Re Energy Networks Association and Review by COAG Energy Council of Limited Merits Review Framework in the National Electricity Law and the National Gas Law

OPINION

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OPINION

1. Issues arising

1.1 In the context of the terms of reference issued by the COAG Energy Council, 19 August 2016, in the Review of the Limited Merits Review Framework in the National Electricity Law and the National Gas Law (**Review**), the Energy Networks Association (**ENA**) has sought advice as to the following questions, to which short answers (developed in detail below) are now given:

1. What, if any, is the difference between judicial review and limited merits review, having regard to the scope in judicial review for a court to correct factual error, in particular following the High Court's decision in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332;

Answer: Judicial review is fundamentally different from limited merits review, and has not become close to, or even similar to, limited merits review on account of *Li*, for the following reasons:

(i) Constitutional limitations preclude federal courts from providing full merits review or limited merits review that corrects factual error.

(ii) The *Li* test of unreasonableness asks whether a decision has an evident or intelligible justification, and does not ask whether the decision involves an error of

fact or is unreasonable in a more general sense. Applying the latter test would require the court to trespass on the merits of the decision under review. Post *Li* cases adhere to this common law constitutionally mandated legality/merits distinction by refusing to intervene on the basis of factual error.

(iii) *Li* unreasonableness is a ground properly argued where no reasons have been given for a decision. Where detailed reasons have been given, as is the case with reviewable regulatory decisions made by the AER, there is very little scope to establish *Li* unreasonableness. The reasons ordinarily provide an evident and intelligible justification for the decision (or may do so with the benefit of affidavit evidence in judicial review proceedings presenting the basis for the decision more effectively). The *Li* ground does not enable a court to go beyond the intelligible justification given. The court cannot correct factual error in the decision.

(iv) *Li* unreasonableness is generally only established with respect to an exercise of procedural power, rather than an exercise of substantive power. The AER's reviewable regulatory decisions are exercises of substantive power.

(v) *Li* unreasonableness may not be an available ground of review of the performance of statutory duties as distinct from the exercise of statutory powers.

2. What, if any, is the difference between judicial review and limited merits review, having regard to the suitability of judicial review and limited merits review as avenues for review of decisions involving highly technical and complex economic reasoning.

Answer: Judicial review is not a suitable avenue for review of decisions involving highly technical economic reasoning, for the following reasons:

(i) In judicial review the grounds of review, including *Li* unreasonableness, and the remedies that a court may grant, are not capable of correcting factual error.

(ii) A court does not have the benefit of evaluation of complex economic evidence that can be provided by expert tribunal members.

(iii) Procedural rules applying in courts constrain their ability to admit evidence and otherwise distort the basis on which factual issues may be reviewed.

1.2 This opinion is intended to inform and be read with a submission to the Review, prepared on behalf of the ENA by Herbert Smith Freehills, responding to the terms of reference for the Review issued on 19 August 2016 and the *Review of the Limited Merits Review Regime Consultation Paper*, issued by the COAG Energy Council on 6 September 2016. I have read the submission and am in agreement with the analysis contained in it. In order to answer Questions 1 and 2 it will be necessary to set out some preliminary comments on the availability of avenues of review; the nature of limited merits review; the scope for review of factual findings in judicial review; and an account of the judgments in *Li* and judicial review post *Li*.

2. Availability of avenues of review

2.1 Decisions of the Australian Energy Regulator (**AER**) are justiciable in the Federal Court, under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (***ADJR Act***)[1] or the *Judiciary Act* 1903 (Cth) s 39B(1) and (1A), and in the High Court under s 75(iii) or (v) of the Commonwealth Constitution.

[1] A decision of the AER under the National Electricity Law (**NEL**) in the Schedule to the *National Electricity (South Australia) Act* 1996 (SA) ordinarily would meet the test of justiciability under the *ADJR Act* : see note to s 70(1) of the NEL. The NEL is an "enactment" for the purposes of s 3(1) of the *ADJR Act*: *ADJR Act* Sch 3, cl 2(da). A "reviewable regulatory decision" made by the AER (as defined in NEL s 71A) would also be a final or operative decision and be "of an administrative character", so as to meet the other requirements for justiciability in s 3(1) of the *ADJR Act*. See also the *Australian Energy Market Act* 2004 (Cth) s 13.

2.2 Where an avenue for review of a decision of a statutory authority or tribunal exists, then the Federal Court or the High Court may decline to exercise judicial review jurisdiction, or decline to provide relief, in relation to that decision, provided that the avenue of review is an equally convenient and satisfactory avenue for review.[2] An entitlement to obtain full merits review by a tribunal is generally accepted to be an equally convenient avenue of review, save in a case where judicial review can more efficiently resolve a short question of law, or deal with circumstances involving urgency. Thus, if full merits review of a decision of the AER is available, the Federal Court in most circumstances would decline to exercise its judicial review jurisdiction in respect of that decision. Limited merits review of the kind provided by the Australian Competition Tribunal (**ACT**) under s 71C of the National Energy Law (**NEL**)[3] is also adequate provision for review for the purposes of application of this principle to an attempt to obtain direct judicial review of a decision of the AER, by-passing the ACT.[4] However a short question as to whether the AER has jurisdiction to exercise its regulatory powers in relation to a particular service may appropriately be directly reviewed under the *ADJR Act*.[5]

2.3 Where a statutory appeal on a question of law lies from a decision to the Federal Court, the statutory appeal should be pursued rather than judicial review. For example, a decision of the Administrative Appeals Tribunal (**AAT**) may be appealed on a question of law to the Federal Court.[6] Ordinarily the Court would decline to engage in judicial review of an AAT decision. In the absence of a statutory appeal provision, decisions of a federal tribunal such as the ACT, like decisions of any other federal statutory authority, are in principle justiciable in the Federal Court, under the *ADJR Act* or the *Judiciary Act* and in the High Court under s 75(iii) or (v) of the Constitution. There is no provision for an appeal from a decision of the ACT on review of

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[2] Where review is sought under the *ADJR Act* the Federal Court may decline to exercise jurisdiction where there is adequate provision for review by another court or tribunal: *ADJR Act* s 10(2)(b)(ii).

[3] While reference throughout is to the NEL and the National Electricity Objective (**NEO**) (NEL s 7), this opinion is intended to apply equally to limited merits review under the National Gas Law (**NGL**) in the Schedule to the *National Gas (South Australia) Act* 2008 (SA) and the National Gas Objective (**NGO**) in s 23 of the NGL.

[4] See *ActewAGL Distribution v The Australian Energy Regulator* (2011) 195 FCR 142 at 184[193] per Katzmann J; *SPI Electricity Pty Ltd (ACN 064 651 118) (t/as SP Ausnet) v Australian Energy Regulator* [2014] FCA 1012 at [49]-[57] per Foster J.

[5] For example, *Ergon Energy Corporation Ltd v Australian Energy Regulator* (2012) 213 FCR 576.

[6] *Administrative Appeals Tribunal Act* 1975 (Cth) s 44(1).

a reviewable regulatory decision under the NEL. The ACT's decisions are reviewable under the *ADJR Act* and s 39B(1) and 39B(1A)(c) of the *Judiciary Act*.[7]

3. Limited merits review

3.1 Limited merits review is markedly different from full merits review. Full merits review is de novo review in which the tribunal has jurisdiction to re-exercise the power previously exercised by the regulator. Thus, the AAT, vested with "all the powers and discretions" of the decision-maker whose decision is under review,[8] has a function of reaching the correct or preferable decision on all the material before the AAT.[9] The "correct or preferable" formula is not an external criterion with a fixed meaning to be applied in every case, but is a label describing the outcome of a decision-making process in which power is re-exercised. The tribunal's function is "doing over again" what the original decision-maker did.[10]

3.2 Because a tribunal engaging in full merits review re-exercises power, it does not have a function of identifying and correcting error in the decision under review.[11] The word "correct" in the formula "correct or preferable" refers only to the decision being "rightly made, in the proper sense",[12] not to correction of error. The word "preferable" in the formula refers to discretionary considerations.[13]

3.3 Review by the ACT of a "reviewable regulatory decision" made by the AER under the NEL[14] is clearly not full merits review and has been described as "limited merits review". The review centres upon grounds of review directed to identifying error in the AER's decision. The ACT stands in the shoes of the AER only in a limited sense, with no power to substitute its decision

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[7] See, for example, *SPI Electricity Pty Ltd v Australian Competition Tribunal* (2012) 208 FCR 151 at 152[1].
[8] *Administrative Appeals Tribunal Act* 1975 (Cth) s 43(1).
[9] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68 ("*Drake (No 1)*") .
[10] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 315[100] per Hayne and Heydon JJ, 327-8[142] per Kiefel J.
[11] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 326[127] per Kiefel J.
[12] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 326[137], 327[140] per Kiefel J.
[13] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 327[140] per Kiefel J.
[14] *National Electricity (South Australia) Act* 1996 (SA) Schedule, National Electricity Law Part 6 Div 3A.

for that of the AER. The following seeks to identify the structuring of limited merits review, which is much more complex than full merits review.

3.4 Where the ACT has granted leave pursuant to s 71B(1) of the NEL to an affected or interested person or body to apply for review, the ACT is to:

(1) determine whether the AER:

(a) made an error of fact in its findings of facts, and that error of fact was material to the making of the decision: s 71C(1)(a) (**Ground (a)**);

(b) made more than one error of fact in its findings of facts and those errors of fact, in combination, were material to the making of the decision: s 71C(1)(b) (**Ground (b)**);

(c) made an exercise of discretion that was incorrect, having regard to all the circumstances: s 71C(1)(c) (**Ground (c)**);

(d) made a decision that was unreasonable, having regard to all the circumstances: s 71C(1)(d) (**Ground (d)**),

(2) respond to any matter raised by the applicant or an intervener (subject to the restrictions in s 71O(2)-(3)), and raise any other matter that relates to a Ground or a matter raised in support of a Ground or a matter relating to issues to be considered under s 71P(2a) and (2b): s 71O(1)(a),(b);

(3) determine the outcome or relief, being either to affirm the decision (performing all the functions and exercising all the powers of the AER under the NEL and the NER: s 71P(3)); or vary the decision (performing all the functions and exercising all the powers of

the AER under the NEL and the NER: s 71P(3)); or set aside the decision, remitting the matter to the AER to make the decision again in accordance with any direction or recommendation of the ACT (s 71P(2)(a),(b),(c)), in accordance with the following procedure:

(a) if satisfied that to vary or set aside and remit (under s 71P(2)(a) or (b)) will, or is likely to, result in a decision that is materially preferable to the reviewable regulatory decision in making a contribution to the achievement of the national electricity objective (**NEO**),[15] the ACT has power to set aside and remit (but if not so satisfied, the ACT must affirm the decision): s 71P(2a)(c);

(b) if satisfied as to (a) above (ie the satisfaction with respect to the NEO that is also required to set aside and remit), and that to vary (under s 71P(2)((b)) will not require the ACT to undertake an assessment of such complexity that the preferable course of action would be to set aside the decision and remit the matter to the AER to make the decision again, the ACT has power to vary: s 71P(2a)(d).

(c) in forming a state of satisfaction under (3)(a) and (b)) above (ie under s 71P(2a), as to whether to set aside or vary):

    (i) consider how the constituent components of the AER's decision interrelate with each other and with the matters raised as a Ground: s 71P(2b)(a);[16]

    (ii) take into account the revenue and pricing principles: ss 16(2), 71P(2b)(b);

[15] The NEO is defined in s 7 of the NEL. The AER has a distinct duty, where there are two or more possible reviewable regulatory decisions, that will or are likely to contribute to the achievement of the NEO, to make the decision that the AER is satisfied will or is likely to contribute to the achievement of the NEO to the greatest degree: NEL s 16(1)(d)(i).

[16] The AER has a counterpart duty under NEL s 16(1)(c).

(iii) in assessing the extent of contribution to the achievement of the NEO, consider the decision as a whole: s 71P(2b)(c);

(iv) not allow certain matters, in themselves, to determine the question about whether a materially preferable NEO decision exists (eg the mere establishment of a Ground does not of itself determine the question): s 71P(2b)(d).

3.5 This summary of the ACT's layered limited merits review function does not attempt to capture the exercise by the ACT of any of its procedural powers. Such procedural steps may affect the exercise by the ACT of its substantive functions or explain their exercise. The ACT:

(a) may extend the standard period for determining an application for review: s 71Q;

(b) is to consult as required by s 71R(1)(b);

(c) may not consider any matter other than "review related matter" or matter arising as a result of consultation: s 71R(1)(a),(6), which includes the "decision related matter" being a defined record of the material before the AER and its decision: ss 28ZJ, 71R(6)(d);

(d) may allow new information to be submitted, either on application by a party or on its own initiative: s 71R(3)-(6);

(e) is to give a statement of its reasons that specifies:[17]

- in a determination to vary or to set aside and remit, the manner in which it has taken into account the interrelationship between the constituent components of

[17] Impliedly the decision of the ACT must include a statement of reasons.

the decision and how they relate to the matter raised as a Ground, as contemplated by s 71P(2b)(a): s 71P(2c)(a); and

- in a determination to vary, the reasons why it is proceeding to make the variation in view of the requirements of s 71P(2a)(d): s 71(2c)(b).

3.6 In s 71C(1) Grounds (a) and (b) are similar, with a focus on error of fact. Both Grounds require that the error of fact be material to the making of the decision. Grounds (c) and (d) pose different tests, but both require the ACT to apply the relevant test "having regard to all the circumstances". That phrase indicates that Grounds (c) and (d) are not tests of the lawfulness of the AER's decision but require an evaluation of factual aspects of the AER's decision, including the weight given to evidence.

3.7 It would be misconceived to assume that any of the Grounds is intended to reflect an equivalent judicial review ground. Section 71C(1) does not purport to offer a partial codification of judicial review grounds. Each of Grounds (a) to (d) has a broader meaning than any particular ground in judicial review.[18]

3.8 In Layer (1), Ground (d) is a test of whether the AER's decision is "unreasonable". The language indicates that this is not the *Wednesbury* test, explained below, of whether the AER's decision is so unreasonable no reasonable regulator could have reached it. Application of Ground (d) cannot be equated to judicial review on the ground of *Wednesbury* unreasonableness.[19] Ground (d) sets a lower threshold. Nor is Ground (d) the same as *Li*

[18] The opinions that the Commonwealth Ombudsman may set out in a report on an investigation into action relating to a matter of administration, range from "appears to have been contrary to law" to "was otherwise, in all the circumstances, wrong": *Ombudsman Act* 1976 (Cth) s 15(1)(a)(i),(v). While the former requires resort to legal principles, the latter does not. Some of the opinions that may be reached are expressed in language that resembles grounds available in judicial review. For example, the action was "unreasonable" or "irrelevant considerations were taken into account": s 15(1)(ii),(c)(i). These tests have properly been interpreted by Ombudsmen in a broad and flexible manner, not constrained by the judicial review case-law.

[19] This is consistent with the approach taken in *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 to the construction of "unreasonable" in s 39(2)(a)(ii) in Sch 1 to the *Gas Pipelines Access (South Australia) Act* 1997 (SA). Pursuant to this provision the ACT had jurisdiction to review a decision of

unreasonableness. Ground (d) may be established free of the constraints that attend the *Li* ground of review in a judicial review context, as developed below.

3.9 In Layer (1), Grounds (a) and (b) are tests of whether the AER made an error of fact in its findings of fact, that was material to its decision, or made more than one error of fact, in combination material to the decision. Here the focus is not so much upon material findings of fact as upon the facts on the basis of which findings are made. While the error or errors must be material to the making of the decision, Grounds (a) and (b) are not equivalent to the "no evidence" ground in judicial review. That ground is established only where there is no evidence at all to support a finding of fact.[20]

3.10 In Ground (c) "incorrect" is capable of covering incorrectness not only as a matter of fact (given the reference to "having regard to all the circumstances"), but also as a matter of law.[21]

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the Australian Competition and Consumer Commission (**ACCC**) on the ground that the ACCC's exercise of discretion "was incorrect or was unreasonable having regard to all the circumstances". In *East Australian Pipeline* the High Court held the ACT did not make an error of law within s 5(1)(f) of the *ADJR Act* when it varied a decision of the ACCC on the ground in s 39(2)(a)(ii). Justices Gummow and Hayne (Gleeson CJ, Heydon and Crennan JJ agreeing at 234[13]) held that "the better view" was that limited merits review under s 39(2)(a)(ii) is not, and does not include, review on the ground of *Wednesbury* unreasonableness: (2007) 233 CLR 229 at 250[80]. See also *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33 at 74-5[175]-[177]. In *East Australian Pipeline* the Court made clear that unreasonableness within s 39(2)(a)(ii) may be established in a case where an administrative decision-maker gives no reasons (as in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360, where the Commissioner gave reasons for a decision). In the absence of reasons it may be inferred from the result of the exercise of discretion that the decision is an incorrect exercise of discretion. This description of the inference that may be drawn as to unreasonableness was not intended to identify other grounds of judicial review, *Wednesbury* already having been put aside. That would be inconsistent with the rejection by Gummow and Hayne JJ of the idea that "unreasonable" in s 39(2)(a)(ii) is to be construed by simply inserting judicial review grounds. The Court (at 250[79]) approved the approach taken by Cooper J in *Application by Epic Energy South Australia Pty Ltd* [2004] ATPR 41,997. This was that the exercise of discretion must be "unreasonable because the totality of the relevant circumstances, viewed objectively, render it so": [2004] ATPR 41,997at 28,443[14]. While "different observers may hold different views as to what is unreasonable having regard to all the circumstances", all that the ACT needed to do was to form its own state of satisfaction by having regard to the particular circumstances the applicant for review relied upon as rendering the decision unreasonable: [2004] ATPR 41,997at 28,443[15]. This test overtakes that suggested in *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33 at 75[178]. There is no reason why the approach in *Epic Energy South Australia Epic Energy South Australia Pty Ltd* [2004] ATPR 41,997 approved in *East Australian Pipeline*, should not also apply to the NEL s 71C(1)(d).

[20] See paragraph 4.10 below.

[21] This is consistent with the approach taken in *East Australian Pipeline Pty Ld v Australian Competition and Consumer Commission* (2007) 233 CLR 229 to the construction of "incorrect" in s 39(2)(a)(ii) in Sch 1 to the *Gas Pipelines Access (South Australia) Act* 1997 (SA), referred to in note 19 above. The Court (Gummow and Hayne JJ at 250[79], Gleeson CJ, Heydon and Crennan JJ agreeing at 234[13]) held that an incorrect exercise of discretion may occur because the decision–maker acted on a wrong principle, allowed extraneous or irrelevant matters to guide or affect him or her, or failed to take into account some material consideration. This description of error in the exercise of discretion is not intended to invoke grounds of judicial review. It was provided by Gummow and Hayne JJ to

3.11 In Layer 2, where a Ground is established the ACT is likely to consider (d) then (c) in s 71P(2a). If (d) is not met, the ACT cannot vary the decision but may set it aside and remit. If (c) is not met, it has to affirm the decision. Given that the facts or matters under review are usually complex, it could be expected that the ACT would often not be able to reach the state of satisfaction required by s 71P(2a)(d), because it does not have the resources that are available to the AER to undertake the complex tasks of determining these matters.[22]

4. Judicial review

4.1 In judicial review, the court's role is to review the legality of the decision and not to trespass upon the merits. Unless an error of law can be established, the court does not interfere with such factual findings or exercises of discretion. This common law position is no different in review under the *ADJR Act* where the grounds of review are codified with some minor modifications. The merits consist in the decision-maker's function of giving weight to various items of evidence and drawing factual inferences from that evidence, and determining policy. There is no error of law in making a wrong finding of fact.[23] The weight given to a particular relevant consideration is a matter of the merits, which is not reviewable in judicial review.[24]

4.2 The prohibition upon trespassing on the merits is also reflected in the relief available in judicial review. Ordinarily where a decision is infected by jurisdictional error the relief is to quash the decision and remit the matter to be decided again according to law. A court will not issue mandamus to compel a decision-maker to make a particular decision unless that is the only lawful decision that can be made, with the decision-maker having no residual discretion. The same constraint applies to the power of the Federal Court under s 16(1)(d) of the *ADJR Act* to

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assist in understanding the kind of error that falls within the broad meaning of "incorrect". There is no reason why this approach to "incorrect" should not also apply to the NEL s 71C(1)(c).

[22] See for example, *Application by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [1170].

[23] *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J.

[24] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

make an order directing a party to do or refrain from doing an act or thing which the Court considers necessary to do justice between the parties.[25]

4.3 In four areas it appears that a reviewing court may engage in review of facts:

(a) jurisdictional facts;

(b) review on the ground of *Wednesbury* unreasonableness;

(c) review on the "no evidence" ground; and

(d) admission of expert evidence on the meaning of technical terms in statutory provisions.

4.4 (a) *Jurisdictional facts*. A precondition that must exist in order for a decision-maker's jurisdiction to be enlivened is a jurisdictional fact. In order to determine whether there is an excess of jurisdiction, or a constructive failure to exercise jurisdiction, a reviewing court may determine for itself whether that fact or state of affairs existed. In some cases what is termed a jurisdictional fact is a complex of elements containing legal and factual components. A reviewing court may admit expert evidence that was not before the decision-maker in order to determine whether a factual component of a jurisdictional fact objectively existed. A jurisdictional fact may also consist in the formation of a state of satisfaction or an opinion on the part of a decision-maker.

4.5 From 2003 to 2010 the High Court developed a new basis for review of jurisdictional facts, accepting that illogicality and irrationality is a basis for finding jurisdictional error.[26] While illogicality is explained in different ways in the leading case, *Minister for Immigration and Citizenship*

[25] *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 536-7, 541.

[26] *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59; *Minister for Immigration and Citizenship v SGLB* (2004) 207 ALR 12; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 61. Cf *Haritos v Commissioner of Taxation* (2015) 233 FCR 315, an appeal from the AAT rather than a judicial review case based on jurisdictional error, where nonetheless *SZMDS* was applied.

v SZMDS,[27] it may be demonstrated where there is an absence of a logical connection between the evidence and the reasons of the decision-maker, or there is only one conclusion open on the evidence and the decision-maker does not come to that conclusion.[28] However a decision is not illogical or unreasonable just because the decision-maker preferred one finding to another, or where there is room for a logical or rational person to reach the same decision on the material before the decision-maker.[29]

4.6 Whether there is a jurisdictional fact that may be reviewed on the basis of illogicality or irrationality is a question of construction of the statutory provisions conferring jurisdiction on the decision-maker. In practice reviewing courts appear to be reluctant to accept that a matter involving expert judgment[30] or a consultation procedure[31] is a jurisdictional fact.

4.7 Where jurisdictional error is claimed to have occurred on account of the absence or presence of a jurisdictional fact, preparation for a judicial review hearing is uncertain. If there is no existing clear authority on the construction of the particular statutory provision, it will be uncertain until the hearing as to whether the court will admit the expert evidence relating to a jurisdictional fact. The applicant will be able to file and serve the expert evidence, and other parties will incur the cost of putting on expert evidence. All parties will prepare for cross examination or concurrent evidence of experts, even though the court at the hearing may decline to admit any of the expert evidence on the ground that there is no jurisdictional fact, or admit it but find it unnecessary to evaluate it as there is no jurisdictional fact.

4.8 *(b) Review on the ground of Wednesbury unreasonableness*. The ground of *Wednesbury* unreasonableness is established where a decision is so unreasonable no reasonable decision-maker could have

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[27] (2010) 240 CLR 611.
[28] (2010) 240 CLR 611 at 649-650[135] per Crennan and Bell JJ, 627[51] per Gummow ACJ and Kiefel JJ.
[29] (2010) 240 CLR 611 at 648[131], 649[135] per Crennan and Bell JJ.
[30] *The Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297; *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* (2008) 166 FCR 54.
[31] *The Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297.

reached it.[32] This may be established where the decision-maker in exercising a discretion has given insufficient or excessive weight to some matter,[33] but not simply because the reviewing court emphatically disagrees with the decision-maker's finding or evaluative judgment. It is possible that expert evidence could be admissible in order to establish that a decision is *Wednesbury* unreasonable because it is perverse, say because of a statistical fallacy.

4.9 The ground has always required "something overwhelming", and there are few cases where it is established.[34] In *Li* the plurality accepted that *Wednesbury* unreasonableness may arise if a decision-maker gives inadequate weight to a relevant factor of great importance or gives excessive weight to an irrelevant factor of no importance,[35] and that cases involving *Wednesbury* unreasonableness can be ordered under paradigms, one of which is lack of proportion.[36] However *Wednesbury* unreasonableness only occurs where the decision is shown to be "irrational if not bizarre".[37] The plurality may have regarded *Wednesbury* as a more extreme case of unreasonableness than unreasonableness in the *Li* sense. It was *Li* unreasonableness that formed the basis of the plurality's decision. Chief Justice French held that a decision that is disproportionate and therefore *Wednesbury* unreasonable, falls within the realm of what is irrational,[38] and as a gloss on the *Wednesbury* test, said that such a decision must be, and was in this case "arbitrary or capricious or [abandons] common sense".[39] As discussed below, Gageler J held that the former Migration Review Tribunal (**MRT**) failed to grant an adjournment of proceedings before it in circumstances where no reasonable tribunal could have failed to

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32 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
33 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.
34 As to *ADJR Act* review of decisions of the AER, *Wednesbury* unreasonableness was not established in *ActewAGL Distribution v The Australian Energy Regulator* (2011) 195 FCR 142 at 175[151]-176[156], although the ACT had set aside similar decisions made with respect to other network service providers. (The applicant in the *ADJR Act* proceedings had failed to seek review in the ACT and then unsuccessfully sought to persuade the AER to revise its decision in line with the others.)
35 (2013) 249 CLR 332 at 365-6[72].
36 (2013) 249 CLR 332 at 366[73]. The plurality also said that there is an analogy with the test in *House v The King* (1936) 55 CLR 499 at 505 for appellate review by a court of a judge's exercise of a discretion: (2013) 249 CLR 332 at 367[76].
37 (2013) 249 CLR 332 at 364[68].
38 (2013) 249 CLR 332 at 352[30].
39 (2013) 249 CLR 332 at 351[28], 352[31].

adjourn.[40] However the *Wednesbury* unreasonableness test is one of "stringency" and will be met only in "a rare case".[41] The test is more difficult to satisfy when the decision-maker legitimately may apply a policy.[42] This was one of those rare cases where *Wednesbury* unreasonableness was established.[43]

4.10 *(c) No evidence ground.* This ground is established only where there is legal error because there is no evidence at all to support a finding of fact.[44] In review under the *ADJR Act* there is a limited additional basis for establishing the no evidence ground.[45]

4.11 *(d) Admission of expert evidence in relation to the meaning of technical terms in statutory provisions.* In judicial review any reasons statements, together with documentary or affidavit evidence as to the decision-making process and the material before the decision-maker provide the court with evidence as to the basis on which the decision was made. This enables the court to make factual findings as to the basis on which the decision was made in order to determine whether the decision is infected by legal error. Beyond this, evidence of an expert or technical nature relating to the issues that were before the decision-maker is ordinarily inadmissible. It is not relevant since it is not the function of the court to re-exercise the power.

4.12 However if the court entertains a ground or contention of the kind in (a), (b) or (c) above, it may admit expert evidence for that limited purpose.[46] Further, a court in judicial review may admit expert evidence as to the meaning or trade usage of technical words in statutory provisions.[47]

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[40] (2013) 249 CLR 332 at 374[103].
[41] (2013) 249 CLR 332 at 377-8[113].
[42] (2013) 249 CLR 332 at 376[108].
[43] (2013) 249 CLR 332 at 378[113]. In *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at 451[77] the Full Federal Court in obiter held that a refusal to grant an adjournment was *Wednesbury* unreasonable (applying the *Wednesbury* paradigm of disproportionality).
[44] *Hope v Bathurst City Council* (1980) 144 CLR 1; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
[45] *ADJR Act* ss 5(1)(h) with 5(3), 6(1)(h) with 6(3).
[46] See. for example, *ActewAGL Distribution v The Australian Energy Regulator* (2011) 195 FCR 142 at 173-4[146].
[47] *Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 at 543-4[107]; *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 401-410[462]-[505], 423-5[559]-[596], 435-440[649]- [669]; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [471]

4.13 Grounds (a), (b) and (c) go to the lawfulness of the decision under review. It remains the case that there is no error of law in making a wrong finding of fact. Consistently with this principle, at common law in Australia "want of logic is not synonymous with error of law" because even if an "inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place".[48] This principle was qualified by the development of the illogicality test for review of jurisdictional facts. However there has been no doubt that the legality/merits distinction persists, including in judicial review of decisions of the AER: "the ADJR Act does not authorise the correction of unreasonable decisions, only those where the exercise of the discretion was [*Wednesbury* unreasonable]".[49] The new question is whether *Li* introduces a more general ground of review of fact finding on the ground of unreasonableness, irrationality or illogicality that qualifies the legality/merits distinction so substantially that judicial review offers a form of review close to, or even similar to, limited merits review.

5. Review on the ground of unreasonableness in the *Li* sense

The decision in *Li*

5.1 According to *Minister for Immigration and Citizenship v Li*,[50] there is a legal presumption that the legislature intends a statutory discretionary power to be exercised reasonably, and failure to exercise the power reasonably constitutes jurisdictional error.[51] *Li* was not a jurisdictional fact case and there is little discussion of *SZMDS*. The requirement in *Li* to exercise power reasonably apparently sits alongside *Wednesbury* unreasonableness, offering a distinct basis for establishing jurisdictional error. The MRT had refused an adjournment sought by an applicant for review of a decision refusing a skilled visa. The applicant had explained to the MRT that

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Telstra v Australian Competition and Consumer Commission (2008) 176 FCR 153 at 168[46]-169[52]; *CKI Utilities Development Pty Ltd v Australian Energy Regulator* [2016] FCA 17 at [128].

48 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 per Mason CJ.

49 *ActewAGL Distribution v The Australian Energy Regulator* (2011) 195 FCR 142 at 167-8[113] per Katzmann J.

50 (2013) 249 CLR 332.

51 (2013) 249 CLR 332 at 348-351[23]-[29] per French CJ, 362[63] per Hayne, Kiefel and Bell JJ, 370-1[89]-92] per Gageler J.

she was in a position to get a favourable review of her skills assessment within a short period of time. The MRT's stated reasons for its adverse exercise of the power to adjourn in s 363(1)(b) of the *Migration Act* 1958 (Cth), were that the applicant had been given enough opportunities to present her case, and it was not prepared to delay further.[52] The plurality held that on the true construction of this statutory power, it was required to be exercised reasonably.[53] Given the facts and matters to be decided, it was not possible for the plurality to comprehend how the MRT arrived at its decision, which "lack[ed] an evident and intelligible justification".[54]

5.2 The general principle in *Li* was stated by the plurality (Hayne, Kiefel and Bell JJ), with Gageler J accepting that there is such a presumption, and French CJ refraining from doing so explicitly. As discussed above, French CJ and Gageler J confined themselves to holding that *Wednesbury* unreasonableness was established.[55] Properly understood, French CJ and Gageler J may have accepted a much more limited version of the implied requirement to act reasonably, a presumption that a statutory power is not to be exercised so unreasonably that no reasonable decision-maker could have so exercised it. Nonetheless the approach of the plurality can be expected to determine the principle and the ground of review in the future. In particular, the plurality's conclusion that the MRT's decision "lack[ed] an evident and intelligible justification" will operate as the practical test of unreasonableness.[56]

Judicial review post *Li*

5.3 The following indicate that judicial review post *Li* remains entirely different from merits review:

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[52] (2013) 249 CLR 332 at 352[31].
[53] (2013) 249 CLR 332 at 362[63], 363-4[67].
[54] (2013) 249 CLR 332 at 367[76].
[55] (2013) 249 CLR 332 at 350-1[28], 352[31], 377-8[113].
[56] Subsequently the High Court has referred to *Li* in passing as a case of jurisdictional error for failure to conduct the review required by the *Migration Act*: *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at 222[68]n48. In two interlocutory decisions the High Court has dismissed claims based on *Li*. In the first, Bell J refused an extension of time to commence proceedings where an unrepresented applicant made an unparticularised claim that the RRT acted unreasonably in affirming a decision to refuse her a protection visa: *Plaintiff S33 of 2016 v Minister for Immigration and Border Protection* [2016] HCATrans 214. The second was a summary dismissal of proceedings for futility: *Plaintiff S38 of 2016 v Minister for Immigration and Border Protection* [2016] HCATrans 215.

(vi) constitutional limitations preclude federal courts from providing merits review;

(vii) the legality/merits distinction is retained;

(viii) the importance of a lack of adequate reasons;

(ix) *Li* may be primarily directed to the exercise of procedural powers rather than substantive powers; and

(x) the implied requirement to act reasonably does not apply to the exercise of statutory duties.

(i) Constitutional limitations

5.4 The federal constitutional doctrine of separation of powers requires that the Federal Court only exercise judicial power of the Commonwealth. Chapter III of the Commonwealth Constitution precludes the Federal Court from exercising a type of merits review power. Federal judges are able to accept appointment as presidential members of federal merits review tribunals only in their personal capacity.[57]

5.5 Acting as a presidential member of the AAT, which conducts full merits review, a Federal Court judge does not exercise judicial power of the Commonwealth but exercises executive power. The position is no different when a Federal Court judge acting as a presidential member of the ACT engages in limited merits review. That function includes power for certain purposes to perform all the functions and exercise all the powers of the AER under the NEL and the NER, including power to vary a reviewable regulatory decision and to reach a state of

[57] *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60.

satisfaction concerning policy matters involved in the materially preferable NEO decision. Such a function of limited merits review cannot be vested in the Federal Court.

5.6 Review on the ground of unreasonableness in the *Li* sense, including direct judicial review on this ground of a decision made by the AER, cannot be equated with limited merits review in the ACT. The former is an exercise of judicial power of the Commonwealth to supervise the lawfulness of an administrator's exercise of statutory power. This is not a review which includes review of fact finding, evaluation of policy matters and potential re-exercise of powers of the decision-maker. Any claim that judicial review in the Federal Court on the ground of *Li* unreasonableness is close to, or even similar to, limited merits review in the ACT, is fallacious. There is a constitutional gulf between the nature of the functions and the nature of the reviewing institutions.

(ii) Legality / merits distinction

5.7 *Li* establishes the implied requirement to exercise a statutory power reasonably without abandoning the fundamental limitation upon the function of a court in judicial review. In judicial review the court's role is supervisory, confined to review of the legality of the decision and may not trespass on the merits.[58] The court may not substitute its view as to how a discretion should be exercised for that of the decision-maker. The limitation on the function of courts in judicial review is a fundamental common law constitutional principle. It is consistent with federal constitutional separation of powers.

5.8 This was explicitly stated by the plurality in *Li*,[59] referring to the classic authority of *Attorney-General (NSW) v Quin*.[60] The plurality said that review on the ground of unreasonableness does not enable "review of the merits of an exercise of discretionary power" and "does not involve

[58] (1990) 170 CLR 1 at 36-37.
[59] (2013) 249 CLR 332 at 363[66].
[60] (1990) 170 CLR 1 at 36-37.

substituting a court's view as to how a discretion should be exercised for that of a decision-maker".[61] The preservation of the legality/merits distinction is captured in the judgments of the plurality and French CJ by the idea that in the exercise of a statutory discretionary power there is "an area within which a decision-maker has a genuinely free discretion",[62] or an "area of decisional freedom".[63] Chief Justice French gave the point greater emphasis by re-affirming a dictum in *Minister for Immigration and Multicultural Affairs v Eshetu*,[64] that a court's characterisation of reasoning as illogical or unreasonable "as an emphatic way of expressing disagreement with it", need not amount to legal error if the decision is rationally open to the decision-maker.[65] Like other members of the Court, French CJ cautioned that reasonableness is not demonstrated by a court's emphatic disagreement with the outcome of the exercise of power. Significantly, French CJ rejected the proposition that application of the reasonableness requirement entitles a court to interfere with a decision on the basis that insufficient or excessive weight was given to some matter.[66] While French CJ accepted that proportionality is a basis for finding that a decision is unreasonable, he apparently did so within the bounds of *Wednesbury* unreasonableness.[67]

5.9 In the judgment of Gageler J the preservation of the legality/merits distinction is more subtle, reflected in the emphasis upon the stringency of the test of *Wednesbury* unreasonableness and the difficulty of meeting that test where the exercise of power involves policy considerations.[68]

5.10 The High Court made it clear that the requirement to act reasonably is not an opportunity to review the factual findings of a decision-maker in its area of decisional freedom. The Full Federal Court has consistently warned that *Li* does not allow it to trespass upon the merits of

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61 (2013) 249 CLR 332 at 363[66].
62 (2013) 249 CLR 332 at 363[66] per Hayne, Kiefel and Bell JJ.
63 (2013) 249 CLR 332 at 351[28] per French CJ.
64 (1999) 197 CLR 611 at 626[40] per Gleeson CJ and McHugh J. The dictum was repeated in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1167[5] and *Minister for Immigration and Citizenship v SZMDS* 2020) 240 CLR 611 at 647[129] per Crennan and Bell JJ.
65 (2013) 249 CLR 332 at 351[30].
66 (2013) 249 CLR 332 at 351[30].
67 (2013) 249 CLR 332 at 352[30].
68 (2013) 249 CLR 332 at 376[108], 377-8[113].

an exercise of discretion by placing itself in the position of the decision-maker and substituting its own view as to the weight to be given to evidence from which factual inferences are drawn. Post *Li*, the Court in judicial review is confined to determining whether a power was exercised lawfully, there being one legally correct answer to that question.

5.11 In the Federal Court *Li* was quickly followed by *Minister for Immigration and Border Protection v Singh*,[69] a case concerned with a refusal to adjourn, in exercise of the same power of the MRT. The circumstances were very similar to those in *Li* although the MRT's reasons were slightly more informative.[70] The Court (Allsop CJ, Robertson and Mortimer JJ) held that the power to adjourn was exercised unreasonably because the MRT had provided no objective or intelligible justification for its decision and, given the circumstances, it had not given "active consideration" to the request.[71] Nonetheless the Court held that it should not trespass on the merits by placing itself in the position of the decision-maker and re-exercising the power.[72] While required to scrutinise the facts when evaluating the justification given in the reasons, the Court's function is restricted to finding legal error in the decision-maker's reasoning process.

5.12 That *Li* does not give the Court a new ability to trespass upon the fact finding that is part of the merits is made clear not only in *Singh*, but in the leading Full Federal Court cases following *Singh*: *Minister for Immigration and Border Protection v Stretton*[73] and *Minister for Immigration and Border*

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[69] (2014) 231 FCR 437.

[70] The applicant sought an adjournment of a review in the MRT, to give him time to obtain a re-mark of an English skills test which the MRT had agreed he should be able to take. The MRT refused the adjournment, giving as reasons that it had no evidence the applicant had actually applied for the re-mark, and that he had had a reasonable period of time to provide evidence of competent English, having applied for the visa two years earlier and attempted the test several times.

[71] The Court inferred this from the circumstances. The request had been made for the highly specific purpose of enabling a re-mark to be obtained of the test, to confirm whether the results were an accurate reflection of his performance; the MRT had already agreed to await the outcome of the test; it was unlikely that the re-mark process would be long or complex; there was no prejudice the respondent in granting an adjournment; and the decision was not affected by policies of which the Court had no experience.

[72] (2014) 231 FCR 437 at 447[47].

[73] (2016) 237 FCR 1. Special leave was refused: *Stretton v Minister for Immigration and Border Protection* [2016] HCATrans 200. The applicant, who had resided in Australia since he was a small boy and whose family was in Australia, had been convicted of crimes involving the sexual abuse of his eight or nine year old granddaughter.

Protection v Eden.[74] In both cases the primary judge had held that cancellation of a visa on the basis of the character test in s 501(2) of the *Migration Act* 1958 (Cth) was not *Wednesbury* unreasonable but was unreasonable in the broad sense set out in *Li*.[75] The Full Court (Allsop CJ, Griffiths and Wigney JJ) reversed both decisions, holding that that the primary judge had trespassed on the merits. The primary judge had engaged in "a form of impermissible merits review under the guise of the legal unreasonableness ground of judicial review".[76] Failing to refer to the area of free discretion and to the fact that reasonable minds might differ as to whether the visa should be cancelled, the primary judge had applied his own view of reasonableness.[77] In *Eden* the dictum of Gageler J in *Li* that *Wednesbury* unreasonableness is established only in a rare case was invoked, and extended in its application to cases of unreasonableness in the *Li* sense.[78] Further reference was made to the fact that this was a decision made by the Minister personally, not subject to review by the AAT, and hence not intended to be subject to merits review. In both cases the Full Court repeated the warning that a court's function in judicial review is strictly supervisory and does not allow for interference on the ground of unreasonableness merely because of the court's emphatic disagreement with the outcome.[79] The Minister's statement of reasons provided an evident and intelligible justification for the cancellation decision. The *Li* test was to be applied by reference to the terms, scope and purpose of the relevant statutory provisions.[80]

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[74] (2016) 240 FCR 158. The applicant, a taxi driver, had been convicted of sexual assault of a female passenger. While his sentence of 12 months' imprisonment was wholly suspended, he just fell within the scope of the power to cancel on the character ground under s 501(2).

[75] In *Eden* the primary judge held that the objective seriousness of the offence, delay by the Minister after the conviction, and the competing considerations of the applicant's personal circumstances, were factors showing that the cancellation decision lacked an evident and intelligible justification under the test of the plurality in *Li* and was disproportionate under the test of French CJ in *Li*.

[76] *Eden* (2016) 240 FCR 158 at 180[103].

[77] *Eden* (2016) 240 FCR 158 at 177[91], 178[93]. In *Eden* it was open to the Minister to form the view that the offence was very serious. The primary judge trespassed on the merits in replacing that finding with a finding that the offence was not objectively serious. The Minister's findings as to the risk of harm to the Australian community were reasonably open, and provided an evident and intelligible justification for the cancellation decision: (2016) 240 FCR 158 at 178-9[98]-[99]. The primary judge had not explained why cancellation was a disproportionate response to that risk: (2016) 240 FCR 158 at [100].

[78] (2016) 240 FCR 158 at 180[103].

[79] *Stretton* (2016) 237 FCR 1 at 5[8], 6[12] per Allsop CJ, 25-6[74], 26[76] per Griffiths J, 29-30[92] per Wigney J; *Eden* (2016) 240 FCR 158 at 171[59], [62] per Allsop CJ, Griffiths and Wigney JJ.

[80] *Stretton* (2016) 237 FCR 1 at 5-6[11] per Allsop CJ, 17[55] per Griffiths J, 29-30[92] per Wigney J; *Eden* (2016) 240 FCR 158 at 171-2[63].

5.13 The warning given in *Stretton* and *Eden* has been heeded in single Federal Court cases.[81]

5.14 In *Li* the plurality said that there is an analogy between unreasonableness and the test in *House v The King*, where an appellate court may infer that a discretion is not exercised properly because on the facts the outcome is "unreasonable or plainly unjust".[82] Justice Gageler described this as a "close analogy".[83] However analogy is not sameness. Unreasonableness in the *Li* sense does not equate with the test for appellate review of the exercise of a judicial discretion as set out in *House v The King*.[84] In *Stretton* Allsop CJ was correct to reject any suggestion[85] that *Li* unreasonableness is akin to review under *House v The King*.[86] In judicial review a determination is made as to whether a power was or was not exercised lawfully, there being one legally correct answer to that question. The appellate discretion to interfere with a judicial discretion is different, being a fresh evaluative judgment.[87]

5.15 The caution exercised in *Stretton* and *Eden* is not confined to judicial review of visa cancellation decisions under s 501(2) of the *Migration Act* but applies generally to the application of the ground of *Li* unreasonableness. For example, in *Emmett v McCormack*[88] the Full Court rejected a contention that a decision made by a delegate of the Minister refusing to waive a debt under s 34 of the *Financial Management and Accountability Act* 1997 (Cth) was unreasonable in the *Li* sense. The debt was assessed under the *Child Support (Registration and Collection) Act* 1988 (Cth). There was an allegation of partisan or defective administration in the assessment because the Department of Human Services ("DHS") failed to bring to the appellant's attention a provision under which he could have applied to have his debt partially extinguished by registration of his second liability to make payments pursuant to a United Kingdom order. Whatever the defects

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81 *ABAR15 v Minister for Immigration and Border Protection (No 2)* [2016] FCA 721 at [47]-[52], [85]-[88]; *Kaur v Minister for Immigration and Border Protection (No 2)* (2014) 236 FCR 393 at 422[110], 423[113].
82 (2013) 249 CLR 332 at 366-7[75]-[76].
83 (2013) 249 CLR 332 at 376[110].
84 (1936) 55 CLR 499 at 505.
85 (2016) 237 FCR 1 at 9[25].
86 (1936) 55 CLR 499 at 505.
87 (2016) 237 FCR 1 at 9[25]. See also *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158 at 178[94] (Allsop CJ, Griffiths and Wigney JJ).
88 [2016] FCAFC 65.

in the decision-making of DHS, the Minister's delegate had not made the errors contended for (denial of procedural fairness and *Wednesbury* unreasonableness), when refusing to waive the debt. In dealing with *Wednesbury* unreasonableness, Flick J rejected a contention that the delegate's decision was arbitrary and capricious in the sense articulated by French CJ in *Li*.[89]

5.16 In State and Territory judicial review cases *Li* has been understood to leave intact the requirement that the court does not trespass on the merits.[90] In cases relying on *Wednesbury* rather than *Li*, State judges have referred to Gageler J's comments that the *Wednesbury* test is a stringent one, that *Wednesbury* is rarely established, and that nothing in *Li* should be taken as encouragement to greater frequency of applications for relief on the *Wednesbury* ground.[91] Of particular significance is the refusal to trespass on the policy considerations that form part of the merits. In *Waterhouse v Independent Commission Against Corruption (No 2)*[92] the NSW Court of Appeal referred to Gageler J's reference in *Li* to the particular difficulty of establishing *Wednesbury* unreasonableness where the exercise of power is "legitimately informed by considerations of policy", and interpreted the reference to "policy" to mean broad questions of public interest.[93] By extending Gageler J's dictum to *Li* unreasonableness, the Court emphasised that *Li* does not allow the Court to trespass on the policy elements of an exercise of discretionary power. In *Acquista Investments Pty Ltd v The Urban Renewal Authority*[94] the Full Court of the Supreme Court of South Australia by majority held that was not for the Court to

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[89] [2016] FCAFC 65 at [76].

[90] See *Tan v Kotzman* [2016] VSC 482 at [18] per John Dixon J (the merits of any opinion expressed by the medical panel established under Victorian workers compensation legislation are for the medical panel alone).

[91] *Young Mining Co Pty Ltd v Minister for Industry, Resources and Energy NSW* [2016] NSWSC 1193 at [12]-[13] per Stevenson J (rejecting a contention at an interlocutory stage that there was a serious question to be tried that the Minister acted *Wednesbury* unreasonably in refusing an extension of time to lodge a security deposit for a mining lease).

[92] [2016] NSWCA 133.

[93] [2016] NSWCA 133 at [83]-[85]. In exercising its statutory power to decline to investigate, the Independent Commission Against Corruption (**ICAC**) could, without acting *Li* unreasonably, legitimately take into account budgetary constraints limiting its resources to investigate, as an aspect of the competing public interests for or against investigation of a particular complaint

[94] (2015) 123 SASR 147. Special leave was granted, but the appeal was not pursued: *Acquista Investments Pty Ltd v The Urban Renewal Authority* [2015] HCATrans 295.

evaluate, on the ground of *Li* unreasonableness, a decision to enter a contract that involved competing policy considerations.[95]

5.17 *Li* unreasonableness has not introduced a new function of courts in judicial review entering into the merits of an exercise of power. The caution expressed in *Li* itself, consistently repeated by the Federal Court, is that review for unreasonableness does not involve a re-exercise of the discretion to evaluate evidence, find facts or make policy judgments. The outcomes of the judicial review cases are consistent with this stated retention of the legality/merits distinction.

(iii) Lack of reasons

5.18 In *Singh* the Full Court explained how *Li* should operate by distinguishing between two different contexts where an exercise of power may be alleged to be unreasonable. In the first, jurisdictional error is established on the basis of an identified leg*al error,* constituting jurisdictional error, but the decision may also be described as unreasonable. In the second context, described as "outcome focused", jurisdictional error is established on the basis of unreasonableness, without necessarily identifying some other legal error. The decision is "arbitrary, capricious or [has abandoned] common sense" in the sense described by French CJ in *Li*, or the Court cannot comprehend how the decision was arrived at, in that it lacks "an evident and intelligible justification", to use the description of the plurality.[96] The outcome focused situation is more likely to arise where a decision-maker has given no reasons and all the court can do is focus on the outcome and apply this test. When a decision-maker has given reasons, the first context arises because the court is more likely to identify a particular error in the reasoning process that constitutes jurisdictional error rather than be focused on the outcome.[97] If there is an intelligible justification it will be found in the reasons.

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[95] (2015) 123 SASR 147 at 169-170[84]. See also *Cavo Pty Ltd v Simon Corbell, Minister for the Environment and Sustainable Development* [2016] ACTCA 45 at [199]-[205].
[96] (2014) 231 FCR 437 at 445[44].
[97] (2014) 231 FCR 437 at 446[45], [47].

5.19 In *Stretton* and *Eden* the Full Court provided a further summary of principles governing review on the *Li* ground. Importantly, where there is a statement of reasons this is the focus for evaluation of whether the decision is unreasonable. In *Stretton* and *Eden* the Full Court retained the distinction between outcome focused and other contexts in which unreasonableness may be considered.[98] In *Stretton* Griffiths J said that while it is possible to establish unreasonableness in the *Li* sense where there is a statement of reasons, if there is a statement of reasons that discloses a justification for the decision it will be rare for the court to intervene.[99] In *Eden* the Court held that if the reasons provide an evident and intelligible justification for the decision it is unlikely that it is unreasonable. If the reasons do not show some other distinct legal error, a decision will be *Li* unreasonable because the Court is not able to comprehend from the reasons how the decision was arrived at, or because the justification given is not sufficient to outweigh the inference that the decision is otherwise outside the bounds of legal reasonableness or possible lawful outcomes.[100]

5.20 The disinclination of the Court to review on the *Li* ground where reasons have been given and the decision involves error that may properly be expressed via other grounds, is illustrated by *Minister for Immigration and Border Protection v SZSNW,*[101] *Ayoub v Minister for Immigration and Border Protection*,[102] *Cotterill v Minister for Immigration and Border Protection*[103] and *AZAFQ v Minister for Immigration and Border Protection.*[104]

5.21 In *SZSNW* the Full Federal Court was concerned with judicial review of an assessment of a refugee claim undertaken by the Independent Merits Review (**IMR**), as a step towards a possible exercise of statutory power by the Minister. It was clear that the IMR made an error of fact when it found that the applicant made no claim of sexual torture in Sri Lanka at his

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98 *Stretton* (2016) 237 FCR 1 at 4-5[7], 29[91] per Allsop CJ (Wigney J agreeing); *Eden* (2016) 240 FCR 158 at 171[60].
99 (2016) 237 FCR 1 at 24[70](d).
100 *Eden* (2016) 240 FCR 158 at 172[64].
101 [2014] FCAFC 145.
102 (2015) 231 FCR 513.
103 (2016) 150 ALD 252.
104 [2016] FCAFC 105.

initial entry interview. Its adverse credibility finding about the applicant was based on this false factual premise. Justices Mansfield and Perram held that the IMR's decision was *Wednesbury* unreasonable.[105] Justice Buchanan held that the IMR made an error of law in disregarding the fact that the applicant had made the claim of torture,[106] and also denied the applicant procedural fairness. Justice Mansfield found it unnecessary to decide whether the decision was unreasonable in the *Li* sense, Perram J held in obiter that it was,[107] and Buchanan J held *Li* incapable of application to the IMR which does not actually exercise statutory power itself.[108] Justice Perram stated that he shared Buchanan J's "concern that *Li* is not about the review of facts generally but about the exercise of statutory powers".[109] The decision suggests that the Court will focus on other arguable grounds, rather than determine a contention that there is *Li* unreasonableness.

5.22 In *Ayoub*, a further case of review of a visa cancellation decision under s 501(2) of the *Migration Act*, the Full Court rejected a contention that the Minister erred by failing to take into account a relevant consideration of the risk of future harm to the Australian community. In the course of addressing this ground of review, the Full Court expressed its opinion that the Minister's reasons for decision were adequate, disclosing a logical pathway of reasoning.[110] As a consequence, when the Court turned to consider the ground of *Li* unreasonableness, it was swiftly dismissed.[111]

5.23 Similarly, in *Cotterill* Kenny and Perry JJ did not determine an appeal on the *Li* ground which was the only ground in the notice of appeal, but on a different ground, raised with leave only in the course of the appeal hearing. This was that the Minister failed to take into account a relevant consideration that a possible consequence of the visa cancellation decision was the applicant's prolonged or indefinite detention because of his ill-health. These two judges allowed

105 [2014] FCAFC 145 at [16] per Mansfield J, [108] per Perram J.
106 [2014] FCAFC 145 at [83]-[84]
107 [2014] FCAFC 145 at [108], [110].
108 [2014] FCAFC 145 at [81]-[82].
109 [2014] FCAFC 145 at [109].
110 (2015) 231 FCR 513 at 525[42]-529[49].
111 (2015) 231 FCR 513 at 529[51]-530[54].

the applicant's appeal on this ground, which constituted jurisdictional error, without determining the *Li* ground. Justice North held that the same ground was established, but also held that a number of aspects of the Minister's reasoning indicated it lacked an intelligible justification and was *Li* unreasonable.[112]

5.24 In *AZAFQ* the Full Court observed that because the Minister had given reasons, the *Li* claim before it could not be a challenge to the outcome but rather was a challenge to the reasoning process.[113] The Full Court (Allsop CJ, Robertson and Griffiths JJ) disposed of the *Li* ground by having resort to other grounds of review, asking whether the Minister had failed to take into account relevant considerations as to whether there was a possibility the applicant might be detained indefinitely, and as to the risk of harm to the Australian community. Since these grounds of review were not established, there was an intelligible justification for the Minister's cancellation decision.[114] This emphasises the point of the distinction first made in *Stretton*, that when full reasons are given the Court will understand the claim of *Li* unreasonableness by reference to other grounds of review.

5.25 While the distinction between the two contexts is no more than a description by the Full Court of the kinds of decision-making contexts to which the *Li* test is applied, the clear implication is that an outcome focused context means simply that no reasons or manifestly inadequate reasons have been given, and therefore the decision is more strongly exposed to a *Li* challenge. In short, the Court expects that *Li* will be argued in cases where no reasons are given, rather than in cases where reasons have been given and some other ground of review is or is not capable of being established. The decision is of such a nature that it calls for justification, but there are no reasons justifying it or the reasons that are given are too meagre and unconvincing to succeed in doing so. In *Li* itself reasons were given but they were insufficient to enable the plurality to understand why the adjournment was refused. It was enough that "the result itself

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112 (2016) 150 ALD 252 at 269[96],[99].
113 [2016] FCAFC 105 at [43].
114 [2016] FCAFC 105 at [58].

bespeaks error"[115] and "error must be inferred".[116] In *Singh* slightly more detailed reasons were given, but they were not responsive to the application and the circumstances. In both cases the reasons failed to justify the decision, in the context of the subject, scope and purpose of the particular statutory provisions.

5.26 In cases where there is no other legal error, applicants may fail to establish *Li* unreasonableness because the reasons provide an evident and intelligible justification for the decision. In *Minister for Immigration and Border Protection v Le*[117] the Full Court (Allsop CJ, Griffiths and Wigney JJ) rejected a contention that the Minister acted unreasonably in the *Li* sense in cancelling a visa.[118] There was no error by the Minister as to which visa the applicant held, or as to which visa was cancelled, nor was the Department required to advise the Minister when and how the applicant ceased to hold a protection visa or a transitional visa, or as to Australia's protection obligations.

5.27 This approach is generally taken in single Federal Court cases. The reasons of the former Refugee Review Tribunal (**RRT**) have been held to provide an evident or intelligible justification if it evaluates evidence as to risk of harm on the basis of some evidence, since these are questions of degree. *Li* unreasonableness does not allow the Court to interfere on the basis of the relative sufficiency of the evidence that forms part of the justification the RRT gives.[119]

5.28 In *ABAR15 v Minister for Immigration and Border Protection (No 2)*[120] adherence to the legality/merits distinction would have prevented the Court from finding *Li* unreasonableness, save that other errors were established. On one hand, the former RRT was entitled to "cherry pick from among various sources of country information so as to form, by its own evaluation

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115 (2013) 249 CLR 332 at 369[85].
116 (2013) 249 CLR 332 at 369[85].
117 [2016] FCAFC 120.
118 [2016] FCAFC 120 at [72]-[78].
119 For example, in *MZAJG v Minister for Immigration and Border Protection* [2016] FCA 1045 at [18]-[20] the RRT had rejected evidence that a person who converted would be targeted by the Sunni community. Justice Jessup rejected a contention that the finding was *Li* unreasonable. The RRT was presented with a question of degree and on its evaluation of the country information the risk of harm was remote. This was a case where there was an evident or intelligible justification but the complaint was about the sufficiency of the justification which the RRT favoured.
120 *ABAR15 v Minister for Immigration and Border Protection (No 2)* [2016] FCA 721.

of the selected material, its own conclusions of fact", and "the weighing and evaluation of countervailing considerations is not a decision amenable to interference by a Court on judicial review merely because the Court might evaluate the considerations differently or accord different considerations more or less weight than that accorded by the [RRT]".[121] On the other hand, the RRT had made a finding that reports were varied as to the effectiveness of enforcement by the Vietnamese authorities of domestic violence laws, in circumstances where there was no country information before the RRT stating that the laws were effectively implemented, and the reports precluded such a finding. This was not a case of the RRT preferring or evaluating evidence, but was a case of the RRT acting on the basis of no evidence, or failing to take into account a relevant consideration, and it followed that *Li* unreasonableness was also established.[122] In this case *Li* unreasonableness would not have been established unless the strict no evidence rule had been satisfied.

5.29 In the New South Wales Court of Appeal *Li* unreasonableness has been accepted to be a ground of judicial review, but one which is not readily established when the decision-maker has given reasons. In *Duncan v Independent Commission Against Corruption*[123] the Court accepted that the ground of *Li* unreasonableness could potentially be applied in judicial review of a finding by the ICAC of corrupt conduct.[124] However the ICAC had given a detailed report which contained clear findings logically supporting the ICAC's conclusion that the appellants knew of certain activities.[125] Single judge decisions in NSW have also illustrated that *Li* unreasonableness is not established where adequate reasons have been given,[126] or that where reasons are given

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121 *ABAR15 v Minister for Immigration and Border Protection (No 2)* [2016] FCA 721 at [86]-[88].
122 *ABAR15 v Minister for Immigration and Border Protection (No 2)* [2016] FCA 721 at [101].
123 [2016] NSWCA 143.
124 [2016] NSWCA 143 at [287] [290] per Bathurst CJ, Beazley P agreeing. Justice Basten at [723] simply held that ample reasons were given for the findings in the report and it could not be said that the ICAC's recommendation was arbitrary or irrational or that no reasonable Commissioner could have made it.
125 [2016] NSWCA 143 at [292]-[301]. Agreeing with Bathurst CJ, Beazley P held that none of the ICAC's factual findings was unreasonable. See also *Learmont v Commissioner of Police* [2016] NSWCA 137 at [97], [99], where the Court of Appeal (Ward JA, Beazley P and Sackville AJA agreeing) held that the District Court (exercising merits review jurisdiction with respect to a decision of the Commissioner of Police concerning compensation for a work injury) did not make a decision as to the nature of the injury that lacked an evident and intelligible justification when the evidence was considered as a whole.
126 See for example, *Dominice v Allianz Insurance* [2016] NSWSC 1241, a challenge to a decision made by the Proper Officer under the *Motor Accidents Compensation Act* 1999 (NSW) s 63 to refer a medical assessment to a panel of

another ground of review may be established without resort to *Li*.[127] In some other state intermediate appellate decisions the court, mindful of the principle that mere factual error is not legal error, applies *Li* unreasonableness as a test of whether there is no evidence to support a factual finding.[128]

5.30 The AER has a duty to give a statement of reasons when it makes a reviewable regulatory decision.[129] The "outcome focused" context described by the Full Court in *Singh* does not arise. Even if the Federal Court were to disagree with the AER's factual inferences or the AER's evaluative judgments supporting its exercise of discretion, the Court would find itself in the first context, where a known ground of review other than *Li* unreasonableness must be identified. The AER's decision will, by virtue of its having given detailed reasons including findings on material questions of fact, referring to the evidence, be one which has an evident and intelligible justification.

(iv) Procedural and substantive powers

5.31 Both *Li* and *Singh* were concerned with procedural decisions of the MRT under s 363(1)(b) of the *Migration Act* whether to grant an adjournment. *Stretton* and *Eden* were concerned with the

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assessors for review. The Proper Officer has power to refer "if the proper officer is satisfied that there is reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application". Justice Fagan held that the decision did not lack an evident and intelligible justification. The reasons exposed how the Proper Officer came to the decision to refer (at [40]-[41]) and the Court was not prepared to trespass on the merits (at [35], [39]).

[127] See, for example, *Richard Crookes Construction Pty Ltd v CS Projects (Aust) Pty Ltd (No 2)* [2016] NSWSC 1229, where judicial review was sought of a determination made by an adjudicator under the *Building and Construction Industry Security of Payment Act* 1999 (NSW). It was argued that the adjudication was *Li* unreasonable. It was true that having rejected the contractor's analysis the adjudicator simply adopted the subcontractor's s evaluation of the claims, without disclosing any process of reasoning based on the factual material leading to a rational assessment (at [56]). However the Court based its decision on an established ground. The adjudicator in breach of his statutory obligation failed to carry out his essential function of identifying what construction work, the subject of the payment claim, had been carried out, what was the value of that work, and give reasons for that conclusion ([2016] NSWSC 1229 at [8], [16]-[24], [47]).

[128] See, for example, *Giudice v Legal profession Complaints Committee* [2014] WASCA 115 at [34]-[41], [111]-[117], [154]-[160], where the Western Australian Court of Appeal applied the test of *Li* unreasonableness (to a finding made by a disciplinary committee that a legal practitioner had recklessly disregarded whether a statement in his affidavit was true or false), by asking whether there was no evidence for that finding.

[129] NEL s 16(1)(d)(ii), requiring the AER to specify reasons as to the basis on which it is satisfied that the decision is the preferable reviewable regulatory decision. The AER is required to keep a written record of "decision related matter", which includes the decision, and the written record of it, and any written reasons for it: NEL s 28ZJ(1),(2)(a). See also NEL ss 128(2(3)(b), 28ZG(1)(b).

Minister's substantive decision to cancel a visa under s 501(2). In *Stretton* Griffiths J (Allsop CJ and Wigney J agreeing) suggested that the standard of reasonableness is informed by whether the subject matter of the power is substantive or procedural, with a higher intensity of review where the discretionary power is of a procedural character.[130] This observation is driven by a view that trespassing on the merits, the central concern of the Full Court in *Stretton*, is more likely to occur when the Court is asked to apply *Li* to an exercise of a substantive power than an exercise of a procedural power.

5.32 Intervention solely on the basis of *Li* unreasonableness has occurred in review of other procedural powers, where there were no reasons, or the reasons given lacked an intelligible justification. In *CZBH v Minister for Immigration and Border Protection*[131] review was sought of a decision by the RRT not to exercise its power under s 426(3) of the *Migration Act* to obtain oral evidence from a nominated witness at the request of the two applicants. The RRT gave no reason for its decision not to telephone the applicants' fathers, who could have given evidence relevant to credit. This was a cogent reason for obtaining the evidence, but the RRT had not identified countervailing factors. Justice Rangiah concluded that its decision was *Li* unreasonable.[132] On the other hand in *Minister for Immigration and Border Protection v CZBP*[133] the Full Court held that an exercise of the same power, not to obtain information by telephoning the applicant's lawyer in Iran, was not *Li* unreasonable. The applicant had not made a request and the RRT's reasons justified its decision, namely that the call could be monitored and give rise to a *sur place* claim.[134]

5.33 In *Huynh v Minister for Immigration and Border Protection*[135] Griffiths J held that the MRT acted unreasonably in the *Li* sense in exercising its discretionary power under s 359 of the *Migration Act* to invite a person to "give information". The unreasonableness consisted in failing to ask

130 (2016) 237 FCR 1 at 25[71].
131 [2014] FCA 1023.
132 [2014] FCA 1023 at [60-[63].
133 [2014] FCAFC 105.
134 [2014] FCAFC 105 at [105]-[106].
135 (2015) 232 FCR 497.

an applicant for a spouse visa (who was the husband of the applicant for MRT review) during the course of his telephone interview questions relating to the matters relating to the review that ultimately were the key issues identified in the MRT's reasons. The MRT member asked merely perfunctory questions, failing to give a meaningful opportunity to the applicant to "give information" under s 359, which required an opportunity to address the particular issues of concern to the MRT, being the credibility of the husband and the applicant for review. The MRT therefore constructively failed to exercise its jurisdiction.[136] This outcome was not a matter of the merits of the case, but reflected the application of the reasonableness test to the procedure adopted by the MRT in the circumstances of the case.[137]

5.34 In *Kaur v Minister for Immigration and Border Protection*[138] a hearing invitation letter sent to the applicant was returned to the MRT undelivered. The MRT had already proceeded to hear the matter in the absence of the applicant, who was deemed by the relevant statutory provisions to have received the letter. Despite the return of the letter, the MRT proceeded to issue a decision adverse to the applicant. In the course of her dealings with the MRT, the applicant had always been responsive to letters, emails and telephone calls, and compliant with the MRT's requests. Section 362B(1) of the *Migration Act* empowered the MRT, where an applicant had been invited to appear and did not appear on the scheduled day for hearing, to make a decision on the review without taking any further action to allow or enable the applicant to appear before it. Section 362B(2) also empowered the MRT in such circumstances to reschedule the hearing. Since the MRT had given no reasons for its decision to proceed in the absence of the applicant, this was an outcome focused context.[139] In the circumstances Mortimer J held that the MRT's decision to proceed without attempting to contact the applicant was unreasonable in the *Li* sense.[140]

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136 (2015) 232 FCR 497 at 529[103].
137 (2015) 232 FCR 497 at 529[103].
138 (2014) 236 FCR 393.
139 (2014) 236 FCR 393 at 421-2[109]-[111].
140 (2014) 236 FCR 393 at 429[141]. See also *SZTGS v Minister for Immigration and Border Protection* [2014] FCA 908 at [37] where Logan J held that a decision of the former RRT was infected by jurisdictional error for failure to give reasons as required by s 430 of the *Migration Act*. A failure to give adequate reasons amounts to a failure to provide

5.35 In other cases *Li* has assisted in the interpretation of a statutory provision conferring a substantive power, but not operated as a ground for its review.[141] In single Federal Court decisions, *Li* unreasonableness may sit alongside other grounds of review, such as failure to take into account relevant considerations and the no evidence rule, and do no more than assist in the construction of the statutory provisions conferring power for the purpose of applying those grounds.[142]

5.36 In some State judicial review cases, *Li* has been distinguished on the basis that it applies in cases where judicial review is sought of an exercise of a procedural power rather than an exercise of a substantive power.[143] Even where judicial review is sought of an exercise of a procedural power for which no reasons have been given, as the NSW Court of Appeal has stated, by arguing *Li* a plaintiff does not become "entitled to a merits review by a Court".[144]

5.37 Success in *Li* challenges is predominantly confined to review of exercises of procedural power, like the power to grant an adjournment in *Li* itself. Reviewable regulatory decisions made by the AER are exercises of substantive power, rather than procedural power.

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a reasonable basis for the RRT's absence of the satisfaction it is required to reach under the relevant statutory provision.

141 For example, *Lobban v Minister for Justice* [2016] FCAFC 109 at [97]-[98], where Charlesworth J (Siopis and Barker JJ agreeing in the orders) held that the Attorney-General's discretionary power under s 22(3)(f) of the *Extradition Act* 1988 (Cth) to consider that a person should be surrendered in relation to a qualifying extradition offence, had to be exercised reasonably, but this amounted to a requirement that the Attorney–General consider that it is "proper" to surrender the person, conformably with the language of the relevant extradition treaty.

142 See *ABAR15 v Minister for Immigration and Border Protection (No 2)* [2016] FCA 721 at [101].

143 For example, *BVT v Office of the Children's Guardian* [2016] NSWSC 1169 at [81] per Adamson J (holding that NCAT did not act unreasonably in refusing an enabling order under the *Child Protection (Working with Children) Act* 2012 (NSW) to entitle the plaintiff to work with children on the ground that the plaintiff failed to discharge his onus).

144 *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240 at 244[5] per Bathurst CJ, 261[74](c),[75] per Basten JA, 272[140] - 273[148] per Ward JA (rejecting a contention of *Li* unreasonableness in ICAC's exercise of statutory power to require the production of documents). See also *Cromwell Property Services Ltd v Financial Ombudsman Service Ltd* (2014) 288 FLR 374 at 401[96]-[98], 408[136] (where the Victorian Court of Appeal rejected a contention that the Financial Ombudsman Service Ltd acted *Li* unreasonably in refusing to refer a complaint to a court and exclude it from its own determination).

(v) Implied duty to act reasonably inapplicable to statutory duties

5.38 A limitation on the implication of the requirement to act reasonably has emerged since *Li* and *Singh* were decided. Those cases concerned implication of the requirement to act reasonably in exercising a discretionary statutory power. In *AEK15 v Minister for Immigration and Border Protection*[145] it was contended that the presumption of a requirement to act reasonably applied to the discharge by the AAT of its duty under s 425 of the *Migration Act* to invite an applicant to appear to give evidence and present arguments as to the issues arising in respect of the decision under review. The AAT had invited the applicant to appear, and the applicant had participated in an oral hearing, but the AAT had been reconstituted and completed the review on the papers without issuing a second invitation to the applicant to present evidence and arguments. The Full Court held that where the AAT has been reconstituted, s 425 imposes an obligation, rather than confers a discretionary power,[146] for the AAT to consider whether there is some reason why a fresh invitation should be extended to the applicant. All that the AAT needs to do is to consider whether in the circumstances its duty under s 425 has been discharged, and it may proceed to determine the review having regard to the record of the first hearing. The Court distinguished *Li* and *Stretton* on the basis that those cases were concerned with reasonableness in the exercise of statutory discretionary powers rather than statutory duties.[147]

5.39 Where the AER is discharging a duty rather than exercising a power, there is no scope for review on the ground of *Li* unreasonableness.

6. QUESTION 1: Limited merits review compared with judicial review on the *Li* ground

6.1 Judicial review is fundamentally different from limited merits review, for the reasons given in paragraphs 5.3 to 5.39 above. Post *Li* this remains true.

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145 [2016] FCAFC 131.
146 [2016] FCAFC 131 at [40], [54], [56], [61], [64].
147 [2016] FCAFC 131 at [64].

6.2 The constitutional underpinnings of judicial review in the Federal Court make it fundamentally different from limited merits review in the ACT.

6.3 Direct judicial review of a reviewable regulatory decision of the AER is review of an exercise of a substantive rather than a procedural power. The history of reliance on *Li* strongly indicates its unsuitability as a basis for review of an exercise of substantive power.

6.4 As set out in paragraphs 3.3 to 3.11 above, the layers of review in limited merits review bear no resemblance to judicial review for *Li* unreasonableness. Even if it were appropriate to single out one layer and one ground of limited merits review, such as Layer (1) and Ground (d), the test here is not *Li* unreasonableness. Since the AER gives detailed reasons for its decisions, in neither judicial review nor limited merits review is unreasonableness a matter of inference. However here any similarity ends. The ACT is to apply Ground (d) on the merits, free of any legality/merits distinction or other constraints within which *Li* operates. *Li* unreasonableness requires an absence of an evident or intelligible justification for the decision as a whole. As discussed above, in limited merits review unreasonableness in Ground (d) is established where in the totality of the circumstances the applicant has established that the decision is wrong for the reasons particularised in the application for review.[148] The proper approach to the test of what is incorrect under Ground (c) is the same.[149] Comparison of *Li* unreasonableness with Grounds (a) and (b) is starker. *Li* unreasonableness does not allow for review of an error of fact, as that is part of the merits.

6.5 In any event it is inappropriate to single out one aspect of one layer of limited merits review for comparison with the *Li* ground in judicial review. This ignores, for example, the fact that the ACT must take into account policy considerations in Layer (3) and has power to vary the decision under review. Policy considerations are part of the merits and are for the decision-

[148] See paragraphs 3.7 to 3.8 above, in particular note 19, referring to *Application by Epic Energy South Australia Pty Ltd* [2004] ATPR 41,997, approved in *East Australian Pipeline Pty Ld v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 250[79].
[149] See paragraph 3.10 above, in particular note 21.

maker and the limited merits review tribunal, and are not for the courts to determine, including where *Li* unreasonableness is argued.[150] Moreover the relief available in judicial review does not extend to re-exercise of the power by varying the decision under review, or to giving directions as to how the discretion as to the merits is to be exercised in any remitter.[151] Judicial review in the Federal Court on the ground of *Li* unreasonableness is not equivalent to review in the ACT on the test in ss 71C and 71P of the NEL.

6.6 The AER gives detailed reasons for its reviewable regulatory decisions. Where reasons have been given justifying a decision, there is very little scope to argue *Li* unreasonableness, unless the reasons given are quite meagre. When reasons have been given, the decision-maker has ordinarily provided an evident or intelligible justification for the decision. The decision-maker's evaluation of evidence to reach factual findings and judgments on policy matters are exposed, allowing the legality/merits distinction to operate with greater force. If the reasons reveal error, it is most unlikely to be *Li* unreasonableness, but may be some well established error such as a failure to take into account a relevant consideration, or acting on the basis of no evidence, or a denial of procedural fairness.

6.7 Review for *Li* unreasonableness does not allow the Federal Court to engage in merits review of a decision of the AER. In particular, the AER's evaluation of the policy considerations involved in determining which is the materially preferable NEO decision,[152] would, in the absence of limited merits review, remain free from review or correction.

6.8 Comparison of judicial review post *Li* with limited merits review is invited by the Federal Court decision in *CKI Utilities Development Pty Ltd v Australian Energy Regulator*,[153] where review was sought under the *ADJR Act* of decisions of the AER requiring the applicant to submit a revised pricing proposal, and approving the revised pricing proposal submitted. The applicant

[150] See paragraphs 5.9, 5.11 note 71, 5.16, 5.17.
[151] See paragraph 4.2 above.
[152] See paragraph 3.7(3)(a) above.
[153] [2016] FCA 17.

contended, inter alia, that the AER applied the wrong clause of the NER, made decisions that were *Wednesbury* unreasonable on account of use of incorrect statistical methods, and erroneously interpreted a clause of the NER. The Court admitted expert evidence which had not been before the AER, including two reports by the applicant's expert and affidavits by a senior technical adviser of the AER. The applicant argued that the Court should accept its expert's evidence that that AER acted unreasonably in not simply accepting its original pricing proposal.[154] Effectively the applicant contended that the test of *Wednesbury* unreasonableness had been expanded as a result of *Li*.[155]

6.9 Justice Mansfield held that the relevant clause of the NER could not be construed in the way advanced by the applicant so as to allow its proposal to be approved by the AER. Neither *Wednesbury* unreasonableness[156] nor *Li* unreasonableness[157] was established. As to *Li* unreasonableness, the published reasons AER had given for its decisions did not represent its real reasons.[158] The evidence given by AER's senior technical adviser indicated what constituted the real reasons of the AER when it made its decisions, and they justified the AER's decisions.[159] His reasoning informed AER's decisions at the time, because it was his role in the AER to carry out the analysis that supported the decisions under review.[160] His reasoning was not illogical or unreasonable. It followed that the AER's reasoning was not unreasonable in the *Li* sense.[161]

6.10 In raising the *Li* ground, the applicant sought to obtain review of factual error (incorrect application by AER of statistical methods and principles), but the Court refused to entertain review for factual error. Justice Mansfield rejected the proposition that the Court's function was to determine which evidence it preferred as being more reasonable, as this "would in the

154 [2016] FCA 17at [52]-[53].
155 [2016] FCA 17 at [54].
156 [2016] FCA 17 at [54], [145].
157 [2016] FCA 17 at [54], [142], [145].
158 [2016] FCA 17 at [50].
159 [2016] FCA 17 at [50], [55].
160 [2016] FCA 17 at [134], [136], [141].
161 [2016] FCA 17 at [142], [144].

particular circumstances amount to a 'merits review' of the AER's Primary Decision", which he was not prepared to undertake.[162] Nor was the Court required to make findings as to what were the applicant's key drivers for the pricing proposal and whether they were correct.[163]

6.11 A formal statement of reasons given by an administrative decision-maker is just one item of evidence as to the basis on which it made the decision under review.[164] Although decision-makers usually confine themselves to providing documentary evidence as to the basis on which a decision was made, in addition to the reasons statement, affidavit evidence is admissible. In *CKI Utilities* it was this evidence of AER, including cross-examination on its officer's affidavit, that provided an evident and intelligible justification for AER's decision. *CKI Utilities* demonstrates that even if the true reasons become clear only in affidavit evidence, the AER will be able to point to an intelligible justification and escape *Li* unreasonableness, notwithstanding that there is factual error in its decision. No doubt Mansfield J addressed the contentions put as to *Li* unreasonableness because no other ground of review was established. *CKI Utilities* does provide an example of review for *Li* unreasonableness of a substantive rather than a procedural power. However so do *Stretton* and *Eden*, and in those cases as well the ground was not established.

7. QUESTION 2: Suitability of judicial review and merits review for review of decisions involving highly technical and complex economic reasoning

7.1 Technical and economic issues determined by a decision-maker are generally issues of fact or discretion which are part of the merits. Judicial review is not a suitable vehicle for review of such issues, precisely for the reasons considered in answering Question 1.

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[162] [2016] FCA 17 at [51].
[163] [2016] FCA 17 at [61].
[164] *Minister for Immigration and Ethnic Affairs v Taveli* (199) 23 FCR 162; *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* (2008) 251 ALR 80.

7.2 A court in judicial review does not have a function of determining such issues, which are matters of the merits rather than the lawfulness of the decision. To the extent that such issues arise for determination in the context of jurisdictional facts, *Wednesbury* unreasonableness, the no evidence rule or the construction of technical words in statutory provisions, the review is limited. It may also be uncertain as to its scope and possibly carried out in a distorted and indirect fashion by reason of the statutory framework within which the economic issues arise. A tribunal with full or limited merits review jurisdiction is entitled to address economic and technical issues directly and completely, free from uncertainty as to the scope of review or any distortion of the issues.

7.3 A tribunal such as the ACT, constituted by a judge with experience in economic matters, and tribunal members with professional qualifications and experience primarily in relevant fields involving complex technical economic issues, is well equipped to address allegations of error in technical economic reasoning. It is not bound to consider those errors within the constraints of errors of law and it is able to adopt flexible procedures without being bound by the rules of evidence or the adversary system.

7.4 As discussed above, in the limited areas where factual issues are determined in judicial review, expert evidence may be admissible. That evidence has to be evaluated by a judge sitting alone. While judges become experienced in evaluating a wide variety of expert evidence, the position is plainly less satisfactory than in the context of review by a tribunal such as the ACT constituted by a judge and two members with expertise that will assist the tribunal as a whole to evaluate the technical economic evidence.

3 October 2016

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