If the title is any indication, 2014 was an interesting time to practice administrative law. This paper will review most of the key cases decided in the NSW and Commonwealth jurisdictions. Perhaps unsurprisingly, these cases stretch across the full gamut of the administrative law field and address several orthodox concepts, including the notion of unreasonableness (particularly those cases which have followed *Li* and *Singh*), relevant considerations, procedural fairness, reasons for decision, illogicality and the hearing rule. For that reason I will also take the opportunity to revisit some of the fundamentals. Possible implications for clients and areas for further development will also be identified in the accompanying oral presentation.

**Unreasonableness and “Life after Li”**

In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, Hayne, Kiefel and Bell JJ held at [63]:

> The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.

Legal unreasonableness can be a conclusion reached by a supervising court without identifying an underlying jurisdictional error. Their Honours held (at [76]):

> [I]t was said in *House v The King* that an appellate court may infer that in some way there has been a failure properly to exercise the discretion “if upon the facts [the result] is unreasonable or plainly unjust”. The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

To this must be added *Minister for Immigration and Border Protection v Singh* (2014) 139 ALD 50, where the Full Court said (at [45]):

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

Both of these cases concerned the legal unreasonableness of decisions of the Migration Review Tribunal to refuse to adjourn review applications to allow an applicant to attend to matters that might satisfy the criteria for the grant of a visa. Subsequent cases have extended this ground further afield.
This paper will not seek to review all the cases which came after *Li* and *Singh*. That task has been ably done elsewhere. However, reference will be made to a paper by Justice Barker who made the following points which practitioners should note:

- the ground of unreasonableness offers a flexible approach capable of responding to a range of administrative decisions;
- courts have a “margin of evaluation” when applying legal unreasonableness to a case;
- a contextual and fact-driven approach to legal unreasonableness is undertaken;
- courts will closely consider:
  - the decisionmaker’s reasoning process;
  - the scope and purpose of the statute conferring the discretion;
  - the outcome of the exercise of discretionary power; and,
  - in some circumstances, proportionality;
- there is no reasonableness “checklist”;
- unreasonableness may be applied to any statutory discretion (whether or not fundamental rights are affected);
- Australian courts have not adopted a variegated standard of legal unreasonableness.

Some of these points can be found in the following illustrations.

(i) *Li* and adjournment applications  

*Fiorentino v Companies Auditors and Liquidators Disciplinary Board* [2014] FCA 641 involved an application for review of a decision of the Companies Auditors and Liquidators Disciplinary Board (the Board). The Board had originally listed ASIC’s hearing application in October 2013. The hearing date was vacated on the plaintiff’s application. The matter was set down for hearing on a later date. On the eve of that hearing the plaintiff again applied for and was granted an adjournment. The hearing date was again vacated and the matter was set down for hearing on a third occasion. On the eve of that hearing date, the plaintiff again applied for an adjournment and the vacation of the hearing date on the basis that he was arranging legal representation. This application was refused.  
The Court concluded that there was no “serious injustice” or denial of procedural fairness resulting from the refusal of the adjournment application. Although it would have been to his advantage to have his lawyers appear, it did not follow that the plaintiff was incapable of presenting his case. The matter was not so complex that a person with the plaintiff’s education, training and experience could not deal with it without legal representation. That is the case even if some cross-examination was necessary.  
The Court considered whether the decision to refuse an adjournment was legally unreasonable, having regard to *Li* and *Singh*. The judgment contains a very helpful summary of the principles of legal unreasonableness as follows:

(a) The requirement of reasonableness flows from or is connected with an implied legislative intention that a discretionary power that is statutorily conferred must be exercised reasonably: *Li* at [29], [63], [88]; *Singh* at [43].  

(b) Legal unreasonableness can be a conclusion reached by a supervising Court after the identification of an underlying jurisdictional error in the decision-making process. Or it can be a conclusion reached without necessarily identifying another jurisdictional error: *Li* at [27]-[28], [72]; *Singh* at [44]. In the

---


4 *Fiorentino v Companies Auditors and Liquidators Disciplinary Board* [2014] FCA 641, [76].
latter case unreasonableness may be taken to be unreasonableness from which an undisclosed error may be inferred: *Li at* [27], [68]; *Singh at* [44].

c) Unreasonableness can be inferred where the decision appears to be arbitrary, capricious, without common sense or “plainly unjust”: *Li at* [28], [110]; *Singh at* [44].

d) In those circumstances, where reasons are given, the supervising court is concerned with seeing if there is an evident, transparent and intelligible justification within the decision-making process: *Li at* [105]; *Singh at* [44]-[45]. The intelligible justification must generally lie within the reasons given by the decision-maker: *Singh at* [47].

e) Regard can also be given to the outcome of the decision: whether the “decision falls within a range of possible, acceptable outcomes which are defensible in respect of fact and law”: *Li at* [105] (Gageler J quoting *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 220-221); *Singh at* [44]-[45].

(f) The legal standard of reasonableness and the indicia of legal unreasonableness will need to be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case: *Li at* [67]; *Singh at* [48].

(g) If, by reason of the refusal of an adjournment application, an applicant is not provided with an opportunity to present his or her evidence, it might be concluded that the hearing contemplated did not take place: *Li at* [62]; *Singh at* [51]-[52].

(h) The overriding duty of the Tribunal to review a decision may require the Tribunal, acting reasonably, to consider the exercise of the discretion to adjourn in a particular case. A failure to adjourn can, in some circumstances, be so unreasonable as to constitute a failure to review: *Li at* [100]-[102].

(i) It cannot be suggested that the Tribunal is under an obligation to afford every opportunity to an applicant for review to present his or her best possible case or improve upon the evidence. It may decide in an appropriate case that “enough is enough”: *Li at* [82].

(j) Properly applied, a standard of legal reasonableness does not involve substituting a Court’s view as to how a discretion should be exercised for that of a decision-maker: *Li at* [30], [66]; *Singh at* [47]. The test of legal unreasonableness is stringent: *Li at* [113].

The Court applied these principles to the decision at hand.\(^5\) It could not be concluded that the Board’s decision to refuse the adjournment application was legally unreasonable. The Board’s reasons disclosed an evident and intelligible justification. The reasons given by the Board were as follows:

- the hearing had already been substantially delayed, and there was a public interest in hearing complaints expeditiously;
- it was unacceptable to adjourn proceeding to a “date to be fixed” to accommodate the plaintiff’s foreshadowed action to compel his insurer to indemnify him;
- there was no certainty that the plaintiff’s action against his insurer would be successful and that he would ultimately secure legal representation. For the previous adjournment application, everyone had proceeded on the assumption that the insurers would be funding the plaintiff’s legal representation. A short adjournment to a fixed date was allowed at that time to ensure that his lawyers were able to properly prepare;
- whilst the Board accepted that it would be “beneficial” for the plaintiff to be legally represented, it did not accept that he would not be able to adequately present his case unrepresented. The plaintiff had already received significant assistance from his existing legal representatives in preparing the matter for hearing. Furthermore, the plaintiff never claimed that he was unable to present his case if unrepresented. Indeed, he initially intended to represent himself leading up to the first hearing date. At its highest, the plaintiff’s evidence was that he would be “disadvantaged” if not given an adjournment; and
- the plaintiff had applied at the “eleventh hour” when he should have done so a month earlier when he became aware of the insurer’s changed position. This had resulted in disruption and prejudice to the Board and its members.

For these reasons the plaintiff’s challenge failed.

---

\(^5\) Ibid, [78]-[94].
(ii) Li and taking witness evidence
The Court in *CZBH v Minister for Immigration and Border Protection* [2014] FCA 1023 held that the Refugee Review Tribunal (the tribunal) had exercised its discretion under s 426(3) *Migration Act 1958* (Cth) unreasonably. The applicant husband and wife claimed to fear persecution in Pakistan arising from their marriage. The appellants’ solicitor gave notice under s 426(2) of the *Migration Act 1958* (Cth) for the tribunal to obtain oral evidence from two witnesses. Section 426(3) of that Act empowers the tribunal to obtain oral evidence from witnesses but does not oblige it to.

The proposed witnesses were the father of each applicant. A very brief description of their evidence and its relevance was also provided, as well as telephone numbers at which the fathers could be contacted. Before the hearing, the legal advisor provided to the tribunal a written submission accompanied by several documents, including statements from each father.

At hearing the tribunal noted the applicant’s request to take telephone evidence from overseas. At the end of the hearing, the tribunal declined to obtain oral evidence by telephone from the fathers (located in Pakistan and South Africa). However, it said that if the applicants wanted the tribunal to consider evidence from their fathers, then they should get them to put something in writing and submit it to the tribunal when making a final submission. In other words, the tribunal appeared to be unaware that the applicants had already submitted statements from their fathers.

In its reasons for decision, the tribunal indicated that it had considered the statements from the applicants’ fathers which essentially supported the applicants’ claims. It asserted that at the hearing the advisor has been told that the tribunal had decided not to telephone the parents overseas because it had their written submissions. However, given a finding that the applicants’ claims were contrived to enhance their protection visa applications, the supporting evidence was similarly contrived.

At first instance before the Federal Circuit Court the primary judge noted that the hearing was less than optimal. However, any failure had been later remedied by the tribunal’s consideration of the statements.

Upon appeal the tribunal’s decision not to obtain the fathers’ oral evidence was found to be legally unreasonable. 6 *Li and Singh* were both considered. The Court first noted that the tribunal had initially provided no reasons, whether orally at the hearing or later in writing, for its decision to decline to take the fathers’ oral evidence. It acknowledged that the tribunal was not obliged to provide reasons. However, the fact that it did not leave the exercise of the power unexplained. 7

It was then necessary to examine whether there was any evident and intelligible justification for its decision. 8 No such justification for the tribunal’s decision was discernable in the circumstances. 9 The Court noted that the applicants had asked the tribunal to obtain their fathers’ oral evidence in the expectation that it would corroborate their written statements. 10

There was no obvious practical difficulty for the tribunal to obtain oral evidence from the applicants’ fathers. Both were immediately contactable through the numbers provided. An interpreter was available. The fathers’ oral evidence was relevant and potentially important because acceptance would have bolstered the applicants’ credibility. 11

---

6 *CZBH v Minister for Immigration and Border Protection* [2014] FCA 1023, [63].  
7 Comparing *Kaur v Minister for Immigration and Border Protection* [2014] FCA 915, [110].  
8 *CZBH v Minister for Immigration and Border Protection* [2014] FCA 1023, [53].  
9 Ibid, [61].  
10 Ibid, [57].  
11 Ibid, [59].
(iii) Li and the merits of a decision

Jones v Office of the Australian Information Commissioner [2014] FCA 285 illustrated two salient points. First, the conditions upon which a statutory discretion is exercised are, unsurprisingly, determined by the terms of the legislation. Second, reasonableness is not a basis for revisiting the merits of a decision. The merits of administrative action are for the repository of the relevant power and, subject to political control, for the repository alone.

The applicant in that case had sought an order of review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act) of a decision of the Australian Information Commissioner (the respondent). The respondent had exercised a statutory discretion under s 41(1)(a) of the Privacy Act 1988 (Cth) (the Privacy Act) to cease further investigation of a complaint made by the applicant under the Privacy Act. The applicant had complained that a medical practitioner had interfered with her privacy by disclosing her medical records to officers of the Queensland Police Service. The respondent had concluded that the practitioner had not interfered with her privacy because the disclosure was permitted by National Privacy Principle 2.1(h)(i) (that is, a reasonable belief that disclosure was reasonably necessary for the investigation of a criminal offence by an enforcement body).

Citing Li, the Court indicated that, when determining whether a statutory power had been abused, unreasonableness was a legal standard indicated by the true construction of the statute. Unreasonableness was a conclusion which may be applied to a decision which lacked an evident and intelligible justification. An inference of unreasonableness may be objectively drawn even where a particular error in reasoning cannot be identified. Unreasonableness would be demonstrated where “no sensible authority acting with due appreciation of its responsibilities” would have so decided. The exercise of an administrative discretion by the respondent required the Commissioner to be satisfied, according to the rules of reason, that the specific requirements of the express statutory conditions were met. However, a requirement of legality that a decision be reached according to the rules of reason - or reached reasonably or not unreasonably reached - was not a vehicle for challenging a decision made in contended error of law and beyond power simply because disagreement was found with the evaluative judgment of the decisionmaker.

To summarise, some of the important practical considerations for applying Li are:

- Were reasons given?
- Does the decision lack an evident and intelligible justification?
- What is the scope and purpose of the statute conferring the discretion?
- What were the circumstances of the decision?
- Did the outcome of the decision amount to an obviously disproportionate response?

Deers, Lions, Relevant Considerations and Other Wild Animals

The following propositions are relatively uncontroversial:

- the ground of failure to take into account a relevant consideration is only made out if there has been a failure to take into account a matter the decision-maker is bound to take into account;
- the matters that a decision-maker is bound to consider are determined by the construction of the statute conferring the discretion. If the statute expressly specified

---

that certain matters must be taken into account, it is a question of construction as to whether those matters are exhaustive or merely inclusive;

• not every failure to take into account a matter that a decision maker is bound to consider will impugn a decision. A matter may be insignificant in the sense that it could not have materially affected the decision;
• in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decisionmaker to accord such weight to those considerations as the decision-maker considers appropriate.14 However, a court may set aside an administrative decision where the decisionmaker fails to give adequate weight to a relevant factor of great importance.

(i) Relevance and Purpose
When considering relevant and irrelevant considerations, it is also necessary to consider the purpose for which a consideration is said to be relevant. A failure to do so may lead a decisionmaker into error by asking itself the wrong question.
An illustration is Duffy v Da Rin [2014] NSWCA 270. Section 269(1) of the Local Government Act 1993 (NSW) provides that a person is a resident if they are entitled to enrol on a roll for an electoral district under the Parliamentary Electorates and Elections Act 1912 (NSW) and their “place of living” is within the area. To be enrolled one had to be a “resident” of the ward or area: s 266(1)(a). The appellant in that case, Kevin Duffy, began staying at his son’s home in Orange in order to run for election as a councillor on Orange City Council. However, he continued to regularly visit his previous residence in Borenore which was outside the boundaries of Orange City Council. The respondent alleged that the appellant could not stand and be elected as a councillor because he was not entitled to be enrolled as an elector as he was not a resident.

The Court first noted the conventional view is that if matters to which regard is had do not fall within the category of those prohibited by statute, then they will be categorised as either mandatory or permissible considerations.15 However, the Court then observed that:

“considerations” have different qualities which are not recognised by a simple classification as permissible, mandatory or prohibited. To identify a lion and a deer as wild animals and place them together in a zoo is unlikely to provide a satisfactory outcome (at least for the deer). Two considerations may each be relevant, but may pull in opposite directions. A particular consideration may be relevant to one aspect of the reasoning process, but not to other aspects. For example, in sentencing an offender a prior criminal record is relevant, but may only be used to diminish a plea for leniency, not to increase an otherwise appropriate sentence for the particular offence. Thus a consideration which is relevant for a specific purpose or in respect of a particular issue only may be impermissibly used for a different purpose or with respect to another issue. Such misuse could constitute an error of law.

The Court first stated that the impugned considerations taken into account by the Administrative Decisions Tribunal (the tribunal) were not irrelevant for all purposes. Its error was to accord particular significance to connections with the Borenore property as diminishing the significance of physical occupation of the premises at Orange. The appellant was entitled to rely on his physical occupation of the Orange property.16 The conclusion of

16 The Court reasoned that a member of university staff on sabbatical leave or a member of the public service on secondment, in either case for a period of a few months, might well be entitled to be enrolled for a local government election despite the fact that each intended to return to his or her permanent place of living and employment within weeks after the election. It additionally found persuasive the point that a person intending to
the Court, however, was that ultimately the tribunal had not undertaken the statutory exercise required of it. It appeared to have accepted that both the Borenore and Orange premises constituted possible places of living and then determined whether the connections with one either outweighed connections with the other, or were sufficiently substantial to prevent the other constituting a place of living. The Court clarified the nature of the error by indicating that “[t]he use to which the factors, while not irrelevant for all purposes, were put by the Tribunal indicates that it misdirected itself as to the precise question it was required to determine.”

(ii) Looking for the “focal point”
A statutory scheme may involve single factors or limited discrete matters which have to be considered in the decisionmaking process. One way of differentiating between mandatory relevant considerations is to consider whether there is a “focal point” or “fundamental element”.

The notion of a “fundamental” or “focal” consideration was introduced into the field of relevant considerations in *R v Hunt; Ex Parte Sean Investments Pty Ltd* (1979) 180 CLR 322. In that case a nursing home proprietor had applied for approval for an increase in fees charged for care in a nursing home it conducted. Under s 40AA(7) of the *National Health Act 1953* (Cth), the head of the relevant department, in determining an application for a fees increase, was to “have regard to costs necessarily incurred in providing nursing home care in the nursing home”. A question arose as to the meaning of this phrase. Mason J stated that:

> When sub-s. (7) directs the Permanent Head to “have regard to” the costs, it requires him to take those costs into account and to give weight to them as a fundamental element in making his determination.

The expression “focal point” or “fundamental element” seeks to emphasise the requirement to consider a statutorily prescribed matter (eg “costs necessarily incurred”) upon which a determination was to be made. The relevant mandatory consideration is not a subsidiary consideration but instead a factor to be placed at the forefront of the decisionmaker's consideration. The language may be appropriate where limited factors or discrete requirements are specified in the legislation.

The concept was recently revisited in *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105. In that case the Planning Assessment Commission, as delegate to the Minister for Planning and Infrastructure, granted approval to an application for a major infrastructure project by Warkworth Mining Limited (Warkworth) under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (the EPA Act). Bulga Milbrodale Progress Association Inc (the Association) appealed to the Land and Environment Court.

Preston CJ re-exercised the statutory power of the Minister and disapproved the project application. Warkworth appealed.

The judgment makes several useful points. Of present interest is the conclusion that, although s 75J(2) of the EPA Act made consideration of an environmental assessment report

---

17 See also *Zhang v Canterbury City Council* [2001] NSWCA 167.
18 *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105, [217], [231].
19 Proceedings in this jurisdiction are to be brought with as little formality as possible: *Land and Environment Court Act 1979* (NSW), s 38(1). Section 38(1) did not abrogate the fundamental requirements of procedural fairness: *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105, [38].
20 First, if evidence was required to meet an issue, then the party asserting the factual basis for the issue bore the responsibility for adducing the necessary evidence. The failure to adduce relevant evidence did not give rise to a failure to afford procedural fairness: ibid, [112]. Second, when engaged in balancing a number of relevant
mandatory, it did not operate to require the report to be a “fundamental element” or “focal point” in the decisionmaker’s consideration. There was no requirement for prima facie effect to be given to the recommendations in the report, or for the decisionmaker to articulate why those recommendations should not be followed. The obligation with respect to the report was simply an obligation to consider. Although the report was important, acceptance of the recommendation depended upon a myriad of factors, including (for the Minister) policy considerations which may point in a different direction and (for the court) the cogency of evidence and expert opinions tested by cross-examination, or where matters took on a different emphasis given other evidence.

**Procedural fairness: some illustrative circumstances**

One classic formulation is as follows:

A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise...The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision-making is not to be clogged by enquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made.

Whether procedural fairness has been afforded necessarily requires assessing fairness. How unfairness is revealed or demonstrated depends on the circumstances. Sometimes these circumstances are clear cut.

In *Reznitsky v Director of Public Prosecutions (NSW)* [2014] NSWCA 79 the plaintiff sought relief under s 69 of the *Supreme Court Act 1970* (NSW) in respect of a decision made by a District Court judge. He claimed that he was denied a fair opportunity to put to the judge an explanation as to why he had failed to appear at hearing. When he sought to make further submissions he was told to “just sit down”.

Procedural fairness mandated that the applicant be provided with the opportunity to fairly put his case. That opportunity was denied to him and he was treated in an arrogant, rude and inappropriate manner. The Court concluded that the applicant was contumeliously denied procedural fairness. He was simply not heard and therefore there was no “hearing” within the meaning of s 22(3) of the *Crimes (Appeal and Review) Act 2001* (NSW).

Procedural fairness was also found to have been denied in *The Owners - Strata Plan No. 70030 v Decon Australia Pty Ltd* [2014] NSWSC 347 as a result of the exercise of the power of dismissal. The plaintiff was an owners corporation established under the *Strata Schemes Management Act 1996* (NSW) as the owner of the common property of a home unit development at Narrabeen. It challenged the jurisdiction of the Consumer, Trader and Tenancy Tribunal (the tribunal) to make an order striking out proceedings commenced under s 48K of the *Home Building Act 1989* (NSW) concerning alleged defective building work. It requested that the strike out application and an application for transfer proceedings to the Supreme Court be listed for hearing. Because the plaintiff’s claims exceeded the tribunal’s jurisdictional limit, it no longer had jurisdiction to deal with the application such that the proceedings should be vacated and transferred to the Supreme Court. Over the plaintiff’s objections, the hearing proceeded on the basis that both applications would be heard and

---

22 Ibid, 583 (Mason J).
determined, with the parties’ submissions on the dismissal application being heard first. However, the tribunal exercised the power to dismiss the proceedings without hearing the parties on the transfer application.

The Court concluded that there was no question that procedural fairness was denied by the course pursued at hearing. The transfer application had not been heard and determined before the matter was dismissed. The transfer application had been dismissed without the jurisdictional issue being resolved and each party being heard on the transfer application. This involved an obvious departure from what was required of the tribunal under the statutory scheme. The tribunal was required to act according to equity, good conscience and the substantial merits of the case (s 28, Consumer, Trader and Tenancy Tribunal Act 2001 (NSW)). The circumstances which had arisen required it to consider and resolve whether it had the jurisdiction to dismiss proceedings which it had purported to exercise. Justice demanded that the tribunal not depart from the course on which it first embarked: that is, hearing the parties on both applications before determining either of them.  

(i) Medical assessments

The content of the obligation by a review panel to accord procedural fairness when reviewing a medical assessment under the Motor Accidents Compensation Act 1999 (NSW) was considered in Frost v Kourouche [2014] NSWCA 39. It was common ground that the panel was obliged to accord procedural fairness to the defendant. The Court accepted that the “common law” usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. It was also common ground between the parties that the content of the obligation upon the panel to accord procedural fairness extended to confronting an applicant with inconsistencies and providing them with an opportunity to respond.

The court concluded, following well-known authority, that, ultimately, the question of the content of the obligation to accord procedural fairness was one of practical justice.

The primary judge’s conclusion that there had been a denial of procedural fairness was found to be erroneous. When the review panel determined to re-examine the defendant, the possibility that all or some of its members might disbelieve her history was real. The possibility of an adverse conclusion would not have taken her by surprise. She was unable to identify anything which would be put by her which would avoid injustice or ensure fairness.

(ii) Refusing adjournment applications

23 The Owners - Strata Plan No. 70030 v Decon Australia Pty Ltd [2014] NSWSC 347, [66].

24 Plaintiff S10/2011 v Minister for Immigration and Citizenship (2012) 246 CLR 636, [97]. Gummow, Hayne, Crennan and Bell JJ placed quotation marks around “common law” to explain that it was unproductive and a false dichotomy to ask whether the obligation to accord procedural fairness was a common law duty or an implication from statute, once it is observed that the principles and presumptions of statutory construction were part of the common law.

25 “Procedural fairness requires a decision-maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power. The decision-maker must also advise of any adverse conclusion which would not obviously be open on the known material. However, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision”: Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594, [9] (French CJ and Kiefel J).

26 Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1, [37] (Gleeson CJ).

27 Frost v Kourouche [2014] NSWCA 39, [31]-[48]. Frost was considered in Sadsad v NRMA Insurance Ltd [2014] NSWSC 1216 – see text infra.
Procedural fairness was denied in *AEA Constructions Pty Ltd v New South Wales Civil and Administrative Tribunal and Ors* [2014] NSWSC 911. The New South Wales Civil and Administrative Tribunal (NCAT) decided not to vacate a hearing for the purpose of allowing the plaintiff to obtain an expert report. It was not prepared to stand the matter down and waste another day of its time. NCAT expressly took into account the impact of an adjournment on its resources, its busy lists, the competing claims of other litigants, the working of the list system and the plaintiff's fault in not obtaining the expert’s report.\(^\text{28}\) However, NCAT did not indicate that it was prepared to hear the expert over the telephone.

Importantly, NCAT has not referred to s 35(a) of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) which provides that “the Tribunal must ensure that each party in any proceedings is given a reasonable opportunity to call or give evidence and otherwise present the party's case.” This section was described as a fundamental consideration in the decisionmaking process which had not been properly considered. Nor had s 35(a) been mentioned in discussions with the parties. The Court considered that, if s 35(a) has been considered, a different decision may have been made.

Consideration was also not given to the consequences to the plaintiff if the adjournment application had been refused. Determining the substantive application centred upon expert evidence such that refusing the adjournment was fatal to the plaintiff's case.

(iii) Conducting a hearing without a party

Can proceedings be conducted in the absence of a party, in circumstances where there had been prior non-compliance with a procedural direction by the other side? The question arose in *Boensch v Donovan Electrical Services Pty Ltd* [2014] NSWSC 1297. The plaintiff had failed to appear, the case proceeded and he was ordered by the Consumer, Trader and Tenancy Tribunal (the tribunal) to pay the defendant for the amount due for the supply and installation of two solar receptors at his premises. The tribunal had previously made a procedural direction concerning the service of evidence by each party, for which the defendant had not complied by the time of the hearing.

The Court identified s 35 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) (repealed), which imposed an obligation on the tribunal to provide “a reasonable opportunity” to the parties to present their case and make submissions in relation to the issues. Section 35, consistent with the general law, only required a reasonable opportunity. The Court indicated that the minimum requirement of procedural fairness depended not only on the circumstances of the case but also the statutory regime.

In the event the plaintiff had not established that the tribunal had represented that the hearing would not proceed, or no adverse order be made, unless the defendant complied with the procedural direction.\(^\text{29}\) The procedural direction could not be treated as a promise or representation; to do so would be inconsistent with the terms and breadth of its statute. The tribunal could not be bound to enforce its procedural directions in a particular way to the advantage of a particular party.

Additionally of note was that the Court accepted that, in some limited statutory circumstances, natural justice may require a tribunal, especially one whose procedures were inquisitorial in nature, to make its own inquiries.\(^\text{30}\) *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 83 ALJR 1123 at [25] was quoted:

---

\(^{28}\) A finding that the plaintiff or his solicitor was at fault in not obtaining the expert report prior to the hearing did not by itself justify refusing the adjournment application: *AEA Constructions Pty Ltd v New South Wales Civil and Administrative Tribunal and Ors* [2014] NSWSC 911, [65].

\(^{29}\) *Boensch v Donovan Electrical Services Pty Ltd* [2014] NSWSC 1297, [47]-[48].

\(^{30}\) Ibid, [50].
It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction.

The Court accepted that a party had a prima facie right to have proceedings heard in its presence. It suggested that, where a court or tribunal had sufficient reason to suspect that a party was absent for good cause, the matter should be stood down or stood in the list to enable appropriate inquiries to be made before deciding whether to proceed. However, that was not this case. The tribunal had duly notified the plaintiff that the hearing would proceed on a specified date at a specified time and place and that it was statutorily empowered to proceed in his absence if he did not attend.

(iv) Be aware of “unconscious effects”

The appellant in *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123 was found to have been denied procedural fairness by the Administrative Appeals Tribunal (the tribunal). The tribunal had referred in its reasons to an academic article by Dr Nevotti (the Nevotti article), to a text book “Australian Sentencing: Principles and Practice” by Edney and Bagaric (the Edney/Bagaric textbook) and two decisions of the High Court of Australia (the High Court decisions). This material was not referred to at hearing. The tribunal had referred to these materials on its own initiative after having reserved his decision.

The Nevotti article was entitled “The Case Against the HCR-20”. It was a critique of HCR-20, a tool for the psychological appraisal of the risk of future violent offending, against which the appellant had claimed he presented a low risk. The appellant had also claimed that a prior period of imprisonment would have a salutary deterrent and rehabilitative effect upon him. The Court was satisfied that the tribunal had indirectly used the conclusions made in criminological literature summarised in the Edney/Bagaric textbook in a manner adverse to the appellant. The fact that the tribunal referred to the discussion concerning the efficacy of sanctions as a deterrent and rehabilitation, as well as the number and nature of passages quoted from the textbook, indicated that it regarded this material as casting doubt on the appellant’s claims. This was held to be directly relevant to the tribunal’s assessment of the risk of the appellant engaging in further violent conduct if permitted to remain in Australia.

The “unconscious effect” of the Nevotti article was also considered. The Court was satisfied that the Nevotti article was credible, relevant and significant information which the tribunal had considered prior to making its decision. It was capable of having a subconscious effect on the tribunal’s mind and to prejudice it, albeit unconsciously, against acceptance of an opinion proffered by the appellant’s expert.

By way of a noteworthy aside, the judgment also suggested several bases for distinguishing the *Goldie* line of authority on the interpretation of s 500(6H), *Migration Act 1958* (Cth).

---

31 Ibid, [52].
32 *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123, [55].
33 Ibid, [69], [71].
34 Ibid, [101]. Section 500(6H), *Migration Act 1958* (Cth) requires the tribunal not to have regard to “information presented orally” unless the information was first set out in a written statement given to the Minister at least 2 business days before the hearing. The purpose is to prevent applicants from changing the nature of the case, catching the Minister by surprise and forcing the tribunal into adjourning the proceedings: *Goldie v Minister for Immigration and Multicultural Affairs* [2001] FCA 1318. However, an applicant’s response to a matter raised by the tribunal of its own initiative is not presented “in support of the person’s case” and therefore a matter to which the tribunal could not have regard. Furthermore, a distinction may be made between evidence and submissions concerning the effect of evidence. Thus it was not appropriate to regard the word “information” in s 500(6H) as encompassing the submissions which an applicant may wish to make in
Deterrence as the only reason for a decision

Two judgments delivered in 2014 are noteworthy for concluding that considerable practical injustice occurred in a course pursued by the Minister for Immigration and Border Protection. The Minister had failed to inform applicants that general deterrence was a relevant or central consideration in his decision. *NBNB v Minister for Immigration and Border Protection [2014] FCAFC 39* followed and adopted much of what was said in *NBMZ v Minister for Immigration and Border Protection [2014] FCAFC 38*.

In *NBNB*, each applicant:

- was (with one exception) Afghani;
- had arrived at Christmas Island;
- was held in immigration detention;
- had been found to be a refugee in respect of whom Australia owed protection obligations under the Refugees Convention;
- was provided with Direction No. 55 (which addressed visa cancellation and refusal) and against which their position would be assessed;
- was refused a protection visa by reason of s 501, *Migration Act 1958* (Cth) because they did not pass the “character test” following their conviction for an offence committed while in immigration detention for which they had received identical punishment; and
- posed no future risk to the Australian community.

The Minister’s reasons for decision in each case were practically indistinguishable. Buchanan J concluded that the Minister had not properly addressed the legal consequences of his decisions, being that each applicant:

- must be removed from Australia as soon as reasonably practicable;
- but faced indefinite detention;
- notwithstanding that each applicant was a refugee, such that refusing the protection visa represented a refusal to honour Australia’s protection obligations.

Importantly, the Minister had not made an individual assessment of each application. Instead, the Minister’s purpose in refusing the visa was to provide a “disincentive” to others in detention from engaging in criminal conduct. Buchanan J considered that it was not putting the matter too strongly to state that the issue of general deterrence was the only reason given.

Allsop CJ and Katzmann J concluded that the Minister failed to take into account the mandatory consideration of the legal consequences of the decision being made in the context of Australia’s *non-refoulement* obligation, namely indefinite detention. Their Honours agreed with Buchanan J that each applicant had been denied procedural fairness. None was informed about the central place of deterrence as an issue or likely issue in the decision to be made. Each was unintentionally misled by what they were provided with by way of material they were invited to address. In the circumstances each was denied an opportunity to be heard on the question of deterrence. If a person was not informed of an important aspect of a case he or she had to meet, then, subject to some exceptions, unfairness and practical injustice would have been demonstrated.

---

respect of evidence before the tribunal. See also *SZRTN v Minister for Immigration and Border Protection [2014] FCA 303*, [70] where the Court approved suggestions that legislative policy allowed examination in chief to explain or amplify material in the written statement and for that information to be tested by way of cross-examination.

35 eg where the denial of procedural fairness could not possibly affect the outcome: *Stead v State Government Insurance Commission [1986] HCA 54*. 

---

12
Interestingly, this conclusion stood notwithstanding that each applicant had not tendered any evidence as to what submissions would have been made in response. The Minister had submitted that, even if obliged to tell the applicants that he would or might consider deterrence, the applicants had not identified what they would have said had they been given the opportunity to comment. Allsop CJ and Katzmann J concluded that there was no principle of law to be derived from Lam\textsuperscript{36} that in all cases an evidential onus was placed on an applicant to prove what she or he would have submitted to a decision-maker if she or he had known of a consideration to be taken into account, or to prove that such material would have made a difference.

(vi) \textit{Giving no weight to exhibits}

Had the Administrative Appeals Tribunal (the tribunal) denied the applicant procedural fairness by giving no weight to particular exhibits? That question was considered in \textit{SZRTN v Minister for Immigration and Border Protection} [2014] FCA 303.\textsuperscript{37} In its reasons for decision, the tribunal stated that “no weight” would be given to written statements and statutory declarations from friends of the applicant and members of his extended family who did not give oral evidence (Exhibits A5 - A13). The Minister had not objected to the tender of those statements or sought to cross-examine the writers. The applicant contended that it was a denial of procedural fairness to give no weight to a witness statement merely because the witness did not give oral evidence, in circumstances where the witness was not required for cross-examination. Furthermore, the tribunal had arbitrarily rejected probative material.

The Court concluded that the tribunal’s treatment of the exhibits did not deny procedural fairness. The applicant was taken to have been aware of the deficiencies in the written statements. The opportunity to present his case was not impeded or curtailed by the Minister’s attitude or the tribunal’s silence. The tribunal did not find that the witnesses were dishonest. The mere fact that the documents went into evidence without objection or without the authors being required for cross-examination said nothing about the strength of that evidence.

Crucially, the tribunal did not disregard the evidence, which may have resulted in jurisdictional error.\textsuperscript{38} Instead, having considered it, the tribunal decided that it was not entitled to any weight. That conclusion was open to it. The tribunal’s conclusion as to the weight to be attached to the evidence contained in the statements was “an obvious and natural evaluation of that material”.

(vii) \textit{A reminder: natural justice ≠ challenging fact finding}

The application considered in \textit{TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd} [2014] FCAFC 83 was described as a disguised attack on the factual findings of arbitrators dressed up as a complaint about natural justice. What is novel is the consideration of natural justice within an international arbitral context, and the extent to which unfairness could be the prerequisite for the setting-aside or non-enforcement of an international arbitral awards. However, the case offers a sobering lesson for practitioners in the local context.

The appellant sought the setting-aside and non-enforcement of an arbitral award under Articles 34 and 36, UNCITRAL Model Law on the basis that there was a breach of the rules of natural justice; hence the award was contrary to Australian public policy under s 19,

\textsuperscript{36} \textit{Re Minister for Immigration and Multicultural Affairs; Ex parte Lam} (2003) 214 CLR 1.

\textsuperscript{37} The applicant also challenged the tribunal’s comment that he had a “largely itinerant history”. However, this description was an inference from the applicant’s own evidence and not an issue on which the decision was likely to turn.

\textsuperscript{38} See eg \textit{Minister for Immigration and Citizenship v SZRKT} [2013] FCA 317.
International Arbitration Act 1974 (Cth). The asserted breaches of the rules of natural justice arose from the making by the arbitrators of three central factual findings said to have been made in the absence of probative evidence, and were findings upon which the appellant was said to have been denied an opportunity to present evidence and argument.

The Court’s approach were readily stated upfront:39

If the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly.

An international commercial arbitration award will not be set aside or denied recognition or enforcement under Arts 34 and 36 of the Model Law (or under Art V of the New York Convention) unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness. The demonstration of real unfairness or real practical injustice will generally be able to be expressed, and demonstrated, with tolerable clarity and expedition.

The Court did not doubt that at common law it was an error of law to make a finding of fact for which there is no probative evidence.40 It accepted without the slightest hesitation that the making of a factual finding by an arbitral tribunal without probative evidence may reveal such a breach, particularly when the fact was critical, was never the subject of the parties’ attention and where the finding occurred without the parties having an opportunity to deal with it. Fairness was not an abstract concept, but essentially practical. The concern of the law was to avoid practical injustice. Fairness was normative, evaluative, context-specific and relative.

The Court also considered the requirement for a fair hearing in an international commercial arbitration context. A demand for fairness and equality was at the heart of the balance between the supervisory jurisdiction of national courts and party autonomy. This was not reflected in mechanical technical local rules. Formalism was not the essence of the matter; fairness and equality were. The real question was whether an international commercial party had been treated unfairly or had suffered real practical injustice. How unfairness was revealed or demonstrated in any particular case would depend on the circumstances. No international arbitration award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness had been breached.

The Court moreover accepted the “no evidence rule”, that is, the requirement to base a decision upon probative evidence. A person bound to act judicially was required to “base his [or her] decision” upon material which tended logically to show the existence or non-existence of facts relevant to the issue to be determined.

The Court also made several pertinent comments concerning complaints about breaches of the rules of natural justice based on the “no evidence rule”. Unfairness or practical injustice in the conduct of international commercial arbitration should be able to be expressed shortly and demonstrated tolerably shortly. It will not be demonstrated as a result of a detailed factual analysis of evidence regularly and fairly brought forward involving asserted conclusions of facts different to those reached by the arbitrator.

The appellant’s submissions challenged the weight and value of particular evidence. The evidence was said not to have “probative value” and the placement of weight was a failure of “the tribunal’s fact finding and fact interpretation”, thus leading to a “reasoning failure”. Such expressions and analysis could not demonstrate a breach of any rule of natural justice or

39 TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83, [54]-[54].
40 Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32.
an error of law. They reflected complaints about factual findings and no more. The appellant’s criticism reduced to a contest about the evaluation of evidence. The primary judge had concluded that the arbitrators did not engage in guesswork or speculation. The evidence revealed that the appellant had received a scrupulously fair hearing in a hard fought commercial dispute. No rule of natural justice had been breached.

**Reasons for decision**

A duty to give proper reasons is a legal incident of the judicial process. Nevertheless, there is no general law principle that a body exercising discretionary administrative powers must give reasons to enable persons affected by the exercise of the power to bring proceedings for judicial review.

These points were recently revisited in *Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] NSWCA 112. A correctional officer at Grafton Correctional Centre was threatened with dismissal after disciplinary charges were laid against him and two other officers. The charges related to misconduct in allowing a prisoner apparently bashed by a cell-mate (and who later died) to crawl to an adjacent cell, failing to promptly obtain medical assistance, failing to investigate and failing to establish a crime scene. The Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales (the Union) commenced proceedings in the Industrial Relations Commission to challenge the threatened dismissal. These proceedings found that dismissal would be harsh, unreasonable or unjust and the appropriate penalty was demotion. The employer successfully appealed to the Full Bench of the Industrial Relations Commission. The Union sought judicial review.

Three questions were considered.

(a) **Is there an obligation to provide reasons?**

The Court first observed that a challenge to the adequacy of reasons presupposed a legal obligation to provide reasons of a particular quality. The *Industrial Relations Act 1996* (NSW) contained no express duty for the Full Bench to provide reasons. While the Commission was required to comply with the principles of procedural fairness, it was clear that procedural fairness did not entail an obligation to give reasons.

The starting point, following *Osmond’s case*, was a recognition that in Australia there is no free-standing common law duty to give reasons for making a statutory decision. However, if a decisionmaker does not give any reason for his or her decision, then a Court may be able to infer that he or she had no good reason. The exercise of the statutory power to make a decision is held invalid, not because of a failure to state the reasons for making the decision, but because of a failure to make the decision according to law.

The Court considered that the nature of the jurisdiction may imply an obligation to give reasons for a decision. To reach this conclusion it followed the reasoning in *Vegan*. The Court in that case held that an Appeal Panel established to determine medical disputes under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) was obliged to give reasons for its decision. This was because:

- the assessment of permanent impairment undertaken by the Appeal Panel involved applying a statutory test, by which legal rights between employees and employers were determined. Accordingly it was an exercise in the nature of a judicial function, whatever the precise name or status of the Appeal Panel;

---

41 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 666-667.
42 *Campbelltown City Council v Vegan* [2006] NSWCA 284, [109], [116].
the legislation imposed on the medical specialist, from whom an appeal could be taken to the Panel, an obligation to give reasons; and
the Act allowed for further assessments to be ordered by a Court or the Commission, which was a power which would be hampered if no reasons were available for the certificate given by the Appeal Panel.

For the present case, there were several factors from which it could be inferred that Parliament intended that the Full Bench was obliged to give reasons for its decisions in unfair dismissal cases:

- the nature of the jurisdiction (whether dismissing a person from employment was harsh, unreasonable or unjust) bore a close relationship to many civil disputes determined by courts;
- the statutory obligation on appeal to follow the principles applying to appeals from discretionary decisions invoked general law principles applicable in courts;
- because the decision of the Commission at first instance, being subject to an appeal, would carry an obligation to give reasons, it is unlikely that the appellate body would have a lesser obligation.

(b) what is the content of the duty to provide reasons?
The Court commented that the content of reasons sufficient to satisfy the obligation varied with the issues in dispute, the subject matter, the urgency in reaching a decision and other factors. Guidance may be obtained from standard statutory provisions.43 The concept of “reasons” generally required an explanation connecting any factual findings with the ultimate decision. Where the legal test to be applied involved an evaluative judgment, it might not be practicable to provide a detailed articulation as to how specified (and conflicting) factors have been weighed in the balance - the scope of the obligation must recognise that constraint. Parenthetically, a different question arose if mandatory considerations have not been identified. Importantly, the inquiry for the Court would be limited to determining whether a minimum standard was satisfied, as opposed to fixing some ideal or even desirable level of reasoning.

(c) what are the consequences of failing to provide reasons?
The Court held that the Full Bench did not commit jurisdictional error in failing to provide adequate reasons. While there was an implied duty to provide reasons, the silence of the statute did not support invalidity as to the consequence of failing to provide reasons. The contrary implication was to be preferred.
The question was whether a failure to comply with the legal obligation invalidated the decision. That was a question of statutory construction. The statutory scheme may make the giving of reasons a condition precedent to the validity of a decision. In Soliman v University of Technology, Sydney [2012] FCAFC 146, the Full Court of the Federal Court stated that:

[50] A failure to comply with a statutory obligation to provide reasons may constitute an error of law but it does not follow that a failure to do so constitutes jurisdictional error sufficient to warrant setting a decision aside either in whole or in part...
[51] In circumstances such as the present, where there is no statutory requirement to provide either reasons or findings of fact, it would be difficult to conclude that a failure to do so constitutes jurisdictional error such as to warrant the decision of the Vice President [of Fair Work Australia] being set aside.

43 For example, that written reasons “set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based”: Acts Interpretation Act 1901 (Cth), s 25D.
The Court in the present case concluded that there was nothing in the authorities which might suggest that, in maintaining silence as to any obligation to give reasons and as to the consequence of a failure to provide reasons, the State legislature implicitly assumed or accepted that invalidity would follow. Indeed, the contrary implication was to be preferred. Nevertheless, the Court held that it was also necessary to weigh in the balance any mitigating circumstances. The length of prior employment, the employment record and favourable character considerations may all be relevant to determining whether relief should be granted. It was moreover necessary to separately consider the possibility that dismissal might be “harsh” although not unjust or unreasonable. The Court considered that there must have been a real issue as to whether, given the officer’s long and favourable record, the misconduct was sufficient to warrant termination. The absence of any reference in the reasons to the long and favourable service record suggested that the necessary weighing exercise was not undertaken. The absence of any reference to the essential exercise – to identify the element of misconduct, assess its seriousness and weigh that against the consequence of proposed dismissal - indicated that it was probably not undertaken. The Court accordingly ordered the matter be remitted to the Commission for reconsideration according to law.

(i) Overlooking evidence

The Court in *Minister for Immigration and Border Protection v SZ SRS* [2014] FCAFC 16 considered whether the Refugee Review Tribunal’s (the tribunal’s) failure to refer to a piece of evidence in its reasons for decision demonstrated that the evidence was overlooked. The primary judge found that the tribunal had overlooked a letter from Reverend Lee in conducting the review. The tribunal had listed the documents that were submitted at the beginning of the hearing, and Reverend Lee’s letter was not amongst them. The Court accepted the Minister’s submissions that the applicant bore the onus of proving that the letter had not been considered and that the Tribunal was not bound to refer to every item of evidence. The fact that a matter was not referred to in the tribunal’s reasons did not necessarily mean that the matter had not been considered at all. But where a particular matter or evidence was not referred to then the findings and evidence that had been set out in its reasons may be used as a basis for inferring that the matter or evidence had not been considered.

The Court reasoned that if the letter had been considered, it could readily be expected that it would have been referred to in the tribunal’s reasons. If the tribunal regarded its contents as ambiguous, lacking clarity, or not entitled to significant weight, then one could reasonably expect those matters to have been discussed. Whether the tribunal was obliged to consider a document depended on the circumstances of the case and the nature of the document. The relevant factors to consider were the cogency of the evidentiary material and its place in assessing the applicant’s claims. The circumstances were found to be relevantly indistinguishable from those in *SZRKT* (which concerned an overlooked academic transcript). Central to the tribunal’s reasons for rejecting the applicant’s claims was supposedly conflicting evidence about whether she had been baptised. Reverend Lee’s letter was capable of corroborating her father’s evidence that she had been baptised. It was also direct evidence in support of her claim that she and her family were Christians.

---

44 Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales v Secretary of the Treasury [2014] NSWCA 112, [70]-[71].
45 Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594, [31].
46 VAAD v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 117, [77]
47 Minister for Immigration and Citizenship v SZRKT [2013] FCA 317, [119]-[120].
Additionally noteworthy was that the Court was not persuaded that there was a clear distinction between claims and evidence.\(^{48}\) Merely to ask whether the ignored material was a claim or part of a claim or evidence was too narrow a question. Such an approach may provide the answer in some cases, but not all. Some cases did not fall comfortably on either side of the supposed claims/evidence divide. The fundamental question was instead the importance of the material to the exercise of the tribunal’s function and the seriousness of any error.

(ii) The “pathway” of reasoning
The reasons of administrative decision-makers are intended to inform. They are not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy can be gleaned from the way in which the reasons are expressed. That said, a decisionmaker’s findings and his or her “pathway” of reasoning must be tolerably clear. This has been described as follows:\(^{49}\)

> The statement of reasons must explain the actual path of reasoning by which the medical panel in fact arrived at the opinion the medical panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law.

Can a decisionmaker’s findings and his or her pathway of reasoning be inferred?
The plaintiff in *Sadsad v NRMA Insurance Ltd* [2014] NSWSC 1216 was riding his bicycle in a roundabout when struck by a car. As a result of the collision he suffered a number of injuries. He sought compensation from the first defendant which was the third party personal injury insurer of the driver of the vehicle.

One of the questions arising in that case was the content of the requirement that a medical assessor must provide reasons.\(^{50}\) Section 61(9) of the *Motor Accidents Compensation Act 1999* (NSW) required a certificate to set out the reasons for any finding made by the medical assessor as to any certified matter. Clause 13.2 of the Medical Assessment Guidelines required the certificate to include written reasons for the determination in an approved form. Clause 2.5 required that the rationale for the decision should be explained in the impairment valuation report.

The authorities indicated that the appropriate test when examining the reasons of an assessor was clarity. It has to be clear how the assessor reached his or her decision and what process of reasoning was involved. Each step in the reasoning process need not be enunciated if it was otherwise clear how the assessor arrived at his or her conclusion.

The question in this case was whether the reasons disclosed the pathway of reasoning.\(^{51}\) The answer was no: the pathway of reasoning was not clear. In the Court’s view, an objective reader of the report would not know the rationale behind the determination that he “must” attribute lost movement in the left shoulder to age-related changes. The Court did not know how the conclusion was made that there was a reasonable expectation that both joints would have had a similar condition before the injury. The Court accepted that not every step of the reasoning process needed to be explained explicitly. However, the report did not precisely identify what steps were taken in arriving at the conclusion, what assumptions were made and the basis of any such assumptions.

\(^{48}\) *SHKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 545, [24].

\(^{49}\) *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43, [55].

\(^{50}\) *Sadsad v NRMA Insurance Ltd* [2014] NSWSC 1216, [33].

\(^{51}\) Ibid, [42]-[43].
The Court was particularly drawn to the “directive” in cl 2.5 which required that the “rationale for the decision should be explained”. It was one thing to give a “beneficial construction” to the reasons of an administrative decision maker. However, it was another to fill in the gaps in the path of reasoning by reference to an assumption that the decision was made according to the relevant law.

**The Hearing Rule**

(i) The opportunity to comment on adverse material received from third parties

The principles constituting the “hearing rule” are well-established. These include the following propositions:

- a person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters that are adverse to his or her interests which the repository of the power proposes to take into account in deciding upon its exercise;

- in the ordinary case, where no problem of confidentiality arises, an opportunity should be given to deal with adverse information - that is, information that is credible, relevant and significant to the decision to be made;

- where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decisionmaker in support of an outcome that supports his or her interests;

- a fair hearing presumes that the parties are fully informed of, and able to respond to, the relevant issues. That is not possible if disclosure is inadequate;

- the content of the “hearing rule” is flexible. It is to be determined by what is fair in all the circumstances of the case. The “circumstances” include the nature of the inquiry, the rules under which the decision-maker is acting, and the subject-matter that is being dealt with;

- a hearing is unlikely to be fair when a decision-maker receives material or representations in the absence of one party, or does not disclose relevant material obtained from another source.

This last point featured in two judgments delivered during 2014. These judgments both confirmed that procedural fairness can be denied by denying an opportunity to respond to adverse material which has been provided to a decisionmaker by third parties.

*Angelos v Minister for Health* [2014] FCA 706 involved an application for judicial review of a Ministerial decision not to approve the applicant as being able to provide pharmaceutical benefits from a proposed premises. The Midnight Pharmacy offered longer business hours than its competitors. However, it was also a methadone clinic and located adjacent to schools. Some local residents expressed their opposition to the application, as well as the owners of two competing local pharmacies, with one having written a newspaper article.

---

52 Any ambiguity in reasons need not be resolved in the decisionmaker’s favour; the construction of reasons is beneficial in the sense that the reasons would not be over-zealously scrutinised, with an eye attuned to error: *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9, [26].

53 To fulfil a minimum legal standard, the reasons need not be extensive: where more than one conclusion is open, it is necessary for the decision maker to give some explanation of its preference for one conclusion over another: *Campbelltown City Council v Vegan* [2006] NSWCA 284, [121]-[122].

54 *Kioa v West* (1985) 159 CLR 550, 628 (Brennan J).

55 Ibid, 629.


the South Australian Parliament had also expressed concern for lawless and antisocial behaviour by drug addicts, as well as vandalism. The Minister’s statement of reasons did not refer to the third party material. However, it recorded the evidence that the Minister had considered, including the submissions in opposition by the other two pharmacists and the parliamentarian. The Court considered whether the material was “credible, relevant and significant” information in the VEAL sense. It could not reasonably be dismissed as having no, or limited, significance. The Court was satisfied that the opposition of local residents was capable of having a prejudicial effect in the Minister’s mind. The applicant was aware of community concern in the local press. However, there was no indication that the applicant was on notice of the submissions of the two pharmacists or that of the parliamentarian. The applicant was unaware that adverse material provided to the Minister might form the basis for the reasons for the refusal. As there was no opportunity to address them before the decision was made, procedural fairness had been denied.

The same conclusion was made in X v University of Western Sydney [2014] NSWSC 82. The plaintiff had been suspended under a university policy following an allegation of sexual assault made by another student. The University’s Student Non-Academic Misconduct Policy expressly provided for an obligation to afford procedural fairness. The decision-maker interviewed the complainant prior to making the decision to suspend the plaintiff. However, the statements made in interview were not disclosed to the plaintiff before the decision to suspend was taken. The University was found at first instance to have failed to afford procedural fairness to the plaintiff before he was suspended. First, the plaintiff had not been told that suspension was being considered. Second, he was not apprised of the factors or criteria that were proposed to be relied on or considered before the power was exercised.

Central matters for consideration identified in this case included the duty of disclosure of information available to a decision-maker and whether the plaintiff was entitled to be given notice of, and provided with, the material that the decisionmaker had and proposed to consider in making the suspension decision. Such issues were to be determined at the date of the decision. The Court considered that the rationale for the duty of disclosure was to provide an affected person with an opportunity to respond. The duty of disclosure provided an opportunity to correct, elucidate or add to the materials to be considered. Disclosure safeguarded against using inaccurate material or untested theories, and contributed to the efficiency of a hearing by directing argument and information to the relevant issues and materials. The Court upheld the conclusion that procedural fairness had been denied. There was no opportunity for any independent inquiry or assessment to be made on the nature and level or significance of those matters raised by the complainant. This included any known impact upon her ability to satisfactorily undertake course assignments, examinations, attendance at tutorials, lectures or clinical workshops. Several points could have also been made by the plaintiff had there been an opportunity to do so after the interview with the complainant. The facility for attending on-line lectures, for example, was available. The possibility of limiting the time the plaintiff spent on campus, so as to reduce or minimise any perceived risk arising from contact with the complainant, was not raised with him. The plaintiff could reasonably be expected to have been able to put forward several matters in opposition to a suggestion that he be suspended including suggesting possible alternatives.


X v University of Western Sydney [2014] NSWSC 82, [214]-[215].
Illogicality and “the smoking gun”
The Refugee Review Tribunal (the tribunal) had found that the applicant and his family had not been killed or injured in their State of nationality. This was the basis for a positive finding that the applicants had manufactured their claims and that their claims of persecution had been fabricated. Upon appeal in SZRHS v Minister for Immigration and Citizenship [2014] FCA 121, counsel expressed concern that there was no “smoking gun”. There was no evidence that any manufacture or fabrication - in the sense of a deliberate or reckless attempt to conceal or concoct something – had actually occurred. The primary judge had concluded that, on the probative evidence before it, a logical or rational decision maker could have come to the same conclusion as the tribunal.

Drawing upon High Court authority, the applicable principles included the following:60

- “illogicality” or “irrationality” sufficient to give rise to jurisdictional error meant that the decision to which the tribunal came, in relation to the state of satisfaction required under s 65, Migration Act 1958 (Cth), is one at which no rational or logical decisionmaker could arrive on the same evidence;
- not every lapse in logic gives rise to jurisdictional error;61
- a court should be slow, although not unwilling, to interfere in an appropriate case;
- the correct approach is to ask whether it was open to the tribunal to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it;
- although there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there was room for a logical or rational person to reach the same decision on the material before the decisionmaker. A decision might be said to be illogical or irrational if:
  - only one conclusion was open on the evidence, and the decisionmaker does not come to that conclusion;
  - if the decision to which the decisionmaker came was simply not open on the evidence; or
  - if there is no logical connection between the evidence and the inferences or conclusions drawn.

A wrong finding of fact, which is not a jurisdictional fact, will generally not be sufficient to impugn a decision.62 The Federal Court in this case considered that the critical issue in a finding of jurisdictional error was whether the determination of the jurisdictional fact was irrational, illogical or not based on findings or inferences of fact supported by logical grounds. It was not a back door to impermissible merits review. It must be a decision that no rational or logical decision maker could arrive at on the same evidence. If it met this test, there would be jurisdictional error notwithstanding that the decision was made bona fide. Jurisdictional error on this ground could be established in the three circumstances identified above. However, it would not be enough that one outcome might be preferred over another which was also open on the same evidence. It required more than emphatic disagreement. Differences of degree, impression and empirical judgment between the decisionmaker and a court conducting judicial review would not be sufficient. The appeal was dismissed.

“Decision” and “conduct” under the Administrative Decisions (Judicial Review) Act 1977 (Cth)

---

60 Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611, [130], [133], [135].
61 Illogicality will not amount to jurisdictional error in every case and it will not be sufficient where it would be futile to grant relief because there are other bases for the impugned decision: SZOOR v Minister for Immigration and Citizenship [2012] FCAFC 58, [85] (McKerracher J). In other words, illogicality must affect the decision.
(i) Interim tax findings
The familiar question whether there was a “decision” or “conduct” to which ss 5 and 6, Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) applied was considered.

The plaintiff in Halls v Commissioner of Taxation [2014] FCA 775 sought to challenge an interim audit report of his business prepared by the Australian Taxation Office (ATO). The plaintiff had prepared and lodged Business Activity Statements and had been selected for a GST (Goods and Services Tax) and FTC (Fuel Tax Credits) audit. He was interviewed by two ATO officers. The ATO prepared an interim report in which the “Decision” and “Reasons for Decision” was identified with respect to six issues. The plaintiff was provided with a copy of the report in a letter from the ATO headed “Advice of the interim findings of our fuel tax credit and GST audit”. The plaintiff was given the opportunity to provide comments or additional information before the ATO finalised its audit. Once the ATO finalised the audit, he would be sent a letter outlining the audit result and the ATO’s final position with the proposed adjustments and notices of assessment for any adjustments made to his activity statements.

The Court looked at the process in this case (both as carried out and foreshadowed) as a continuum. It found that the interim findings had not progressed to the stage of “decisions” because they might be changed before the audit report was finalised. Once finalised, then there might be a “decision”.

The interim findings, although authorised by s 3, Taxation Administration Act 1953 (Cth), were not made under any statutory power. They lacked any element of conclusiveness, and were not final or operative in the way that acts which constitute “decisions” under the ADJR Act are usually required to be. Even if they did constitute a decision under s 5 ADJR Act, then they fell within a definition in Schedule 1(e) of decisions to which that Act did not apply (namely, decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty).

Nor did s 6 of the ADJR Act apply, which extended the scope of the Act to cases where a person has engaged, is engaging, or proposes to engage, “in conduct for the purpose of making a decision to which [the] Act applies”. The interim findings were not “conduct” as that word has been interpreted but at best were unreviewable decisions. Secondly, the exclusion in Schedule 1 paragraph (e) again applied.

(ii) Funding applications
To be a person “aggrieved by” a “decision” or “conduct” under the ADJR Act, an impugned decision must be a decision to which the Act applies, and the impugned conduct must be conduct of a kind to which s 6(1) of the Act refers. One dimension is that the “decision” must be a decision of an administrative character made under an enactment. One consequence is that applications for judicial review must be lodged in a timely fashion; in other words, an application is not made prematurely.

The “decision” which the applicant sought to have reviewed in Miller v Goldfields Land and Sea Council Aboriginal Corporation [2014] FCA 183 was identified as:

The decision of the respondent that it will exercise the authority to make a decision as to whether to grant assistance to the applicant in the event that an application for assistance is lodged, and will not delegate that decision-making to an independent party.

---

63 Halls v Commissioner of Taxation [2014] FCA 775, [19]-[21], [23].
64 Compare Meredith v Federal Commissioner of Taxation and Others [2001] FCA 1135.
65 Australian Broadcasting Tribunal v Bond and Others [1990] HCA.
The “conduct” was identified as:

The conduct of the respondent in determining that it will exercise the authority to assess a funding application by the applicant in the event that an application is lodged and will not delegate the assessment of such an application to an independent party.

The Court first noted that, for a decision to be one to which the ADJR Act applies, the decision must be expressly or impliedly authorised by an enactment and must itself confer, alter or otherwise affect legal rights or obligations. 66

In this case, the occasion for the respondent to make a decision under the Native Title Act 1993 (Cth) in relation to a funding request by the applicant had not yet arisen. Nor did the impugned decision affect the applicant’s legal entitlements. Unless and until the applicant made a funding request, the manner in which the respondent proposed to deal with the application was hypothetical. 67

Furthermore, there must be a proper connection between the impugned conduct and a decision under the enactment. The Court held that this connection was lacking when the occasion for a single discharge of a statutory function had not yet arisen, and may never arise.

Some additional cases of interest

(i) Factual errors which go nowhere

Did the Refugee Review Tribunal (the tribunal) become an arbiter of an applicant’s religious faith because of a factual error in SZRPT v Minister for Immigration and Border Protection [2014] FCA 24? The applicant had claimed to be a practising Christian. She contended that being baptised was an essential part of her claim. In its reasons for decision the tribunal stated the following:

She stated that she undertook no preparation for the ceremony yet, because it is a rite of initiation into the Christian church, some form of preparation by an adult candidate will be required.

The difficulty was that the applicant was under 18 years at the time. Furthermore, there was no evidence to support the statement that some form of preparation for baptism by adults was required. Finally, there was no logical inference that some form of preparation would be required because baptism was a rite of initiation.

The primary judge concluded that these errors were not jurisdictional ones. They were not so significant or central to the exercise of its jurisdiction such as to vitiate it and the tribunal would have reached the same conclusion absent its “assumption” or “expectation”. 68

The initial concern for the appeal court was that making a finding without any evidential support could amount to an arbitrary or capricious exercise of power. However, it ultimately accepted the Minister’s submissions that the tribunal’s assumption led to no specific finding. The tribunal did not decide that the applicant was not a Christian. The tribunal’s observation about the need for “some form of preparation” for adult baptismal candidates was not an essential part of its reasoning.

(ii) Failing to consider submissions

67 Ibid, [47]-[48].
68 A fact is jurisdictional if it must objectively exist before an administrative decisionmaker’s jurisdiction to exercise a power is enlivened or if it is a criterion, satisfaction of which enlivens the power of the decisionmaker to exercise a discretion: Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144, [57], [107].
Jurisdictional error can result from a failure to deal with a substantial and clearly articulated argument which relied upon an established fact. But in what circumstances does the failure to consider and determine a clearly articulated submission of substance amount to jurisdictional error? This question was considered in *SZSSC v Minister for Immigration and Border Protection* [2014] FCA 863. The written submissions concerned the credibility of the applicant’s extortion claims and his lack of awareness of a police officer’s identity. They were provided in response to the Refugee Review Tribunal’s (the tribunal’s) stated concerns. The Court first identified the applicable legal principles by analogy to the failure to ignore corroborative evidence or other relevant material and in light of the requirements for a statement of reasons under s 430, *Migration Act 1958* (Cth). These principles were as follows:

- the duty imposed upon the tribunal by the *Migration Act 1958* (Cth) is a duty to review.

In my opinion, the duty to review obliges the Tribunal to consider and deal with submissions of substance which are clearly articulated. As noted above, in assessing whether a submission is one of substance it may be relevant to take into account whether it relies upon an established fact, but that is not the only way in which that requirement may be met. Substantiality might also be established by the fact that, for example, a submission has been made in direct response to an important issue which the Tribunal has raised which bears upon the state of the satisfaction which it is required to meet under s 65 of the Act.

- merely because the tribunal failed to deal with a submission did not necessarily amount to jurisdictional error;
- there was no requirement for the tribunal to refer to every piece of evidence or every contention made by an applicant in its statement of reasons. Some evidence might be irrelevant and some contentions misconceived;
- jurisdictional error could be inferred from the absence of any reference to the submissions in the statement of reasons. A failure to deal with a submission of substance could also amount to procedural unfairness or a constructive failure to exercise jurisdiction, given the tribunal’s core statutory task of conducting a review.
- notwithstanding that the tribunal was not obliged to set out or summarise submissions of substance which are clearly articulated and made to it, in considering whether the tribunal has in fact failed to consider and determine such a submission, it was appropriate to have regard to its statement of decision and reasons and, in particular, the manner in which that document describes and deals with submissions which it has received. Attention should be given to summaries of the submissions, the reasons which purport to consider and determine them and the structure of the tribunal’s reasons;

---

69 See eg *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26. Thus, for example, the absence of any evaluation by the tribunal of a visa applicant’s submission and updated supporting country information signified “a constructive failure to exercise jurisdiction”: *Minister for Immigration and Border Protection v MZYS* [2013] FCAFC 114.

70 The Court also found that the tribunal’s rejection of the applicant’s extortion claims was not illogical or irrational based on the evidence which was before it. It relied on dicta to the effect that fact finding is not subject to review for *Wednesbury* unreasonableness, and can only be impugned where the factual determination was “illogical, irrational or lacking a basis in findings or inferences of fact supported on logical grounds”.


72 *SZSSC v Minister for Immigration and Border Protection* [2014] FCA 863, [81].

73 See further *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184, [46].
• much depended on the circumstances of the case and the nature of the document. Relevant factors to be considered include the cogency of the evidentiary material and the place of that matter in assessing the applicant’s claims;
• the applicant carried the burden of persuading the Court; and
• the tribunal’s reasons are not to be approached with an eye keenly attuned to the detection of error.

Applying those considerations to the present case, the questions posed by the Court were:
• Were there in fact relevant “submissions of substance”? Yes. There were submissions of substance which were squarely directed at addressing the tribunal’s stated concerns.
• Were these submissions clearly articulated and made by or on behalf of the appellant? Yes. The submission was clearly advanced.
• Were these submissions considered and determined by the tribunal? No. There was nothing explicit or implicit in the tribunal’s reasons to suggest that the tribunal appreciated that the appellant had made a particular submission.

For the tribunal to discharge its statutory task of conducting a review of the delegate’s decision, it had to deal with the submission and failed to do so. If it had done so, the tribunal would have arrived at a different conclusion on the appellant’s credibility. The Court was satisfied that there was both a constructive failure to exercise jurisdiction in addition to procedural unfairness.

Oral consideration of:
• Conclusions
• Implications for clients
• Areas for further development
• Any questions?

---

74 Following SZRK T v Minister for Immigration and Citizenship [2013] FCA 317.
75 Salahuddin v Minister for Immigration and Border Protection [2013] FCAFC 141, [19]-[20].
76 To describe them as “submissions of substance” did not suggest that the tribunal was obliged to accept them. Rather, its obligation was to evaluate them and determine whether or not they should be accepted or rejected.