plurality held that where a discretion is ill-defined “it is necessary to look to the scope and purpose of the statute conferring the discretionary power and its real object.”³³ Similarly, in *Singh* the Full Federal Court held that the “indicia of legal unreasonableness” are to be found in the scope, subject and purpose of the particular statutory provisions in issue.”³⁴

The role that statutory construction plays in the assessment of unreasonableness is best illustrated by considering the steps by which the High Court in *Li* determined that the Tribunal’s decision was unreasonable. The starting point was confirming that the discretionary power of the Tribunal to adjourn a matter must be exercised reasonably.³⁵ This discretion was conferred by s. 363(1)(b) of the *Migration Act 1958* (Cth), which provided that “for the purpose of the review of a decision, the Tribunal may...adjourn the review from time to time”.

In the absence of a prescription as to when an adjournment could be granted, it was necessary to consider the broader statutory context in which the discretion was conferred to ascertain what the standard of “reasonableness” required. In undertaking this analysis, the plurality had particular regard to s. 360(1) of the *Migration Act*, which provided that:

“The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.”

Section 360(1) was, in their Honours view, “central” to the conduct of the Tribunal’s review, its purpose being to provide the applicant with the opportunity to present evidence and argument relating to issues arising in connection with the decision under review. Such an opportunity was to be granted prior to the Tribunal making its decision. Accordingly, “the Tribunal’s duty ... extend[ed] further than merely issuing an invitation to an applicant to appear.”³⁶

The plurality found that it must have been clear to the Tribunal that Ms Li did not believe she had fully presented her case, having regard to the discussion of the second skills assessment at the hearing in December 2008, and from the migration agent’s later request that the Tribunal refrain from making a decision until there had been a review of the results of the assessment.³⁷ Considering the purpose of s. 360 of the *Migration Act*, it was necessary for the Tribunal to take this into account when deciding whether or not to adjourn. It did not appear that the Tribunal did so.

The Minister’s submissions sought to rely on the countervailing considerations arising under other provisions of the *Migration Act*, in particular, s.353 which provided that:

“The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, economical, informal and quick.”

³³ *Li*, Hayne, Kiefel and Bell JJ at [67] 363, 364.

³⁴ *Singh*, the Court at [48] 290.

³⁵ *Li*, Hayne, Kiefel and Bell JJ at [77] 367.

³⁶ *Li*, Hayne, Kiefel and Bell JJ at [60] 362.

³⁷ *Li*, Hayne, Kiefel and Bell JJ at [79] 367-368.

The Minister argued that the Tribunal had obviously reached the view that Ms Li had been given sufficient opportunities to present her case and had determined that “enough is enough.”³⁸ The Court acknowledged that it was open to the Tribunal to reach such a conclusion, however, it was not apparent how that conclusion was reached in this particular case, having regard to the facts and the statutory purpose to which the discretion to adjourn was directed.³⁹ Ultimately, their Honours concluded that:

“it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute.”⁴⁰

Accordingly, while no specific error was identified in the Tribunal’s reasons, jurisdictional error could, nevertheless, be inferred from the outcome.

The same statutory discretion to grant an adjournment was at issue in the Full Federal Court’s decision in *Singh*. Considering, specifically, the adjournment discretion conferred on the Tribunal, the Court held that “the language of s. 363 ties the exercise of the adjournment power to ‘the purposes of the review’”. Thus, in exercising its discretion it was necessary for the Tribunal to have regard to the requirements of provisions such as s. 360, as well as its function under ss. 348 and 349 to “make the correct or preferable decision on review.”⁴¹

The decisions in *Li* and *Singh* illustrate the practical difficulty of administrative decision-makers may face in seeking to divine the legislative “purpose” of a particular statutory discretion. The discretionary powers conferred on the Tribunal in connection with its review function were to be exercised so as to give an “economical” and “quick” determination of a review application, but also required the Tribunal to act “according to substantial justice and the merits of the case.” It is clear that the High Court considered that the “fair and just” purpose prevailed over the need for economical and quick determinations in this case.⁴²

There has been some suggestion that Tribunals may need to exercise greater caution in relying on “case management principles” as a factor in determining whether or not to allow an adjournment in view of the decision in *Li*.⁴³ At first glance, the reasoning may appear to be at odds with the earlier decision of *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27, where the Court acknowledged that the public interest in the proper and efficient use of public resources is as much a concern as justice between the parties. *Aon* would suggest that delay is a legitimate factor to take into account when deciding whether or not to grant an adjournment. However, the nature of the MRT’s decision-making process may be distinguished from what was at issue in *Aon* (case management procedures in a court), and these distinctions were significant in the Court’s reasons. Both French CJ in *Li*⁴⁴, and the Full Federal Court in *Singh* considered it relevant that MRT review was not adversarial in nature,

³⁸ *Li*, Hayne, Kiefel and Bell JJ at [81] 368.

³⁹ *Li*, Hayne, Kiefel and Bell JJ at [82] 368

⁴⁰ *Li*, Hayne, Kiefel and Bell JJ at [85] 369.

⁴¹ *Singh*, the Court at [52] 292.

⁴² See discussion in Jackson QC D F and Conde J C “Statutory interpretation in the first quarter of the twenty-first century” (2014) Aust Bar Rev 168 at 172-173.

⁴³ Lane B, Dickens E, “The revitalization of *Wednesbury* unreasonableness: the decision in Minister for Immigration and Citizenship and Li [2013] HCA 18” (2013) 33 Qld Lawyer 168.

⁴⁴ *Li*, French CJ at [10] 341

and that there was no contradictor.⁴⁵ Accordingly, in balancing the requirements to be both quick and efficient, and fair and just, there was no need to consider whether other parties might be prejudiced by the delay. Furthermore, in both *Li* and *Singh*, the Court thought it relevant that there would be no particular prejudice to the Tribunal occasioned by a further short adjournment.⁴⁶

The Supreme Court of Victoria was tasked with construing a very different legislative regime in *Toupozakis v Greater Geelong City Council* [2014] VSC 87. At issue was the reasonableness of a ban from two local pools under provisions of the *Greater Geelong City Council General Local Law 2005* (“the Local Law”) which enabled the Council to restrict access to Municipal Buildings.⁴⁷ This ban was imposed after the plaintiff had been charged with offensive conduct, after taking pictures of women patrons while he was working at the pool kiosks. Although the conduct was found proved, the Magistrates Court ordered that the plaintiff undertake a diversion program, and did not enter a conviction. The plaintiff was later recognised by a visitor to the pool, who complained to the Council about his ongoing presence at the facility. The Council decided to impose a two year ban, which could be reviewed after two years on the plaintiff’s application.

In considering what was required by a “reasonable” exercise of the power to restrict access, the Court had particular regard to cl. 176 of the Local Law, which provided that:

“in exercising any power under this Local Law, Council and an officer must act fairly and reasonably and in proportion to the nature and extent of the breach of this Local Law.”

Having regard to the broader statutory context, Emerton J considered cl. 176 to be “restrictive and not merely facultative”, describing the way in which the Council was obliged to exercise its powers under the Local Law.⁴⁸ These powers were broad, and capable of having a significant impact on lives and businesses. In imposing what was, in essence, an open-ended ban on the plaintiff entering the two premises at which he was employed (by a contractor), the Council was found to have exercised its power in an unreasonable manner.⁴⁹

Lesson 2: An exercise of discretion should be proportionate

As discussed above, both French CJ and the plurality in *Li* considered that a disproportionate exercise of a statutory discretion may give rise to a finding of unreasonableness. It is necessary to proceed with some caution when applying a proportionality analysis in the context of judicial review: the Chief Justice cautioned against such an analysis providing a gateway to review of the merits of a decision⁵⁰. Nevertheless, the High Court’s reasoning suggests that prudent decision-makers should turn their minds to the question of whether the exercise of a discretion in a particular manner would exceed what is necessary for the purpose that discretion serves.

⁴⁵ *Singh*, the Court at [49] 291.

⁴⁶ *Li*, Hayne, Kiefel and Bell JJ at [80] 368; *Singh*, the Court at [76] 295.

⁴⁷ Although the Court questioned whether the relevant provision did, in fact, authorize the Council to prevent a person from attending a Municipal Building where it was their place of work, the plaintiff did not seek to challenge the decision on this basis

⁴⁸ *Toupozakis*, Emerton J at [60].

⁴⁹ *Toupozakis*, at [82].

⁵⁰ *Li*, French CJ at [30] 351.

The analogy employed by French CJ of a “sledgehammer to crack a nut” is a useful touchstone for proportionality in administrative decision-making.

The High Court did not consider whether the Tribunal’s decision was, relevantly, disproportionate in *Li*. However, in *Singh*, the Full Federal Court considered that if a proportionality analysis were undertaken, the Tribunal’s refusal to grant a short adjournment to allow the applicant to obtain a remark of his English test was disproportionate to “the Tribunal’s conduct of the matter to that point, to what was at stake for the first respondent, and what he might reasonably have hoped to secure through a remark.”⁵¹

A proportionality analysis was also applied by Emerton J in *Toupozakis*: his Honour considered that the open-ended ban was a disproportionate response to the Council’s concerns in circumstances where the offensive conduct that prompted the Council’s decision had been dealt with by the Magistrates Court (by imposition of a diversion order), and the ban involved denying the plaintiff access to his workplace, possibly in perpetuity.⁵²

Lesson 3 – the role of reasons in the assessment of reasonableness

An assessment of case law since *Li* demonstrates the critical role that reasons may play in assessing the reasonableness, or otherwise, of an administrative decision. Most fundamentally, the presence or absence of reasons will determine whether a court exercising supervisory jurisdiction may consider the reasonableness of the decision-making process, or is limited to an assessment of the outcome.

Where no reasons have been given for a decision, the supervising court may only assess its reasonableness by reference to outcome. As the Full Federal Court explained in *Singh*:

“in circumstances where no reasons for the exercise of power, or for a decision, are produced, all a supervising court can do is focus on the outcome of the exercise of power in the factual context presented, and assess, for itself, its justification and intelligibility bearing in mind that it is for the depository of power, and not for the court, to exercise the power but to do so according to law.”⁵³

The NSW Court of Appeal also considered the assessment of reasonableness in the absence of reasons in *Lo v Commissioner of State Revenue* [2013] NSWCA 180. President Beazley noted that, in the absence of reasons, it is difficult to say whether a particular factor has been taken into account. If it can be shown that the matter was raised before the decision-maker “the court may be inclined to infer that it was taken into account.”⁵⁴ In other cases, an applicant may rely on the approach enunciated by Dixon J in *Avon Downs Pty Limited v Federal Commissioner of Taxation* (1949) 78 CLR 353: where all the material that was placed before the decision-maker is considered, the conclusion reached by the decision maker may be “capable of explanation only on the ground of some misconception.” In this case, it’s not necessary to be sure of the “precise particular in which [the decision-maker] has gone wrong”: it is enough that “you can see

⁵¹ *Singh*, the Court at [77] 295.

⁵² *Toupozakis*, Emerton J at [80] and [81].

⁵³ *Singh*, the Court at [45] 289.

⁵⁴ *Lo*, Beazley P at [12] 90.

that in some way [he or she] must have failed in the discharge of [his or her] exact function according to law.”⁵⁵

Where reasons are provided, they form the basis for the supervising court’s consideration of whether there is an “evident or intelligible justification” for the decision. As the Full Federal Court explained in *Singh*, “where there are reasons for the exercise of a power, it is those reasons to which a supervising court should look to understand why the power was exercised as it was.”⁵⁶ The court is concerned with whether there “is an evident, transparent and intelligible justification within the decision-making process.”⁵⁷

The Court of Appeal’s assessment of the adequacy of reasons in *D’Amore v Independent Commission Against Corruption* (2013) 303 ALR 242 was closely related to its consideration of the reasonableness requirement (as will be discussed further below). President Beazley found the duty of the Commission to be consistent with that of a trial judge in adversarial litigation, as described by Hayne J in *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402 requiring a record of “the steps that were in fact taken in arriving at [the] result”⁵⁸. This duty was:

“consistent with the requirement that a decision of a kind that may be made under the Act must be in conformity with the law and be reasonable.”⁵⁹

Reasons, therefore, provide an opportunity for decision-makers to set out the process by which they have reached a particular decision. A decision-maker may, by their reasons, demonstrate that they properly understand the nature and purpose of the power they are exercising, have taken all relevant considerations into account, and have acted within that area of “decisional freedom” to which the Chief Justice referred in *Li*. Reasons may also identify any policy considerations that have informed the decision-makers analysis, these being matters with which supervising courts may be more reluctant to intervene.⁶⁰ A well-reasoned decision is more likely to withstand scrutiny by a supervising court, even if that court considers that a different outcome could have been reached. In *Coderre v Minister for Immigration and Border Protection* [2014] FCA 769, Justice Besanko noted that where reasons have been given, and they do not reveal any specific error, “it will not often be the case that a court will conclude that the result is unreasonable or plainly unjust, such that error is to be inferred.”⁶¹

Of course, reasons may also reveal unreasonableness and jurisdictional error. This was the case in *El-Kazzi v Allianz Australia Insurance Limited* [2014] NSWSC 927, where the Supreme Court quashed a decision refusing the plaintiff’s application for a further medical assessment for the purpose of the *Motor Accidents Compensation Act 1999*. The statement of reasons that had been given was found to contain a number of irreconcilable statements as to whether or not there was “additional relevant information”, which was the touchstone of the decision that the proper officer was required to make.⁶² The reasons also cited a judicial decision which had been

⁵⁵ *Avon Downs*, Dixon J at 360, cited by Beazley P in *Lo* at [12] 90.

⁵⁶ *Singh*, the Court at [47] 290.

⁵⁷ *Minister for Immigration and Border Protection v Pandey* [2014] FCA 640 at [41].

⁵⁸ *Fitzgibbon*, Hayne J at [130], cited in *D’Amore* by Beazley P at [101].

⁵⁹ Beazley P at [103].

⁶⁰ As was discussed by Gageler J in *Li* at [108] 376 and [111] 377.

⁶¹ *Coderre*, Besanko J at [46].

⁶² *El-Kazzi*, Hamill J at [33] and [41].

overruled and, in any event, was entirely irrelevant to the determination that was being made.⁶³ Whether these errors were to be categorized as jurisdictional error, a constructive failure to exercise jurisdiction, an error of law on the face of the record, or as “legal, vitiating or ‘Wednesbury’ unreasonableness” was difficult to say: Justice Hamill accepted that it might be all of those things.⁶⁴ Ultimately, his Honour quashed the proper officer’s decision on the basis that it was illogical and irrational.

II. Construing Statutory Requirements to Give Reasons

It has long been the position in Australia that there is no free-standing duty at common law for administrative decision-makers to give reasons.⁶⁵ Statutory rights to reasons are, however, ubiquitous, framed both as an incident of a particular decision-making power⁶⁶, and as a right attaching to administrative decisions more generally.⁶⁷ The High Court’s decision in *Wingfoot Australia Partners Pty Limited v Kocak* [2013] HCA 43 (2013) 88 ALJR 52 considered how the adequacy of reasons is to be assessed in circumstances where a statutory requirement to give reasons applies.

At issue in *Wingfoot* was the adequacy of reasons given by a Medical Panel constituted under the *Accident Compensation Act 1985* (Vic) (“the AC Act”). The AC Act made provision for medical questions to be referred to Medical Panels in a number of situations, including, relevantly by the Magistrates Court exercising jurisdiction under the Act. Section 68 of the AC Act required the Medical Panel to form an opinion on the medical question referred within 60 days, and to give a certificate of its opinion and “a written statement of reasons for that opinion”.

Mr Kocak had made a claim against his employer (the appellant) for statutory compensation relating to a neck injury. His claim was refused, and he subsequently commenced proceedings seeking a declaration of his entitlement to compensation under Pt IV of the AC Act. It was in the context of these proceedings that the Magistrates Court made a referral of three medical questions to the Medical Panel. The Medical Panel provided a certificate of its answers to these questions, accompanied by a six page statement of reasons. After receiving the certificate of opinion, the Magistrates Court made orders by consent to adopt and apply the opinion and dismiss the statutory compensation application. The employer subsequently foreshadowed its intent to rely on the Medical Panel certificate in other proceedings in which common law damages were sought. This provoked Mr Kocak to apply to the Supreme Court of Victoria for an order quashing the opinion, including on the grounds that the Panel had failed to give adequate reasons for its opinion. While this application was dismissed by the primary judge, on appeal the

⁶³ *El-Kazzi*, Hamill J at [34]-[37] and [41].

⁶⁴ *El-Kazzi*, Hamill J at [41]

⁶⁵ *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656

⁶⁶ For example, the requirement to give “brief written reasons” pursuant to cl. 14.8 of the Medical Assessment Guidelines issued under the *Motor Accidents Compensation Act 1999*, as considered in *El-Kazzi v Allianz Australia Insurance Limited* [2014] NSWSC 927; the requirement to give reasons inferred from ss. 74 and 74A of the *Independent Commission Against Corruption Act 1988* considered by the NSW Court of Appeal in *D’Amore v Independent Commission Against Corruption* (2013) 303 ALR 242.

⁶⁷ For example, the *Administrative Decisions Review Act 1997* (NSW), s. 49; *Administrative Decisions (Judicial Review) Act 1977* (Cth), s. 13.

Court of Appeal concluded the reasons given were inadequate and that the Panel's failure to give adequate reasons amounted to an error of law for which certiorari was an appropriate remedy.

The High Court allowed the employer's appeal, finding that the Medical Panel's reasons did meet the standard required by the *AC Act*, properly construed. As a starting point, the Court recognised that, in the absence of a common law duty to give reasons, the Medical Panel's duty to give reasons arose under s. 68(2) of the *AC Act*, and that the content of that duty "defines the statutory standard that a written statement of reasons must meet to fulfill it". Where there was no express prescription as to what was required, "that standard can be determined only by a process of implication."⁶⁸

The Court cautioned against relying on "general observations" about the adequacy of reasons, drawn in cases decided in other statutory contexts and in academic writings.⁶⁹

"To observe, for example, that the provision of reasons imposes intellectual discipline, engenders public confidence and contributes to a culture of justification, is to say little about the standard of reasons required of a particular decision-maker in a particular statutory context."

Accordingly, we should also proceed with caution in seeking to apply the standards determined by the High Court to apply in *Wingfoot* to other decision-making contexts. Nevertheless, the Court's approach to construing the standard of reasons required by the *AC Act* may inform our own inquiries as to what analogous provisions require.

The Court identified two considerations of particular significance when determining the standard required of a written statement of reasons by the Panel:

1. the nature of the function performed by the Medical Panel; and
2. the objective, within the scheme of the Act, of requiring the Medical Panel to give a written statement of reasons.⁷⁰

With respect to the first consideration, the function of the Medical Panel was to form and give its own opinion on a medical question referred to it. In doing so, the Panel was obliged to observe procedural fairness, in order to give those affected by its opinion the opportunity to supply it with material which might be relevant to the question. The Panel did not, however, have the function of deciding a dispute, nor did it make up its mind by reference to competing contentions or medical opinions. Accordingly, the function of the Panel was "neither arbitral or adjudicative", but was "to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise."⁷¹

Having regard to the legislative history of the s.68(2) requirement to give reasons,⁷² the Court determined that its objective was to ensure that persons affected by an opinion would

⁶⁸ *Wingfoot*, the Court at [43] 61.

⁶⁹ *Wingfoot*, the Court at [45] 61.

⁷⁰ *Wingfoot*, the Court at [46] 61.

⁷¹ *Wingfoot*, the Court at [47] 61-62.

⁷² *Wingfoot*, the Court at [49]-[53] 62-63.

automatically be provided with a written statement of reasons “adequate to enable a court to see whether the opinion does or does not involve any error of law.”⁷³ Where such an error was apparent, the person could then seek appropriate relief by a supervisory court. The Court held that “to require less would be to allow an error of law affecting legal rights to remain unchecked”, but that to “require more would be to place a practical burden of cost and time on decision-making by an expert body for no additional legal benefit and no identified systemic gain.”⁷⁴

Accordingly, the Court concluded that s. 68(2) of the *AC Act* required that the statement of reasons:

“explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. 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.”⁷⁵

Ultimately, the Court allowed the employers appeal, finding that the Panel’s reasons were, in fact, adequate. Section 68(2) did not require the Panel to address every piece of material that was put before it. The Panel was not, for example, required to explain why it did not reach an opinion it did not form, even if that different opinion was shown to have been put to it.⁷⁶

A similar approach was taken to construing the requirement to give reasons in *D’Amore v ICAC*, as previously discussed. President Beazley’s consideration of the standard of reasons required under the *ICAC Act* (for findings or recommendations made in the Commission’s reports), was informed by what reasonableness required of the Commission. Specifically, the standard of reasonableness required that ICAC reach a state of satisfaction based upon facts or inferences supported by logical grounds. Correspondingly, the duty to give reasons required the Commission to record “the steps that were taken in arriving at [the] result.” The President went on to hold that the “expressed reasons of an administrative decision-maker should, in my opinion, make it apparent that this reasoning process has been undertaken”, particularly in circumstances where the administrative process involved a formal public hearing by a tribunal, conducted in an adversarial manner, and where the consequences of an adverse finding were potentially very grave for those concerned.⁷⁷

The statutory requirement to give reasons under the *Motor Accidents Compensation Act 1999* was also considered in connection with an argument of unreasonableness by Hamill J in *El-Kazzi*. Under the Act, the proper officer was required to give “brief written reasons” when determining whether or not there should be a further medical assessment. Having regard to the relevant legislative provisions and Guidelines, his Honour accepted that it was not appropriate to submit the proper officer’s reasons to the “kind of fine analysis that may be appropriate in other contexts.”⁷⁸ Nevertheless, as discussed above, the proper officer’s reasons disclosed inconsistencies and errors of real significance, so as to justify the decision being quashed.

⁷³ *Wingfoot*, the Court at [54] 63.

⁷⁴ *Wingfoot*, the Court at [54] 63.

⁷⁵ *Wingfoot*, the Court at [55] 63.

⁷⁶ *Wingfoot*, the Court at [56] 64.

⁷⁷ *D’Amore*, Beazley P at [105].

⁷⁸ *El-Kazzi*, Hamill J at [31].