The *Blue Sky* Effect: a Repatriation of Judicial Review or a Search for Flexibility?

Prof Simon Young[1]

Introduction

At the heart of the High Court's 1998 decision in *Project Blue Sky Inc v Australian Broadcasting Authority*,[2] concerning a trans-Tasman stoush over the validity of broadcasting standards, was a conspicuous emphasis on specific legislative context and purpose. The Court was focused on the legal consequences of a particular executive procedural failure, yet it might be argued more broadly that this decision effectively picked a winner in the lingering contests over the true source and shape of administrative legality. The strong focus on statutory specifics appeared to set in motion a steady conceptual shift away from external or 'pre-mixed' standards drawn from common law archives of principles and presumptions. At the very least, it can be acknowledged that *Project Blue Sky* exerted a strong 'centripetal force' in Australian administrative law[3] – drawing it inwards towards statutory detail and context.

To borrow a term used by some fine international and Australian jurists,[4] this article is an exercise in 'top-down' analysis of some key trends in Australian administrative law. It will re-examine the '*Blue Sky* effect' from above: its permeation through judicial review principles; its contemporary significance; and its place in the broader dynamics of our public law. Top down thinking comes with some risk, as would be noted by that statistician who drowned in a lake of average depth two feet. However, the impractical top-down perspective can be a useful thread in the conversation, and such analysis is in this instance prompted by what would appear to have been some recent top-down reasoning by the High Court itself.

Ultimately, one purpose of this article is to redirect the wandering but tenacious debate between the 'statutor-ist' and 'common law-ist' views of judicial review. This debate manifested itself most prominently in historical arguments between 'ultra vires theorists' (focused on statutory boundaries) and 'common law theorists' (focused on deeper conceptual legal roots),[5] and of course in the formative Australian debate particularly in the natural justice context between Justices Mason and Brennan in the 1980s.[6] As will be seen, the latter (at least) would seem to have been settled as a theoretically unproductive draw. Yet the underlying patterns in Australian legal development have a real and ongoing practical significance. To jump forward in the analysis (and even putting aside the obvious dilemma of

---

1 Prof of Law and Justice and Dep Director of the Centre for Heritage and Culture at the University of Southern Queensland; Adj/Prof at the University of Western Australia School of Law; External Fellow with the University of Queensland Centre for Public, International and Comparative Law. The author thanks Prof Bill Lane and Prof Peter Billings for invaluable comments on a draft of this work – errors remain the author's own.

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

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

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

5 See further Alan Robertson, 'Commentary on 'the entrenched minimum provision of judicial review and the rule of law' by Leighton McDonald' (2010) 21 *Public Law Review* 40; Meyerson D, "State and Federal Privative Clauses: Not So Different After All" (2005) 16 *Public Law Review* 39.

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

what is to be done in review of *non-statutory* powers), does a Federal Court judge today still reach for the pre-mixed categories of jurisdictional error enshrined in *Craig v South Australia*[7] or to a more internal, statute-specific formulation of the concept? Does a state Supreme Court judge still draw from *Wednesbury*[8] to explain and apply the standard of 'unreasonableness', or does that standard now come from specific statutory context? Is there still anything resembling a single standard of bias? Or bad faith? Or fraud? It appears that there has been an incremental 'repatriation' of the judicial review grounds – so carefully lined up for contemporary times by the ADJR Act[9] framework - such that perhaps any remaining freestanding standards are now to be carefully calibrated to specific statutory context.

The emergent concept of 'materiality' in jurisdictional error doctrine, namely the idea that inconsequential errors ordinarily will not qualify,[10] is a part of this story. First, this development is ostensibly on the *Blue Sky* trajectory given that the requirement has been explained as a product of statutory construction (with the precise standard possibly adjusted by specific statute).[11] Secondly, just as a matter of logistics, this idea appears to have travelled from the complex evolutions of the fair hearing rule to the concept of jurisdictional error via the stepping stone of *Blue Sky* procedural error.[12] This article is not a full discussion and critique of the 'materiality' phenomenon in jurisdictional error – that work is being ably progressed by other writers.[13] Yet the history and context of this development can be traced, and is important to our understanding of current and future directions.

The *Blue* Sky effect, then, has a broad reach and ostensibly a very contemporary importance. However, it is certainly not proposed here that we return to the old debates between 'statutor-ists' and the 'common law-ists'. The common law theory has met with visible defeats, and the statutory theory is unsettled by the fact that analysis reveals there have been varying drivers for the courts' deeper excavation of statutory intentions, and some conspicuous diversions from the course. It might seem that the old debate is best left as a dignified draw, lest it distract us from a fuller analysis of the complex dilemmas and practical evolutions in modern Australian administrative law. The contention here is that it is more productive to recognise the repatriation of grounds and closer statutory focus as part of a bigger dynamic – namely a two-stage search for flexibility in judicial review principles, in response to broad changes in regulatory context, legislative drafting, public expectations, litigation strategy and indeed executive realities. As will be seen the 'materiality' overlay, in the test for jurisdictional error, would seem to confirm the presence of this broader dynamic (and perhaps the elasticity of the *Blue Sky* methodological banner). This search for flexibility certainly builds agility in our judicial review principles, but it can be somewhat confounding at times - and would appear to come at some cost.

---

7 (1995) 184 CLR 163.

8 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

9 *Administrative Decisions (Judicial Review) Act 1977* (Cth).

10 See eg *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [29]-[30] (Kiefel CJ, Gageler and Keane JJ) – discussed further below.

11 (2018) 264 CLR 123, [29]-[30]. Cf [72] (Edelman J).

12 See particularly *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 (discussed below).

13 See eg Paul Daly, 'A Typology of Materiality' (2019) 26(3) *Australian Journal of Administrative Law* 134; Courtney Raad, ''Hossain v Minister for Immigration and Border Protection': A material change to the fabric of jurisdictional error?' (2019) 41(2) *Sydney Law Review* 265; Lisa Burton Crawford, 'Immaterial errors, jurisdictional errors and the presumptive limits of executive power' (2019) 30(4) *Public Law Review* 281; Leighton McDonald 'Jurisdictional error as conceptual totem' (2019) 42(3) *UNSW Law Journal* 1019; Alan Freckelton, 'A workable formulation for jurisdictional error in Australia? (2018) 93 *AIAL Forum* 31; Lisa Burton Crawford & Janina Boughey, 'The centrality of jurisdictional error: Rationale and consequences' (2019) 30(1) *Public Law Review* 18.

The '*Blue Sky* effect' – calibration to statutory context

In *Project Blue Sky,*[14] the High Court formally rejected the old (and sometimes pre-emptive) labelling of explicit executive procedural obligations as 'mandatory' or 'directory'. According to McHugh, Gummow, Kirby and Hayne JJ, the old classifications had drawn attention away from the real task of determining whether an act done in breach of a relevant legislative provision was valid: "[the] classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds…[the] classification is the end of the inquiry, not the beginning."[15] It was declared that "a better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid".[16] The legislative purpose in this regard was to be broadly ascertained by reference to factors such as statutory language, subject matter and the consequences of invalidity.[17]

This decision was thematically important in the evolution of Australian administrative law. As will be seen the embedded search for 'essential preconditions' helped to shape the gradually emerging touchstone for jurisdictional error, and indeed this approach to identifying procedural preconditions informed the courts' simultaneous tussles with the identification of 'jurisdictional *facts'*.[18] Yet more broadly, as alluded to above, *Project Blue Sky* gave momentum and prominence to a strengthening explicit focus on specific statutory purpose and context in the Australian principles, and seemed to reflect a broader commitment to clear away older generic ideas and standards that may have become somewhat redundant. As will be seen this trend can be readily (but awkwardly) traced through the recent history of 'jurisdictional error', and as noted above its early footprint (and accompanying debate) is quite conspicuous in formative natural justice cases. Yet close examination reveals the broader reach of this 'Blue Sky effect' across a range of judicial review principles. There is evidence of an ongoing repatriation of judicial review grounds, in a sense returning the remaining outlying or 'freestanding' standards of administrative legality to the corral of grounds that have always been calibrated to statutory context. The most prominent example is the ground of 'unreasonableness', however similar thinking can be found in the context of 'bias', 'bad faith' and 'fraud'. And this lens allows us to spot some other examples of actual or attempted repatriation in the context of the principles relating (for example) to delegation and behest (or 'dictation').

Jurisdictional error

The *Blue Sky* attention to the gravity of particular procedural errors, and consequent distinction between unlawfulness and invalidity, saw the case having a natural and important influence on the broader principles of jurisdictional error – which of course rests on a similarly poised assessment of the seriousness of error.[19] Unsurprisingly the emerging focus on statutory specifics, and indeed some tension with older methodologies, is clearly on display in the recent history of 'jurisdictional error'.

---

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

15 (1998) 194 CLR 355, 390.

16 (1998) 194 CLR 355, 390.

17 (1998) 194 CLR 355, 389.

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

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

Plaintiff S157/2002 v Commonwealth[20] ushered in the modern thinking on the nature and function of jurisdictional error in Australia. Most clearly for present purposes, the High Court re-examined the old 'pre-mixed' *Hickman* formula for the handling of privative clauses[21] and determined (or re-affirmed) that *Hickman* was essentially nothing more than an aid to construction; a tool that might assist the court in reconciling provisions which both define powers and seemingly then free them from restriction.[22] The constitutional backdrop was significant in the *Plaintiff S157* reasoning, but at a more basic level so too was the concern to dismantle external standards that might distract from an examination of specific statutory context and purpose.

Beyond this relegation of *Hickman*, the reasoning of the judges in *Plaintiff S157* reflected some clear convergence of the search for 'essential' limitations in the specific statute and the notion of jurisdictional error.[23] Yet it is was at this point incomplete given the lingering presence of external tools for the identification of jurisdictional error; namely the formulas from *Craig v South Australia*[24] and precedents on the likely status of certain types of error. The joint majority in *Plaintiff S157*, having pressed the idea of a 'reconciliation' of provisions to determine whether some failure constitutes a jurisdictional error (thus outside the privative clause's protection), ultimately quickly classified a breach of natural justice as such an error simply based on earlier precedent.[25] Gleeson CJ proceeded further on the path – apparently resisting presumptions and remaining focused on an internal assessment as he emphasised that the status of a natural justice breach depended on a construction of the statute as a whole (albeit concluding here that it was a breach of an indispensable condition).[26] The Court in the critical state sequel – *Kirk v Industrial Relations Commission (NSW)*[27] - also appeared to waver between the internal (statute-specific) and external (pre-mixed) conceptualisations of jurisdictional error. The joint majority emphasised that there was no 'bright line test', and that the *Craig* formulas were not a rigid taxonomy but only examples, yet ultimately did identify jurisdictional errors in the case with close reference to *Craig* categories.[28]

In recent decisions the 'internal' approach to jurisdictional error (based on the notion of essential 'preconditions' and 'conditions' under the particular statute) has gained some ascendancy – notably in the decision of *Hossain v Minister for Immigration and Border Protection*.[29] And the maturing focus on statutory context and purpose can be found elsewhere in the contemporary handling of privative clauses. For example, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[30] confirmed that permissible ouster (eg

---

20 (2003) 211 CLR 476.

21 *Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

22 (2003) 211 CLR 476, 501 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

23 See (2003) 211 CLR 476, 504-507 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). Cf the implications of Gleeson CJ's comments at 486, 489-490, 493. See also *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627.

24 (1995) 184 CLR 163.

25 (2003) 211 CLR 476, 506-508, cf 496.

26 (2003) 211 CLR 476 at 490-491, 494.

27 (2010) 239 CLR 531.

28 (2010) 239 CLR 531, 573–5 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

29 (2018) 264 CLR 123, esp [23]-[24] (Kiefel CJ, Gageler and Keane JJ).

30 (2018) 264 CLR 1.

of certiorari for 'error of law on the face of the record') need not be by way of an express privative clause – but can be drawn from the Act as a whole (ie text, context and purpose).[31]

Unreasonableness

Another important 'repatriation' of Australian principle is found in the context of the ground of 'unreasonableness'. The 2013 decision of *Minister for Immigration and Citizenship v Li*,[32] concerned a refusal by the former Migration Review Tribunal (MRT) to exercise its power to adjourn review proceedings[33] pending a second skills assessment of the visa applicant by the relevant authority (which was itself delayed by internal review). An obvious natural justice challenge was difficult owing to there being an 'exhaustive statement' provision attached to the express procedural obligations.[34] There were some carefully argued attempts to evade this difficulty, but Justices Hayne, Kiefel and Bell ultimately focused instead on the ground of unreasonableness[35] (which they considered was *not* displaced by the statutory terms).[36] Importantly, close analysis reveals that their Honours seemed eager to keep this ground of review close to statutory context.[37] Most directly, their Honours stated at one point that '[the] legal standard of reasonableness must be the standard indicated by the true construction of the statute'.[38] They emphasised the formulation of the ground from the 1970s *Tameside Council* case ('no sensible authority acting with due appreciation of its responsibilities' would have so decided the matter),[39] which arguably better accommodates the focus on statutory context than the traditional *Wednesbury* formulation (a decision must be 'so unreasonable that no reasonable authority could ever have come to it').[40] The latter was noted to have been criticised for some 'circularity and vagueness'.[41] Their Honours also emphasised that unreasonableness might be inferred from the facts and the matters falling for consideration in the exercise of a particular power: ie inferred where the decision viewed in that context 'lacks an evident and intelligible justification'.[42]

The idea that the actual standard of 'reasonableness' to be applied is calibrated to statutory context[43] is potentially a significant advance on the more obvious (and more conventional) point that the assessment of 'reasonableness' will take account of statutory context. This may have been prompted, in part, by this use of the ground in a space generally occupied by natural justice – a ground very much calibrated to statutory context. Or perhaps this additional tuning

---

31 (2018) 264 CLR 1, [34] and the analysis following.

32 (2013) 249 CLR 332.

33 *Migration Act 1958* (Cth), s 363(1)(b).

34 *Migration Act 1958* (Cth), s 357A. Note however the approach of French CJ at [18]ff, relying on and perhaps extending the reasoning in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

35 See the confirmation of this approach in *BDV17 v Minister for Immigration and Border Protection* [2019] HCA 34, [33]-[36] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

36 (2013) 249 CLR 332, [70], [86]. Cf [14] (French CJ); [92], [94]ff, [99] (Gageler J) (note that his Honour considered the express exclusion of natural justice gave 'added significance' to the implied requirement for reasonableness - which he appeared to consider might itself provide a measure of natural justice).

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

38 (2013) 249 CLR 332, [67]. Cf [92] (Gageler J) (noting possible variation of the 'default' position).

39 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064.

40 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229- 230.

41 (2013) 249 CLR 332, [68].

42 (2013) 249 CLR 332, [76].

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

to statute was a natural extension of a growing (on trend[44]) emphasis on the idea that 'the legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably'.[45] Yet the need for such fine tuning might be arguable, even on that basis, given that the limitation presumed to have been intended by the legislature might simply (and perhaps more logically) be the standard established by the traditional 'unreasonableness' cases.

The recent decision of *Minister for Immigration and Border Protection v SZVFW* [46] concerned a *Li*-style challenge to the former Refugee Review Tribunal's lack of action to facilitate the appearance of the protection visa applicant. The High Court, albeit primarily focused on the nature of the appellate court's role in such a case, rejected the unreasonableness challenge.[47] While the difficulty of precisely defining this ground was noted at various points, the broadly facilitative 'lack of evident or intelligible justification' formulation was emphasised again,[48] as was the traditional stringency of the test.[49] More relevantly for present purposes, the 'presumed legislative intention' approach to the ground continued to grow in prominence.[50] The relevance of statutory context to the assessment was certainly noted at various points,[51] and the variable standard idea raised in *Li* was (at the very least) nudged along. Gageler J's approach appeared to rest (again) on a 'default' standard that might be varied by the specific statute.[52] Gordon and Nettle JJ ultimately appeared to offer a middle position: '[the] standard of reasonableness is derived from the applicable statute but also from the general law'.[53] Edelman J appeared to settle on the proposition that the 'content' of the reasonableness test is 'assessed in light of the terms, scope, purpose, and object of the statute'.[54] Their Honours' ensuing analysis, and indeed the analysis in the short succeeding decision of *TTY167 v Republic of Nauru*,[55] reveals that there might be a fine line between context-driven assessment and a context-driven standard. However, as discussed below, there is an

---

44 See recently (eg) *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [28-[29]. Cf earlier discussion (and cases referred to) in Stephen Gageler QC, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 287; Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 307.

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

46 (2018) 264 CLR 541.

47 (2018) 264 CLR 541, [14] (Kiefel CJ); [70]-[71] (Gageler J); [123] (Gordon and Nettle JJ); [140]-[141] (Edelman J).

48 (2018) 264 CLR 541, [10] (Kiefel CJ), [82] (Nettle and Gordon JJ).

49 (2018) 264 CLR 541, [11]-[13] (Kiefel CJ); [51]-[52] (Gageler); cf [97] (Nettle and Gordon JJ).

50 (2018) 264 CLR 541, [4] (Kiefel CJ); [51]-[53] (Gageler J); [80], [89] (Gordon and Nettle JJ); [131], [134] (Edelman).

51 (2018) 264 CLR 541 eg [52], [59] (Gageler J); [79], [90]ff (Gordon and Nettle JJ); [131]ff (Edelman J).

52 (2018) 264 CLR 541, [53]. Cf much earlier comments in Stephen Gageler QC, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 287.

53 (2018) 264 CLR 541, [88]. Cf [133]ff (Edelman J).

54 (2018) 264 CLR 541, [135] (referring to *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 5 (Allsop CJ).

55 (2018) 362 ALR 246 (Gageler, Nettle and Edelman JJ). Note particularly the comment at [29]: 'It was not in dispute that the standard of legal unreasonableness imposed as a condition of exercise of the power in the Refugees Convention Act is a demanding standard, *particularly in light of* the concerns of informality and the need for efficiency that that underlie Tribunal hearings and the wide latitude that the Tribunal has in making a decision under s 41(1) to decide the matter in an applicant's absence. Nevertheless, there are six reasons, in combination, whey the circumstances of this case were so exceptional that the decision of the Tribunal to proceed…..was legally unreasonable.' (emphasis added and references omitted).

underlying pattern here that is important to the ongoing predictability and normative influence[56] of administrative law in Australia.

Bias, bad faith and fraud

At the sharper end of administrative error, there have long been some ostensibly free-standing standards in operation. Yet in recent years, there have been signs that these might be similarly drawn into the 'repatriation' of grounds process. In the context of bias, it is of course well known that a 'spectrum' of standards approach has been keenly deployed to accommodate the great range of decision-making contexts in which bias challenges might arise.[57] This approach appears to have crystallised in the context of Ministerial actions in the migration context in the late 1990s / early 2000s – where close attention was paid to the nature of the decision-making process and the identity of the decision-maker.[58] This thinking was quickly also applied to tribunal members[59] and has since been applied in various other contexts.[60] The High Court broadly re-affirmed this sensitivity to different decision-making contexts in the 2015 decision of *Isbester v Knox City Council*.[61] Beyond this, however, there have been hints of a more granular examination of statutory context in the formulation of bias standards. A reasonably prominent example is found in a 2012 Federal Court examination of decision-makers' use of 'cut and pasted' reasons (or 'templates') in multiple matters, and the implications as regards both the fair hearing and bias rules.[62] It was noted that a bias challenge might be difficult to make out in this context as the court weighs contextual factors such as decision-making volume and repetition, the nature of the claims and decisions in question, the *kind and degree of neutrality required*, and the precise nature of the similarity between successive decisions.[63]

In the context of 'bad faith' an apparent example of such calibration can be found in the reasoning in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*,[64] which concerned a challenge to a decision of a construction adjudicator. There was support here for a context and statute-specific approach to the meanings of 'good faith' and 'bad faith'. In the leading judgement of White JA, her Honour ultimately preferred to look to what the particular Act required of the decision-maker rather than 'elusive synonyms', and here it was noted particularly that in the relevant context 'rapid' decision-making was necessary.[65]

---

56 See broadly Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 155.

57 For a broader discussion, see Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* 928. See most recently *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50, [58] (Nettle and Gordon JJ).

58 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, [78], [102] (Gleeson CJ and Gummow J). See also, in a different ministerial context, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, [50] (Gaudron, Gummow and Hayne JJ).

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

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

61 (2015) 255 CLR 135, esp [22]ff (Kiefel, Bell, Keane and Nettle JJ).

62 *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223.

63 (2012) 200 FCR 223, [43]ff (emphasis added).

64 [2012] 1 Qd R 525.

65 Esp [96]

In the context of 'fraud', a telling comment is found deep in the important 2007 decision of *SZFDE v Minister for Immigration and Citizenship*:[66]

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

Other examples

A similar analysis might be applied to some other interesting agitation and evolution in administrative law principles - relating (for example) to delegation and the ground most commonly referred to as 'behest'. Notable in the former context is the gradual erosion of the old *Carltona* principle that allowed lower governmental officials to act as the 'alter ego' of senior ones, which has recently been described as being of 'uncertain' scope and status in Australia.[67] Although courts continue to acknowledge that administrative realities require some flexibility as regards the rule against delegation,[68] in a climate of more detailed decision-making structures the *Carltona* principle in its raw form is seen to be less relevant - it has become more important to closely examine the scheme and the nature of the responsibility conferred on the senior official.[69] Indeed the careful inquiry might be directed to which *components* of a function can be handled below.[70] And it appears that in some cases, perhaps where the administrative 'necessity' is less compelling, the courts might look for evidence of a clear authorisation – suggesting some return in these cases to a more traditional search for an implied power to delegate and evidence of its exercise.[71]

One further example illustrates that retrospective analysis of some classic Australian cases might reveal a longer-running trend. In the case of *Bread Manufacturers of NSW v Evans*[72] (which concerned a challenge to orders of the New South Wales Prices Commission on the ground of behest), Mason and Wilson JJ indicated that the extent to which higher views can be taken into account and acted upon will depend on circumstances such as the particular function and character of the decision maker, the intent of the legislation as to the relationships involved, and the nature of the views expressed.[73] These comments, alluding in part to the possibility of a distinctly variable scale of required independence, appear not to have been closely explored in later decisions on this ground. Yet they are obviously significant in the context of this article. On the facts, Mason and Wilson JJ felt that the Commission could not be expected to operate in a vacuum and was therefore free to take advice from others, including the Minister (in light of the ministerial veto power).[74] They went on to conclude that

---

66 (2007) 232 CLR 189, [29] (emphasis added).

67 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* (2014) 88 NSWLR 125 at [11] per Basten JA.

68 See eg *New South Wales Land and Housing Corporation v Navazi* [2013] NSWCA 431.

69 See eg *Koowarta v Queensland* (2014) 316 ALR 724, [201]ff; *Salia Properties Pty Ltd v Commissioner of Highways* (2012) 112 SASR 384; cf *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* (2014) 88 NSWLR 125, [11].

70 See eg *De Angelis v Pepping* [2015] NSWCA 236, [132]ff.

71 [2015] NSWCA 236, [121]ff.

72 (1981) 180 CLR 404.

73 (1981) 180 CLR 404, 429-30.

74 (1981) 180 CLR 404, 428ff.

there was no evidence here that any member of the Commission had forsaken their independence.[75]

Even this brief and esoteric survey of examples reveals something of a pattern in the evolution of Australian administrative law, that it has some deep roots, and that it is continuing to influence legal trajectories. Taking this to its logical end, there is a theoretical possibility that our traditional grounds of judicial review will, over time, be dissolved in principles of statutory interpretation.[76] Yet before we launch into critique, re-enter the theorising of past debates, or even just ask 'how far should this go', it is important that we look at this pattern from a broader perspective – to ensure that we are seeing the whole of the picture. Do the examples selected above truly reflect a consistent pattern of thinking? Does it have a coherent rationale? It is argued here that in fact this pattern of statutory focus and repatriation of grounds is better viewed as part of a larger phenomenon: a natural but conceptually-fraught search for flexibility in judicial review principles in response to broadening and diversifying regulatory context, evolving legislative drafting, and maturing public expectations and litigation strategy.

Departures from the 'statutory specifics' – a search for flexibility?

A broader analysis reveals, first, that there have been some significant pauses, diversions and even retreats in the repatriation of principles sampled above. In many instances, these saw the courts reaching again for deeper external standards or touchstones in the application of judicial review doctrines. In broad terms, the re-furbished but still somewhat opaque 'principle of legality' – a presumption against legislative interference with fundamental rights and freedoms[77] – allows the court to view legislation through a tinted protective lens[78] that can be difficult for drafters to dislodge.[79] Also, the entwined histories of jurisdictional error and privative clause construction (some of which was recounted above), illustrates some ongoing influence of external standards. Whilst *Hickman* may have been firmly returned to the broader toolbox of constructional aids, the pre-mixed *Craig* classifications of jurisdictional error clearly linger in contemporary reasoning.[80]

More specifically, in the context of the very principles that gave rise to *Project Blue Sky*, a recent case also illustrates the ongoing influence of external standards in an otherwise quite exacting statutory interpretation exercise. In *Forrest & Forrest Pty Ltd v Wilson*,[81] the High Court considered the consequences of non-compliance with Western Australian legislation requiring mining lease applications to be accompanied by certain operations statements and mineralisation reports.[82] The joint majority examined the statutory scheme, and carefully considered but distinguished *Project Blue Sky*, in holding that the procedural requirements

---

75 (1981) 180 CLR 404, 439ff.

76 See Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 312.

77 See eg *AL-Kateb v Godwin* (2004) 219 CLR 562, [18]-[19] (Gleeson CJ).

78 See eg *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [25]ff (French CJ); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, [31] and [54] (French CJ, Hayne, Kiefel and Nettle JJ).

79 See eg operation of correlative principles In the natural justice context: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; and most recently *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421.

80 See particularly *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, and recently (eg) *Hossain v MIBP* (2018) 264 CLR 123 (Edelman J); *MIBP v SZMTA* (2019) 264 CLR 421 (Nettle and Gordon JJ).

81 (2017) 262 CLR 510.

82 *Mining Act 1978* (WA), s 74.

were ‘essential preliminaries’ to the grant of leases and that the breaches were effectively invalidating.[83] Notably for present purposes, there was a very conspicuous reliance upon a ‘line of authority’ establishing that where a statutory regime confers power to grant exclusive rights to exploit resources, it will be understood (subject to contrary provision) as ’mandating compliance with the requirements of the reqime…’.[84] The notable reliance on this precedent, obviously external to the specific statutory terms in issue, was clear from the reasoning: ‘Finally, and importantly, *Project Blue Sky* was not concerned with a statutory regime for the making of grants to exploit the resources of a State’.[85]

The history of natural justice (or ‘procedural fairness’) is also instructive in this regard. Building on what has been said already, the context-sensitive ‘spectrum’ approach to bias standards appears to be now sharing ground (at least) with a newer methodology of ‘speciation’ – with some apparent variation in applicable standards depending on the precise nature of the bias alleged.[86] Obviously this quite technical speciation of bias is somewhat removed from excavations of statutory context and purpose. More directly, there is a very relevant history to the fair hearing rule. Much of the steam that drove the contemporary statute v common law debate was of course generated by Brennan J’s denial (most conspicuously in *Kioa v West*[87]) of the existence of a ‘free-standing common law right’ to natural justice - and emphasis upon the centrality of the statutory construction process.[88] His Honour’s particular target in *Kioa* was the situation-specific notion of ‘legitimate expectations’ - which he regarded as being of ‘uncertain connotation’ and potentially misleading. He felt that the question of whether natural justice applied demanded a ‘universal answer’ for any given statutory power.[89] As noted earlier, the debate over the source of natural justice obligations[90] ultimately stalled amidst doubts as to its significance.[91] Yet the notion of ‘legitimate expectations’, at least through Brennan J’s lens, might now be understood as a failed (lengthy) experiment with external circumstantial considerations in the application of judicial review doctrine.[92] Ironically however, and importantly for present purposes, as will be seen external circumstantial considerations do appear to have gained a firm foothold in the fair hearing principles via the

---

83 [2017] 262 CLR 510, [63] (Kiefel CJ, Bell, Gageler and Keane JJ).

84 [2017] 262 CLR 510, [64]ff.

85 [2017] 262 CLR 510, [63].

86 See further discussion of (eg) the ostensibly special position of 'prejudgment' and 'incompatibility' bias: Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* 928.

87 (1985) 159 CLR 550.

88 (1985) 159 CLR 550, 609 (although his Honour did acknowledge the relevance of the ‘background of common law notions of justice and fairness’).

89 (1985) 159 CLR 550, 611-12, 616ff.

90 Later restated as a question of whether the rules of natural justice derive from the common law or are implied in statue by or with reference to the common law: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 83; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [11]-[12] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

91 See particularly *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [74]; *Plaintiff S10-2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ). See also *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, [75], [77], [81], [82]; and recently *Minister for Immigration and Border Protection v SZMTA* (2019) (2019) 264 CLR 421, [83] (Nettle and Gordon JJ).

92 Its demise can be traced through *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; *NAFF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *Plaintiff S10-2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326.

requirement of 'practical injustice'[93] – which reaches out into (at least) the question of whether in a practical sense a person actually lost an opportunity to make some material submission.[94]

Another difficulty with fully embracing the 'statutory focus' explanation of Australia's evolution, even putting aside the obvious problem that it has little to offer as regards *non-statutory* powers, is that it is not easy to identify a clear rationale for such an approach. Certainly at key moments the conspicuous emphasis on statutory specifics has lent some democratic and constitutional legitimacy, and a sense of neutrality, to the more difficult or controversial judicial review decisions.[95] Moreover, there has perhaps been some conceptual pull behind the spread of this approach. As the concept of jurisdictional error (in its classification of the gravity of error) has become more clearly attached to internal statutory specifics, it might seem to be more difficult to sustain freestanding anterior standards of error in the individual grounds. How is an error identified and articulated by reference to external standards accommodated by what is becoming a more internally-driven assessment of whether that error is 'jurisdictional' (when such assessment is required)?

Yet looking beyond these points of higher principle and theory, close analysis shows that in many instances the careful centering of specific statutory context and purpose was part of something more pragmatic – ie part of a deft response to the challenges of modern context. In the examples of the '*Blue Sky* effect' noted above, for example, we see careful avoidance of an unpalatable wholesale invalidation of a broad regulatory framework;[96] simplification of an intractably tangled old principle for varied new purposes;[97] resurrection of some semblance of fairness in the face of a legislative exclusion of natural justice;[98] incremental acknowledgment of vast differences in decision-making contexts and responsibilities;[99] and fine-tuning of principle to the complexity of contemporary decision-making hierarchies.[100] There may also be a larger pragmatism at play in this trend. It must be remembered that 'jurisdictional error' now has a constitutionally privileged place (at both federal and state level). The new reality is that some repatriation of old freestanding grounds, and their integration with the internally-focussed jurisdictional error principles, is perhaps the best way to preserve the underlying standards involved in the face of more legally intrusive legislative prescription. The battles for freestanding common law principles might be sacrificed somewhat in order to win a war over the underlying standards of administrative legality.[101]

The democratic and constitutional legitimacy advertised by deference to statute has undoubtedly been a bonus – particularly given that in some of these cases the courts appeared to be excavating deeper statutory intentions to tunnel around specific statutory obstacles. And we can acknowledge that there has perhaps been some conceptual pull in the pattern of development. Yet overall, analysis indicates that the elevated statutory focus might be best

---

93 See particularly *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; and most recently in the High Court, *HT v R* (2019) 374 ALR 216, [17]ff (Kiefel CJ, Bell and Keane JJ).

94 See eg *CSR v Eddy* (2008) 70 NSWLR 725, [40]-[41] (Basten JA, Hodgson and McColl JJA agreeing).

95 See particularly (eg) *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. And see more generally the valuable discussion in Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153.

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

97 See the progression of cases on 'jurisdictional error' discussed above.

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

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

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

101 See Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 178-9.

understood as a search for greater flexibility in judicial review principles - to accommodate significant evolutions in governmental and regulatory context. It certainly has contributed agility to the judicial review exercise – perhaps more than might have seemed possible. *Blue Sky* itself illustrated that close examination of 'statutory purposes' can extend to a frank consideration and weighing up of the practical implications of invalidating the disputed government action.

Perhaps then we have tended to miscategorise that true nature of the legal evolution in play. The 'statutory purpose' theory would seem to tell only part of the story – and imperfectly. To reconceptualise the challenge as a modern search for flexibility, in middle-aged common law doctrine, might help us to better understand the legal trajectory, contribute more in our commentary to the daily efforts of the courts in meeting the challenge, and more readily spot the attendant risks. Importantly, as explored below, some of the diversions and retreats from the statutory focus (discussed above) sit more easily with this broader theory.

Flexibility 'stage two' – calibration to consequence

The search for flexibility appears to have come in two stages. In the first place, as explained above, the courts have instinctively and deftly sought a closer connection to governmental and regulatory context – to better respond it seems to change and diversity in the subject matter, scope, purposes, style and detail of contemporary regulation. Much of the contextual change is reflected in the relevant decision-making legislation, and can be accessed through a closer and more holistic focus on specific statutory purpose and detail. The key question we are left with is does this necessitate a repatriation of all of the remaining freestanding grounds? The second stage of the search for flexibility (and reflexivity) might be best understood as a broadening and intensifying judicial focus on the consequences of administrative error – to better respond it seems to more complex decision-making contexts, more sophisticated public expectations, evolving litigation volumes and strategies, and indeed new executive realities. This second search can take the courts some way beyond statutory terms (albeit sometimes notionally attributed to presumed statutory intention) – and is in many respects more challenging.

Importantly for present purposes, as alluded to above some of the diversions and retreats from the statutory focus might properly be regarded as components of this second stage evolution of principle. This type of flexibility – calibration to consequence – has long had an inchoate presence in various corners of judicial review doctrine. It was present in the reference to 'materiality' included in the template laid out in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*[102] for the application of the relevancy/irrelevancy grounds of review. In the natural justice context, it had some influence in the wandering operations of the now discarded notion of 'legitimate expectations', and more clearly in the 'adverse, credible, relevant and significant' trigger for an obligation to disclose material under fair hearing rules.[103] Most importantly, calibration to consequence of breach is central to the fair hearing rule requirement of procedural 'practical injustice' (or 'actual unfairness') that emerged from the *Lam* decision,[104] and indeed to the older *Stead* inquiry into the possibility of a different substantive outcome but

---

102 (1986) 162 CLR 24.

103 See particularly *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, [14]ff (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). Cf more recently *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, [83]. See also *BRF038 v The Republic of Nauru* (2017) 349 ALR 67, [58].

104 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

for the natural justice error.[105] Conventionally the *Lam* and *Stead* ideas were kept relatively separate in their operation,[106] however very recently there has been some possible convergence of the two ideas.[107]

Interestingly for present purposes, the calibration to consequence also found its way into the application of *Project Blue Sky* principles. In the New South Wales decision of *Attorney General of New South Wales v World Best Holdings Ltd*[108] Spigelman CJ had identified a possible ambiguity in the reasoning of *Project Blue Sky* - as to whether it is necessary to look for a legislative purpose that "any" act done in contravention of the relevant procedural stipulation should be invalid, or more specifically, a purpose that "an" act done in contravention should be invalid. In his view the latter approach would generally be applicable, in the sense that the court must generally examine what the legislature intended in respect of the particular breach under consideration.[109] This approach appeared to surface in the brief 2009 High Court decision of *Minister for Immigration and Citizenship v SZIZO*.[110] There the High Court overturned the Full Federal Court's conclusion[111] that a misdirected notice of hearing was invalidating despite the attendance in any event of the relevant party. The High Court emphasised that it was necessary to look at the extent and consequences of the particular failure (measured here against basic nature justice standards).[112]

Obviously in *SZIZO* there is some draw upon the notion of procedural 'practical injustice' (or 'actual unfairness') from the natural justice context. More importantly however, the natural association of the *Blue Sky* principles with the principles of 'jurisdictional error'[113] made it somewhat inevitable that this new attention to (specific) consequences in the former would lead to further refinements in the latter. Indeed this likelihood was nudged along, and possible terminology provided, in the 2015 High Court decision of *Wei v Minister for Immigration and Border Protection*.[114] At several points in their judgment Gageler and Keane JJ indicated, although it was not significant in this case, that the search was for a '*material'* breach of the imperative requirement identified.[115]

Ultimately, in the 2018 jurisdictional error decision of *Hossain v Minister for Immigration and Border Protection*,[116] Kiefel CJ, Gageler and Keane JJ emphasised that in addition to the search for preconditions and conditions (noted above), it was necessary to discern the 'extent' of non-compliance necessary (ie whether a particular failure was of a magnitude) to take the decision outside of jurisdiction.[117] Interestingly, as per the specific breach extension of the

---

105 *Stead v State Government Insurance Commission* (1986) 161 CLR 141; see also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609.

106 See eg the cautions of Basten JA In *CSR v Eddy* (2008) 70 NSWLR 725, [40]-[41] (Hodgson and McColl JJA agreeing).

107 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, [3], [38].

108 (2005) 63 NSWLR 557.

109 (2005) 63 NSWLR 557, 580. Cf *Applicant NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 214.

110 (2009) 238 CLR 627.

111 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152. Cf *Le v Minister for Immigration and Citizenship* [(2007) 157 FCR 321.

112 (2009) 238 CLR 627, [35]ff.

113 See eg *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

114 (2015) 257 CLR 22.

115 (2015) 257 CLR 22, [28], [32], [33].

116 (2018) 264 CLR 123. See also *Shrestha v MIBP* (2018) (2018) 264 CLR 151.

117 (2018) 264 CLR 123, [27].

Blue Sky principles, this calibration to consequence was itself categorised as an exercise in statutory construction.[118] Their Honours proceeded to state (referring to the *Stead* cases, the *Peko Wallsend* formulation, and comments in *Wei*) that a statute is ordinarily to be interpreted as incorporating a threshold of 'materiality' before denying legal force and effect to a decision made in breach of a condition – which 'ordinarily' would not be met if compliance could have made 'no difference to the decision in the circumstances in which it was made'.[119] Nettle J and Edelman J, in separate judgments, were at pains to emphasise that there were exceptions to any requirement that an error must be material in this sense before being classified as a 'jurisdictional error'.[120]

A majority of the High Court (Bell, Gageler and Keane JJ) confirmed this consequence-sensitive approach to jurisdictional error in *Minister for Immigration and Border Protection v SZMTA*.[121] As noted at the outset, this article is not a full discussion and critique of the 'materiality' principle in jurisdictional error doctrine. However, it is relevant to note that some of the conceptual difficulties attending this second stage search for flexibility – the attempt to calibrate principles to specific consequence – were aired in Nettle and Gordon JJ's strong dissent on the key issues in *SZMTA*. Their Honours considered that the deployment of a 'materiality' inquiry (as part of the identification of jurisdictional error rather than as a function of residual remedial discretion[122]) entailed departure from the statutory construction exercise and would lead to uncertainty – as well as involving an inappropriate reversal of the onus in the proceedings.[123] We are left with at least two critical questions, as regards this stage two search for flexibility: at what stage has the court descended too far into the substantive reasoning (and hence the task) of the decision maker below; and at what point has the objective preventative procedural protection of judicial review standards drifted too far into subjective, situation-specific speculation.

Conclusion: implications and theoretical compromise?

There would seem to be some obvious practical costs attending the evolutions examined in this article. Most simply stated, there is a growing variability in our standards of administrative legality. While that certainly builds agility into these hard-working principles, it is difficult to avoid the sense that with each 'repatriation' or calibration to specific statutory context, or indeed with each deferral to the consequences of breach, there is some incremental loss of consistency, predictability and normative influence in Australian administrative law (which in turn has potential implications for the quality and perceptions of administrative decision-making). This not only might increase litigation (consider the example of the long-calibrated 'fair hearing' rules) but perhaps even runs counter to some basic precepts of the 'rule of law' in its modern iteration.[124] Long-term teachers in the field might be tempted to apply a litmus test of 'teachability' as they consider the implications of these evolutions. Practitioners might

---

118 See also [66]-[67] (Edelman J).

119 (2018) 264 CLR 123, [29]-[30]. Cf [72] (Edelman J).

120 (2018) 264 CLR 123, [40] and [72] respectively.

121 (2019) 264 CLR 421.

122 Cf recently Nettle J's comments In *Bosanac V Commissioner of Taxation* (2019) 374 ALR 425, [21]; and Nettle and Gordon JJ's comments (and the apparent concession made) in *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47, [104].

123 (2019) 264 CLR 421, [88]-[93].

124 Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 176-9.

apply their own test of 'advisability' as they consider these developments in the context of their clients' affairs. And public officials might be considering the accessibility of these principles in the context of their own, often broad and under-resourced, responsibilities.[125] It seems likely that all might anticipate some difficulty in engaging with the increasingly complex interpretive and predictive inquiries attending this field of law.

There are perhaps further difficulties with the evolutions we are witnessing. Obviously a determined calibration to statutory context brings some devaluation and disassembly of the common law of Australian public law, and given the sophistication of existing judicial review principles there is some artificiality[126] in attempting to attribute their complex nuances and refinements to statutory design or acknowledgment. Even if we embrace the old theoretical compromise that the legislature, being aware of common law principles, can be presumed to have intended them to apply to a power,[127] this would seem to (at best) stultify the capacity of the principles to continue to develop and (at worst) rest the whole exercise upon an eroding and archive of 'common law principles'. Another very obvious difficulty with the statutory focus is that in the context of *non-statutory* powers it is at best conspicuously unhelpful, and at worst quite corrosive.

As regards calibration to consequence of breach, while it brings a certain realism to contemporary administrative law, even in the early iterations of this methodology the potential for overstep has long been a cause for some concern. Courts have been regularly invited to retrospectively ponder procedural hypotheticals (since *Lam*) and the probabilities of different factual findings or outcomes (under the guise of the *Stead*). In the context of the new 'materiality' principles attending jurisdictional error, the High Court recently noted and resisted (in *Nobarani v Moriconte*[128]) a request to conduct a broad hypothetical revisiting of the original decision. More recently, in *Minister for Immigration and Border Protection v SZMTA*,[129] the majority also noted but worked around the risks - while Nettle and Gordon JJ (in dissent on the critical issues) posed the hazard of a drift into 'merits' as one of their key objections to the superimposition of a requirement of 'materiality'.[130] In the most recent High Court decision touching upon the matter, *Minister for Immigration and Border Protection v CED16*,[131] the High Court appeared to avoid the key issue somewhat – emphasising that the 'appeal can be, and is to be, allowed without reference to any issue of materiality'.[132] This is oddly reminiscent of the tone that signalled a final re-think of the old doctrine of 'legitimate expectations'[133] - and would appear at least to be an acknowledgment of the lingering difference of judicial opinion, and growing controversy, around this notion of 'materiality' in jurisdictional error doctrine.

These dilemmas are not easy to navigate. As discussed above there are some complex structural and theoretical issues in play as regards calibration to statutory context – not least the pull exerted by the evolution of jurisdictional error doctrine, and the constitutional place of that concept. And there is also some raw force in play – as regards both calibration to statutory

---

125 On the position of public officials, see Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 178-9.

126 Cf Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 312.

127 See recently (eg) *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [28]-[29].

128 (2018) 265 CLR 236, [48].

129 (2019) 264 CLR 421, [48]-[49].

130 (2019) 264 CLR 421, [95].

131 [2020] HCA 24.

132 [2020] HCA 24, [26] (Gageler, Keane, Nettle and Gordon JJ).

133 See in particular *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [75].

context and calibration to consequence. Both have been a fixture of the natural justice fair hearing rules for some years – and the federal courts in particular have grappled with an enormous caseload in that context. It was perhaps inevitable that there would be some permeation of natural justice methodology (albeit awkward and contentious at times) through broader judicial review principles.

However, for the reasons noted immediately above, these evolutions and dilemmas warrant close consideration. Australian administrative law is perhaps is at a new crossroads. There are two theoretical compromises that might help to steady the trajectory of the calibration to statutory context. First, it is important to recall that the first stage reach for flexibility was driven particularly by jurisdictional error and the *Blue Sky* principles. Many might accept the logic of the *Blue Sky* principles in their own field of operation, and applaud the clarity of a near complete shift to the internal 'essential preconditions' approach jurisdictional error, and yet might be uncomfortable with the broader 'repatriation' of grounds that is possibly taking place. These mixed feelings might be reconcilable, and justifiable, if it is firmly kept in mind that *Blue Sky* and jurisdictional error principles are both in a sense focused on an assessment of the seriousness and appropriate legal *result* of identified error. This would seem to be a quintessentially technical legal question that the courts might quite appropriately seek to answer in a flexible, statute specific (and even somewhat conclusory or instinctive) manner. Yet sacrificing the normative influence and predictability of the underlying grounds of review that themselves *identify* error (including for subsequent jurisdictional error assessment) would seem to be a different matter. The remaining free-standing grounds of Australian judicial review can quite appropriately be preserved – albeit with the aid of a second theoretical compromise of the kind suggested particularly by Gageler J in recent judgments.[134] That second compromise is that the common law version of these grounds, and their attending tests and precedents, can be maintained as clear 'default' standards that are applicable subject to specific statutory variation. Predictability, consistency and the normative influence of administrative law would be best served by requiring any statutory variation to be clear, rather than a product of sophisticated implication.

With regards to the trend of calibration to consequence, driven largely by the high-volume reactive evolutions of natural justice doctrine, the dilemmas are perhaps more intractable. The 'materiality' iteration of this search for flexibility (in jurisdictional error doctrine) – which in a sense gives back to government something of what was taken via the *Plaintiff S157* and *Kirk* constitutional entrenchment of jurisdictional error review – is currently the subject of vigorous academic discussion. The best caution that administrative law history offers in this regard is that we must be diligent in holding arguments that errors are 'immaterial' or inconsequential to a strict standard – lest the balance be shifted too far in favour of decision-makers, and the boundaries of the courts' proper role be lost.

---

134 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [92]; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, [53]. Cf Stephen Gageler QC, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 287.