

---

# Litigating questions of quality

Greg Weeks \*

---

*There are some grounds of judicial review which inherently lead the court to consider questions of the quality of the decision-maker's decision. The most prominent of these are review for *Wednesbury* unreasonableness and *S20/2002* irrationality or illogicality. These grounds of review require careful application to avoid reviewing the merits of a case. The *Australian Retailers* case demonstrates another difficulty with quality review – that of what detail should be allowed in the evidence both supporting and rebutting the alleged error of law. This article provides a brief examination of the nature of quality review, followed by an examination of the approach used by Weinberg J in *Australian Retailers*. The article also suggests a method by which judicial review for issues of quality can serve its intended purpose – to catch rare and absurd decisions – without becoming unduly time-consuming or, worse, degenerating into merits review.*

## INTRODUCTION

Applications for judicial review frequently include an allegation that the decision of an administrative decision-maker amounts to an error of law because it is either *Wednesbury*<sup>1</sup> unreasonable or extremely irrational or illogical in the sense described by the High Court of Australia in *S20/2002*.<sup>2</sup> Such allegations state, in effect, that an error of law is demonstrated by the poor quality of the decision. There are stringent limits on these grounds of judicial review, and few applications succeed relative to the frequency with which they are made.<sup>3</sup>

*Australian Retailers Association v Reserve Bank of Australia*<sup>4</sup> provides an interesting portrait of the difficulties which can surround the litigation of allegations of what this article will describe as “quality review”.

## WHAT IS “QUALITY REVIEW”?

Writing extra-judicially, the Chief Justice of Australia has stated:

---

\* This article is an edited version of a research thesis supervised by Mark Aronson while the author was a student at the University of New South Wales. I would like to extend my thanks to Professor Aronson for his extensive comments on this article in its draft form.

<sup>1</sup> *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680.

<sup>2</sup> *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 CLR 59.

<sup>3</sup> See *A v Pelekanakis* (1999) 91 FCR 70 (Weinberg J).

<sup>4</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446.

## Greg Weeks\*

---

The *Constitution*, the legislation governing judicial review, and the relevant principles of the common law, define the limits of the authority of courts to override administrative decisions. The legislation changes from time to time, and the common law principles develop but the Australian statutes on the subject, and the principles of common law, distinguish between review of the merits of administrative decisions, which is usually undertaken by specialist tribunals, and judicial review based upon principles of legality. The difference is not always clear-cut; but neither is the difference between night and day; and *Wednesbury* unreasonableness does not invalidate the difference between full merits review and judicial review of administrative action.<sup>5</sup>

The “twilight” described by Chief Justice Gleeson is the domain of quality review, which is judicial review of decisions made by the executive branch of government, whose lawfulness is alleged to be vitiated by their poor quality but which do not disclose the presence of an error of law on other grounds. Quality review will be sought, mainly, on the grounds of unreasonableness or irrationality on the part of the decision-maker.<sup>6</sup> Quality review is however, very restrictive, and it usually takes nothing short of “sheer lunacy”<sup>7</sup> on the part of a decision-maker before a court will find for an applicant who alleges either *Wednesbury* unreasonableness or *S20/2002* “extreme irrationality or illogicality”.

The necessity for quality review has not been embraced universally. Chief Justice Spigelman has stated:

The court system cannot supervise the broad stream of discretionary administrative decision-making, even by the application of a standard of “legality”, unless that standard is narrowly confined. Nor in a democratic society should judges attempt any such task where what is criticised, as a matter of substance, is the quality of an outcome of a decision-making process. It is, however, appropriate for the judiciary to ensure the fidelity of decision-makers to their jurisdiction, so that the integrity of the institutions within which those individual decision-makers operate is maintained.<sup>8</sup>

Chief Justice Spigelman has instead promoted the concept of “integrity review”, which would serve to ensure that the power of decision-makers to make decisions is constrained only by the limits of the jurisdiction given to them. The “reasonableness” of a decision would not be at issue provided that the decision was of the type the decision-maker was empowered to make. His Honour argues that this position is a logical one under the principles of representative government. Nonetheless, review for issues of

---

<sup>5</sup> Gleeson AM, “Judicial Legitimacy” (2000) 20 Aust Bar Rev 1 at 8.

<sup>6</sup> But perhaps alternatively for apprehended bias or because the decision-maker either failed to take account of a relevant consideration or took account of an irrelevant consideration.

<sup>7</sup> Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (3rd ed, 2004) p 102.

<sup>8</sup> Spigelman JJ, “Jurisdiction and Integrity: Second Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law” (2004), accessible at [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speeches#CJ](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches#CJ) viewed 25 January 2007.

quality has a long history<sup>9</sup> and its place within the law of judicial review is assured, at least for the present.

From the judgment of Lord Greene MR in *Wednesbury* onwards, the standard of *Wednesbury* unreasonableness has been regarded as a “safety net” to catch “the rare and totally absurd decision which had managed to survive the application of all the other grounds of review”.<sup>10</sup> There have since been frequent judicial statements to the effect that the *Wednesbury* standard will be breached in only the most “exceptional”<sup>11</sup> cases by the most “absurd” decisions.<sup>12</sup> Consequently, *Wednesbury* unreasonableness is seldom made out comparative to the frequency with which it is used as a ground of review and judicial reassurances as to the stringency of *Wednesbury* review are reminders that quality review merely occupies the twilight.

This is, of course, the role that quality review is designed to fill. There are constitutional grounds for the division of review between legality and merits. Aside from these, there are significant practical reasons why the courts ought not to be available to review any and every administrative decision, and why that outcome is desired by neither the judiciary nor by administrators.<sup>13</sup> In *Bond*,<sup>14</sup> Mason CJ observed that judicial review:

ordinarily does not extend to findings of fact as such. To expose all findings of fact, or the generality of them, to judicial review would expose the steps in administrative decision-making to comprehensive review by the courts and thus bring about a radical change in the relationship between the executive and judicial branches of government. Amongst other things, such a change would bring in its train difficult questions concerning the extent to which the courts should take account of policy considerations when reviewing the making of findings of fact and the drawing of inferences of fact.<sup>15</sup>

There is a role within the limits outlined by Mason CJ for review of the quality of administrative decisions, but its proper application is only when an error is of sufficient extremity to justify judicial intervention.

<sup>9</sup> Indeed, one that stretches back to before *Wednesbury*. Quality review can be observed in cases such as *Moreau v Commissioner of Taxation (Cth)* (1926) 39 CLR 65. Then however, as later in *Wednesbury*, the ground of review was tightly constrained, since a decision-maker’s reasoning “is not to be judged of by a Court by the standard of what the ideal reasonable man would think. He is the actual man trusted by the Legislature and charged with the duty of forming a belief ... and no other tribunal can substitute its standard of sufficient reason in the circumstances or its opinion or belief for his. Unless the ground or material on which his belief is based is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason cannot be overridden”: *Moreau v Commissioner of Taxation (Cth)* (1926) 39 CLR 65 at 68 per Isaacs J. There is much in the reasoning of Isaacs J which resonates in the view of Chief Justice Spigelman.

<sup>10</sup> Aronson et al, n 7, p 336.

<sup>11</sup> *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598; 200 ALR 447 at [100] per Kirby J

<sup>12</sup> As to the use of this and similar adjectives for the comparatively rare decision to which the *Wednesbury* standard will apply, see the list of judicial references in Aronson et al, n 7, p 340, fn 250.

<sup>13</sup> The legislative intent to limit quality review can be seen by the use of a (now repealed) privative clause prohibiting review of decisions under the *Migration Act 1958* (Cth) on *Wednesbury* grounds. The application of the then s 476 (2)(b) may be seen as leading to the recognition of S20/2002 “irrationality and illogicality”.

<sup>14</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

<sup>15</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341

## MERITS

What, then, are the merits of a matter? It is established wisdom that judicial review of administrative action and review of the merits of a particular matter are mutually exclusive. The accuracy of this simplistic approach has been challenged by academics on occasion,<sup>16</sup> but it remains essentially true that it is not part of the remit of a court performing judicial review to inquire into the merits of the case before it; indeed a court which does so acts beyond its jurisdiction. Brennan J, in *Quin*,<sup>17</sup> is frequently quoted in support of this proposition:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's powers. If, in so doing, the court avoids administrative injustice or error, so be it, but the court has no jurisdiction simply to cure an administrative injustice or error. The merits of administrative action, to the extent to which they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.<sup>18</sup>

There is a constitutional basis for the divide between merits review and judicial review.<sup>19</sup> The separation of powers between the Executive and the judiciary is one of the main reasons why Australian law has not followed that of the UK into making judicial orders to give effect to a legitimate expectation which the repository of an administrative power has failed to take into account.<sup>20</sup>

What, however, are the merits of a matter, and where is the point past which the judiciary must not trespass?<sup>21</sup> The answer to this question depends greatly upon the definition of the "merits". Sir Anthony Mason has said that "merits review" is "review that includes, but goes beyond" review for legality, in that it can secure the correct or preferable outcome, where review for legality cannot.<sup>22</sup> Aronson, Dyer and Groves have further noted that the relationship between merits review and legality review is dynamic.

---

<sup>16</sup> See, eg Cane P, "Merits Review and Judicial Review – The AAT as Trojan Horse" (2000) 28 Fed L Rev 213.

<sup>17</sup> *Attorney-General (NSW) v Quin* 170 CLR 1.

<sup>18</sup> *Attorney-General (NSW) v Quin* 170 CLR 1 at 35-36.

<sup>19</sup> *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [28], [76]-[77], [118]-[119], [148]; see also Spigelman JJ, "The Integrity Branch of Government" (2004) 78 ALJ 724 at 732-733; Selway B, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues" (2002) 30 Fed L Rev 217.

<sup>20</sup> In *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [76], McHugh and Gummow JJ made it clear that the direction taken by the Court of Appeal in *R v North & East Devon Health Authority; Ex parte Coughlan* [2001] QB 213 cannot be followed by Australian courts.

<sup>21</sup> Debates about the capacity of the judiciary to consider "the merits" have suffered from the difficulty in properly defining what they might be. It may be that the success of qualitative review of any kind is so comparatively rare that marking out a precise border past which judicial review shall not tread represents too much effort for too little gain. This, however, does not explain the wealth of academic and judicial consideration of what constitutes "the merits". It is more likely that an approach which states what "the merits" are not, while most accurate, does not have the level of permanence which is able to finalise the debate. As the judgments in *S20/2002* demonstrate, qualitative review continues to develop even as the debate about what is included in "the merits" of a matter rages on.

<sup>22</sup> Mason AF, "Judicial Review: Constitutional and Other Perspectives" (2000) 28 Fed L Rev 331 at 333; Sir Anthony also noted that comparison between the two forms of review is "hampered by the blancmange-like quality of the expression 'merits review'".

The learned authors have described “the merits” as a “diminishing concept”, which they define as “that which remains after each fresh expansion of judicial review’s grounds”.<sup>23</sup> They argue that, although the insistence of the judiciary that judicial review does not touch “the merits” of a decision has remained steadfast, the content of this residual field has been in a state of change. At any point, therefore, the content of “the merits” is open to argument. For example, I will argue that it is not necessarily correct automatically to equate review of the quality of decision-making with merits review, as McHugh and Gummow JJ did in *Lam*.<sup>24</sup>

It is all but impossible to give a “bright line” definition of the boundary between judicial review and merits review. Chief Justice Spigelman has argued that review seeking the “correct and preferable” decision<sup>25</sup> and which is “concerned to ensure ... that the fairness, consistency and quality of decision-making is maintained” must fall within “merits review”,<sup>26</sup> although his Honour admits that the boundary between legality and merits is “porous and ill defined”.<sup>27</sup> Chief Justice Gleeson used the analogy of twilight, which “does not invalidate the distinction between night and day”, to indicate that the availability of quality review, such as for *Wednesbury* unreasonableness or *S20/2002* irrationality and illogicality, does not bring the entirety of “the merits” within the purview of the judiciary.<sup>28</sup> However, the very fact that the boundary between legality and merits is porous – and has shifted over time – means that it is insufficient to say that “the merits” are beyond the jurisdiction of the courts without explaining what is meant.

With respect, it is my contention that it is overly simplistic to elide the concept of merits review with the issue of the quality of a decision. To state that assessment of the quality of a decision indicates the presence of merits review is to mistake the true nature of *Wednesbury* unreasonableness or *S20/2002* irrationality or illogicality, since these grounds of review occupy the “twilight” described by Chief Justice Gleeson. Whether the boundary between legality and merits has been breached will largely fall to the facts of an individual case, but is not a given whenever the grounds of quality review are utilised.

If we are to adhere to the notion that “the merits” are beyond the jurisdiction of the judiciary, then it cannot be literally true, as McHugh and Gummow JJ suggested in

<sup>23</sup> Aronson et al, n 7, p 147; this view was adopted by Santow JA in *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [46].

<sup>24</sup> *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [73].

<sup>25</sup> The “correct and preferable” formulation is indeed a hallmark of merits review: see Cane, n 16, Kirby MD, “Administrative Review on the Merits: The Right or Preferable Decision” (1980) 6 Mon LR 171. Note, however, that a “correct and preferable” decision is nonetheless reviewable if there has been a breach of procedural fairness: *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [67] per McHugh and Gummow JJ.

<sup>26</sup> Spigelman, n 19 at 730.

<sup>27</sup> Spigelman, n 19 at 732.

<sup>28</sup> Gleeson, n 5 at 8; cf Cane, n 16 at 221, where Professor Cane describes the distinction between legality and merits as “rather watery” if it is accepted that there are “no impervious barriers between issues of law and fact on the one hand, and issues of policy on the other”.

Greg Weeks\*

---

*Lam*, that review of the quality of decision-making is a function only of merits review.<sup>29</sup> The quality of decision-making has long been susceptible to judicial review. The judgment of Lord Greene MR in *Wednesbury* first invited review of decisions “so unreasonable that no reasonable [decision-maker] could ever have come to [them]”.<sup>30</sup> Such a standard of review inevitably involves the court exercising a judicial review function in analysis of the quality of the decision made.<sup>31</sup>

Later, *Moore*<sup>32</sup> continued the development of quality review by stating that a finding of fact will breach natural justice if it is based on material which is not logically probative and relevant. This proposition has never attracted the support of a majority in the High Court of Australia.<sup>33</sup> Therefore, in Australia, the decision of a decision-maker to fail to be persuaded by evidence put to him or her is not necessarily vitiated because it is not supported by probative evidence. For example, in *NAVK*,<sup>34</sup> the applicant claimed that the Refugee Review Tribunal had committed an error of law because its findings of fact were not supported by probative evidence. The Full Federal Court<sup>35</sup> agreed that this was so, but held that “none was required” since the finding “amounted to no more than a rejection of the [appellant’s] claim”.<sup>36</sup>

Nonetheless, the decision in *S20/2002* to allow judicial review on the ground of irrationality or illogicality should be seen merely as the latest step on a long path of case law.<sup>37</sup> Clearly, review on the well-established grounds<sup>38</sup> that a decision-maker has made a decision that either cannot be supported rationally or is *Wednesbury* unreasonable, involves the court in evaluation of the quality of the decision made. It must follow that either “the merits” are not wholly off limits to a court exercising judicial review, or that quality review is able to pass more extensively than most grounds of judicial review through the “porous” boundary between legality and merits.

The latter statement represents the better view. For the sake of clarity, it should be agreed that “the merits” are *jurisdictionally* removed from judicial review, for the reasons outlined by Brennan J in *Quin*.<sup>39</sup> Deciding what “the merits” comprise then becomes the issue. Review of decisions for qualitative faults has been approved where

---

<sup>29</sup> It was in the process of arguing that “the merits” are not wholly removed from judicial review that Professor Cane said that “it is very difficult to understand in what sense a judgment that an administrator made a decision that no reasonable decision-maker could have made is not a judgment about the merits of that decision”. He therefore also seems to elide the concepts of quality and “the merits”: Cane, n 16 at 221.

<sup>30</sup> *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680 at 683.

<sup>31</sup> See Aronson et al, n 7, p 339: “even though it has been stripped back to its original core [in the wake of the decision in *S20/2002*], unreasonableness review is inescapably qualitative because it requires a qualitative assessment of the impugned decision”.

<sup>32</sup> *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456.

<sup>33</sup> Although it has been noted that “several judges” have expressed sympathy with the views expressed by Lord Diplock in *Moore*, including Gleeson CJ and Kirby J in *S20/2002*: Aronson et al, n 7, p 372.

<sup>34</sup> *NAVK v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 124 at [12].

<sup>35</sup> Nicholson and Edmonds JJ; Conti J concurring.

<sup>36</sup> *NAVK v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 124 at [33].

<sup>37</sup> For the history of the development of fact review in the common law, see Aronson et al, n 7, p 246-247.

<sup>38</sup> Albeit perennially surrounded by judicial suspicion: see, eg *Riddle v Telstra Corp Ltd* (2006) 149 FCR 348 at [53], where Edmonds J warned that “in applying [the *Wednesbury* unreasonableness] standard a court must proceed with caution lest it exceed its supervisory role by reviewing the decision on the merits”.

<sup>39</sup> *Attorney-General (NSW) v Quin* 170 CLR 1 at 35-36.

the faults affect the legality of the decision made, although not when attachment of the adverb “unreasonably” to what is essentially a complaint about the merits of a decision seeks thereby to challenge the decision’s legality.<sup>40</sup> To accept the incursion of quality review into what had traditionally been seen as “the merits” is to do no more than to recognise that the twilight described by Chief Justice Gleeson endures longer than previously thought.

The judgment of McHugh and Gummow JJ in *Lam*<sup>41</sup> was at pains to point out that, in contrast to the position in the UK after *Coughlan*,<sup>42</sup> a “legitimate expectation” does not give rise to substantive rights under Australian law, nor is it a breach of natural justice to fail to account for such an expectation. Their Honours confirmed, however, the procedural nature of natural justice. It is the province of merits review merely to obtain the “correct and preferable” result. In a de novo hearing, before the Administrative Appeal Tribunal or other similar tribunal, this may be done without any reference to the quality of the previous decision. Conversely, the quality of the decision made, both substantive and procedural, is the province of judicial review, whether or not the decision was “correct and preferable”.<sup>43</sup> The elision of quality and merits by McHugh and Gummow JJ in *Lam*<sup>44</sup> should therefore be read only as a rejection of the judicial imposition of the outcomes of “fairness review” as used in *Coughlan* rather than a broader rejection of quality review, as embodied in their Honours’ joint judgment in *S20/2002*.

Decision-makers are allowed a wide discretion by courts of judicial review. It is no legal error for a decision-maker to get his or her facts wrong, even if they are very wrong. A decision is not “unreasonable” in the sense of constituting an error of law if that term is used merely to indicate “emphatic” disagreement with the decision.<sup>45</sup> It can be appreciated for these reasons alone that it will be “rare” that a judicial review court makes a finding of *Wednesbury* unreasonableness, but what indicates that a decision is so “extreme” that it falls within this ground of review as an error of law?

It is the utilisation of the *Wednesbury* and *S20/2002* grounds, rather than the relatively uncontroversial principles behind the grounds themselves, which is responsible for the level of discomfort about the proximity of qualitative review to review of “the merits”. The standard of “reasonableness”, or of rationality and logic for *S20/2002* review, is not applied by a judicial review court having taken evidence as to how reasonable decision-makers operate in fact. Nor should it be applied based on the subjective sense of reasonableness of a judge or court,<sup>46</sup> but intuitively<sup>47</sup> against

<sup>40</sup> See *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [570] (Weinberg J).

<sup>41</sup> *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [65]-[77].

<sup>42</sup> *R v North & East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.

<sup>43</sup> *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [67].

<sup>44</sup> *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [73].

<sup>45</sup> *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626 [40] (Gleeson CJ and McHugh J); Gleeson CJ has extended the application of this point to descriptions of fact-finding as “illogical ... or irrational” for the purposes of the *S20/2002* review standard: *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 CLR 59 at [5].

<sup>46</sup> Aronson et al, n 7, p 340.

Greg Weeks\*

---

common norms. This presumes that judges will know the requisite level of unreasonableness when they see it, a presumption which will attract to quality review the same scepticism and cynicism that has been a hallmark of the debate on the distinction between fact and law. No matter how quality review is justified as being applied on an objective standard, an “intuitive” method of application cannot help but be influenced – or even dominated – by the judge’s subjective sense of reasonableness.<sup>48</sup>

### HOW SHOULD “QUALITY REVIEW” BE APPLIED?

Difficulties with quality review stem from seeing the grounds of review as “standards” against which sets of facts may be measured, but which lack definition. Rather, *Wednesbury* unreasonableness, and irrationality and illogicality under *S20/2002* review, should be seen as grounds which benefit from their formlessness relative to other grounds of judicial review to fulfil the task allotted them, namely, to be the safety net which catches the rare and extreme matters which do not fit the more firmly structured grounds of review. The constraint on judicial utilisation of these grounds is not a test per se, but a check on the method of their application.<sup>49</sup>

The finding that a decision of an administrative decision-maker is “extreme” in the sense that it violates the *Wednesbury* or *S20/2002* grounds of review does not require the painstaking approach that is necessary for other grounds of review. An “absurd” decision should be obvious. By extension, it ought not to take extensive hearing for the absurdity of such a decision to become apparent. It is on this level that judges make findings of *Wednesbury* unreasonableness based on intuition. They ought not to come to an intuitive appreciation of what is “reasonable” but rather be able intuitively to spot a decision which is “extreme”.<sup>50</sup>

*Wednesbury* and *S20/2002* review conducted in this manner have much in common with other judicial procedures designed to be conducted with ease and at speed. For example, an application to terminate an action summarily for want of a cause of action in the plaintiff is analogous in many ways to an application for judicial review on the ground of *Wednesbury* unreasonableness. In *General Steel Industries*,<sup>51</sup> Barwick CJ heard an application to set aside the plaintiff’s statement of claim on the

---

<sup>47</sup> See *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 410 per Lord Diplock: “Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer.”

<sup>48</sup> See Aronson et al, n 7, p 339-340: “despite the standard being intuitive rather than evidence-based, the court in each case ... is using the standard only where the unreasonableness is manifest and extreme”. This is doubtless the case. The problem, however, is that an intuitive standard is inescapably personal, meaning that the *level* (rather than the fact of) “self-restraint” must vary from case to case, and could just as easily be applied too stringently as not stringently enough.

<sup>49</sup> This is implicit in the comments of Gleeson CJ in *S20/2002* that, if it is suggested that there is a “legal consequence” to the description of a decision as “unreasonable”, “it may be necessary to be more precise as to the nature and quality of the error attributed to the decision-maker”: *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 CLR 59 at [5].

<sup>50</sup> In *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [564], Weinberg J accepted the contention put forward in Aronson et al, n 7, p 340 that “the courts’ reasonableness standard is ultimately intuitive” in the “vast majority of cases”, but denied that this is universally so.

<sup>51</sup> *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.



grounds that it failed to allege a cause of action against any of the three defendants. His Honour noted:

the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion.<sup>52</sup>

The lack of a cause of action must be “clearly demonstrated”, or alternatively be of a “clear and definite nature”.<sup>53</sup> The claim of the plaintiff must be “manifestly groundless”.<sup>54</sup> The motion will fail unless these conclusions are readily apparent without the need for extensive argument.<sup>55</sup> In short, Barwick CJ thought the jurisdiction to strike out a plaintiff’s statement of claim was of value, inter alia to prevent the expense of arguing a case doomed to fail, but should be used sparingly by the court, since its use would deny a plaintiff the opportunity to argue its case in full. This opportunity should not be withheld except on the clearest grounds.

The analogy with *Wednesbury* unreasonableness is readily apparent. Claims that a decision is so unreasonable as to constitute an error of law are, as we have seen, sparingly upheld, to put it mildly. Such errors of law must be “obvious”,<sup>56</sup> meaning that they should be clear to a court without extensive analysis. If it is not clear following such an approach that the decision-maker has failed to do what was required of him or her, the ground of *Wednesbury* unreasonableness (or *S20/2002* irrationality or illogicality) will not be made out. Of quality review, it could justifiably be said that “if it were done when ‘tis done, then ‘twere well it were done quickly”.<sup>57</sup>

This approach has the notable advantage of providing a level of over-arching review, which is what the ground of review described by Lord Greene MR in *Wednesbury* was meant to provide, while ensuring that the judicial review court does not delve into the merits of the matter. This is one of the senses in which Chief Justice Spigelman saw courts as providing “integrity review”, in as much as qualitative judicial review within these limits ensures “fidelity to purpose” in administrative decision-makers without concerning itself with “actual outcomes”.<sup>58</sup>

An additional benefit of this approach is that *Wednesbury* unreasonableness and *S20/2002* irrationality and illogicality are already used as catch-all grounds by many

<sup>52</sup> *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-129.

<sup>53</sup> *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129, 134.

<sup>54</sup> *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 138.

<sup>55</sup> Although Barwick CJ did not think it right to reserve the jurisdiction only for cases “where argument is unnecessary to evoke the futility of the plaintiff’s claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed”: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130. His Honour’s general approach to this jurisdiction suggests, however, that it would be unlikely to be exercised, thus denying the plaintiff an opportunity to put its case, if “extensive” argument were required to demonstrate the futility of its cause of action.

<sup>56</sup> Aronson et al, n 7, p 102.

<sup>57</sup> *Macbeth*, Act I Scene 7.

<sup>58</sup> Spigelman, n 19 at 726.

Greg Weeks\*

---

claimants for judicial review.<sup>59</sup> After the exhaustion of other, perhaps more reliable, grounds of review, judges are often obliged to deal with a *Wednesbury* claim. If the alleged “unreasonableness” takes no different form from other more specific claims, this may easily be dismissed.<sup>60</sup>

This approach calls for a light but sure judicial hand and is undoubtedly more difficult to apply in practice than it is to describe. This is surely never more the case than in litigation between large parties who have invested significant resources in the outcome, such as *Australian Retailers*. Yet, that case provides an example of the difficulty inherent in conducting *Wednesbury* review in greater detail than in the method advocated by this article.

## AUSTRALIAN RETAILERS

*Australian Retailers* involved a challenge brought by the Australian Retailers Association (ARA) and six large retailers<sup>61</sup> before Weinberg J against a decision of the Payment Systems Board (PSB) of the Reserve Bank of Australia (RBA) to “designate” the EFTPOS debit card payment system. Once “designated”, the system would be subject to the statutory authority of the RBA to determine standards with which participants in the system would be required to comply. The applicants sought judicial review of the PSB’s decision because they feared that “designation” of the EFTPOS system would be the “inevitable forerunner”<sup>62</sup> to the elimination of interchange fees.

Interchange fees are fees paid by the financial institution of a customer paying by EFTPOS (the issuer) to the financial institution which supplied the merchant’s EFTPOS facilities (the acquirer). A fee is usually paid by merchants who have the infrastructure for the provision of EFTPOS facilities supplied by a financial institution to that financial institution. Some large merchants, who install their own EFTPOS infrastructure, have been able to negotiate in effect to “share” the interchange fees with their financial institution.<sup>63</sup> The applicants’ contention was that the elimination of interchange fees would necessarily cause acquirers to increase service fees to small merchants and reduce or cease “sharing” arrangements with large merchants, and that the resulting cost to merchants would necessarily be passed on to consumers. In effect, the applicants were arguing that any regulatory attempt to relieve consumers from direct fees would be off-set by adjustments to other fees and prices, so that regulation would be pointless. Most people are sufficiently cynical of banks (and telecommunications companies, and their ilk) off-setting apparent fee cuts at one point with fee hikes elsewhere, that the applicants’ argument certainly looked plausible. However, the

---

<sup>59</sup> Sometimes demonstrating a victory of hope over reason: see *SZCOX v Minister for Immigration & Multicultural Affairs* [2006] FCA 1053 at [10] (Branson J).

<sup>60</sup> See, eg *Inglewood Olive Processors Ltd v Chief Executive Officer of Customs* (2004) 214 ALR 289; [2004] FCA 1659 at [51] (Stone J).

<sup>61</sup> Australia Post, BP Australia Pty Ltd, Bunnings Pty Ltd, Caltex Australian Petroleum Pty Ltd, Coles Myer Ltd and Sparks Shoes Pty Ltd.

<sup>62</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [36].

<sup>63</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [31].

economist's question was ultimately whether the cynical pessimist must necessarily be right.

One of the alleged errors of law for which the applicants sought review was that the decision of the PSB was *Wednesbury* unreasonable. In marked contrast to most applications for judicial review,<sup>64</sup> both parties led extensive expert testimony. The applicants' expert witnesses were called in an attempt to demonstrate the "unreasonableness" of the decision made by the PSB. The respondent was allowed to call its own experts to rebut this testimony on the grounds that "what is sauce for the goose is sauce for the gander".<sup>65</sup> Weinberg J was inclined to admit the vast bulk of the expert testimony, preferring to deal with any weaknesses through adverse findings as to weight.<sup>66</sup>

The difficulty with his Honour's approach, with respect, is that each party was subject to different requirements. As Weinberg J recognised, there is a significant burden attached to the task of demonstrating that a decision demonstrates an error of law because it is *Wednesbury* unreasonable, not least because the persons on the PSB who were responsible for the decision were not run-of-the-mill administrators but immensely qualified and experienced persons in the relevant field.<sup>67</sup> His Honour also recognised that allowing such a breadth of evidence in *Wednesbury* claims ought not to be encouraged,<sup>68</sup> and that extensive theorising about the kinds of decisions which may otherwise have been reached risks allowing the judicial review to "degenerate" into an "interminable excursus into merits review".<sup>69</sup>

However, I would suggest respectfully that his Honour was not compelled to allow the tendering of such a vast array of expert evidence as he did. The difficulty in establishing "absurdity" in the exercise of "opinion or policy" is well understood.<sup>70</sup> This being so, a less exhaustive approach would have been justified, indeed preferable given that "even on the broadest ground of review"<sup>71</sup> the applicants did not succeed in establishing *Wednesbury* unreasonableness. The necessity for a judicial review court "to proceed with care"<sup>72</sup> when hearing a claim of *Wednesbury* unreasonableness, lest it

<sup>64</sup> As described in Aronson et al, n 7, p 225-256: these are "usually dealt with courteously but at fairly high speed" because evidence is usually only led, eg, to "prove the record".

<sup>65</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [460].

<sup>66</sup> The exception to this approach came when Weinberg J excluded the entire evidence in chief of one of the respondent's expert witnesses on the ground that its lengthy attempts to explain the bases of the witness' opinions were too "confusing": *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [480].

<sup>67</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [567]. Weinberg J qualified his remarks in this regard by confirming that this did not serve to make decisions by the PSB immune to a finding of *Wednesbury* unreasonableness, although it should be recognised in practice that there is very little chance of demonstrating that a finding of such an august body was suitably "lunatic".

<sup>68</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [459].

<sup>69</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [477].

<sup>70</sup> *Buck v Bavone* (1976) 135 CLR 110 at 118-119 (Gibbs J); *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [568].

<sup>71</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [571].

<sup>72</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [553] citing the warning from Gleeson CJ and McHugh J in *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626 [40].

Greg Weeks\*

---

be drawn into merits review, should not oblige the court to do more than provide a swift check on the decision-maker's exercise of power, particularly when it is so clearly evident that, although reasonable disagreement with the relevant decision is manifest,<sup>73</sup> there is no reviewable error.<sup>74</sup>

The question before Weinberg J was, in effect, whether it was justifiable for the PSB to regard it as possible to regulate the EFTPOS system in a way which would in fact reduce, rather than shift or disguise, the overall charges payable under it. All that was required was for Weinberg J to inquire as to the credentials of the regulatory economists on the PSB, and ask whether other regulatory economists took the same view. If so, the decision of the PSB could not have been "so unreasonable that no reasonable decision-maker could have made it", and the challenge of the applicants would fail. Such an approach would have been markedly faster in delivering the same result.

The breadth of evidence allowed by Weinberg J was apt to lead to an "interminable excursus into merits review"<sup>75</sup> for another reason. The evidence adduced went beyond explaining the material before the PSB at the time that the relevant decision was made. Rather, it addressed whether the reasoning of the PSB could be regarded as *Wednesbury* unreasonable at the time of the trial, when the only relevant question was whether, on the material before it, the PSB *had been Wednesbury* unreasonable.

*Wednesbury* unreasonableness is, as has been noted above, a high standard for an applicant to meet. Few succeed. If the removal of irrationality and illogicality from under the *Wednesbury* umbrella by *S20/2002* has in fact created an even more stringent review standard for challenges to fact-finding,<sup>76</sup> it has yet to become clear how seriously irrational or illogical a decision would need to be for such a challenge to succeed.<sup>77</sup>

*Byrne v Law Institute of Victoria*<sup>78</sup> saw a successful application for judicial review on the *S20/2002* standard. There, it was crucial that the respondent had purported to make findings as to disputed facts "on the papers" rather than by inviting evidence to be given. The result was held to be "pure speculation"<sup>79</sup> and Gillard J stated that it was impossible that the decision-maker could "logically and rationally" have "come to that conclusion on the evidence".<sup>80</sup> This result, however, seems to have been

---

<sup>73</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [570].

<sup>74</sup> Furthermore, as Weinberg J noted, many of the claimed instances of *Wednesbury* unreasonableness were duplicated in other claimed grounds of review. None of them appear to allege anything like the level of "lunacy" which would have seen them succeed. On this basis, the extent of evidence and argument on the claims was probably unnecessary.

<sup>75</sup> *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [477].

<sup>76</sup> As Santow JA says it has: *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [59].

<sup>77</sup> Aronson et al, n 7, p 266.

<sup>78</sup> *Byrne v Law Institute of Victoria Pty Ltd* [2005] VSC 509.

<sup>79</sup> *Byrne v Law Institute of Victoria Pty Ltd* [2005] VSC 509 at [66].

<sup>80</sup> *Byrne v Law Institute of Victoria Pty Ltd* [2005] VSC 509 at [67].

extensively based on errors in process on the part of the respondent rather than as a result of qualitatively poor decision-making per se.

Confusion about the exact nature of the *S20/2002* standard may in part be due to the fact that, while the test in *Wednesbury* has frequently been criticised for its circularity,<sup>81</sup> there is currently no test at all for *S20/2002* irrationality.<sup>82</sup> Some doubts exist that an “irrationality” standard is relevantly different from *Wednesbury* unreasonableness.<sup>83</sup> These circumstances support the approach to quality review espoused above, namely that, having assessed the facts of the case overall, a court should make an intuitive determination as to whether any aspect of the fact-finding has obviously been so irrational or illogical that the decision-maker has effectively failed to do his or her job. This can and should be done quickly.

## CONCLUSION

Quality review performs a vital role within the law of judicial review, that of providing a remedy for patently absurd decisions which manage not to demonstrate an error of law on any other ground. Necessarily, such decisions are rare. Care must be taken with quality review for the reason that it comes closest to breaching the “porous” boundary between review for errors of fact and review on the merits. This should not, however, prevent courts from utilising quality review in the manner best suited to its purpose. Absurd decisions are obvious, and stand out without needing to be diligently sought. Conversely, if any significant quantity of evidence is required to demonstrate that a decision is of such poor quality that it constitutes an error of law, it is unlikely to be so. *Australian Retailers* is an example of an application for quality review being met with the right result but in the wrong way. Applications for judicial review on the ground that a qualitative error exists in a decision should be heard in a manner which demonstrates an understanding that errors of quality must be superficially apparent.

---

<sup>81</sup> See, eg Airo-Farulla G, “Rationality and Judicial Review of Administrative Action” (2000) 24 MULR 543 at 572.

<sup>82</sup> To some extent, the fact that *S20/2002* has established a different standard has had little practical impact on courts, which are still apt to apply the *Wednesbury* standard to fact finding (eg *Buckley v Victims Compensation Fund Corporation* [2004] NSWSC 513 at [33]; *Director of Plant & Animal Quarantine v Australian Pork Ltd* (2005) 146 FCR 368 at [65]; [2005] FCAFC 206). This indicates that the exclusion of the *Wednesbury* standard from judicial review of fact-finding is yet to be settled. In cases where the decision is held not to breach the *Wednesbury* standard in any case, this issue is unimportant.

<sup>83</sup> See, eg *Inglewood Olive Processors Ltd v Chief Executive Officer of Customs* [2005] FCAFC 101 at [46] (Kiefel, Weinberg and Edmonds JJ).