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SPECIAL CONFERENCE ISSUE
FROM PROFESSING TO ADVISING TO JUDGING:
CONFERENCE IN HONOUR OF SIR KENNETH KEITH

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A MURKY METHODOLOGY: STANDARDS OF REVIEW IN ADMINISTRATIVE LAW

Dean R Knight*

The approach the courts should adopt when reviewing the "merits" of an administrative decision continues to be a vexed issue. For many years Wednesbury *unreasonableness was regarded as the appropriate monolithic standard for this task. However, dissatisfaction with this standard has led to the development of alternative approaches, most notably the concept of variegated standards of reasonableness. This article explores the methodology adopted by New Zealand courts on this point and concludes that, while the courts have been prepared to adopt a sliding-scale of unreasonableness, the approach is under-developed and inadequate in a number of respects. From the existing experience, a refined five-standard framework is proposed to guide the degree of intensity the courts should adopt in their supervisory judicial review role.*

I INTRODUCTION

Back in 1969, a senior lecturer of the Faculty of Law at Victoria University of Wellington addressed the question of the appropriate scope of review in relation to appeals from administrative tribunals.[1] The author spoke of a range of methodologies available to an appellate court, from "a limited 'wrong principle' conception" at one end to full review at "the other extreme" where the court "will substitute its own discretion".[2] He went on to suggest:[3]

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1 KJ Keith "Appeals from Administrative Tribunals — the Existing Judicial Experience" (1969) 5 VUWLR 123 ["Appeals from Administrative Tribunals"].

2 Ibid, 137.

3 Ibid, 151.

> … there is no single precise answer to the extent of appellate review of the exercise of discretion. Moreover, there can clearly be approaches falling between the two possibilities stated at the outset — "wrong principles" and complete substitution. Accordingly, providing for a general appeal in respect of such decisions will be only a short first step in the working out of the appropriate scope of review, the relation between the appeal court and the tribunal. More precise articulation of the line will normally have to come from the courts ...

The focus of his discussion was the standard of review in relation to the courts' statutory appellate function. However, there are strong analogies to be made to the courts' supervisory jurisdiction through judicial review, a point noted by the author.[4]

That piece was one of the first scholarly articles penned by the person we honour in this series of articles.[5] Of course, since that time a lot of water has flowed under the bridge of administrative law. And Sir Kenneth has been heavily involved in many of the developments within that area of law, variously as a professor, advisor and judge. But the central issue still remains: what is the appropriate standard of review that the courts should adopt when reviewing the decisions of public bodies and officials?

In this article I explore that issue, focusing on the question of the methodology the New Zealand courts should adopt when judicially reviewing the substance or "merits" of an administrative decision. To frame this in terms of the conventional tripartite framework, this paper addresses the "irrationality"[6] or "reasonableness"[7] ground of review, particularly the operation of the so-called "sliding-scale" of reasonableness. While a standards of review approach need not be restricted to this ground,[8] the main developments in this methodology have taken place under it. Application of

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4 Sir Kenneth made a brief comparison between appellate review and "common law review", concluding that "the distinction between appeals, especially appeals on law alone, on the one hand, and judicial review on the other can and often does disappear": ibid, 159.

5 In fact, according to a bibliography prepared for the forthcoming festschrift honouring Sir Kenneth, it was his eleventh article: "Bibliography of Sir Kenneth's Writings" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008, forthcoming).

6 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (HL) Lord Diplock [*Council of Civil Service Unions*].

7 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 552 (CA) Cooke P. See also Rt Hon Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 1, 5 ["Struggle for Simplicity"].

8 For example, standards of review are also adopted by Canadian courts when reviewing questions of law or mixed questions of law and facts: see *Canada (Director of Investigation & Research) v Southam Inc* [1997] 1 SCR 748 [*Southam*] and discussion at below n 244 and associated text. Further, matters presently addressed by the New Zealand courts under the "illegality"/"lawfulness" or "procedural

the framework to other grounds would require greater re-evaluation of those other grounds than is possible in this article.

Some may question the value of concentrating on the reasonableness ground, with it often being said that cases are usually resolved under the legality or lawfulness ground (often as a matter of relevancy) and reasonableness is seldom a winning ground in its own right.[9] In some respects that arises from the present residual nature of the reasonableness ground, but this is not necessary immutable.[10] In any event, the fact that the reasonableness ground does not frequently succeed in its traditional formulation does not make its methodology any less important, especially where recent developments suggest greater scrutiny and more frequent success.

I begin by briefly surveying the approach of New Zealand's courts to the *Wednesbury* reasonableness doctrine and their receptiveness to varying standards of review.[11] In doing so, I identify a number of concerns about their methodology. I then seek to distil a robust framework from the presently murky approaches, focusing particularly on the methodological differences between each standard of review. From existing experience, I synthesise a five-standard continuum: non-justiciability, flagrant impropriety, manifest unreasonableness, simple unreasonableness and incorrectness.

Given the vastness of the topic of substantive review and intensity of judicial supervision, my analysis is relatively rudimentary and contemplates encouraging more dialogue on the standards and their methodologies. However, my analysis is distinct from some of the other work on this issue because it focuses squarely on the doctrinal methodology, taking the conceptual discourse on deference and substantive review as a given.[12]

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impropriety"/"fairness" grounds could also be reconceived in terms of standards of review. However, exploration of such developments is largely beyond the scope of this article.

9 For an English survey of cases in which it has been deployed, successfully and unsuccessfully, see Andrew Le Sueur "The Rise and Ruin of Unreasonableness?" [2005] 10 JR 32, Appendix.

10 See text at n 195.

11 For a discussion of the position in other Anglo-Commonwealth jurisdictions, see Le Sueur, above n 9 (on the United Kingdom); Lisa Busch "Standards of Review of Administrative Decision-Making in Australian Public Law" [2006] JR 363 (on Australia); Johannes Chan "A Sliding Scale of Reasonableness in Judicial Review" [2006] Acta Juridica 233–257 (on Hong Kong); and Anashri Pillay "Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction" (2005) 2 SA Law Journal 419 (on South Africa).

12 See below n 153.

II RAINBOWS, SPECTRUMS, CONTINUA AND SLIDES: VARIEGATED STANDARDS OF REVIEW

A The Story so Far: the Rise and Fall(?) of the Geographical Epithet

The starting point for any discussion of the standard for reviewing matters of substance in administrative law must be *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (*Wednesbury*).[13] As much as there are those who would prefer to purge the "geographical epithet" from the administrative law lexicon,[14] or those who question the purported seminal nature of the decision,[15] the *Wednesbury* test has for many years represented the orthodox standard for reviewing matters of substance such as fact-finding, judgement or discretion. Judicial intervention is only permitted if a decision is "unreasonable in the sense … that the court considers [it] to be a decision that no reasonable body could have come to".[16] In England, *Wednesbury*'s status was entrenched by Lord Diplock's authoritative endorsement of the case in his tripartite statement of judicial review grounds.[17] Although *Wednesbury* has featured in numerous cases in New Zealand,[18] its primacy was reiterated in *Wellington City Council v Woolworths New Zealand Ltd (No 2)* (*Woolworths*).[19] In rejecting a challenge to the merits of a rates-setting decision of a local authority, Richardson P

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13 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (CA) [*Wednesbury*]. This formulation only reflects one element of the standard in *Wednesbury*, with intervention also being permitted in cases where the decision-maker acted in "bad faith", with "dishonesty", failed to "direct himself properly in law", or failed to "call his own attention to the matters which he is bound to consider … [or] exclude from his consideration matters which are irrelevant to the matter". For a discussion of these aspects of the case see Michael Taggart "Reinventing Administrative Law" in N Bamforth and P Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 251 ["Reinventing Administrative Law"].

14 See *Hawkins v Minister of Justice* [1991] 2 NZLR 530, 534 (CA) Richardson J [*Hawkins*].

15 See discussion in Taggart "Reinventing Administrative Law", above n 13, 327 and in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 2 AC 418, 452 (HL) Lord Slynn [*International Trader's Ferry Ltd*].

16 *Wednesbury*, above n 13, 230 Lord Greene MR.

17 *Council of Civil Service Unions*, above n 6, 410 Lord Diplock. Notably, Lord Diplock suggested that the ground could "stand on its own feet as an accepted ground" without the need to resort to the "ingenious explanation" of the ground in terms of an inferred but unidentified mistake of law.

18 Some examples prior to *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) [*Woolworths*] include *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA); *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA); *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 (PC) [*Re Erebus Royal Commission*]; *Martin v Ryan* [1990] 2 NZLR 209 (HC); and *Chan v Minister of Immigration* (8 May 1989) HC AK CP 80/89. See also Paul Walker "What's Wrong with Irrationality?" [1995] PL 556 and GDS Taylor *Judicial Review* (Butterworths, Wellington, 1991) paras 14.42–14.43.

19 *Woolworths*, above n 18.

endorsed the highly deferential form of *Wednesbury* reasonableness.[20] "Clearly", he said, "the test is a stringent one."[21]

But the pervasiveness of the *Wednesbury* language within our courts belies its degree of acceptance within our legal community. There has been growing dissatisfaction with the concept of *Wednesbury* reasonableness. The oft-cited criticism comes from Professor Jowell and Lord Lester.[22] In their discussion of substantive principles of administrative law, they described *Wednesbury* reasonableness as "unsatisfactory".[23] They suggested it is defective for three reasons: the test is "inadequate",[24] "unrealistic",[25] and "confusing [and] tautologous".[26] Other judges and scholars — including particularly our own Lord Cooke[27] — have made similar criticisms of *Wednesbury*; these criticisms are well-known and I do not repeat them here.[28]

On the back of growing dissatisfaction, some of which has been mentioned above, the courts have sought to loosen the shackles of the *Wednesbury* test, varying the depth of judicial scrutiny in

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20 Ibid, 545. Richardson P adopted various definitions of unreasonableness, including the "something overwhelming" standard from *Wednesbury*, above n 13, the "defiance of logic or of accepted moral standards" language from *Council of Civil Service Unions*, above n 6, the "absurd"/"pattern of perversity" tests from *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, 248 (HL) Lord Scarman, and the "outside the limits of reason" test from *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA), above n 18, 131 Cooke P.

21 *Woolworths*, above n 18, 545 Richardson P.

22 Jeffrey Jowell and Anthony Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1988] PL 368. See also J Jowell "Proportionality: Neither Novel nor Dangerous" in Jeffrey Jowell and Dawn Oliver *New Directions in Judicial Review* (Sweet and Maxwell, London, 1998) 61, and Jeffery Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671.

23 Jowell and Lester, above n 22, 371.

24 Ibid.

25 Ibid, 372.

26 Ibid.

27 See my discussion of his views and general themes: Dean R Knight "Simple, Fair, and Discretionary Administrative Law" (2008) 39 VUWLR 99.

28 See for example, PP Craig *Administrative Law* (5 ed, Sweet and Maxwell, London, 2003) 610; P Craig "Unreasonableness and Proportionality in UK Law" in E Ellis (ed) *The Principle of Proportionality in the Law of Europe* (Hart Publishing, Oxford, 1999) 85; Sir Stephen Sedley "The Sound of Silence: Constitutional Law Without a Constitution" (1994) 110 LQR 270; Rt Hon Lord Nolan of Brasted and Sir Stephen Sedley *The Making and Remaking of the British Constitution* (Blackstone Press, London, 1997) 19 and 31; Michael Fordham "*Wednesbury* Successes in 1995" [1996] JR 115; Sian Elias "'Hard Look' and the Judicial Function" (1996) 4 Waikato LR 1.

the particular circumstances. In *Wednesbury*'s home country,[29] the courts began to talk about a variegated standard of reasonableness, including "anxious scrutiny",[30] increased intensity of review,[31] or a "sliding-scale of review".[32] The importance of context in determining the threshold for judicial intervention was reiterated by Lord Steyn in his (now famous) conclusion in *R (Daly) v Secretary of State for the Home Department* (*Daly*) that:[33] "In law context is everything." The future of the *Wednesbury* principle was most directly addressed, though, by the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence*, where the Court recognised the mounting push to replace *Wednesbury* unreasonableness with proportionality as the general standard in administrative law.[34] The Court accepted that the "strictness of the Wednesbury test has been relaxed in recent years" and it "is moving closer to proportionality and in some cases it is not possible to see any daylight between the two tests".[35] The judges remarked that they had some difficulty discerning a continuing justification for the retention

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29 Increasing comparative differences between the countries mean the value of an inter-jurisdictional comparison should not be overstated. On the distinctiveness of New Zealand administrative law, see the comments of Cooke P in *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA) ("The time has probably come to emphasise that New Zealand administrative law is significantly indigenous") and generally Philip A Joseph "Constitutional Review Now" [1998] NZ Law Rev 85; Michael Taggart "The New Zealandness of New Zealand Public Law" (2004) 15 PLR 81; KJ Keith "Public Law in New Zealand" (2003) 1 NZJPIL 3.

30 *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514, 531 (HL) Lord Bridge, suggesting that a decision putting a person's life at risk should be scrutinised with "the most anxious scrutiny". For a full examination of other cases which have adopted this language, see Le Sueur, above n 9, 39.

31 *R v Secretary of State for Defence, ex parte Smith* [1996] QB 517, 540 (HL) Sir Thomas Bingham MR [*Smith*], speaking of a "margin of appreciation" for decision-makers but suggesting that "the more substantial the interference with human rights, the more the court will require by way of justification".

32 *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, 849 (CA) Laws LJ, saying that: "the intensity of review in a public law case will depend on the subject matter in hand". He spoke of "a sliding scale of review" where "the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required".

33 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, para 28 (HL) Lord Steyn [*Daly*].

34 *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 (CA).

35 Ibid, para 34 Dyson LJ for the Court. This remark may be contrasted with Lord Steyn's view in *Daly*, above n 33 — in agreement with the Strasbourg court — that the anxious scrutiny methodology was not identical to the proportionality methodology mandated by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Human Rights Act 1998 (UK). Previously, the European Court of Human Rights ruled that the threshold applied by the Court of Appeal in *Smith*, above n 31, of increased intensity was still too high and did not accommodate the proportionality analysis mandated by the European Convention: see *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 (Section II, ECtHR). See also *Lustig-Prean and Beckett v United Kingdom* (2000) 29 EHRR 548 (Section III, ECtHR).

of the *Wednesbury* test but reluctantly concluded that it was "not for this court to perform its burial rites".[36] The English courts have therefore demonstrated a willingness to more intensely scrutinise the decisions of public bodies and officials under a *Wednesbury* framework. As Sir John Laws recorded extra-judicially, "the [English] courts, while broadly adhering to the monolithic language of *Wednesbury*, have to a considerable extent in recent years adopted variable standards of review".[37] Although human rights have driven these developments, the courts have also "loosened the test [of *Wednesbury* unreasonableness] in cases which have nothing to do with fundamental rights".[38] Of course, more recently, the English courts have understandably become somewhat more obsessed with the proportionality methodology as they grapple with the substantive review of decisions under the Human Rights Act 1998 (UK) and European law.[39]

B The Experience in New Zealand

In the section that follows, I turn to New Zealand's recent experience with *Wednesbury*, examining the cases which have addressed this issue or explicitly applied a standard of reasonableness that differs from the traditional *Wednesbury* standard. Since its restatement in *Woolworths*, a variegated standard of reasonableness has received a good deal of judicial attention in New Zealand. First, I assess the extent of departure from the previously all-embracing *Wednesbury* test and conclude that it has become common-place for the courts to recognise and apply variable standards of review. Secondly, I critique the methodology of the courts when invoking or applying these alternative standards of review.

1 Variegated standard of reasonableness now largely orthodox

A variegated standard of reasonableness now appears orthodox in New Zealand, although its present lack of definitive endorsement by our appellate courts is curious and unsatisfying. This approach is prevalent amongst the courts which have addressed the issue in the light of

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36 *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence*, above n 34, para 34 Dyson LJ for the Court. The Court referred to the recognition of the "continuing existence" of *Wednesbury* in the following House of Lords decisions: *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696; *International Trader's Ferry Ltd*, above n 15; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295; *Daly*, above n 33, 549 Lord Cooke.

37 Sir John Laws "*Wednesbury*" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord* (Clarendon Press, Oxford, 1998) 185, 187.

38 Craig *Administrative Law*, above n 28, 582. Craig points to the assessment of reasonableness in a range of planning cases and industrial relations cases as being closer to whether the courts believed the exercise of discretion was unreasonable in the simple sense. See also Le Sueur, above n 9.

39 See *Daly*, above n 33; *Tweed v Parades Commission for Northern Ireland* [2007] 2 WLR 1 (HL); *Somerville v Scottish Ministers* [2007] 1 WLR 2734 (HL); Julian Rivers "Proportionality and Variable Intensity of Review" (2006) 65 CLJ 174.

developments since *Woolworths*, and has been resoundingly endorsed by leading administrative law scholars and commentators. No longer can *Wednesbury* claim to represent the orthodox, monolithic basis for reviewing the reasonableness of a decision.

The challenge to *Wednesbury*'s monolithic status began shortly after its endorsement and restatement in *Woolworths*. These developments can usefully be marshalled into two separate groupings. First, a number of cases suggested that the high threshold for intervention in *Wednesbury* should not be taken as being universal, although the alternative basis for intervention was left somewhat inchoate. Secondly, and more recently, a series of cases adopted and endorsed a variegated standard or "sliding-scale" of reasonableness.

First, there are the early cases which largely sought to rebut the proposition that *Wednesbury* represented the universal standard for intervention on the merits. In some respects, this line of cases has it pedigree in the substantive fairness doctrine that was commended by Lord Cooke before the restatement of *Wednesbury* in *Woolworths.* Lord Cooke suggested that the review of the *quality* of the decision was justified, albeit not when "the mere personal opinion of a Judge [is] that a decision is unfair".[40] His Honour regarded this approach as "a legitimate ground of judicial review, shading into but not identical with unreasonableness".[41] The language of substantive fairness fell out of favour, probably because it has since been overtaken by other substantive developments such as *Coughlan*-style substantive legitimate expectation and the other developments in the reasonableness doctrine discussed below.[42]

Following *Woolworths*, a number of judges either directly attacked the *Wednesbury* standard or made obiter suggestions doubting its universality — although there was some reluctance in the particular cases to apply a standard other than *Wednesbury.* The high threshold for intervention was strongly criticised by Thomas J in his separate and well-known judgment in *Waitakere City Council*

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40 *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641, 653 (CA) Cooke P [*Thames Valley*]. He also commended its "valuable flexibility" which enables "redress for misuses of administrative authority which might otherwise go unchecked" (ibid). For a more detailed analysis, see my discussion in Dean R Knight "Simple, Fair, and Discretionary Administrative Law", above n 27; and Melissa Poole "Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" [1995] NZ Law Rev 426. The doctrine has affinities with the so-called "innominate" ground of review expressed by Lord Donaldson in *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146, 160 (HL) [*Guinness*], that is, the threshold for intervention being "whether something had gone wrong of a nature and degree which required the intervention of the court". See also the adoption of this generic approach in *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

41 *Thames Valley*, above n 40, 653 Cooke P.

42 *R v North East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA) [*Coughlan*]; *R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58 (HL) [*Pebsham*]; *Challis v Destination Marlborough Trust Board Inc* [2003] 2 NZLR 107 (HC); and *NZ Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45.

v Lovelock, almost immediately after the *Woolworths* decision was released.[43] The particular target of his criticism was the "subjective element inherent in *Wednesbury* reasonableness", along with its semantic complexity.[44] Although he proposed a uniform standard divorced from the exaggerated *Wednesbury* language,[45] he envisaged that degrees of tolerance would vary according to the circumstances.[46] He was also critical of the lack of transparency in judicial supervision and suggested the courts should develop a series of principles which inform the reasonableness analysis.[47] The majority did not find it necessary to revisit the approach, especially as it had recently been approved by the full bench of the Court of Appeal in *Woolworths*. However, the door to a variable standard was left open by Blanchard J in his obiter comment that a different standard may apply in a different context, noting that a "less-restrained approach" might be adopted in relation to other bodies or local authorities performing other functions.[48] "The approach of the Court must be flexible", Blanchard J said, "but it must also be sensitive to the realities of the situation under review."[49]

Similar departure from *Wednesbury* — albeit under the "hard look" rubric — was also hinted at in an obiter comment of the Court of Appeal majority in the *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd.*[50] The Court suggested that in some cases, such as those involving human rights, "a less restricted approach, even perhaps, to use the expression commonly adopted in the United States, a 'hard look', may be needed" or that "the concept of substantive fairness" might require further consideration.[51] The majority, though, once again reinforced the primacy of the existing principle and suggested that there was no call for departure from

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43 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) [*Lovelock*]. The Court of Appeal decision in *Woolworths* was released after the lower court hearing in *Lovelock* but before the judgment was released. The *Lovelock* decision is also notable for the fact that the plaintiffs who were successful at first instance did not actively take part in the appeal: ibid, 395 Thomas J.

44 Ibid, 400–401 Thomas J.

45 Ibid, 403. Thomas J expressed this in the form of a question: "It is simpler to ask whether a reasonable authority acting with fidelity to its empowering statute could have arrived at the decision it did in the circumstances of that case".

46 Ibid.

47 Ibid, 413 Thomas J.

48 Ibid, 419. Blanchard J pointed to the adoption of a lower standard of reasonableness in the then recent decision in *Electoral Commission v Cameron*, above n 40.

49 *Lovelock*, above n 43, 419 Blanchard J.

50 *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66 (CA) [*Pharmac*]. Thomas J in his dissent addressed the issue as one of inconsistency or lack of even-handedness.

51 Ibid.

Wednesbury in the context of the present case, one involving a challenge to the pharmaceutical drug funding agency's decision to lower the subsidy of a certain drug.[52] The possibility of the adoption of the "hard look" doctrine was also raised by Hammond J in *New Zealand Public Service Association Inc v Hamilton City Council.* His Honour noted that the "hard look" doctrine allowed, on the one hand, the courts to scrutinise the logical and factual basis for choices made by agencies and to "interfere for inadequacy" while, on the other hand, "still leaving to those bodies or persons the ultimate selection of policy, so long as it has been a considered and rational choice".[53] However, he recognised the term was a "loose expression", with it varying "from a firm look to a steely-eyed examination".[54] Regardless, the approach adopted proved immaterial as his Honour indicated that the decision of the local authority to restructure and to put various services out for tender would survive even this more intense scrutiny.[55]

In a similar theme, the Court of Appeal made passing reference to the degree of scrutiny under the reasonableness head in *Pring v Wanganui District Council*,[56] where a local authority's factual conclusion that a proposal met the requirements for the issue of a certificate of compliance under the Resource Management Act 1991 was challenged. After reciting the usual caveats about judicial review not being an appeal and matters of weight being for the decision-maker, the Court noted:[57]

> Having said that, … the court will scrutinise what has occurred more carefully and with a less tolerant eye when considering whether the decision was one open to the consent authority on the material before it than it will do in a case where the decision which is being questioned required the balancing of broad policy considerations and there was less direct impact upon the lives of individual citizens as, for example, where the exercise of statutory power involved the striking of a general rate …

On this basis, though, the Court agreed with the High Court judge that there was nothing to suggest that the factual evaluation of each criterion was erroneous, except for one minor error which was not sufficient to justify overturning the decision. The departure from the primacy of *Wednesbury* was also noted in another resource management case in the Court of Appeal's majority judgment in

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52 The majority said the case was "entirely about money, subsidisation of the sale of pharmaceuticals" and on those facts there was "no call for any departure ... from the position so recently taken in *Woolworths*": ibid.

53 *New Zealand Public Service Association Inc v Hamilton City Council* [1997] 1 NZLR 30, 34 (HC) [*New Zealand Public Service Association*]. Hammond J also mentioned this doctrine in an earlier decision: *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741 (HC).

54 *New Zealand Public Service Association*, above n 53, 34.

55 Ibid.

56 *Pring v Wanganui District Council* [1999] NZRMA 519 (CA).

57 Ibid, para 7 Richardson P, Henry and Blanchard JJ.

Discount Brands Ltd v Northcote Mainstreet Inc.[58] Hammond J noted the primacy of the traditional *Wednesbury* test until about a decade earlier, but pointed to a shift in New Zealand and the United Kingdom: "the depth of administrative law review has been said to vary with context".[59] Noting the adoption of the "hard-look doctrine" in North America and what he described as the "super-*Wednesbury*" doctrine in the United Kingdom,[60] Hammond J summarised the principle in the following way:[61]

> … at least where important … interests are at stake (for instance, in human rights cases) so-called *Wednesbury* review should be abandoned and the depth of review altered to (at least) a less deferential "reasonableness" inquiry …

However, at that time, his Honour — rather unusually — was not prepared to express any view on the propriety of those developments. He rather baldly concluded that:[62]

> … in the particular context of notification/non-notification decisions under section 94 of the Resource Management Act 1991, we can see no appropriate basis for adopting a more stringent standard of review than the traditional approach.

When the matter came before the Supreme Court, it is striking to note that there was no discussion of the issue in terms of the intensity of review, even though all members of the Court developed specific tests for notification that were more intense than *Wednesbury* unreasonableness as applied by the Court of Appeal.[63]

More recently, the courts have begun to conceptualise the departure from *Wednesbury* in terms of a sliding-scale of review. This movement has largely been led by two judges in the High Court, Baragwanath and Wild JJ. In a number of cases, this increased intensity of review has been material in justifying judicial intervention that would not have been possible under the *Wednesbury* approach.

In a series of cases, Baragwanath J sought to articulate in greater detail the various approaches available as an alternative to the high *Wednesbury* standard and to deploy these approaches. In *Ports*

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58 *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA) [*Discount Brands* (CA)].

59 Ibid, para 49 Hammond J.

60 As noted by Taggart, some care needs to be taken with the term "super-*Wednesbury*": Michael Taggart "Administrative Law" [2006] NZ Law Rev 75, 85.

61 *Discount Brands* (CA), above n 58, para 49 Hammond J.

62 Ibid, para 50 Thomas J.

63 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (NZSC) [*Discount Brands* (NZSC)]. See further text at n 81.

of Auckland Ltd v Auckland City Council, his Honour adopted what he described as "the lower-level test" of reasonableness when assessing whether the non-notification decision of a local authority was invalid.[64] The supervisory method he employed was whether the decision was "based upon an evident logical fallacy".[65] Although he disclaimed any need to consider "the outer limits of reasonableness in a sphere beyond the ordinary experience of the Court", Baragwanath J declined to apply the "stringent *Wednesbury* test employed in the rating cases" on the basis that the situation was "towards the opposite end of the spectrum" than that addressed in the *Woolworths* case.[66] Later in *Tupou v Removal Review Authority*, his Honour noted the "hard look" and "anxious scrutiny" developments elsewhere[67] and admitted that review of this nature was "in a state of evolution".[68] In this case he enunciated three variants of the deferential *Wednesbury* approach, namely, lowest, intermediate, and highest formulations.[69] He said that it was up to judges to determine what approach was "appropriate in the circumstances", and suggested that in "some cases, such as that of personal liberty, the quality of human right may be so high" to justify an assessment of the merits of a case, particularly if the courts have familiarity with the competing interests at stake.[70] In the particular case, his Honour suggested that one of the *Wednesbury* variants he had identified or "hard look" was therefore appropriate, but he did not need to be more specific because the only error alleged would only be reached if a correctness standard was applied.[71]

Baragwanath J advanced his examination of the issue of the intensity of review in *Progressive Enterprises v North Shore City Council*, once again in the context of a local authority's decision not to notify a resource consent.[72] On the generic point, Baragwanath J once again drew the standards in terms of an expanded continuum or hierarchy, namely:[73]

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64 *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 (HC) [*Ports of Auckland*].

65 Ibid, 606. Baragwanath J drew this approach from the Privy Council's decision in *Re Erebus Royal Commission*, above n 18, but also noted the Court of Appeal's reference to the "hard look" doctrine adopted in the United States in *Pharmac*, above n 50. Reference was also made to Walker, above n 18, 556.

66 *Ports of Auckland*, above n 64, 606 Baragwanath J.

67 *Tupou v Removal Review Authority* [2001] NZAR 696, para 17 (HC) Baragwanath J [*Tupou*], referring to *Pharmac*, above n 50 and *Smith*, above n 31.

68 *Tupou*, above n 67, para 15 Baragwanath J.

69 Ibid, para 17 Baragwanath J. See below nn 76–79 for a similar formulation in a subsequent case.

70 *Tupou*, above n 67, para 16 Baragwanath J.

71 Ibid, para 24 Baragwanath J.

72 *Progressive Enterprises v North Shore City Council* [2006] NZRMA 72 (HC) [*Progressive Enterprises*].

73 Ibid, para 70 Baragwanath J.

(a) the court "forming its own factual conclusion on matters of precedent fact";[74]

(b) "a judgment of proportionality", including in some cases, "a less restricted approach [than the deferential Wednesbury formula]" or "hard look";[75] and

(c) "three conventional Wednesbury tests of progressively decreased intensity",[76] including "logical fallacy",[77] the less intense "intermediate" Wednesbury test with the "so outrageous in its defiance of logic" standard[78] and the most deferential or "super" Wednesbury test requiring a "pattern of perversity; bad faith or misconduct".[79]

Baragwanath J's selection of the appropriate standard in the particular case was complicated somewhat by the Supreme Court's decision in *Discount Brands Ltd v Westfield (New Zealand) Ltd* (*Discount Brands* (NZSC)),[80] where the Supreme Court had ruled that the *Wednesbury* standard should not be applied when reviewing the sufficiency of evidence before a local authority when making such a decision. However, the precise formulation of the standard was complicated by the different approaches adopted by each judge in *Discount Brands* (NZSC) on the applicable standard;[81] all approaches, apart from Keith J's,[82] spoke of the decision requiring some degree of

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74 Ibid, referring to *Liversidge v Anderson* [1942] AC 206, 227 (HL) Lord Atkin and *R v Home Secretary, ex parte Khawaja* [1984] AC 74, 97 (HL) Lord Scarman [*Khawaja*].

75 *Progressive Enterprises*, above n 72, para 70 Baragwanath J, referring to "European human rights cases", New Zealand's "nearest equivalent", *Pharmac*, above n 50, and — for the "hard look" expression — the United States.

76 *Progressive Enterprises*, above n 72, para 70 Baragwanath J, referring to his previous identification in *Tupou*, above n 67.

77 *Progressive Enterprises*, above n 72, para 70 Baragwanath J, referring to *Re Erebus Royal Commission*, above n 18.

78 *Progressive Enterprises*, above n 72, para 70 Baragwanath J, referring to *Council of Civil Service Union*, above n 6.

79 *Progressive Enterprises*, above n 72, para 70 Baragwanath J, referring to *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, 247 (HL) Lord Scarman and *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 596 Lord Bridge.

80 *Discount Brands* (NZSC), above n 63.

81 *Progressive Enterprises*, above n 72, paras 69–72. Baragwanath J construed Elias CJ's approach as "a precautionary approach by the Court to ensure legality", Blanchard J's reasonableness formulation as "suggestive of the conventional *Wednesbury* approach at the intensive end of the spectrum", Keith J's articulation of the test in terms of procedural natural justice rights as mandating the "substitut[ion of] the Court's own appraisal" and Tipping J's approach as amounting to "the hard look approach but impos[ing] a reverse onus if there is real doubt".

82 Sir Kenneth's conceptualisation of the issue in natural justice terms effectively amounted to the application of a correctness standard in that it left no room for any deference to the decision-maker's assessment. Keith J

deference but as still involving a degree of intense scrutiny. The appropriate approach was further complicated by a legislative amendment which removed a jurisdictional precondition which had led, in part, to the Supreme Court's rejection of the *Wednesbury* standard in this context.[83] In the end Baragwanath J concluded that there was "a need for close appraisal by this Court", along with a precautionary gloss favouring notification of applications in cases of "real doubt".[84] While his Honour's analysis was cognisant of the intensity of review jurisprudence, it is regrettable that the standard he adopted was a fresh creation, with different language from the hierarchy previously identified by him in other cases. Baragwanath J subsequently commended his expanded continuum in a later immigration case, *Ding v Minister of Immigration*.[85] In a case centred on the effect of removal orders made against foreign parents on their New Zealand citizen children, Baragwanath J felt that he was bound to apply the deferential *Wednesbury* standard due to the firm appellate dicta.[86]

In contrast to Baragwanath J's relatively complicated continuum of various approaches, Wild J has championed a simple, intermediate form of reasonableness. In *Wolf v Minister of Immigration*, Wild J sought to put the question of the sliding-scale of unreasonableness beyond doubt:[87]

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was also critical of the fact that the decision-makers failed to expressly declare that they were satisfied that the adequate information pre-condition was satisfied or provide reasons for the determination, thereby inferring that they had not in fact satisfied themselves of that pre-condition: see *Discount Brand*s (NZSC), above n 63, para 55 Keith J.

83 Prior to amendment, the section included the phrase: "Once a consent authority is satisfied that it has received adequate information." This was omitted when the notification provisions were amended by the Resource Management Amendment Act 2003, s 93(1): see *Discount Brand*s (NZSC), above n 63, para 18 Elias CJ.

84 *Progressive Enterprises*, above n 72, para 73 Baragwanath J.

85 *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC) (under appeal).

86 Ibid, para 278 Baragwanath J. His Honour noted that "in the context of immigration decision-making the citizenship element has been asserted in most appellate decisions postdating *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) to be no more than a mere *Wednesbury* factor, mention of which by the decision-maker is enough to validate the decision", but he regarded this as unsatisfactory and thought the gravity of risk to the child citizen and recognition of the right of children to individual value and identity in related legislation would have justified more intense review.

87 *Wolf v Minister of Immigration* [2004] NZAR 414, para 47 (HC) Wild J [*Wolf*]. The decision is also notable for Wild J's rejection of the proportionality approach (ibid, para 35). Wild J later reiterated his disaffection for proportionality in *Powerco v Commerce Commission* (9 June 2006) HC WN CIV–2005–483–1220: see Jason E Varuhas "*Powerco v Commerce Commission:* Developing Trends of Proportionality in New Zealand Administrative Law" (2006) 4 NZJPIL 339.

> I consider the time has come to state — or really to clarify — that the tests as laid down in *GCHQ* and *Woolworths* respectively are not, or should no longer be, the invariable or universal tests of "unreasonableness" applied in New Zealand public law.

The judgment contained one of the most thorough recent analyses of this issue. His Honour's conclusion about the availability, in general terms, of an intermediate category of reasonableness was based on four main factors: [88]

(a) the development of administrative law as a distinct discipline within law over the 50 years since *Wednesbury*, along with influence of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act);

(b) domestic developments over the last 20 years where greater intensity of review has been applied, albeit under different rubrics;

(c) acceptance of variegated standards of review by legal text writers and commentators;

(d) developments in comparable jurisdictions, namely the endorsement of increased scrutiny in the United Kingdom and the availability of an intermediate standard of reasonableness under the pragmatic and functional framework in Canada.

In the circumstances of the particular case (a deportation case which would result in a father being separated from his children), Wild J determined that "the lower standard of reasonableness — or higher level of judicial scrutiny" — could appropriately be applied, the lower standard providing a material basis for the Court to intervene.[89]

Building on the groundwork of Baragwanath and Wild JJ, the development of a sliding-scale of review for unreasonableness has been endorsed by numerous other High Court judges, often without extensive independent analysis. In *B v Commissioner of Inland Revenue*, Paterson J accepted that the highly deferential *Wednesbury* standard was inappropriate for reviewing decisions of the Commissioner to stay various appeals by taxpayers on the basis that the issues were addressed in other test cases.[90] His Honour commended either the "less tolerant eye" approach noted in *Pring*, or the principle of "substantive unfairness", rather than what he described as the "perversity" test.[91] Winkelmann J in *A v Chief Executive of the Department of Labour* expressly endorsed Wild J's pronouncement in *Wolf*, agreeing that "the time has come when the *Wednesbury* test of unreasonableness is no longer to be regarded as the invariable or universal test in New Zealand

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88 *Wolf*, above n 87, para 48 Wild J.

89 Ibid, para 72 Wild J.

90 *B v Commissioner of Inland Revenue* [2004] 2 NZLR 86 (HC) Paterson J.

91 Ibid.

public law".[92] She expressed the standard in variegated form:[93] "The intensity with which … decisions are scrutinised will vary according to the subject matter in hand". Applying this greater scrutiny (or, as her Honour described it, "that a reviewing court should look at an impugned decision with great care"),[94] she concluded that the inferences drawn by the Refugee Status Appeals Authority from a report tendered in evidence before it failed this more intense test and quashed the decision.[95] In the sequel to the *Discount Brands* case, *Northcote Mainstreet Inc v North Shore City Council*,[96] Lang J accepted Baragwanath J's continuum account but preferred the *Pring* "less tolerant eye" standard to the more intense standards from *Discount Brands* (NZSC) and *Progressive Enterprises*. However, he found no fault with the evaluation, even when scrutinised with a less tolerant eye.[97] Asher J in *Huang v Minister of Immigration* accepted that a less restricted approach or hard look approach might be justified in particular cases, although his Honour doubted that a more intense standard was required simply because citizen children were involved.[98] However, as there was no evidence that the child involved was likely to suffer because of the removal of his parents, Asher J accordingly applied "established *Wednesbury* principles".[99]

Venning J in *Wright v Attorney-General*, accepted that "in cases involving human rights a 'hard look' is appropriate",[100] although — even with the greater scrutiny — the challenge to the decision of a minister to designate various court holding cells as appropriate for remand prisoners failed. Similarly, in *S v Chief Executive of Department of Labour*, Keane J endorsed the approach in *Wolf*

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92 *A v Chief Executive of the Department of Labour* (19 October 2005) HC AK CIV–2004–404–6314, para 30. Winkelmann J's discussion of the issue made reference (only) to the various English and domestic cases in which, as she put it, "the 'adequate consideration' or 'hard look' approach to judicial review has been discussed or applied (sometimes without discussion)": ibid, para 29 Winkelmann J.

93 Ibid, para 30.

94 Ibid, para 32 Winkelmann J.

95 Ibid, para 52 Winkelmann J. The Court also concluded that the Authority made a material error of law, by failing to take into account aspects on which the claim for refugee status was based: ibid, para 39 Winkelmann J.

96 *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (HC). His Honour distinguished these cases on the basis that the present case was about the determination of whether the potential adverse effects on the environment were likely to be more than minor, not the adequacy of the information pre-condition: ibid, para 170 Lang J.

97 Ibid, para 174 Lang J.

98 *Huang v Minister of Immigration; alt cit Qiong v Minister of Immigration* [2007] NZAR 163 (HC).

99 Ibid, paras 49–51 Asher J.

100 *Wright v Attorney-General* [2006] NZAR 66, para 78 (HC) Venning J. His Honour adopted Professor Joseph's "spectrum" account and picked up on the remark in *Pharmac*, above n 50, that lesser review thresholds might be appropriate in other contexts.

and recognition of the sliding-scale.[101] Despite Keane J's discussion of the generic issues about the standard of review, it is not immediately apparent which standard he applied when he concluded that the decision of the Refugee Status Appeals Authority to refuse refugee status was not unreasonable.[102] Greater intensity of review was also deployed in the successful challenge to the composition of a televised electoral debate in *Dunne v CanWest TVWorks Ltd*.[103] Ronald Young J said that the courts are "anxious to protect fundamental rights" and that other courts have made it clear that where such rights are affected "the levels of arbitrariness or in another context, irrationality required by a plaintiff to establish their case will not be high".[104] Scrutinising the decision against this standard, his Honour ruled that the decision to exclude the leaders of two minor political parties was therefore arbitrary and unreasonable, due to problems arising from it being based on the results of a public opinion poll.[105]

As can been seen, variable intensity or standards of review has now become commonplace in the High Court; a sliding-scale of unreasonableness has replaced the previously all-embracing *Wednesbury* standard. While reference to the sliding-scale is flourishing, the actual application of this increased scrutiny is relatively uncommon. Human rights has been the main — but not sole — theme underlying increased scrutiny, with immigration cases being the largest class of cases in which it has been engaged. Other cases, although not necessarily explicitly, have also touched on rights protected under our Bill of Rights Act. The approach has been endorsed in the local authority planning context but generally where participatory rights — which have some analogy with natural

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101 *S v Chief Executive of Department of Labour* [2006] NZAR 234, para 52 (HC) Keane J.

102 Keane J's endorsement of Winkelmann J's approach in *A v Chief Executive of the Department of Labour*, above n 92, (which also addressed a decision of the Refugee Status Appeals Authority), a slightly ambiguous reference to the focus of the court being on "reasonableness, not unreasonableness" and his remark that the decision warranted a "close look" (but not a "fresh look") suggest that Keane J applied some greater, but undefined, degree of scrutiny: *S v Chief Executive of Department of Labour*, above n 101, paras 23, 25, and 31. The editors of the law reports were not similarly puzzled, concluding authoritatively in the headnote that the court ruled as follows: "The consequences of a wrong decision as to refugee status could be grave. The test on judicial review was therefore not whether the decision was unreasonable (in the sense of perverse or irrational) but whether, after a close look, the decision was inherently reasonable" (ibid, headnote).

103 *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC) [*Dunne*]. For general analysis of the administrative law aspects of the decision see Dean R Knight "*Dunne v Canwest TVWorks Ltd*: Enhancing or Undermining the Democratic and Constitutional Balance?" (2005) 21 NZULR 711 ["Enhancing or Undermining the Democratic and Constitutional Balance?"] and Taggart "Administrative Law", above n 60.

104 *Dunne*, above n 103, para 43 Young J.

105 His Honour's conclusion on the error — based on the interpretation of margins of errors for opinion polls — proved to be erroneous. See my discussion of this point: Knight "Enhancing or Undermining the Democrating and Constitutional Balance?" above n 103, 720.

justice — have been implicated.[106] Other cases involving greater scrutiny, *B v Commissioner of Inland Revenue*[107] and *Dunne*,[108] could have directly engaged the Bill of Rights Act (sections 27(3) and 14 respectively).

Consistent with this series of cases, the notion of variable intensity of review has attracted universal recognition among leading administrative law scholars and commentators. Professor Taggart concludes that "the courts now openly accept that [*Wednesbury*] (un)reasonableness is not a monolithic concept, and in truth never was" and points to a "rainbow of possibilities, with the intensity of review varying depending on the context and other factors".[109] In the leading local administrative law textbook, Professor Joseph says "the sliding-scale of review is part of the legal tapestry".[110] Professor McLean accepts, at least in cases involving human rights, the move away from *Wednesbury* unreasonableness in New Zealand and the United Kingdom (but notes that the "proper methodology for judicial review involving human rights remains unsettled and controversial").[111] This same position is also adopted in leading practice papers and digests.[112]

In the light of these developments, though, the appellate courts have been surprisingly reticent to discuss this new methodology, beyond the earlier obiter comments leaving the door open for departure from *Wednesbury* in some undefined contexts.[113] The notable exception is Hammond J's rhetorical speculation about the application of the hard look doctrine in his dissenting judgment in *Thompson v Treaty of Waitangi Fisheries Commission* (*Thompson*),[114] in a challenge to the proposed allocation of fishing quotas by the Treaty of Waitangi Fisheries Commission as part of a Treaty settlement with the Crown. His Honour emphasised the importance of determining the degree of scrutiny mandated in the particular case: "It is imperative to clearly establish what

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106 *Discount Brands* (NZSC), above n 63, para 54 Keith J.

107 *B v Commission of Inland Revenue*, above n 90.

108 *Dunne*, above n 103.

109 Taggart "Administrative Law", above n 60, 83. See also Taggart "Reinventing Administrative Law", above n 13 and Michael Taggart "Proportionality, Deference, *Wednesbury*" in *Judicial Review* (New Zealand Law Society, Wellington, 2007) 23 ["Proportionality"].

110 Philip A Joseph *Constitutional Law and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) 936 [*Constitutional and Administrative Law*].

111 Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utilities, and Administrative Law" (2008) NZ Law Rev (forthcoming).

112 Paul Radich and Jessica Hodgson *Public Law* (New Zealand Law Society, Wellington, 2006) 83; *The Laws of New Zealand* (LexisNexis, Wellington, 2003) Administrative Law, 106, para 102.

113 See text at nn 43–63.

114 *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (CA) [*Thompson*].

standard of review is appropriate to the proceeding."[115] He noted that although *Wednesbury* has not yet been "distinctly interred", both English and New Zealand courts now overtly recognise that "where some important interests are at stake *Wednesbury* review is not appropriate, and that the depth of review should be a less deferential, 'reasonableness' inquiry".[116] Once again though, he explored the potential of the hard look — or, as he re-phrased it, the "adequate consideration" doctrine — this time noting some of the difficulties associated with the analysis.[117] In the end, though, Hammond J agreed with the trial judge that the deferential *Wednesbury* standard was appropriate for the particular context.[118] In contrast the majority avoided addressing questions about the appropriate standard of review by ultimately concluding that the decision was not "unreasonable in the administrative law sense (whatever the appropriate standard of review)".[119] Glazebrook and William Young JJ did not appear to be concerned about the adoption of a sliding-scale framework, though.[120]

It may be argued that, to a certain degree, the absence of endorsement or otherwise of the sliding-scale framework may be a function of the reactive nature of appellate adjudication, with the courts only being able to address cases and propositions that come before them. However, the appellate courts have seemed unduly reluctant to address the issue even in cases in which it was possible, albeit not essential, to address the point. Intensity of review could readily have been addressed by the Supreme Court in *Discount Brands* (NZSC),[121] and by the majority of the Court of Appeal in *Thompson*; an invitation to address these matters was also declined by the Court of

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115 Ibid, para 204 Hammond J dissenting.

116 Ibid, para 211 Hammond J dissenting.

117 Ibid, para 219 Hammond J dissenting.

118 Ibid, para 222 Hammond J dissenting.

119 Ibid, para 195 Glazebrook and William Young JJ. No objection, either from counsel or the Court, was taken to McGechan J's observation at first instance that unreasonableness varies according to subject matter and close scrutiny may be required where the decision had a direct effect on individual rights: *Manukau Urban Maori Authority Inc v Treaty of Waitangi Fisheries Commission* (28 October 2003) HC AK CP122/95; CP171/97, para 48. The argument focused instead on whether the circumstances justified greater scrutiny: *Thompson*, above n 114, para 85 Glazebrook and William Young JJ.

120 *Thompson*, above n 114, para 85 Glazebrook and William Young JJ.

121 Elias CJ expressly avoided the issue, noting that she did not consider that the questions raised in the case were "helpfully advanced by consideration of the scope and intensity of the High Court's supervisory jurisdiction to ensure reasonableness in substantive result in the exercise of statutory powers": *Discount Brands* (NZSC), above n 63, para 5 Elias CJ. In an earlier extra-judicial address, however, the Chief Justice has conceptualised the scope of judicial review in terms of a continuum, rejected the monolithic nature of *Wednesbury* and recognised the concept of a variable "margin of appreciation": Elias, above n 28, 14–23.

Appeal in *Awatere Huata v Prebble.*[122] Given the centrality of this principle, one might have expected greater engagement with the developments.

Although the appellate courts are yet to definitively rule on the question of variable intensity and the post-*Woolworths* future of *Wednesbury* unreasonableness, the various obiter comments and the absence of adverse comment hint that it may only be a matter of time before our appellate courts endorse this approach.[123] That said, some judges may be unwilling to see their broad discretion to intervene under this ground being structured or refined in any way — a stance which would vindicate the arguments made by critics of *Wednesbury*.

2 Evaluation of appropriate standard generally cursory and patchy

While the concept of a variable standard of reasonableness now appears to be relatively settled, the different methodology required by the new framework remains somewhat obscure. A variable standard converts the present one-stage or unified assessment of reasonableness into a two-stage assessment. A preliminary evaluation of the appropriate standard must be undertaken, along with an identification of the methodology required by the standard, before the circumstances of the actual case are assessed against that standard. Unfortunately, the evaluation of the appropriate standard and the consideration of the differences in judicial method have generally been cursory and poorly articulated. Apart from a couple of notable examples,[124] the preliminary analysis of the appropriate standard has been patchy and almost perfunctory. To date the courts have failed to undertake the comprehensive contextual analysis required to determine the appropriate standard of review. Further, there has been little attempt by the courts to develop, even on a provisional basis, a comprehensive or structured framework for determining the applicable standard of review.

The central factor relied on by most judges to justify increased scrutiny has been human or fundamental rights. In *B v Commissioner of Inland Revenue*, Paterson J referred to the "fundamental right" under section 27(3) of the Bill of Rights Act of a taxpayer to have their dispute about tax liability determined in Court.[125] Winkelmann J in *A v Chief Executive of the Department of Labour* emphasised that the decision of the Refugee Status Appeals Authority to decline refugee status was "one affecting such fundamental human rights as the right to be free from persecution";[126] similar

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122 *Awatere Huata v Prebble* [2004] 3 NZLR 359.

123 See *Pharmac*, above n 50, 66 Blanchard J for the Court; *Discount Brands* (NZSC), above n 63, para 54 fn 28 Keith J; *Thompson*, above n 114, para 204 Hammond J dissenting; and *Discount Brands* (CA), above n 58, para 50 Hammond J for the Court.

124 Namely, Baragwanath and Wild JJ in their analyses.

125 *B v Commissioner of Inland Revenue*, above n 90, para 40 Paterson J. His Honour also noted that the decision was made by the Commissioner exercising delegated authority, not by a publicly elected body, and referred to the fact that the Commissioner "was not an objective bystander".

126 *A v Chief Executive of the Department of Labour*, above n 92, para 33 Winkelmann J.

sentiments also being expressed in one of the other refugee cases, *S v Chief Executive of Department of Labour*.[127] In the same theme, the rights of the family and children were identified as potential triggers for increased scrutiny in other immigration cases.[128] The detention of remand prisoners touched human rights sufficient for Venning J to adopt greater scrutiny in *Wright v Attorney-General*.[129] Possible deleterious effects on the democratic process justified greater scrutiny in *Dunne v CanWest TVWorks Ltd*.[130] Ronald Young J referred to "a fundamental right of citizens in a democracy to be as well informed as possible before exercising their right to vote and to ensure the electoral outcome is as far as possible not subject to the arbitrary provision of information".[131]

In most of these cases, the assertion of increased scrutiny has been solely justified by reference to human rights. Few cases refer to any other contextual factors supporting or negating greater intensity of review; in such cases, additional reference was made to the relative expertise (or lack thereof) of the decision-maker,[132] or contradistinction between the body in question and the elected body in *Woolworths*.[133]

In this context, the slogan of human rights is too "blunt" as a factor to determine the standard of review.[134] Resort to the mantra of human or fundamental rights is both over and under-inclusive. The mantra of human rights is over-inclusive because it creates the irresistible temptation for judges to treat any right or interest as being a human right or fundamental right. There is the question of whether this phrase is intended only to apply to rights explicitly recognised in our domestic human rights instrument. If so, that then raises the question of the bifurcation of our administrative law.[135] At present, a distinct methodology has been adopted for cases in which rights protected under the Bill of Rights Act are directly engaged. The proportionality calculus is used by our courts to assess

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127 *S v Chief Executive of Department of Labour*, above n 101, para 24.

128 *Huang v Minister of Immigration; alt cit Qiong v Minister of Immigration*, above n 98, para 50; *S v Chief Executive of Department of Labour*, above n 103, paras 22–24; and *Wolf*, above n 87, para 65.

129 *Wright v Attorney-General*, above n 100, para 78 Venning J.

130 *Dunne*, above n 103.

131 Ibid, para 43 Ronald Young LJ.

132 *Northcote Mainstreet Inc v North Shore City Council*, above n 96, para 126; *Wolf*, above n 87, para 72 Wild J; *Progressive Enterprises*, above n 72, para 63 Baragwanath J.

133 *B v Commissioner of Inland Revenue*, above n 90, para 40 Paterson J; *Wolf*, above n 87, para 72 Wild J; *Progressive Enterprises*, above n 72, para 63 Baragwanath J.

134 Taggart "Administrative Law", above n 60, 89.

135 See ibid, above n 60, and Taggart "Proportionality", above n 109, 55–57. It is not, however, my intention to confront here this much vexed issue. On this see ibid; and McLean, above n 111.

whether the governmental imperative may override or balance the impugned right,[136] consistent with international practice in relation to human rights instruments.[137] In the main, this calculus has applied without any separate calibration of the proportionality standard to address questions of intensity.[138]

Should we treat claims made under the Bill of Rights Act as a separate species of administrative law subject to distinct treatment, particularly the more intense and exacting proportionality calculus? And if we do, is there then any point in human rights featuring in the contextual assessment of the intensity of review in "ordinary" administrative law cases? After all, jurisprudence has suggested that even the anxious scrutiny approach falls short of the protection of rights required under human rights instruments.[139] Why would any litigant frame a case in terms of the softer administrative law standard when direct engagement with the human rights instrument will no doubt proffer greater scrutiny and success? If "human rights" or "fundamental rights" extend beyond those rights recognised in the Bill of Rights Act, then the approach (re-) opens the can of worms about which "rights" are fundamental and adopts the uncertainty associated with that debate. Many interests can be rephrased as a fundamental right or something that speaks to a person's liberty. With the present frenzy about high mortgage rates, for example, might we see a claim that the Reserve Bank's approach to monetary policy should be more closely scrutinised because it impugns the "fundamental" right to a home?

The abundant references to human or fundamental rights appear to be more a rhetorical device utilised to prioritise a claim that the governmental action has a grave effect on an individual. If this is so, then it seems more honest to justify greater scrutiny by that factor alone: the gravity of the effect of a decision on an individual. Obviously any governmental action which undermines rights in our Bill of Rights Act will generally qualify as a grave effect.

The mantra of human or fundamental rights is also under-inclusive because it ignores those rights or interests which cannot tenably be brought into the class of human rights. While the human rights rubric has been the genesis of increased scrutiny, the criticism of the exaggerated standard is not so confined. Again, there may be cases where the degree of effect on an individual's interests would be so great as to justify greater scrutiny.

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136 *R v Hansen* [2007] 3 NZLR 1 (NZSC) [*Hansen*].

137 For example *R v Oakes* [1986] 1 SCR 103; *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (HL); and Julian Rivers "Proportionality and Variable Intensity of Review" (2006) 65 CLJ 174.

138 See text at nn 214–219 and Taggart "Administrative Law", above n 60, 89. But see text at n 205, discussing Tipping J's deference approach in *Hansen*, above n 136.

139 See *Smith*, above n 31.

At the other extreme, Wild J's identification of the relevant factors in *Wolf* was comprehensive:[140]

> Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: upon who made it; by what process; what the decision involves (ie its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them.

This statement restates all possible contextual factors (a point noted by his Honour)[141] but its generality means the statement lacks the depth and guidance required to operate as instructive criteria. Further, despite this broad statement of principle, the analysis actually applied by Wild J is arguably as superficial as many of the other cases. The application of increased scrutiny was justified by reference only to the effect on the applicant (or, rather, the applicant's family) and the country's obligations at international law,[142] although as an apparent after-thought after concluding the decision was unreasonable, his Honour reinforced his finding by mentioning the lack of similarity to the context in *Woolworths*.[143]

Overall, the looseness of the New Zealand courts' preliminary analysis of the applicable standard and associated lack of depth and clarity is disappointing. Issues of deference involve a complex matrix of competing factors, such as the constitutional allocation of functions, relative expertise and competence, functional suitability of decision-makers and courts to assess certain questions, and the nature of other controls on the decision-making process.[144] This analysis is fundamental to the determination of any case and deserves more careful treatment and articulation. The process of rationalising the appropriate intensity of review requires judges to confront and recognise the competing imperatives of vigilance and restraint involved in the unique supervisory jurisdiction of judicial review.[145]

Further, one of the major criticisms that led to the departure from the *Wednesbury* test was its lack of transparency.[146] In its present form, the variegated approach suffers from the same defect.

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140 *Wolf*, above n 87, para 47 Wild J.

141 Ibid, para 47, referring to Lord Steyn's statement on "context" in *Daly* above n 33.

142 *Wolf*, above n 87, para 65 Wild J.

143 Ibid, para 72. Wild J pointed to the lack of policy content or comparative expertise in the decision, along with the fact that in this case the decision-making body was not an elected body.

144 See Part III (C) Determining the Appropriate Standard.

145 For the expression of judicial review theory in terms of "vigilance" and "restraint" see Michael Fordham *Judicial Review Handbook* (4 ed, Hart Publishing, Oxford, 2004) 270.

146 See Jowell and Lester, above n 22, 371.

While it is not expected that a perfect set of factors can be developed overnight, the cursory evaluation of this point means that it is unlikely to develop incrementally over time. It is not an impossible task. Elsewhere courts have been able to express more coherently the factors relied on to determine the applicable standard. For example, in the usual Canadian way, for over two decades the courts in Canada applied a relatively settled framework for resolving this preliminary question.[147] Some judges in England have begun to formulate a set of principles governing issues of deference, albeit in the context of human rights instruments.[148]

The lack of clarity is continued through into the impact of increased scrutiny on the judicial methodology. Little, if any, guidance is given on the different method of supervision other than the fact that the decision is scrutinised more "closely" or with "greater scrutiny". Occasionally, the courts have also cautioned that, despite increased scrutiny, it is not for the court to substitute its own view for that of the decision-maker, that is, increased scrutiny does not amount to a correctness review. We are left with a continuum with infinite possibilities, with the undefined degree of intensity ultimately being a value judgement for the judge. Once again this fails the plea for transparency and intellectual honesty that followed *Wednesbury*, particularly as a result of suspicion that "prejudice or policy considerations may be hiding underneath *Wednesbury*'s ample cloak".[149] In my view, the sliding-scale or continuum approach fails to provide sufficient navigation lights to guide the judicial evaluation; the approach involves an overall evaluation which, in the absence of clearly demarcated guidance, condones "palm tree justice". Even the judges who have sought to identify distinct categories have done so in a way which does not address these criticisms.[150] While Baragwanath J has been one of the key champions of the sliding-scale, the myriad of standards identified by him contains categories which are overly refined and probably do not present sufficiently distinct judicial methods to justify their separate articulation.

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147 *Pushpanathan v Canada (Minister of Citizenship & Immigration)* [1998] 1 SCR 982 [*Pushpanathan*]. See generally David Phillips Jones and Anne S de Villars *Principles of Administrative Law* (4 ed, Thomson Carswell, Scarborough, 2004) 486–518; Philip Bryden "Understanding the Standard of Review in Administrative Law" (2005) 54 Uni New Brun LJ 75; and Audrey Macklin "Standard of Review: The Pragmatic and Functional Test" in Colleen M Flood and Lorne Sossin (eds) *Administrative Law in Context* (Edmond Montgomery Publications, Toronto, 2008) 197. The Supreme Court of Canada has recently revised this framework: see *Dunsmuir v New Brunswick* (2008) SCC 9 [*Dunsmuir*].

148 See for example *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 761–762 (CA) Laws LJ dissenting and the endorsement of these principles by other members of the Court of Appeal in *Shala v Secretary of State for the Home Department* [2003] CA Civ 233, para 12 Lord Keene.

149 Jowell and Lester, above n 22, 371.

150 See for example Baragwanath J in *Ports of Auckland*, above n 64.

Intensity of review, in my view, would be better expressed in terms of a few examples of distinct judicial methodology. In relation to the English experience, Professor Le Sueur makes a similar criticism: "Arguably, recognising categories may make it easier for there to be a principled and more certain approach to the court's role: of situation A then intensity B, rather than slithering around in grey areas."[151] The notion that reasonableness can float along a spectrum between two extremes was also rejected by the Supreme Court of Canada in favour of distinct categories of review — although the Canadian Supreme Court appears to have recently reneged on this view.[152]

In the next Part, I explore how a set of more distinct standards of review could be developed, in the light of these criticisms.

III TOWARDS A MORE TRANSPARENT AND PRINCIPLED FRAMEWORK AND METHODOLOGY

A Introduction

Much has already been written on the concept of deference and the theory underlying substantive review.[153] I do not try and rehearse those arguments here, except to note Dyzenhaus' powerful articulation of the justification for "deference", that is, it arises from "institutional respect" rather than the idea of "submission to authority" (which carries with it the baggage of the much contested *ultra vires* debate).[154] Instead, I aim to refine some of the ideas that have been advanced on a doctrinal level and attempt to sketch a basic framework incorporating distinct methodologies.

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151 Le Sueur, above n 9, para 30. Professor Bryden makes a similar point in the Canadian context, that is that, the difference between the standards of review "offers a distinction in kind rather than merely one of degree": Bryden, above n 147, 93.

152 Compare *Law Society (New Brunswick)* v *Ryan* [2003] 1 SCR 247, para 43–47 Iacobucci J [*Ryan*] and *Dunsmuir*, above n 147. In the latter case, the Supreme Court collapsed the two unreasonableness categories into one but recognised undefined variants of unreasonableness within it.

153 David Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 280; Michael Beloff "The Concept of 'Deference' in Public Law" [2006] JR 213; Lord Justice Dyson "Some Thoughts on Judicial Deference" [2006] JR 103; Richard Clayton "Principles for Judicial Deference" [2006] JR 109; Sadat Sayeed "Beyond the Language of 'Deference'" [2005] JR 98; Lord Steyn "Deference: a Tangled Story" (2005) PL 346; TRS Allan "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671; J Jowell "Judicial deference: servility, civility or institutional capacity" [2003] PL 59.

154 Dyzenhaus, above n 153, 303. This conception has been endorsed by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Information)* [1999] 2 SCR 817, para 65 L'Heureux-Dubé J; and *Ryan*, above n 152, para 49 Iacobucci J. For myself, while I embrace the theory of deference, the language leaves me cold. I prefer the term scrutiny rather than deference. Although they are flip-sides of the same coin, they emphasise different starting points: deference starts from basis of non-assessment or non-interference; scrutiny contemplates review or evaluation of a decision. I wonder whether this *may* ultimately affect the end point.

B Defining the Categories and Identifying their Methodology

First, there is the issue of the differing standards along the continuum or sliding-scale or, as Professor Taggart describes it, "colours of the rainbow".[155] Taggart's taxonomy, drawn from recent case law and similar to that identified by Baragwanath J, is a useful starting point:[156]

(a) correctness review;

(b) anxious scrutiny;

(c) proportionality review or "hard look" doctrine;

(d) reasonableness simpliciter or intermediate/sliding *Wednesbury* reasonableness review;

(e) logically fallacious;

(f) outrageous/patent unreasonableness (Canada) or super-*Wednesbury* unreasonableness;

(g) bad faith, fraud, or corruption; and

(h) non-justiciability.

While the taxonomy represents a useful synthesis of the differing approaches, it is relatively unsatisfying from a normative perspective.[157] As I argued earlier, there are dangers in calibrating the intensity of review too precisely and in a manner which does not provide sufficiently distinct judicial methods. It must be doubted whether eight variable standards represents a viable and workable set of standards.[158] The distinctions between the methodology required by these standards

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155 Taggart "Administrative Law", above n 60, 82. I must confess that I originally misconstrued Taggart's "colours of the rainbow" metaphor. When I first read it I visualised each colour or band as representing distinct degrees of intensity, from violet — the most intense — at the centre, to red — the most deferential — on the outer edge. However, Taggart's own sketch of his metaphor in his most recent paper depicts, more simply, a curved continuum: Taggart "Proportionality", above n 109. As I note below, I find this depiction less appealing because it still operates as an undefined spectrum.

156 Taggart "Administrative Law", above n 60, 84.

157 Professor Taggart's discussion, in his annual review of Administrative Law, understandably only addresses the present position and does not attempt to propose any significant changes to the set of standards. It seems clear, however, that Professor Taggart was not seeking to endorse those standards. He noted in his introduction that administrative law was going though "one of its periodic bouts of excessive terminology" and suggested that this was "not only causing confusion but may also mask significant realignments of doctrine and methodology": ibid, 75. Further, his later discussion cast doubt on the helpfulness of the "hard look" principle and raised questions about the relationship between proportionality and *Wednesbury* unreasonableness: ibid, 88. More recently, Taggart has attempted to develop his own normative framework, refining his rainbow metaphor: Taggart "Proportionality", above n 109.

158 In his most recent edition, Professor Joseph has similarly proposed that the terminological schema of substantive review be rationalised, although he continues to push for proportionality (and for it to be the

are, at best, subtle and, in truth, unrealistic. Supervisory review, particularly of the merits, undeniably involves a strong element of discretion.[159] However, as already mentioned, one of the key catalysts for the rethinking of the *Wednesbury* standard has been complaints about its lack of transparency and confusing nature. The present state of affairs does little to address those concerns and, indeed, appears to exacerbate them. Further for the same reason, I reject the concept of a continuum with infinite degrees of intensity.

In my view, the central focus of any framework needs to be the precise judicial method mandated by each standard. Unless a category provides a materially distinct methodology it should not be adopted. To this extent, the definition of categories cannot sensibly be developed without consideration of the actual method of judicial supervision in each category. I am less concerned about the nomenclature adopted, although proper labelling will help ensure the methodology is properly understood. As Walker notes, a label which is "semantically inapt might not matter if it had no effect on the future development of the law [but] there is inevitably a danger that lawyers' — and administrators' — conceptual ideas are moulded by the language they use".[160]

Accordingly, I set out below, on a tentative basis, a possible refinement of the categories, along with a discussion of the distinct methodology within each. I am not proposing dramatic surgery; instead, I am aiming to synthesise the present approach, tweaked by reference to my earlier criticisms and improved by reference to some of the international jurisprudence on this issue. The purpose is to advance dialogue on the framework rather than to try and pronounce an "off the shelf" model. No doubt some will quibble with elements of the framework. And indeed, some questions are deliberately left open, most notably the difficult question of the role of proportionality within a reasonableness/merits framework.

I suggest therefore that the present framework could be refined to provide the following distinct categories or bases for judicial intervention on the merits:

(a) non-justiciability;

(b) flagrant impropriety;

(c) manifest unreasonableness;

(d) simple reasonableness; and

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preeminent methodology in the "middle ground"): Joseph *Constitutional and Administrative Law*, above n 110, 857.

159 Lord Cooke "The Discretionary Heart of Administrative Law" in Forsyth and Hare (eds), above n 37, 203–220.

160 Walker, above n 18, 570.

(e) incorrectness.

These standards represent a pyramid; that is, when one of the more intense standards is adopted, it also incorporates and complements the approach of the more deferential standards above it.

1 Non-justiciability

Non-justiciability has traditionally been treated as a preliminary matter, analogous to jurisdiction.[161] However, in my view, the question of substantive non-justiciability is more appropriately analysed under a standard of review framework. This approach is implicitly favoured by others who have sketched a complete continuum.[162] Both Le Sueur and Taggart place non-justiciability at one end of the spectrum. Taggart's rationale is brief, recording that his conception of non-justiciability is "in the narrow sense of something that the court cannot (rather than will not) resolve by the application of legal norms" and noting the recent discussion of Professor Harris on non-justiciability in the context of the prerogative of mercy.[163] Harris advocates the retention of the concept of justiciability:[164]

> [T]he concept continues to have value as an analytical tool in judicial review decision-making. It is a fact that the court may not be the appropriate body, or be suitably equipped in all contexts to carry out the decision-making which judicial review would ideally ask of them. … An advantage of justiciability as a tool of analysis is that it invites a "big picture" constitutional appreciation of whether or not the decision is an appropriate one for the courts.

He goes on to advance a series of factors that he suggests should determine whether a decision is non-justiciable.[165] As is evident, the rationale for (non-)intervention and the suite of factors bear remarkable similarity to the rationale and factors oft-raised in relation to intensity of review. Indeed, while Harris' discussion is principally directed at what he describes as "primary justiciability", that is, the jurisdictional form of justiciability, he also notes that his analysis and criteria may be relevant

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161 BV Harris "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 63 CLJ 631, 633.

162 Taggart "Administrative Law", above n 60; Le Sueur, above n 9.

163 Taggart "Administrative Law", above n 60, 82.

164 Harris, above n 161, 633. Compare Chris Finn "The Justiciability of Administrative Decisions: A Redundant Concept?" (2002) 30 FL Rev 239.

165 Harris, above n 161, 635–643. The factors he suggests are as follows: (a) appreciation of the subject-matter of the executive decision; (b) legislative determination of justiciability; (c) the constitutional appropriateness of the matter being held justiciable; (d) the suitability of the court's personnel and processes to the decision-making required; (e) availability of objective criteria.

to "secondary justiciability", that is, the grounds upon which judicial review may be made or the intensity of review within those grounds.[166]

Our courts have remained alert to situations of non-justiciability, although they have not explicitly drawn the linkage with intensity of review and reasonableness.[167] This standard is the most deferential standard, which rejects any role for the courts in checking the decision of the public body or official. No discussion, therefore, is required on the judicial methodology involved; judicial supervision of the merits is completely off-limits. There is no doubt that this standard remains an important and viable category.

2 Flagrant impropriety

Closely aligned to the concept of non-justiciability is the notion that, in some circumstances, judicial interference is not permitted except in very extreme cases. This is the methodology most famously adopted by the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*.[168] On the question of whether commercial decisions of a state-owned enterprise were reviewable, Lord Templeman ruled that such decisions were "in principle amenable to judicial review" both under the Judicature Amendment Act 1972 and under the common law. However, the ambit of any review was narrowed by the restricted basis on which intervention would have been permitted:[169]

> It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.

This limited form of review is not, however, limited to this scenario. It is also evident in a number of other areas, often as a mechanism to soften the effect of otherwise non-justiciable matters. For example, it has been adopted in cases reviewing prosecutorial discretion: "a decision to prosecute may … be susceptible to judicial review if it were established that the prosecuting authority acted in

166 Ibid, 644–645.

167 See for example *Curtis v Minister of Defence* [2002] 2 NZLR 744 para 27 (CA) Tipping J; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA); and *Boscawen v Attorney-General* (20 June 2008) HC WN CIV–2007–485–2418.

168 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC). See Janet McLean "New Public Management New Zealand Style" in Paul Craig and Adam Tomkins (eds) *The Executive and Public Law* (Oxford University Press, Oxford, 2006) 124.

169 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*, above n 168, 391 Lord Templeman.

bad faith or brought the prosecution for collateral purposes".[170] It has also been applied in a challenge to the tendering processes of a local authority for the disposal of land.[171]

This standard of review provides a workable methodology in that intervention is reserved for the most exceptional cases, that is, bad faith, corruption, and fraud. These touchstones are established concepts within the law and their content is readily understood.[172] The focus is not on the quality or merits of the decision per se; instead the focus is on the conduct and motives of the decision-maker. The nature of judicial supervision is therefore sufficiently distinct from traditional *Wednesbury* unreasonableness or, as I have described it, manifest unreasonableness, which focuses on the substance of the decision.

Given the existing experience with this type of deferential approach, there is no difficulty recognising this as a standard within the framework. One suggested minor refinement is the adoption of a more generic label, "flagrant impropriety". This reinforces both the focus on the demeanour of the decision-maker and the high threshold for intervention. The label is not novel; while it has not been formalised into the tripartite standards of review in Canadian jurisprudence, the courts in Canada have adopted the label as shorthand for bad faith, corruption, and fraud in specific contexts.[173]

3 Manifest unreasonableness

This standard is broadly equivalent to the traditional *Wednesbury* reasonableness standard. I suspect there would be less antagonism towards the reasonableness framework if the "geographical epithet" was removed from the title. It would mark out the departure from *Wednesbury* as a monolithic concept and would also more cogently link the title and the judicial methodology. The proposed adjective — "manifest" — has some pedigree. The Canadian courts adopted a similar "patent" unreasonableness label within their pragmatic and functional framework;[174] *Halsbury's*

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170 *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC). See also *R v Director of Public Prosecutions, ex parte Kebeline* [2000] 2 AC 326, 393 (HL) Lord Hobhouse; and *Kostuch v Alberta (Attorney-General)* (1995) 128 DLR (4th) 440, para 33 (Alberta CA) (leave to appeal refused in *Kostuch v Alberta (Attorney-General*) (1996) 133 DLR (4th) vii (SCC)). The courts also have the co-extensive power to intervene and stay criminal proceedings if they amount to an "abuse of process", an approach which mimics the threshold for intervention in review cases: see *Fox v Attorney-General* [2002] 3 NZLR 62 (CA).

171 *Gregory v Rangitikei District Council* [1995] 2 NZLR 208 (HC).

172 See *Smith v East Elloe Rural District Council* [1956] AC 736 (HL); *Roncarelli v Duplessis* [1959] SCR 121; and Fordham *Judicial Review Handbook*, above n 145, para 52.1.

173 *Campbell v Ontario (Attorney-General)* (1987) 42 DLR (4th) 383 (Ontario CA), approving the approach in *Campbell v Ontario (Attorney-General)* (1987) 38 DLR (4th) 64 and *Kostuch v Alberta (Attorney-General)* (1995) 128 DLR (4th) 440 (Alberta CA), above n 170. I am grateful to Ru Yee Hii for bringing this line of cases to my attention.

174 *Pushpanathan*, above n 147. Compare *Dunsmuir*, above n 147.

Laws of England has also adopted the phrase "manifest unreasonableness" as the heading for its discussion of irrationality or *Wednesbury* unreasonableness.[175]

For the purposes of this standard, I suggest the purported iterations of *Wednesbury* which provide a similarly deferential standard ought to be amalgamated into this category. The underpinnings of the “logical fallacy” approach applied in *Re Erebus Royal Commission; Air New Zealand v Mahon* (as treated as a distinct basis for intervention by Baragwanath J in *Tupou* and *Progressive Enterprises*) do not materially deviate from the underpinnings of this standard and can readily be addressed in the methodology of this standard.[176]

Identifying — or rather, articulating — the distinct methodology is more difficult for this standard. It is easy to say this is one of the more deferential standards, but what does that really mean? Various linguistic terms have been adopted by the courts when applying the highly deferential standard: phrases such as "so absurd that the decision-maker must have taken leave of his senses",[177] "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"[178] or "based on an evident logical fallacy".[179] To these phrases can be added the famous "irrationality" term (a term though that has not been without its own critics).[180]

Two well-established principles should also be mentioned, as they have operated as important qualifications on judicial scrutiny of administrative discretion under this head. The contradistinction with a correctness standard has been applied universally, that is, it is not for the courts to substitute their view for that of the decision-maker.[181] Further, in terms of the relationship with the relevancy principle, weight to be given to relevant considerations remains a matter for the decision-maker;[182]

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175 *Halsbury's Laws of England* (4 ed reissue, Butterworths, London, 2001) vol 1(1), Administrative Law, page 197, para 86.

176 *Re Erebus Royal Commission*, above n 18; *Tupou*, above n 67; and *Progressive Enterprises*, above n 72. It is unclear whether Baragwanath J's so-called "super *Wednesbury*" test — a pattern of perversity and bad faith — speaks only to the intentions or culpability of the decision-maker or also addresses defects in the decision itself. If it is the latter, then the element dealing with the unsoundness of the decision can be accommodated into manifest unreasonableness, and the element dealing with the decision-maker's motives into the flagrant impropriety standard.

177 *Nottinghamshire County Council v Secretary of State for the Environment*, above n 79.

178 *Council of Civil Service Unions*, above n 6, 410.

179 *Re Erebus Royal Commission*, above n 18, 832.

180 See Walker, above n 18.

181 Fordham *Judicial Review Handbook*, above n 145, para 15.6.

this principle is usually expressed subject to the *Wednesbury* standard but it also colours the *Wednesbury* standard itself by suggesting highly deferential supervision of matters of weight.

The method of this type of standard has also been the subject of increasing discussion by judges and scholars in Canada.[183] For a number of years, the pragmatic and functional framework required judges to distinguish between patent unreasonableness and reasonableness simpliciter. Iacobucci J in *Law Society (New Brunswick) v Ryan* described the methodology of patent unreasonableness in the following way:[184]

> In *Southam*, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect." Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

It was suggested that cases of patent unreasonableness are rare: "A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd."[185] Professor Bryden has sought to draw from existing jurisprudence the "types of flaws that are characteristic of 'patently unreasonable' decisions".[186] He identified the following touchstones for intervention under this standard:[187]

(a) bad faith;

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182 *Tesco Stores Ltd v Secretary of State for the Environment* [2005] 1 WLR 759, 764 (CA); *Waikato Regional Airport Ltd v Attorney-General* [2001] 2 NZLR 670 (HC); and GDS Taylor *Judicial Review* (Butterworths, Wellington, 1991) para 14.31.

183 Guy Régimbald "Correctness, Reasonableness, and Proportionality: A New Standard of Judicial Review" (2005) 31 Man LJ 239; David J Mullan "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 Can J Admin L & Prac 59; Bryden, above n 147; and Jones and de Villars, above n 147.

184 *Ryan*, above 152, paras 52–55 Iacobucci J.

185 *Voice Construction Ltd v Construction & General Workers' Union, Local 92* [2004] 1 SCR 609, para 18 Major J.

186 Bryden, above n 147. Bryden's main argument is that "more attention needs to be paid to the implications that the outcome of the standard of review analysis holds for the types of arguments that lawyers make on judicial review applications and the reasons that judges give to support their decisions"; he seeks to move the discussion beyond the "principled account of the rationale for judicial deference" to a companion "workable description of the types of situations in which judicial intervention is appropriate": ibid, 76 and 100.

187 Ibid, 94–98.

(b) a decision that is "based on a premise which is unquestionably incorrect";

(c) serious flaws in the decision's logical underpinnings;

(d) a failure by the decision-maker to "observe the limits of its institutional role" (for example, attempting to amend legislative rules rather than interpret them);

(e) arguably, a decision which is inconsistent with the policy and objective of the statute; or

(f) an interpretation that is obviously inconsistent with accepted principles of interpretation.

The approach of developing touchstones for intervention to augment the conceptual definitions has some attraction.[188] Of course, the distinction between a decision which is patently unreasonable and one which is simply unreasonable will always be a difficult one to draw.[189] Most recently, in the light of some of this criticism, the Supreme Court abandoned the formal distinction between patent and simple unreasonableness by collapsing the two reasonableness standards into one;[190] however, in substance, the distinction appears to have been maintained as the Court recognised that different degrees of deference would apply within this single standard, thereby still requiring judges to apply variegated standards of reasonableness.[191]

Regardless, it is clear that manifestly unreasonable decisions must necessarily be a subset of unreasonable decisions generally;[192] but a meaningful difference must be drawn to avoid the distinction collapsing entirely. If we draw on the Canadian experience, the central principle of manifest unreasonableness seems to be the immediacy or obviousness (or magnitude)[193] of the factual or logical flaw.[194] When viewed in this manner, the prospect of an adverse finding is therefore likely to be uncommon.

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188 See Thomas J's suggestion in *Lovelock*, above n 43, 411–413.

189 For some of the criticisms of the distinction, see *Dunsmuir*, above n 147, paras 39–42 Bastarache and Lebel JJ; *Toronto (City) v CUPE, Local 79* [2003] SCC 63, para 96 Lebel J; and Régimbald, above n 183, 239, 249–252.

190 *Dunsmuir*, above n 147, para 34 Bastarache and Lebel JJ.

191 Ibid, paras 47–50. See particularly Binnie J's discussion of this point in his separate judgment: ibid, para 139.

192 Bryden, above n 147, 94.

193 Régimbald, above n 183, 250. Régimbald suggests that the approach is more properly indicative of the "magnitude of the error" rather than its immediacy or obviousness.

194 There is some analogy with the tenor of the now abandoned error (of law) on the face of the record: Joseph *Constitutional and Administrative Law*, above n 110, 921, that is, the focus is on errors which are readily apparent. It is not suggested, though, that the formal doctrine should be directly applied, particularly as the definition of the "record" was particularly vexed and problematic.

As an aside, there is the possibility that this standard could potentially incorporate errors relating to the exercise of discretion which traditionally are addressed under the "illegality" ground, such as a failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose, fettering of discretion and so forth. There may be some merit in exploring whether these errors are better addressed under a unified standard, as touchstones of manifest unreasonableness, rather than somewhat awkwardly accommodating them under the illegality head in the tripartite framework. Indeed, this is consistent with the umbrella approach to reasonableness adopted by Lord Greene in *Wednesbury* and has been suggested in relation to the Canadian framework.[195] This would reshape the reasonableness standard — from a "safety-net" to a "spear-head". However, any such move would require more examination and reflection.

4 Simple reasonableness

The intermediate category between the well-established extremes is probably the most contentious standard. As it is flanked between two other standards which both examine the quality or merits of a decision, its methodology needs to be sufficiently distinct on two separate fronts. The methodology also potentially subsumes various different doctrines or approaches that have been floated, without a clear front-runner.

I suspect some will argue that the most meaningful way to articulate a definition of this category is to define it by what it is not. That is, it is neither the well-known deferential manifest unreasonableness standard from *Wednesbury* nor correctness. The benefit of a single middle ground between the two means it is exactly that — a middle ground. While attractive from the perspective of simplicity, this approach remains somewhat unsatisfying in terms of the identification of the judicial methodology.

First, there is the question of the boundary with manifest unreasonableness. As noted earlier, one of the more difficult questions is distinguishing the methodologies of the respective unreasonableness categories. Once again Iacobucci J attempted to articulate the approach required in *Law Society (New Brunswick) v Ryan*: "A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after 'significant searching or testing.'"[196] His Honour emphasised the centrality of the reasons given by the tribunal, suggesting "a detailed exposition" may be required to show that there are "no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did".[197] If any of the reasons are "tenable", he said, "in the sense that they can stand up to a

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195 David J Mullan *Essentials of Canadian Law: Administrative Law* (Irwin Law, Toronto, 2001) chapter 6, part 2, section C "Specific Grounds".

196 *Ryan*, above 152, para 52 Iacobucci J.

197 Ibid.

somewhat probing examination",[198] then the reviewing court must not interfere even if the "[tenable] explanation is not one that the reviewing court finds compelling".[199] The explanation highlights both the scope and magnitude of a supervising court's analysis. It is more probing than manifest unreasonableness and may consider a wider range of material.[200] As noted earlier, Bryden has also attempted to amplify the distinction between these two categories by cataloguing a series of defects which qualify as manifest unreasonableness; the corollary being that other defects of reasoning or analysis are only triggered in cases of unreasonableness per se.[201]

This type of supervision has implications further up the decision-making process, though. The intense focus on the reasoning behind a decision presupposes that reasons are available.[202] More intense scrutiny may therefore require the modification of the present common law rule that does not explicitly require that a decision-maker provide reasons for their decision.[203] Any such development is not necessarily as dramatic as it may seem, though.[204]

Secondly, there is the boundary with correctness review. In order for this standard to provide a meaningful difference from the correctness standard, the decision-maker must be accorded some latitude with their judgement. Some analogy may be drawn with the deference jurisprudence developing in the Bill of Rights arena, although it must be remembered that the context there is somewhat different. Recently, Tipping J described the operation of the "margin of appreciation" or deference in the following terms:[205]

> The general approach ... can be figuratively described by reference to a shooting target. The court's view may be that, in order to qualify, the limitation must fall within the bull's-eye but still be on the target. The size of the target beyond the bull's eye will depend on the subject matter. The margin of judgment or discretion left to Parliament represents that area of the target outside the bull's eye. Parliament's

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198 Ibid.

199 Ibid.

200 See Jones and de Villars, above n 147, 486.

201 Above n 186 and associated text.

202 Taggart "Proportionality", above n 109, 64.

203 *R v Awatere* [1982] 1 NZLR 644 (CA).

204 First, the courts have been close to adopting a common law requirement to give reasons: *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546, para 85 (CA) Elias CJ for the Court. Secondly, legislation is increasingly requiring the contemporaneous provision of reasons: see for example, Resource Management Act 1991, s 113. Thirdly, our official information regime includes a generic obligation to give reasons on request: Official Information Act 1982, s 23 and Local Government Official Information and Meetings Act 1987, s 22.

205 *Hansen*, above n 136, para 119 Tipping J.

> appraisal must not, of course, miss the target altogether. If that is so Parliament has exceeded its area of discretion or judgment. Resort to this metaphor may be necessary several times during the course of the proportionality inquiry; indeed the size of the target may differ at different stages of the inquiry. The court's job is to delineate the size of the target and then say whether Parliament's measure hits the target or misses it.

While Tipping J should be commended for his attempt to address questions of deference in an intelligible fashion, in my view, there is real danger with his bull's eye metaphor. At its heart it implies — whether deliberately or not — that there is one "correct" answer to the question and sets up deference as degrees of "wrongness"; that is, some deviation from the bull's eye is permissible, but too much deviation is not.

But this misconstrues one of the basic features of public law decision-making by implying there may be one correct answer — and suggesting that the courts are oracles of correctness. In truth, there is usually a range of answers to public law questions, none of which can be regarded as being the correct one.[206] On this point, the Supreme Court of Canada has recently, properly in my view, admonished judges for asking themselves what the correct decision would have been at any time in their analysis:[207]

> Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

The Court also warned that there will often be no single right answer, for example, "when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others".[208] And, even if there might be "notionally, a single best answer",[209] the Court reiterated that it is not the task of the reviewing court to seek it out. A more useful metaphor might therefore be Lord Greene's "four corners of discretion" or, probably more accurately, Lord Diplock's "elliptical" formulation, both of which do not have an obvious central spot.[210] Ultimately, the adoption of an alternative formulation to the *Wednesbury* test does

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206 Compare the distinction made by Fordham about "hard" and "soft-edged" questions: Michael Fordham "Surveying the Grounds: Key Themes in Judicial Intervention" in Peter Leyland and Terry Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, London, 1997) 184, 190 ["Surveying the Grounds"].

207 *Ryan*, above n 152, para 50 Iacobucci J.

208 Ibid.

209 Ibid.

210 *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 (HL), discussed in Craig *Administrative Law*, above n 28, 633.

not negate the underlying proposition that the court's role is not to substitute its judgement for that of the decision-maker.

Thirdly, against these abstract attempts to articulate a methodology there is the question of whether the space should be filled by existing doctrinal approaches. Most obviously, this raises the issue of the proper place, if any, for proportionality within administrative law. Increased scrutiny triggered by the engagement of human rights may suggest that proportionality falls to be considered in the intermediate category.[211] This issue was raised in *Daly* and has been explored by other scholars, both domestically and internationally.[212] In this context, a thorough consideration of the issue is not feasible. However, I offer a few brief comments.

A proportionality test does not in itself provide an answer to questions about the intensity of review. It sets up a framework for balancing rights or interests against a government imperative and directs that the intrusion must be proportionate to the gain. However, this begs the question of how proportionate the balance must be. The proportionality test — probably better described as the proportionality calculus[213] — raises, but does not supply, the answer. The proportionality calculus is meaningless without it being calibrated with an intensity filter. Many options are available:

(a) the action must be exactly (correctly) proportionate, that is, no deference applies and the courts will impose their own assessment of the appropriate balance;

(b) the action must be reasonably proportionate, that is, a "margin" is applied and it is sufficient that a reasonable balance is achieved;

(c) the action must not be disproportionate.

Our courts already apply the different intensities of proportionality. First, in the context of the Bill of Rights Act, our courts have generally required that proportionality be established to their satisfaction, goaded by the requirement under the framework that the governmental measure should impair the right "as little as possible".[214] This requirement effectively mandates a "correctness" standard or something pretty close to it. While more recently, discussion of deference, a margin of appreciation/latitude, or a discretionary area of judgement has attracted some favour, [215] it seems clear

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211 Taggart "Administrative Law", above n 60.

212 Craig *Administrative Law*, above n 28, 617–632; McLean, above n 111; and Taggart "Proportionality", above n 109, 32.

213 McLean, above n 111.

214 *R v Oakes*, above n 137, para 70 Dickson CJ for the Court. This element was recently tweaked by the Supreme Court in *Hansen*, above n 136.

215 For example *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650, para 36 (HL) Lord Carswell.

that any softening of the standard does not take the balance far away from the correctness end of the spectrum, and certainly does not begin to approach the highly deferential *Wednesbury* standard. It is notable that the courts have firmly eschewed the idea that the "justified limit" caveat could be determined according to traditional administrative law methodology,[216] although the incontrovertibility of this approach has recently been questioned in Canada.[217] Secondly, the proportionality methodology — or assessment of relative weightings — is evident in existing administrative law methodology. The famous *McCarthy v Madden* test for reviewing the reasonableness of local authority bylaws in essence requires the court to weigh up the productive benefits of a bylaw against its negative effects.[218] This exercise mimics the framework of proportionality but does not adopt its language or insist on the same degree of precision. Thirdly, (extreme) disproportionality is an established basis for intervention in administrative law, either in its own right[219] or as a touchstone of *Wednesbury* reasonableness.[220] The talk of the potential of proportionality within administrative law seems to presuppose the application of the (high intensity) proportionality calculus adopted in rights jurisprudence, but it is clearly not the only option.

While I make the point that the methodology of proportionality is not foreign to administrative law, I need to acknowledge that its more explicit and transparent methodology may bring a more subtle difference. As some commentators have noted, proportionality — or "constitutional review"[221] — has a particular theme that marks it out from the less structured overall evaluation. Proportionality potentially affects the onus of proof, either explicitly or implicitly, that is, the proportionality methodology brings with it a "culture of justification".[222] Once a right or protected interest has been engaged, it falls on the

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216 See for example *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, para 11 Dickson CJ.

217 See for example *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, para 128 Deschamps and Abella JJ dissenting.

218 The material aspect of the test from *McCarthy v Madden* (1914) 33 NZLR 1251 (SC) recognises that the courts may assess and weigh the productive benefits and negative effects of a bylaw: see Dean R Knight "Brothels, Bylaws, Prostitutes and Proportionality" [2005] NZLJ 423; *Willowford Family Trust v Christchurch City Council* (29 July 2005) HC CH CIV–2004–409–002299; *JB International Ltd v Auckland City Council* [2006] NZRMA 401 (HC); *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 (HC); and *Conley v Hamilton City Council* [2007] NZCA 543 (CA).

219 *R v Barnsley Council, ex parte Hook* [1976] 1 WLR 1052 (CA) and *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 (CA), both in relation to disproportionality of excessive penalties.

220 *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 60 (HC).

221 Philip A Joseph "The Demise of *Ultra Vires* — Judicial Review in the New Zealand Courts" [2001] PL 354.

222 Taggart "Reinventing Administrative Law", above n 13, 312 and Taggart "Proportionality", above n 109, 49. Taggart also makes the similar point that proportionality requires that the proportionality calculus be at the forefront of any analysis, while reasonableness operates more as a residual "safety net": ibid, 33.

public body or official to justify the interference with that right. But I remain ambivalent about whether this culture is causally related to proportionality or whether it is merely an outcome of what Professor Taggart describes as the erosion of the classic model of administrative law over time.[223] In my view, the main lesson to take from the push for proportionality is the recognition that review by the courts of respective weight is not heretical. But implicit in the methodology of simple unreasonableness is the loosing of the shackles that prevent the assessment of relative weight. Accepting that the reasonableness standard contemplates this approach is sufficient to mark the distinctiveness of reasonableness, and does so without injecting the loaded proportionality calculus into the mix.

Then there is the question of the "anxious scrutiny" approach. My framework contemplates that the anxious scrutiny approach can readily be subsumed within the intermediate category of simple reasonableness. However, there appears to be some disagreement about the relative intensity of this approach, particularly how close the approach is to correctness review. In his taxonomy, Professor Le Sueur groups anxious scrutiny with "enhanced level scrutiny", "rigorous examination" or "super-*Wednesbury*".[224] This grouping suggests it falls in the intermediate category but his identification of principles applied under this rubric demonstrates the danger that it is simply correctness review in drag (or, indeed, proportionality).[225] Professor Taggart, however, explicitly places anxious scrutiny much closer to correctness and some way away from the intermediate category of reasonableness and proportionality.[226] Regardless, from a normative perspective, I consider there is value in incorporating it within the intermediate category even if this deviates from its descriptive origins; the framework otherwise becomes too overly refined and any adverse effects from such a move do not seem to be that great.

Adoption of the United States "hard look" doctrine (or, as Hammond J prefers to describe it, the "due consideration" doctrine)[227] as the guiding methodology is another possibility.[228] However, as Taggart notes in his recent discussion of this doctrine, it was developed in the peculiarly American "rule-making" context and is less suitable for our less formalised adjudicative and rule-making

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223 Taggart "Reinventing Administrative Law", above n 13, 312, and Taggart "Proportionality", above n 109, 25, drawing on Carol Harlow's discussion of this phenomenon: Carol Harlow "A Special Relationship? American Influences on Judicial Review in England" in Ian Loveland (ed) *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press, Oxford, 1995) 79, 83.

224 See above n 60 for the caveat to the use of this term.

225 Le Sueur, above n 9, 41.

226 Taggart "Proportionality", above n 109, 42.

227 *New Zealand Public Service Association*, above n 53, 35.

228 For a recent examination from the United States see Patrick M Garry "Judicial Review and the 'Hard Look' Doctrine" [2006] 7 Nevada L Rev 151.

processes.[229] Further, as was recognised by Hammond J in *New Zealand Public Service Association Inc v Hamilton City Council*, it suffers from the same defect of increased scrutiny, that is, it fails to calibrate the intensity of the harder look.[230]

The methodology of simple unreasonableness could also be informed by the simple formulations of reasonableness championed by, amongst others, Lord Cooke and Thomas J. Lord Cooke took the view that a reviewing court should simply ask whether the decision was one which a reasonable authority could reach.[231] Although this simple statement somewhat begs the question, Lord Cooke was adamant that reasonableness means what it says:[232]

> [R]easonable means reasonable. The definition in the Concise Oxford Dictionary, reflecting as it should ordinary educated usage, is "within the limits of reason". What is outside the limits is unreasonable; what is inside them is reasonable.

Thomas J promoted a less exaggerated standard but also proposed that the standard develop incrementally by reference to a series of articulated principles:[233]

> An integral part of the exercise of determining whether a decision is unreasonable, therefore, is to articulate the ground, principle or value why it is unreasonable. Cases may arise where unreasonableness can be resorted to without greater specificity because, although the precise flaw or defect in the decision or decision-making process cannot be identified, it must be assumed from the sheer unreasonableness of the decision that such a flaw or defect exists. For the most part, however, a decision will be unreasonable for a reason, and what is required is that this reason be spelt out. In the assertion that "a decision is unreasonable because …" it is what comes after the "because" which is important.

Much like Jowell and Lester,[234] his Honour suggests various errors of principle — disproportionality, inadequate weight on fundamental rights, a logical flaw, a failure to comply with a fiduciary duty, a failure to properly balance interests — although concludes that the list is "probably limitless".[235] Incrementally, they will become recognised as the principles of unreasonableness. Although Thomas J's comments are directed at a unitary standard of

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229 Taggart "Administrative Law", above n 60, 86. Taggart also draws on Professor Craig's critique of the hard look principle in Craig *Administrative Law* above n 28.

230 *New Zealand Public Service Association*, above n 53, 34–35.

231 *International Trader's Ferry Ltd*, above n 15, 157.

232 Cooke "Struggle For Simplicity", above n 7, 14.

233 *Lovelock*, above n 43, 413.

234 Jowell and Lester, above n 22.

235 *Lovelock*, above n 43, 413.

reasonableness, his comments about the need to identify and articulate a transparent principle for intervention are apt, that is, as he puts it, the words following the "because" in a court's finding of reasonableness are the crucial part of the court's analysis. A court's reasoning is as important as its intervention.

The methodology of this approach can also be harmonised with other developing doctrines within administrative law. An example of this is the present *Coughlan* "abuse of power" approach to substantive legitimate expectation.[236] In situations justifying the protection of substantive expectations, the courts have adopted a method of scrutiny which examines whether the reneging on an assurance or otherwise changing one's position amounts to an "abuse of power".[237] The implicit feature of this legal method is a broad, unstructured assessment of a public body's action against general standards of (substantive) propriety, fairness or justice — less intense than correctness review and more intense than *Wednesbury* unreasonableness.[238] Similarly, there are some analogies with the "innominate" ground adopted by Lord Donaldson in *Guinness*[239] and Lord Cooke's substantive fairness ground of review.[240] The trigger for intervention in the *Guinness* approach is bald and was expressed in an extremely discretionary manner: "whether something had gone wrong of a nature and degree which required the intervention of the court".[241]

The preceding analysis suggests there is a multiplicity of different approaches to the methodology involved in this intermediate category. In this article it is not possible to advocate definitely the precise nature of the methodology that should be adopted in this category or whether one of the existing methodologies should succeed the others. It is sufficient to note that this grouping represents a distinct methodology. This standard has a markedly different analysis to the correctness standard. While the demarcation between types of unreasonableness is less clear-cut, it

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236 *Coughlan*, above n 42. The approach was drawn from *R v Inland Revenue Commissioners, ex parte Preston* [1985] AC 835 (HL) and later approved by the House of Lords in *Pebsham*, above n 42. I have explored the methodology of substantive legitimate expectation and public law estoppel elsewhere: Dean R Knight *Estoppel (Principles?) in Public Law: the Substantive Protection of Legitimate Expectations* (LLM Thesis, University of British Columbia, 2004). See also PP Craig and Søren Schønberg "Substantive Legitimate Expectations and *Coughlan*" [2000] PL 684; and Mark Elliott "Legitimate Expectations: Procedure, Substance, Policy and Proportionality" [2006] CLJ 254.

237 It is notable that some scholars have suggested that the proportionality calculus should be employed in these cases. See for example Craig and Schønberg, above n 236.

238 Ibid, 699.

239 *Guinness*, above n 40, 160 Lord Donaldson.

240 See *Thames Valley*, above n 40 and associated text.

241 *Guinness*, above n 40, 513 Lord Donaldson, referred to in Sir Robin Cooke "Fairness" (1989) 19 VUWLR 421, 426, and Lord Cooke of Thorndon "The Discretionary Heart of Administrative Law" in Forsyth and Hare (eds), above n 37, 203, 212.

contemplates a more wide-ranging review of the reasoning than is evident in manifest unreasonableness. Further examination and reflection on these matters are essential for the legitimisation of the sliding-scale framework.

5 Incorrectness

Finally, there is the self-evident incorrectness standard. This standard allows the reviewing court to consider the merits itself, allowing it to substitute its own view of the merits for that of the decision-maker. This approach is also described as de novo or appellate style review,[242] although the language of appeal and review perhaps overstates the distinction between the methodologies.[243]

Although rarely articulated as the application of a correctness standard, the Anglo-Australasian courts — in contrast to the North American courts — routinely adopt this as the sole standard of review in relation to errors of law by public bodies or officials.[244] At first blush, this standard may seem foreign in any consideration of the substantive merits of a decision. However, the courts have in effect, applied this standard in the supervision of the fact-finding process, through the doctrines of jurisdictional fact[245] or mistake of fact.[246] Crystallisation as a standard of review in its own right is therefore sensible.

C Determining the Appropriate Standard

As important as the definition of the framework and the principled articulation of the methodology of each standard are the factors relevant to determining the appropriate standard. As I discussed earlier, the courts' examination of this element has generally been patchy and opaque. And

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242 Joseph *Constitutional and Administrative Law*, above n 110, 823. See for example *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (NZSC).

243 As has been shown, correctness is adopted by the court in common law review in some cases; variable standards also apply in cases of appellate review: see Keith "Appeals from Administrative Tribunals", above n 1, and Peter Cane *Administrative Law* (4 ed, Oxford University Press, Oxford, 2004) 32.

244 See Michael B Taggart "The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective" in Paul Rishworth (ed) *The Struggle For Simplicity in the Law: Essays For Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 189; and Philip A Joseph *Constitutional and Administrative Law*, above n 110, 833. North American courts also contemplate more deferential standards being applied to interpretative questions, in addition to a correctness standard: see *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837; *CUPE, Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227 and *Southam*, above n 8.

245 *Khawaja*, above n 74; and *Hawkins*, above n 14. See discussion in Mark Elliott *Beatson, Matthews and Elliott's Administrative Law* (3 ed, Oxford University Press, Oxford, 2005) 59–75.

246 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA); *Taiaroa v Minister of Justice* (4 October 1994) HC WN CP 99/94; and *Northern Inshore Fisheries Company Ltd v Minister of Fisheries* (4 March 2002) HC WN CP 235/01.

the few judges who have attempted to articulate some principles for this preliminary analysis have adopted comprehensive contextualism which provides little, if any, guidance. Some have argued that articulating a clear set of rules is impossible: "All attempts degenerate into lists of factors, with contestable weights."[247] However, I do not share their pessimism. I believe it is incumbent on judges to attempt to distil the principles underlying the selection of the applicable category. Quite simply, there is no point trying to articulate principled standards of review if the framework is obfuscated by the unprincipled and indeterminate selection of the applicable standard. While contestable weights and an overall value judgement cannot be avoided, the process of addressing key principles in judicial reasoning brings with it a greater prospect of consistency than the fully contextual, "open-slather" approach. In some respects, such a discipline is simply the self-application of the standards the courts set for decision-makers. Identifying certain factors which must be addressed when determining the appropriate standard of review imposes a discipline on the courts and requires them to be rigorous and transparent in their reasoning. The courts' discretion is structured, but not unduly limited, and can be readily critiqued by appellate courts and observers.

It is not feasible here to undertake a comprehensive discussion of the factors relevant to determining the appropriate standard; that is a project in itself. However, to give some flavour of the nature of the project and its feasibility, it is sufficient to give some examples of some attempts to develop a framework for determining the intensity to be applied by the courts.[248]

Sir Kenneth Keith's own examination of the contextual factors relevant to the determination of the standards of appellate review nearly 40 years ago still rings true for common law review today.[249] Some years later he identified similar contextual factors for the purposes of determining the nature and content of natural justice protections.[250] As noted earlier, Laws LJ has recently attempted to articulate a set of considerations in relation to similar questions of deference under the Human Rights Act (UK).[251] A similar model of considerations was provided by Professor Harris in

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247 Taggart "Proportionality", above n 109, 47. See also Beloff, above n 153.

248 See also the identification of some common failings in my critique: Part II B (2) Evaluation of appropriate standard generally cursory and patchy.

249 Keith "Appeals from Administrative Tribunals", above n 1, 148–151. The set of factors he identified were: (a) the legislative language; (b) the composition, experience, and independence of the original body; (c) the nature of the (appellate) body; (d) the form of proceedings of the original authority; (e) the form of proceedings of the appellate body; (f) the interests involved; (g) uniformity of administration; and (h) the width of discretion conferred.

250 KJ Keith "The Courts and the Administration: A Change in Judicial Method" (1977) 7 NZULR 325, 339. The broad factors he mentioned included "the decider", "the procedural safeguards", "the power conferred", "the interests involved", "the nature of the legislation", and "the administrative context".

251 *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 765 (CA) Laws LJ.

his examination of justiciability, although principally directed at the jurisdictional aspect of the justiciability question.[252] Finally, under its pragmatic and functional framework, the Supreme Court of Canada adopted a four-factor analysis for selecting the appropriate standard.[253] None of the factors identified by these judges or scholars are particularly novel. They are simply the re-expression of many of the themes which imbue judicial review theory and practice.[254] It is their distillation into a workable framework and amplification of the principles beyond their slogans that will ultimately assist the robustness of the courts' application of a standards of review methodology.

IV CONCLUSION

It is safe to say that a sliding-scale of reasonableness or different standards of review for matters of substance represents, or soon will represent, the orthodox approach in New Zealand. But, as this approach is still in its infancy, its components remain unsettled and its application by the courts has generally been patchy and rudimentary.

In this article, I have attempted to distil and refine a more robust version of the framework, namely, a continuum with distinct, carefully demarcated methods of scrutiny. The focus of my analysis has been on the distinct judicial methodologies required in each separate category. The purpose has been to anchor future discussion and refinement — future work that still contains a number of difficult questions and choices.

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252 Harris, above n 161, 635–643.

253 *Pushpanathan*, above n 147, paras 29–38.

254 See for example Fordham "Surveying the Grounds", above n 206, 184–199.