A MARRIAGE OF STRANGERS: THE WEDNESBURY STANDARD IN TORT LAW

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The recent process of legislative reform has seen the public law Wednesbury standard grafted onto the law of tort. Can these concepts operate together or are they fundamentally incongruous? Eminent jurists, most notably Brennan CJ and Lord Hoffmann, had previously proposed the Wednesbury standard as an appropriate measure of whether a public authority owed a duty of care in negligence. While this approach has never commanded the support of a High Court majority, tort law reforms have adopted the use of the Wednesbury standard as a means of restricting the liability of public authorities. This paper will analyse the interaction between Wednesbury and tort law both at common law (particularly in Brennan CJ's judgment in Pyrenees Shire Council v Day (1998) 192 CLR 330) and under the Civil Liabilities Act 2002 (NSW), with particular reference to Firth v Latham [2007] NSWCA 40. I will argue that the fact that there are different purposes behind the public law Wednesbury standard and its application to tort law is productive of anomalies in the latter sphere. These anomalies are best addressed by greater legislative specificity.

I INTRODUCTION

The distinction between 'public' law and 'private' law has long been criticised.[1] At the very least, the boundary between these two legal fields is somewhat artificial. It is also rather porous; there are many situations which straddle the public / private divide. However, imperfect though it may be, the distinction between public and private law recognises the fact that different considerations apply to government bodies than to the obligations owed by and to private parties. It is the right and

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1 See e.g. Carol Harlow, "Public' and 'Private' Law: Definition without Distinction' (1980) 43(3) *Modern Law Review* 241-265.

privilege of private parties to be essentially self-regarding,[2] to the extent that they do not expose others to harm. This is not true of government bodies, which are obliged to act in the interest of the public generally. Consequently, these bodies are given additional protection from private law liability in tort, both at common law[3] and more recently under statute.[4] Furthermore, public law remedies are essentially procedural in focus and do not, in Australia, expose public authorities to damages for acts performed *ultra vires*.

It follows from this that standards and grounds of review developed in public law will not apply seamlessly to private law issues. Perhaps the quintessential example of this point comes from the use in private law circumstances of the public law standard of *Wednesbury* unreasonableness.

II WHAT IS THE *WEDNESBURY* STANDARD?

The so-called *Wednesbury* unreasonableness standard is considerably older than the case from which it takes its popular name.[5] It allows courts a strictly defined jurisdiction to invalidate any decision "so unreasonable that no reasonable authority could ever have come to it". This is an objective standard which is not able to be satisfied by mere judicial disagreement with the relevant exercise of discretion. As the High Court has emphasised in recent years, a decision is not *Wednesbury* "unreasonable" if that term is used merely to indicate "emphatic" disagreement with the decision.[6] Rather, the capacity to invalidate an exercise of power for *Wednesbury* unreasonableness should be seen as a residual power to overturn a decision so outrageous that it cannot be characterised as a proper exercise of the decision-maker's jurisdiction.[7] It is not open to the courts to deprive a decision-maker of the jurisdiction to exercise his or her power for any lesser reason, since the power has been granted to the decision-maker and not to the court.[8] This reasoning was the reason why *Wednesbury* became "the emblem of the classic model of administrative law".[9] It is also the reason that judicial and academic discussions of

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2 cf *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, per Priestley and Handley JJA; Meagher JA contra (NSW Court of Appeal).

3 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, ('*Heyman's Case*').

4 *Civil Liability Act 2002* (NSW) Part 5.

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

6 *Re Minister for Immigration and Multicultural Affairs; ex parte Eshetu* (1999) 197 CLR 611, 626 per Gleeson CJ & McHugh J.

7 Isaacs J referred to a decision "so irrational as not to be worthy of being called a reason by any honest man": *Moreau v Commissioner of Taxation (Cth)* (1926) 39 CLR 65, 68.

8 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680 at 682.

9 Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 429.

Wednesbury are so frequently followed by warnings that courts should not be tempted into a consideration of the merits of a matter when exercising this ground of review.

My characterisation of *Wednesbury* as a residual ground of review stems from the fact that a decision which breaches the *Wednesbury* standard will generally breach other grounds of judicial review, such as unauthorised use of power, taking into account irrelevant considerations or acting in bad faith.[10] It is almost impossible to think of a good example of a decision which is *Wednesbury* unreasonable which would not be invalid on another ground. In *Wednesbury*, Lord Greene MR cited the example of the "red-haired teacher, dismissed because she had red hair"[11] but conceded that such a decision would likely include irrelevant considerations and may even have been made in bad faith.[12] This has been seen by some commentators as an indication that *Wednesbury* is not a ground of review in its own right,[13] although that argument has long since been rejected by the courts.[14] *Wednesbury* is better seen as a "safety net", capable of catching an obviously wrong decision which, for some reason, is not caught by any other ground of review.[15]

Wednesbury has fallen into disuse in both Australia and the UK, although for different reasons. In the UK, the advent of the *Human Rights Act 1998* (UK) has led to the development of a 'proportionality' ground, which allows courts greater scope to overturn decisions which affect human rights.[16] In Australia, by contrast, it has fallen by the wayside as a result of the administrative law reforms of the 1970s. The widespread availability of merits review has meant that it is now all but unthinkable for a decision to reach a court exercising judicial review which could be regarded as unreasonable to the requisite degree. Additionally, the increase in reasoned administrative decisions has meant that courts now seldom have the scope

10 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680 at 683 per Lord Greene MR. See also Peter Cane, *Administrative law* (4th ed, 2004) 252.

11 *Short v Poole Corporation* [1926] Ch 66, 90-1 per Warrington LJ.

12 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680 at 683.

13 S.A. de Smith and J.M. Evans, *De Smith's Judicial review of administrative action* (4th ed, 1980) 348.

14 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (4th ed, 2009) 371.

15 See Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 427.

16 See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (4th ed, 2009) 379-383; Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423.

to infer that an otherwise inexplicable decision must be *Wednesbury* unreasonable.[17] Legally complete reasons leave little room to draw such an inference.[18]

Wednesbury, then, is a quintessential public law standard which foresees a *procedural* remedy for any exercise of jurisdiction which is of such poor quality that *nobody* could reasonably have exercised it in that way. It is a forbidding standard, now seldom used in practice although still a popular illustration of the limits of judicial review.[19] It is a standard to which parties are held in the exercise of a discretion,[20] a typically 'public law' circumstance. Its exercise should be focused more on decision-making which is so poor in quality as to justify the interference of a court rather than the merits of a decision itself; a point emphasised by the scarcity of examples of a *Wednesbury* unreasonable decision. It is not a standard that was developed with private law issues in mind.

III *WEDNESBURY* AND *MANDAMUS* IN TORT AT COMMON LAW

Although it is at the very least open to doubt whether the labels 'public' law and 'private' law are accurate or helpful,[21] torts are generally considered to be examples of 'private law', in that they usually deal with disputes between private parties. Where, as in the tort of negligence, damage is the gist of the action, the damage suffered by one party is remedied by monetary compensation paid by the other. Contrary to what is suggested by the label 'private law', negligence can be committed by public authorities and it is possible to obtain compensatory remedies against them.[22]

It is a matter of common law that proceedings are able to be brought against public authorities to establish liability in tort.[23] Any procedural immunity to tort actions

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17 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360 per Dixon J.

18 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (4th ed, 2009) 370.

19 See e.g. A. M. Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 1-8; J. J. Spigelman, 'The integrity branch of government' (2004) 78(11) *Australian Law Journal* 724-737.

20 There is now, in Australia, a separate standard for irrational fact-finding: *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165.

21 See Carol Harlow, "Public' and 'Private' Law: Definition without Distinction' (1980) 43(3) *Modern Law Review* 241-265. The High Court has also commented on the affinity between tort law and public law: *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 153-154 per Gummow, Hayne, Heydon and Crennan JJ. See also *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 558; *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, 106-107 [53] per Gaudron & Gummow JJ.

22 Prue Vines, 'Straddling the public/private divide: tortious liability of public authorities' (2010) 9(4) *Judicial Review* 445, 447.

23 *Commonwealth v Mewett* (1997) 191 CLR 471.

has been removed by statute[24] and, at Commonwealth level, by s 75(iii) of the *Constitution*. The wording of this legislation requires that "the rights of parties shall as nearly as possible be the same" in any litigation between government and private parties. The terms of the legislation therefore admits that public authorities cannot be *exactly* the same as private litigants; as Gleeson CJ noted in *Graham Barclay Oysters*, the qualification "as nearly as possible"[25] is an "aspiration" that cannot be realised completely.[26] To the extent that public authorities are liable in negligence, they are liable as a matter of private, rather than public, law. Obtaining a remedy against a public authority is not dependant on its actions being invalid in the public law sense.

However, there have been attempts over the course of the last forty years to bring public law standards into the task of assessing whether a public authority owes a duty of care in negligence. In particular, some judges have held that, in order to create a common law duty of care owed to an individual, that individual must be able to compel a public authority to exercise its power to act by obtaining a writ of *mandamus*. The starting point for this reasoning is the speech of Lord Diplock in *Home Office v Dorset Yacht Co Ltd*, in which his Lordship said that courts do not have jurisdiction to determine whether a public authority has breached a common law duty of care to a plaintiff unless the act or omission complained of did not fall "within the statutory limits imposed upon the department's or authority's discretion".[27] On this basis, Lord Diplock utilised the *Wednesbury* standard to connect public law invalidity to the existence of a duty of care in negligence. His Lordship held that it could not:[28]

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24 In each State, the relevant legislative provisions are *Crown Proceedings Act 1993* (Tas) s 5(1); *Crown Proceedings Act 1993* (NT) s 5(1); *Crown Proceedings Act 1992* (ACT) s 5(1); *Crown Proceedings Act 1992* (SA) s 5(1); *Crown Proceedings Act 1988* (NSW) s 5(2); *Crown Proceedings Act 1980* (Qld) s 9(2); *Crown Proceedings Act 1958* (Vic) s 25; *Crown Suits Act 1947* (WA) s 5(1). At Commonwealth level, see *Judiciary Act 1903* (Cth) s 64.

25 His Honour was discussing the NSW legislation: *Crown Proceedings Act 1988* (NSW) s 5.

26 "That formula reflects an aspiration to equality before the law, embracing governments and citizens, and also a recognition that perfect equality is not attainable. Although the first principle is that the tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens.": *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 556 (citation omitted).

27 *Home Office v Dorset Yacht Co. Ltd* [1970] AC 1004, 1067-1068.

28 Ibid. 1068. Gibbs CJ alluded to public law standards, using reasoning adapted from Lord Diplock's speech in *Dorset Yacht*, in a judgment with which Wilson J agreed in *Heyman's Case*. "Once it is accepted, as it must be, that the ordinary principles of the law of negligence apply to public authorities, it follows that they are liable for damage caused by a negligent failure to act when they are under a duty to act, or *for a*

> have been intended by Parliament to give rise to any cause of action on the part of any private citizen unless the system adopted was so unrelated to any purpose of reformation that no reasonable person could have reached a *bona fide* conclusion that it was conducive to that purpose. Only then would the decision to adopt be *ultra vires* in public law.

His Lordship's reasoning that the discretion granted by statute to the Borstal officers in that case could only be challenged in a negligence suit if it were *ultra vires* was rejected by Mason J in *Heyman's Case*,[29] in a passage which has subsequently been approved by McHugh J.[30] Mason J was at pains to point out that liability for breach of a duty of care where there has been general reliance on a public authority arises in negligence and not as a matter of public law.[31]

However, Lord Diplock's speech in *Dorset Yacht* received the implicit approval of Brennan CJ in *Pyrenees Shire Council*.[32] As had Lord Hoffmann in *Stovin v Wise*,[33]

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negligent failure to consider whether to exercise a power conferred on them with the intention that it should be exercised if and when the public interest requires it.": *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 445 (emphasis added) ('*Heyman's Case*').

29 "Moreover, although a public authority may be under a public duty, enforceable by *mandamus*, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with, or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of the power. *Mandamus* will compel proper consideration by the authority of its discretion, but that is all.": Ibid. 465. Mason J was specifically rejecting the reasoning applied by Lord Wilberforce in *Anns v Merton Borough Council [1978] AC 728* but this rejection extends *a fortiori* to Lord Diplock's speech in *Dorset Yacht*.

30 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 35.

31 Lord Hoffmann shared some of Mason J's concerns with a right to a writ of mandamus as the source of a common law duty of care: "A *mandamus* can require future consideration of the exercise of a power. But an action for negligence looks back to what the council ought to have done. Upon what principles can one say of a public authority that not only did it have a duty in public law to consider the exercise of the power but that it would thereupon have been under a duty in private law to act, giving rise to a claim in compensation against public funds for its failure to do so?": *Stovin v Wise* [1996] AC 923, 950. Given his Lordship's support for a rationality standard to be applied to public authorities' exercises of power in order to determine whether they owe a duty of care, it is clear that his objection to mandamus as a source of such a duty is not based on the fact that it is a public law remedy.

32 Gummow J put the contrary view that "the liability of the Shire in negligence does not turn upon the further (and public law) question whether (as may have been the case) those who later sued in tort would have had standing to seek against the Shire an order in the nature of *mandamus*. Their actions for damages in negligence are not brought in addition to or in substitution for any public law remedy.": *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 390-391 (citations omitted).

Brennan CJ was prepared to use *Wednesbury* as a minimum quality standard on public authorities' exercises of power in preference to the doctrine of general reliance articulated by Mason J in *Heyman's Case*. In one sense, this use of *Wednesbury* is more coherent than the general reliance doctrine because it focuses on the behaviour of the decision-maker rather than on the expectations of the plaintiff, with the inevitable evidentiary difficulties that go with proving them.[34] In another, it carries the seeds of doctrinal confusion by bringing a public law standard into a private law cause of action.

In putting the case for *Wednesbury* to be used as a minimum quality standard, Brennan CJ first stated that:[35]

> if a decision not to exercise a statutory power is a **rational** decision, there can be no duty imposed by the common law to exercise the power. I further agree that if it be contrary to the policy of the statute to confer a private right to compensation for non-exercise of a statutory power, the common law cannot create that right. A statutory power and its incidents are creatures of the legislature and the common law must conform to the legislative intention.
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> But the existence of a discretion to exercise a power is not necessarily inconsistent with a duty to exercise it.

His Honour went on to say that a common law duty of care would not be breached such as to create a liability in damages to an individual "when the power is intended to be exercised for the benefit of the public generally and not for the protection of the person or property of members of a particular class". When a statutory power was intended to be exercised to provide protection to specified persons, his Honour said that the extent of the common law duty of care to those persons would be coextensive with "the measure of the public law duty to exercise the power". The applicable standard of care required to discharge the common law duty would "vary according to the circumstances that are known".[36]

In effect, Brennan CJ replaced the general reliance doctrine, of which he disapproved, with a requirement that the Council decide rationally whether or not to exercise its statutory powers. He held that, on the facts of *Pyrenees Shire Council*, even though there was no actual reliance on the part of the first respondent (or any other person in the town of Beaufort), "the Council was under a public law duty to

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33 *Stovin v Wise* [1996] AC 923, 953 per Lord Hoffmann. This was approved by Brennan CJ at *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 346. See Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 67-68.

34 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 344 per Brennan CJ.

35 Ibid. 346 (emphasis added).

36 Ibid. 347-348.

enforce compliance" with the improvements required to the premises in order to eliminate the risk of fire. Given the "extreme" risk "for lives and property in the neighbourhood of the defective chimney", Brennan CJ held that "there was **no reason** which could have justified the Council's failure".[37] Contrary to *dicta* of Gibbs CJ in *Heyman's Case*,[38] this passage indicates that Brennan CJ had in mind a standard of *Wednesbury* unreasonableness[39] rather than the 'Clapham omnibus' standard generally applied in negligence. This is also different to the standard proposed by Lord Diplock, which incorporated an inquiry as to the *bona fides* of the decision-maker. Such an inquiry has no part in the public law application of *Wednesbury* unreasonableness.

Brennan CJ's reasoning, with respect, becomes rather circular when it is put to the question of whether a public authority can be liable for failing properly to consider whether to exercise a statutory power. His Honour starts with the proposition that the failure of the defendant Council in *Pyrenees Shire Council* to exercise its statutory fire-prevention powers was "irrational". In public law, an applicant would have been able to obtain an order of *mandamus* to compel the Council to exercise its powers, because an "irrational" refusal to exercise a power is a jurisdictional error remediable by *mandamus* if it meets the standard of *Wednesbury* unreasonableness. Brennan CJ's approach would then apply Lord Diplock's reasoning in *Dorset Yacht* to say that the fact that the exercise of a statutory power is able to be compelled by *mandamus* is sufficient to give a court *jurisdiction* to consider whether it has breached a common law duty of care in respect of that power, although a statutory duty is never in itself enough to *create* a common law duty of care.[40]

The content of the duty of care is not, however, to exercise the power but to give *reasonable* consideration before refusing to exercise the power. The duty to act (enforceable by *mandamus*) therefore includes a duty to give proper consideration to any refusal to act (remediable in damages). The circularity of this process becomes apparent when it is remembered that the whole inquiry is started by a finding that the failure to act *is* unreasonable. It is inconceivable that an unreasonable failure to act will have been preceded by a reasonable process of consideration *whether to* act. Therefore, in practice, any public authority with a

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37 Ibid. 348 per Brennan CJ (emphasis added).

38 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 445 ('*Heyman's Case*').

39 This seems to have been the standard contemplated by Lord Hoffmann in *Stovin v Wise*. "I think that the minimum pre-conditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.": *Stovin v Wise* [1996] AC 923, 953.

40 Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 67.

statutory power which it could be compelled to perform by a writ of *mandamus* will also be liable for damages for the breach of a common law duty of care to give reasonable consideration to the exercise of that power once the remaining common law measures of liability have been met. As much is clear from Brennan CJ's statement that "the measure of the [common law] duty owed to members of the relevant class is no greater than the measure of the public law duty to exercise the power".[41]

With great respect to the learned judges who have expressed these views,[42] this is no more supportable in principle than the doctrine of general reliance which was rejected by a majority of the High Court in *Pyrenees Shire Council*. To whatever extent general reliance is a "fiction",[43] this epithet may also be levelled at a doctrine which attempts to graft onto a public law minimum qualitative standard for public decision-making a common law duty to have regard to others.[44]

There is nothing fundamentally wrong with bringing judicial review principles into private law settings, where judicial review's remedies cannot follow.[45] Nonetheless, several judges have disapproved of importing the concept of *Wednesbury* unreasonableness as a measure of whether a private law duty is owed. In *Crimmins*, McHugh J stated that he was "unable to accept that determination of a duty of care should depend on public law concepts [because] public law concepts of duty and private law notions of duty are informed by differing rationales".[46] It appears that his Honour was particularly concerned with *ultra vires* being used as a determinant of whether a duty of care is owed by a public authority,[47] but this objection[48] has been adopted by those who oppose the use of *Wednesbury* as a tort law standard on

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41 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 347-348.

42 This form of words is borrowed from *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 35 per McHugh J.

43 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 387 [163] (Gummow J); 409-411 [228], [231] (Kirby J). cf Ibid. 356 [62] (Toohey J); 370 [107] (McHugh J).

44 Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 80.

45 For example, it is a principle of long standing that certain private institutions are required to observe procedural fairness, even though this requirement is not enforced with a judicial review remedy: Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (4th ed, 2009) 513-517. Aronson, Dyer and Groves note cases from the 1870s in which courts required natural justice to be provided to persons excluded from clubs or professional associations: Ibid. 415 (fn 97).

46 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 35 (Gleeson CJ agreeing).

47 This is made clear by McHugh J's citation of J.J. Doyle, 'Tort Liability for the Exercise of Statutory Powers' in P. D. Finn (ed), *Essays on Torts* (1989) 203-242, 235-236. See *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 36.

48 Along with that of Kirby J in the same case: Ibid. 78.

the basis that "public law and negligence law are fundamentally different and should be treated as independent regimes".[49]

The major problems with transplanting the *Wednesbury* standard from public law centre on the fact that, as an administrative law standard, it has an entirely different purpose to that to which it is put in negligence. Mark Aronson has noted in this regard that the *Wednesbury* standard in administrative law relates to exercises of discretion in regard to which the decision-maker has no personal self-interest.[50] This is completely different to situations in which it is alleged that a public authority has been negligent for breaching its duty of care to an individual. A connected problem is the amount of baggage that *Wednesbury* carries as an administrative law concept. Its circularity of expression has frequently been criticised. Nor does it denote a universal standard: UK courts tend to be readier to find that a decision has breached the *Wednesbury* standard than Australian courts, where *Wednesbury* unreasonableness is frequently pleaded and very rarely found.[51] This is connected to the fact that, in Australia at least, it is a very demanding standard,[52] generally requiring nothing short of sheer lunacy.[53]

There are very few exercises of power which would expose a public authority to liability in negligence if the *Wednesbury* standard were to be applied in the same

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49 Elizabeth Carroll, 'Wednesbury unreasonableness as a limit on the civil liability of public authorities' (2007) 15(2) *Tort Law Review* 77-92, 86.

50 "Administrative decision-makers must typically exercise their statutory discretions without any sense of personal self-interest. Indeed, some of the more pronounced forms of self-interest - such as personal advancement, personal convenience, personal dislike of the other party, and the wish to make a profit - might well count against the validity of a purported exercise of public power without the need to resort to *Wednesbury* unreasonableness. When their decisions are measured against *Wednesbury*, the court does not balance the decision-maker's interests against the interests of the person affected by the decision. Negligence law by contrast tries to strike a balance between the interests of plaintiff and defendant. The verbal formula is the same, therefore, but transplanting *Wednesbury* into negligence soil will mean that it has a wholly different operation. Before its transplant, *Wednesbury* had nothing to say to decision-makers about being careful to avoid harming others.": Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 80 (citations omitted).

51 *A v Pelekanakis* (1999) 91 FCR 70, (Weinberg J).

52 *Re Minister for Immigration and Multicultural Affairs; ex parte Eshetu* (1999) 197 CLR 611, [32] per Gleeson CJ and McHugh J. See also: Mark Aronson, 'Process, Quality, and Variable Standards: Responding to an *Agent Provocateur*' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) 5-32, 11-13.

53 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (3rd ed, 2004) 102. The words "sheer lunacy" appear to have been dropped from the new edition of this work, but see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (4th ed, 2009) 367-378.

manner as in administrative law.[54] At present, the Australian application of the *Wednesbury* standard is so restricted that a literal application of that standard would produce no practical difference to challenging a broad statutory discretion, such as the power to arrest without warrant, by making out the tort of misfeasance in public office. That tort requires no proof that the plaintiff's rights have been infringed in order to obtain substantial damages for his or her loss, but does require proof that such loss was suffered as a result of a public officer's malicious act.[55] Suggestions that *Wednesbury* be replaced by a doctrine which exposes exercises of discretion to greater intensity of review the more they threaten human rights or fundamental freedoms[56] have so far come to nothing in Australia. This state of affairs is unlikely to change in the short term.

IV *WEDNESBURY* UNDER TORT REFORM LEGISLATION

In Australia, the debate about the suitability of public law concepts to the law of torts has been changed by the fact that the *Wednesbury* standard now crops up in the torts reform legislation in most jurisdictions. Prior to this, it had been the subject of a recommendation in the *Ipp Report*. Whereas the House of Lords in *X v Bedfordshire*[57] and *Stovin v Wise*[58] had "experimented with the idea that a duty to take action might sometimes arise because the public authority's decision not to act was invalid for *Wednesbury* unreasonableness",[59] the Ipp Panel recommended that

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54 Compare the argument of Scott Wotherspoon in favour of using *Wednesbury* unreasonableness to determine whether a public authority owes a duty of care: "It has been said that, applied literally, the *Wednesbury* test is 'so stringent that unreasonable decisions in this sense are likely to be a very rare occurrence in real life': Peter Cane, *Administrative law* (4th ed, 2004) 250. Whether or not this will be so will depend upon the facts of the particular case. But the application of *Wednesbury* unreasonableness is an appropriate limitation, or control mechanism, given the undemanding nature of other elements that determine the existence of a duty of care on the part of public authorities.": Scott Wotherspoon, 'Translating the public law 'may' into the common law 'ought' : the case for a unique common law cause of action for statutory negligence' (2009) 83(5) *Australian Law Journal* 331, 341.

55 *Northern Territory v Mengel* (1995) 185 CLR 307, 345; *Sanders v Snell* (1998) 196 CLR 329; *Sanders v Snell (No.2)* (2003) 130 FCR 149; Robert Stevens, *Torts and Rights* (2007) 242-243.

56 Michael Taggart, "Australian exceptionalism' in judicial review' (2008) 36(1) *Federal Law Review* 1-30; Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423. cf Mark Aronson, 'Process, Quality, and Variable Standards: Responding to an *Agent Provocateur*' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) 5-32.

57 *X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and other appeals* [1995] 2 AC 633, ('*X v Bedfordshire*').

58 *Stovin v Wise* [1996] AC 923.

59 Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 69-70. Aronson notes that similar suggestions had

it be considered in relation to applying a policy defence against liability "in a claim for negligently-caused personal injury or death where the alleged negligence arises out of the exercise or non-exercise of a public function".[60] The Panel's explication of the proposed function of this defence would mean that a plaintiff would have, in effect two hurdles to clear:[61] first, to refute any claim that the decision in question "was the result of a decision about the allocation of scarce resources or was based on some other political or social consideration"[62] and; second, to establish that the decision was unreasonable to the *Wednesbury* standard. As we have seen, *Wednesbury* is an almost prohibitive standard in Australia and is used to provide a residual ground of review for decisions which do not fall within any other ground but are clearly and obviously 'wrong'.[63] This is not a test which weighs reasonableness based upon all of the circumstances, as in the test for breach of duty in negligence. The Panel's reference to the "cost of taking precautions", with respect, seems to elide the two standards without explaining how this problem has been avoided.

Furthermore, the *Wednesbury* standard is, with respect, unlikely to be satisfied by an erroneous judgment that a hypothetical risk either required the public authority to take no action or only to take action at some future time. Indeed, such a standard would not likely have altered the outcome of *East Sussex Rivers Catchment Board v Kent*,[64] since the merely *inefficient* performance of a task is far from being 'so unreasonable that *no* reasonable authority in the position of the defendant' could have performed the task in the same manner. The reality of the *Wednesbury* test, as I have argued above, is that it has been given such a stringently defined scope in Australian administrative law that to 'transplant' its standard into private law will, apart from other issues, result in a test which is almost never able to be satisfied.[65] As Mark Aronson has noted, it may have been preferable for the legislation to use another form of words altogether, such as 'gross negligence'.[66]

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been made in *Anns v Merton Borough Council [1978] AC 728* and, prior to that, in *Dorset Yacht*, but "without the restriction to cases where *Wednesbury* unreasonableness was the ground of the invalidity": Ibid. 70.

60 Panel of Eminent Persons ('Ipp Committee'), *Review of the Law of Negligence: Final Report* (2002) 157.

61 Ibid. 158-159.

62 Ibid. 157.

63 See Greg Weeks, 'Litigating questions of quality' (2007) 14(2) *Australian Journal of Administrative Law* 76-85.

64 *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58.

65 cf *T&H Fatouros Pty Ltd v Randwick City Council* (2006) 147 LGERA 319, (Simpson J). See Elizabeth Carroll, 'Wednesbury unreasonableness as a limit on the civil liability of public authorities' (2007) 15(2) *Tort Law Review* 77-92, 90.

66 Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 80. cf *Precision Products (NSW) Pty Limited v Hawkesbury City Council* (2008) 74 NSWLR 102, 141 [177] per Allsop P (NSW Court of Appeal).

Nonetheless, the *Wednesbury* standard has been adopted into tort reform legislation passed following the *Ipp Report* in most Australian jurisdictions. Much of this has been in regard to the tort of breach of statutory duty,[67] and will probably have the practical effect of placing the final nail in the coffin of that cause of action.[68] However, it also appears in relation to negligence actions against public authorities in New South Wales under ss 43A and 44 of the *Civil Liability Act 2002*. The latter section imposes a barrier to the recognition of a common law duty on the part of a public authority to take positive action "if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff."[69] Elizabeth Carroll[70] and Prue Vines have each called for the s 44 to be repealed because the public law concept of *mandamus* is "inappropriate in a negligence action".[71] I respectfully agree; the difficulties caused by any elision of public law invalidity and tortious liability are extensive, as this paper has noted above.

Section 43A was inserted into the Act by the NSW government in somewhat politicised circumstances.[72] The precise scope and effect of this section are still developing through litigation but, although they remain less than entirely clear,[73] it is beyond doubt that s 43A is designed and will have the effect of limiting the occasions when a public authority will owe a duty of care in relation to the exercise of a statutory power not generally held by private actors. As much was confirmed by Campbell JA, who stated in *Refrigerated Roadways* that:[74]

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67 e.g. *Civil Liability Act 2002* (NSW) s 43. See Elizabeth Carroll, 'Wednesbury unreasonableness as a limit on the civil liability of public authorities' (2007) 15(2) *Tort Law Review* 77-92, 81-83.

68 Mark Aronson contended that it already had "almost no life in this country beyond its original context of workplace injuries", with the implication that the tort reform legislation has little practical effect in this regard: Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 76. The tort of breach of statutory duty was abolished by the Canadian Supreme Court in *The Queen v Saskatchewan Wheat Pool* [1983] 1 SCR 205.

69 *Civil Liability Act 2002* (NSW) s 44. See the discussion of s 44 at: Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 73-76.

70 Elizabeth Carroll, 'Wednesbury unreasonableness as a limit on the civil liability of public authorities' (2007) 15(2) *Tort Law Review* 77-92.

71 Prue Vines, 'Straddling the public/private divide: tortious liability of public authorities' (2010) 9(4) *Judicial Review* 445, 474.

72 Following the decision in *Presland v Hunter Area Health Service* [2003] NSWSC 754. The decision of the trial judge was later overturned by the Court of Appeal in *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22. A good account of the amendment of the *Civil Liability Act 2002* (NSW) by the insertion of s 43A appears in Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 77-78. As to the legislative history of the section, see *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Limited* (2009) 168 LGERA 357, 431 per Campbell JA (NSW Court of Appeal).

73 This may be, at least in part, because it appears that the section was drafted hurriedly.

74 Ibid. 432 [358].

> [i]t can confidently be said that the standard that s 43A imposes is not the same as that by which the reasonableness is assessed for the purposes of deciding whether there has been a breach of a particular duty of care. I say that because it is clear that by enacting s 43A the legislature was intending to alter what would otherwise be the law by which the negligence of public authorities was decided.

The application of the standard of reasonableness required under s 43A can be observed from the NSW Court of Appeal case of *Firth v Latham*.[75] In those proceedings, the claimant lawyer appealed unsuccessfully against a finding that he should be personally liable for his client's costs against the defendant local government authority ("the Council") on the basis that he had "provided legal services to a party without reasonable prospects of success" in breach of the *Legal Profession Act 2004* (NSW).[76] At trial, the plaintiff (a minor) had joined the Council as second defendant in an action against a driver who, it was alleged, had been negligent in driving into and injuring her. She sought to adduce evidence which alleged that the traffic refuge upon which she had been standing had not been constructed in compliance with the relevant Australian Standard, nor had it been constructed in the manner in which it had been designed. The trial judge concluded, for other reasons, that the action against the Council had no reasonable prospects of success and accordingly awarded damages personally against the claimant. On appeal, Hoeben J (with whom Santow JA and McClellan CJ at CL agreed) upheld the trial judge's reasoning but also remarked in *obiter dicta* that there was "another consideration which leads to the same result":[77]

> The Council put its submission in this way: s 43A in essence provided a defence by requiring the plaintiff to establish that no local council having special statutory powers relating to the erection of traffic control devices could properly consider the act or omission to be a reasonable exercise or failure to exercise that power.
>
> That being so, it was submitted that there was never any evidence marshalled by the plaintiff which could have related to this issue and that there could never have been success against the Council without some evidence that it had departed from what Councils normally did in similar areas of responsibility. To the extent that there was evidence available on that issue it was

75 *Firth v Latham* [2007] NSWCA 40.

76 *Legal Profession Act 2004* (NSW) s 348(1).

77 *Firth v Latham* [2007] NSWCA 40 [60]. NB: the Court did not reach a concluded view whether "the matters raised by s43A were not matters of defence but rather matters which a plaintiff has to prove as a precondition to establishing liability on the part of a public or other authority for its exercise of a special statutory power.": Ibid. [64].

> against the plaintiff, … These submissions by the Council are clearly correct.

The Court of Appeal therefore construed the terms of s 43A as providing a defence to a public authority, placing the onus on a plaintiff to prove that *no* public authority possessed of the relevant statutory power could have exercised that power as the defendant authority did. In practice, this will be impossible in all but the most unusual circumstances. Furthermore, it will require in practice that any plaintiff who chooses to attempt to satisfy this heavy onus adduce evidence of the manner in which other public authorities would exercise the same power. I have argued elsewhere that a decision which is *Wednesbury* unreasonable should be so clear to a court that it should not require lengthy hearings to establish breach of the standard but rather be able to reach that conclusion intuitively.[78] If the application of s 43A is consistent with this proposition, it amounts less to a defence than to a practical exclusion of liability.

In the circumstances of *Firth v Latham*, the scope of the protection provided to the Council by s 43A was sufficient for the Court to uphold the decision that the plaintiff had no reasonable grounds for success against the Council, although *Firth v Latham* does not constitute precedent on this issue since the application of s 43A was "common ground".[79]

The limitations of using the *Wednesbury* standard in private law have been discussed above. Given that the *Wednesbury* standard is now entrenched in statute, at least in NSW, the courts will need to develop a coherent approach to the application of that standard. This may well be to apply *Wednesbury* other than it is applied in administrative law.[80] However, even if this is able to be squared with the intent of the legislature which passed s 43A, it is hard to see how the content of that standard will be determined. At the very least, it is certain to be highly forgiving to acts of public authorities which fall within the definition of a "special statutory power" at s 43A(2).[81] Indeed, in *Precision Products*, Allsop P (with whom Beazley and McColl JJA agreed) was prepared to accept that the subjective "honest belief"

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78 Greg Weeks, 'Litigating questions of quality' (2007) 14(2) *Australian Journal of Administrative Law* 76-85.

79 "In the Court below and in submissions before this Court it was accepted by the Council that s 43A provided a defence to the Council provided it could establish that the liability alleged against it was based on its exercise of a special statutory power. It was common ground that the construction of a pedestrian crossing did involve such an exercise. Although his Honour did not base his decision on it, the Council submitted that because of s 43A, the plaintiff had no reasonable prospects of success against the Council at the time the trial commenced.": *Firth v Latham* [2007] NSWCA 40 [60].

80 See Elizabeth Carroll, 'Wednesbury unreasonableness as a limit on the civil liability of public authorities' (2007) 15(2) *Tort Law Review* 77-92, 90.

81 See *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Limited* (2009) 168 LGERA 357, 434-435 [370]-374] per Campbell JA (NSW Court of Appeal).

of the Council officer responsible for the act in question was sufficient to establish that the Council had not been "so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of … its power" as required by s 43A(3).[82] At face value, this application of the test in s 43A(3) is even less restrictive on a public authority than the *Wednesbury* standard itself.

V CONCLUSION

The warnings of Mason J in *Heyman's Case* and McHugh J in *Crimmins* that public law standards are inappropriate to the task of ascertaining liability for damages in tort have not prevented the *Wednesbury* standard from becoming embedded in tort reform legislation. This is unfortunate, since that standard cannot have the same content in determining liability for negligence as it does in administrative law. Ultimately, it must fall to the legislature to define what is meant by an "act or omission … so unreasonable that no authority … could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power". As the *Civil Liability Act 2002* (NSW) stands, the inclusion of the *Wednesbury* standard creates confusion in the application of that doctrine both in public law and private law.

82 *Precision Products (NSW) Pty Limited v Hawkesbury City Council* (2008) 74 NSWLR 102, 142 [179] per Allsop P (NSW Court of Appeal).