

- on this view, basis of the fettering rule, which precludes inflexible application of policy, may be in tension with the value of consistency
- is unrealistic to expect a decision-makers to sit alone + independent, choosing which matters to consider, treating each decision as separate from all others + putting to one side the pressure in high-volume decision-making in a large bureaucracy to decide cases consistently + with an eye to the views of the elected gov

Legal consequences of ignoring, breaching or misconstruing a policy (p. 789)

- might be hard to challenge an instance where the gov has a policy + choses not to apply in some instances
 - except in extreme circumstances where breach of procedural fairness + unreasonableness
- **what if a policy that would advantage a person has been ignored or breach by the decision-maker?**
 - **if, as the non-fettering rule suggests, a policy is not binding but is only one consideration to be balanced along with the facts of the case, it would logically follow the decision maker is free to depart from the policy**
- is questionable, as remarks in Wetzel + Ansett indicate, whether a subordinate decision-maker should be free to ignore a policy devised by a superior, especially a minister
- Gerah Imports; Nikac + Gray highlight that
 - **while a breach of a policy is not in itself an invalid action, policies are not without legal significance + cannot be breach or disregarded with impunity**
 - to do so runs the risk of failing to consider a relevant matter, or committing an error of law
- a policy which has statutory backing may be classified as a species of subordinate legislation that is binding on a decision-maker
- before a policy is departed for, there can also be a natural justice obligation to provide a hearing to a person who has a legitimate expectation that the policy will be applied
- whether a department should be obliged to conform to its own policies also merges with whether there is a principle of estoppel that prevents a decision-maker from acting inconsistently with a promise or representation

ERROR 3: UNREASONABLENESS

- ADJR s 5(2)(g): ‘an exercise of power that is so unreasonable that no reasonable person could have so exercised the power’
- might look at the objects of the act to set out the bounds of what is reasonable
- unreasonableness + irrelevant considerations will often overlap
 - one might be stronger if a small element of the facts change

1. Wednesbury is NOT the starting point

- Wednesbury is not the starting point nor the end point. (Li (Hayne, Kiefel + Bell JJ); SZVFW)
- Li goes beyond Wednesbury in a few ways
 - disproportionality
 - requiring a logical justification linking the factual finding + the outcome
- **Wednesbury is not the starting point for the standard of reasonableness, nor should it be the end point Li (Hayne, Kiefel + Bell JJ)**
 - **legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision— which is to say one that is so**

unreasonable that no reasonable person could have arrived at it— nor should Lord Greene be taken to have limited unreasonableness in this way

- this aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified

2. Test

- However, the test remains a stringent one (Li; SZVFW)
- **Courts are determining whether decision goes beyond implied legal condition of reasonableness** (SZVFW)
 - need to look at the purpose of the statute (SZVFW)
 - **where it appears that the dominating, actuating reason for the decision is outside the scope of that purpose, the discretion has not been excised lawfully**
 - within the sphere of the statutory purpose there is scope for a decision-maker to give effect to the power according to his or her view of the justice of a case, without interference by the courts
 - **sometimes what is reasonable will be a more intrusive standard because the statute makes its so** (SZVFW)
 - sometimes decision-makers will have more or less discretionary power
 - depends on the statute
 - **implied condition of reasonableness is not confined as to why a statutory decision is made (Li- Gageler)**
 - it extends to how a statutory decision is made
 - Is necessary to construe the statute because the Q to which the standard of reasonableness is addressed is whether the statutory power has been abused (Li)
- **what is legally unreasonable will depend on the statutory + factual context** (Li; SZVFW)
 - **What is reasonable and justifiable will depend on context:** (Li; SZVFW)
 - Statute
 - scope, purpose, context
 - Nature of decision
 - Facts
- **a decision made in the exercise of a statutory power is unreasonable when it lacks an evident + intelligible justification** (Li)
 - reinforced in SZVFW: Unreasonableness is concerned both with outcome and with whether decision-maker has provided an intelligible justification
- it may be, following Li, that courts will regard unreasonableness, illogicality + irrationality as overlapping or integrated + as applying at all stages in judicial review
 - 'requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgement with which a court disagrees even through that judgment is rationally open to the decision-maker' (Li per French)
- **Concerned with process, not (just) substance (Li)**
 - is more concerned with the justification provided- then solely with the outcome (SZVFW)

- regard can also be given to the outcome of the decision: whether the ‘decision falls within a range of possible, acceptable outcomes which are defensible in respect of fact + law’ (Li; Singh)
- **unreasonableness can be inferred where the decision appears to be arbitrary, capricious, without common sense or ‘plainly unjust’** (Li; Sing)
- **disproportionately**
 - **an obviously disproportionate response is one by which a conclusion of unreasonableness may be reached** (Li- Hayne, Kiefel + Bell JJ)
- Concern with weighting (Li)
- Nettle and Gordon JJ: whether “abuse of power” (SZVFW)
 - ‘Is necessary to construe the statute because the Q to which the standard of reasonableness is addressed is whether the statutory power has been abused’ (Li Hayne, Kiefel + Bell JJ)
- legal unreasonableness can be a conclusion reached after the identification of an underlying jurisdictional error
 - or it can be a conclusion reached with necessarily identifying another jurisdictional error (Li; Singh)
- **this approach does not deny that there is an area within which a decision-maker has a genuinely free discretion** (Li)
 - **that area resides within the bounds of legal reasonableness**
- **not re-determining merits**
 - properly applied, a standard of legal reasonableness does not involve substituting a court’s view as to how a discretion should be exercised for that of a decision-maker (Li)

3. Outline the statute + facts

4. Draw analogous + distinctions from the cases

- **Minister for Immigration and Citizenship v Li (2013) 249 CLR 332**
 - **p. 928**
 - **Background**
 - **Li’s migration agent advised the MRT that the second skills assessment was based on two fundamental errors + a review had been sought of that decision**
 - **agent requested that no decision be made by the MRT until the outcome of the review was known**
 - **without waiting for that advice, the MRT affirmed the initial decision on the grounds that Li had ‘been provided with enough opportunities to present her case’, has not provided evidence that she sought a reassessment, + had had a ‘reasonable period of time to obtain evidence of competent English’**
 - said Ms Li had been provided with enough opportunities to demonstrate her skills
 - **HC affirmed the early courts that the refusal to adjourn proceedings under s 363 of the Migration Act was unreasonable, unfair + involved jurisdictional error**
 - error was giving too much weight to one consideration over the other

- **MRT seems to have given excessive weight to the fact that Ms Li had been provided with enough opportunities to present her case/demonstrate her skills; and not enough to what is just in the circumstances**
- weigh in relevant to unreasonableness
- MRT's refusal to issue a stay to allow Ms Li to appeal her (second) adverse skills assessment was legally unreasonable
- had acted unreasonably because it was not possible for a court to comprehend how the decision had been arrived at
 - It lacked an intelligible justification
- **French CJ**
- **every statutory discretion is confined by the subject matter, scope + purpose of the legislation under which it is conferred**
- a decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power
 - it falls outside the framework of rationality provided by the statute
- **when exercising discretion- that officials exercising discretion comply with the canons of rationality means, inter alia, that their decisions must be reached by reasoning which is intelligible + reasonable + directed towards + related intelligibly to the purposes of the power**
- to that framework, defined by the subject matter, scope + purpose of the statute concerning the discretion, there may be added specific requirements of a procedural or substantive character
 - they may be express statutory conditions or, in the case of the requirements of procedural fairness, implied conditions
- **vitiating unreasonableness may be characterised in more than one way susceptible of judicial review**
 - a decision affected by actual bias may lead to a discretion being exercised for an improper purpose or by reference to irrelevant considerations
 - a failure to accord, to a person to be affected by a decision, a reasonable opportunity to be heard may contravene a statutory requirements to accord such a hearing
 - may also have the consequence that relevant material which the decision-maker is bound to take into account is not taken into account
- beyond unreasonableness expressive of particular error however, it is possible to say, as **Lord Greene said, that although a decision-maker has kept within the four corners of the matters it ought to consider 'they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it'**
- requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgement with which a court disagrees even though that judgment is rationally open to the decision-maker
- a distinction may arguably be drawn between rationality + reasonableness on the basis that not every rational decision is reasonable
 - **be that as it may, a disproportionate exercise of an admin discretion, taking a sledgehammer to crack a nut, may be characterised as irrational + also as unreasonable** simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves'

- **decision of the MRT to proceed to its determination was not, on the face of it, informed by any consideration other than the asserted sufficiency of the opportunities provided to the first respondent to put her case**
 - **MRT did not in terms or by implication accept or reject the substance of the reasons for a deferment put to it by the first respondent's migration agent**
 - it did not suggest that the first respondent's request for a deferment was due to any fault on her part or on the part of her migration agent
 - it did not suggest that its decision was based on any balancing of the legislative objectives set out in s 353
- **there was in the circumstances, including the already long history of the matter, an arbitrariness about the decision, which rendered it unreasonable in the limiting sense explained above**
- **Hayne, Kiefel + Bell JJ**
- **legislature is taken to intend that a discretionary power will be exercised reasonably**
 - this approach does not deny that there is an area within which a decision-maker has a genuinely free discretion
 - **that area resides within the bounds of legal reasonableness**
 - properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker
 - **legal standard of reasonableness must be the standard indicated by the true construction of the statute**
 - Is necessary to construe the statute because the Q to which the standard of reasonableness is addressed is whether the statutory power has been abused
- **Wednesbury is not the starting point for the standard of reasonableness, nor should it be the end point**
 - **legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision— which is to say one that is so unreasonable that no reasonable person could have arrived at it— nor should Lord Greene be taken to have limited unreasonableness in this way**
 - this aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified
- Lord Russell in *Kruse v Johnson*
 - **this case may avoid some of the circularity identified in the Wednesbury formulation**
 - consideration that unreasonableness was found where delegated laws were
 - 'partial + unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; [or] if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men'
- *Peko-Wallsend (Mason J)*
 - considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is 'manifestly unreasonable'
 - **whether a decision-maker be regarded, by reference to the scope + purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally,**