

# APPEALS FROM DISCRETIONS, SATISFACTIONS AND VALUE JUDGMENTS: REVIEWING THE *HOUSE* RULES

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*The general rules governing appeals seem well settled. Where the decision challenged involves the exercise of a discretion, broadly described to include states of satisfaction and value judgments, the principles developed in House v The King apply. Under the House rules, the appellant must identify either specific error of fact or law or inferred error (eg where the decision is unreasonable or clearly unjust). However, beneath this apparently settled framework, the law raises complex and unresolved issues. That the court should exercise such restraint is periodically challenged. The House rules in themselves are of limited value in identifying how appeals from discretionary decisions differ from appeals generally. What constitutes the exercise of a 'discretion', what is the relationship between the exercise of a 'discretion' and the making of a 'value judgment', and what rules respectively apply are the subject of conflicting decisions. Whilst the House appears presentable, internally it requires attention.*

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## I INTRODUCTION

A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.<sup>1</sup>

The argument made here is that whilst courts have developed a body of principles and rules regulating appeals from discretionary decisions (broadly described), these principles are in various respects poorly defined, of limited utility, or in conflict. In part, this instability in the formulation and application of such rules reflects an inherent tension where legislation both confers a power on a tribunal<sup>2</sup> to make a subjective choice and also provides a right of

<sup>1</sup> *Universal Camera Corp v National Labor Relations Board*, 340 US 474, 488–9 (Frankfurter J) (1951). The passage was cited by Gageler J in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 375–6 [107] in the context of disagreement as to the application of 'Wednesbury unreasonableness', as described in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 ('Wednesbury').

<sup>2</sup> A reference to a 'tribunal' includes a court of first instance.

appeal from that choice. That requires a court<sup>3</sup> to exercise judgment as to the appropriateness of it intervening, in particular as to whether its decision will provide a more just outcome. In part also, it reflects the inherent complexity of the subject. There is heavy traffic at this intersection: the nature of the appeal, issues of fact and law, primary facts and inferences, discretion, satisfaction, value judgment, rule-application, deference, reasonableness, proportionality and rationality. The passage quoted above also alludes to the tension between the requirements of the profession (and tribunals) for certainty, and of the courts for flexibility in resolving the particular issues before them. Finally, there is uncertainty arising from developments in related areas, particularly judicial review of administrative discretionary decisions. There is evidence that some of the established principles governing appeals of discretionary decisions are being reassessed, tentatively in Australia and England and more radically in New Zealand. This has largely escaped informed professional critique.<sup>4</sup>

Part II outlines the nature and scope of appeals from ‘discretionary’ and related decisions and the (*House*) rules<sup>5</sup> applying to them. Part III explains limitations in the *House* rules and suggests how the rules might be reconstituted. Part IV refers to criticism of the court’s restrictive approach to appeals from discretionary judgments. Part V describes the concept of a ‘value judgment’, the absence of settled principles applying to the respective concepts of discretionary judgments and value judgments, and the resulting confused state of the law. Part VI examines both a new approach to the subject explored in England and the model adopted in New Zealand. Part VII reaches some conclusions on how the principles governing appeals might, in some respects, be reformulated and integrated.

## II APPEALS FROM DISCRETIONARY DECISIONS

In both a ‘general appeal’ (a right of appeal by rehearing on both fact and law) and a ‘limited appeal’ (a right of appeal by ‘rehearing’ confined to a question

<sup>3</sup> Generally, a reference to a ‘court’ means a court hearing an appeal. It has not been necessary to distinguish between appellate review of judicial, as opposed to administrative, decisions (although the intensity of the review will vary depending on whether the decision being reviewed is judicial or administrative).

<sup>4</sup> And, some will say, continues to do so. It seems curious that, whilst there are excellent books and a multitude of articles on judicial review of administrative action, there are few texts on appellate review. The subject, whilst dominant in practice and case law, is merely a footnote to publications on judicial review of administrative action.

<sup>5</sup> See *House v The King* (1936) 55 CLR 499.

or error of law) from a discretionary decision,<sup>6</sup> identification of error in the tribunal's exercise of discretion is the basis upon which the court will uphold the appeal. Outside the limitations imposed by public law on the exercise of discretionary powers,<sup>7</sup> courts in England and Australia have, as a matter of judicial policy, exercised considerable restraint in intervening in decisions characterised as involving the exercise of a discretion. This is primarily on the basis that Parliament has determined that the tribunal which is vested with the power to make the relevant decision should do so according to what it (that is, the tribunal) regards as the most appropriate outcome in the particular circumstances. It is also on the basis that reaching finality in litigation is important and that, having regard to the nature of the decision under consideration, the court may be in no better position to resolve the matter than is the tribunal.

In examining the state of the law on this subject, it is necessary first, by reference to established principles, to identify the elements of a discretionary decision, the rules governing when the court will intervene in such a decision and the extent to which these rules apply in analogous situations.

#### A *The Elements of a Discretionary Decision*

Some statements of principle on the first of these subjects were provided by the High Court in *Norbis v Norbis*, a case concerning the equitable distribution of property between parties to a failed marriage:

'Discretion' signifies a number of different legal concepts ... Here the order is discretionary because it depends on the application of a very general standard — what is 'just and equitable' — which calls for an overall assessment in the light of the factors mentioned in [the statutory provision], each of which in turn calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order

<sup>6</sup> This article is concerned with appeals by rehearing, as opposed to hearings *de novo*. Where a limited appeal is under consideration the 'rehearing' will necessarily be confined to the issue of law involved. In that respect, whilst many Acts provide for an appeal on a 'question of law' (or similar), for the appeal to be successful it will generally be necessary for the 'question' to have been wrongly answered by the tribunal: ie for the tribunal to have 'erred in law'. A reference here to an appeal by 'rehearing' will also include an appeal strictly so called (although, again, not technically a rehearing): ie whether the decision was right on the materials and law before the tribunal.

<sup>7</sup> For example, the requirement that decisions be made in good faith and for a proper purpose.

involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.

The principles enunciated in *House v The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal.<sup>8</sup>

Under this analysis, exercise of a 'discretion' and the attachment of the *House* rules may extend to the application of a general standard, a value judgment in which there is room for reasonable differences of opinion and a value judgment otherwise not governed by the application of a fixed rule to the facts as found.<sup>9</sup>

### B *The Rules Governing an Appeal from a Discretionary Decision*

The rules governing when a court will upset a discretionary decision were settled in *House v The King*.<sup>10</sup> The accused brought a general appeal (then) as

<sup>8</sup> (1986) 161 CLR 513, 518–19 (Mason and Deane JJ) (citations omitted). See also the description of a discretionary decision, and the need for the court on appeal to exercise restraint in that circumstance, in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, discussed in Part II(C)(1).

<sup>9</sup> As to the last point, in *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 Mason CJ, Brennan, Dawson and Gaudron JJ said that '[w]here a power to decide is conferred by statute, a general discretion, confined only by the scope and purposes of the legislation, will ordinarily be implied if the context ... provides no positive indication of the considerations by reference to which a decision is to be made'. Note that in *Mobilio v Balliotis* [1998] 3 VR 833, 837 Brooking JA doubted that the passage quoted from *Norbis* meant that a discretionary judgment attracting the *House* rules arose 'wherever there is a value judgment, or a value judgment where there is room for reasonable differences of opinion'. Spigelman CJ made a similar observation in *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 549–50 [558]. This subject is discussed in Part V.

<sup>10</sup> *House* (n 5).

of right under s 73 of the *Constitution* (ie an appeal strictly so called), against a sentence of imprisonment for a bankruptcy offence. The joint judgment (Dixon, Evatt and McTiernan JJ) treated sentencing as involving the exercise of a ‘judicial discretion.’<sup>11</sup> Drawing upon English and Australian authorities, they held that

[i]t is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed ... It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.<sup>12</sup>

For present purposes, the rules for allowing an appeal from a discretionary judgment may be categorised<sup>13</sup> as comprising: (1) ‘specific error’, ie an error of law (including acting upon a wrong principle), a mistake as to the facts, relying upon an irrelevant consideration or ignoring a relevant consideration, or (exceptionally) giving inappropriate weight to such considerations<sup>14</sup> (together ‘relevancy grounds’); and (2) ‘inferred error’, ie where, in the absence of identification of specific error, the decision is regarded as unreasonable or clearly unjust. Where inferred error is found, this will have been brought about by some unidentifiable specific error.<sup>15</sup>

<sup>11</sup> Ibid 504.

<sup>12</sup> Ibid 504–5. Note that following the passage cited, the judgment summarised the grounds for interfering as arising from ‘error of fact or of law, or failure to take into account any material consideration, or from giving undue weight to any circumstance or matter’ or where the decision was ‘unreasonable or clearly unjust’: at 507.

<sup>13</sup> Subject to the discussion in Part III(C). A classification derived from *House* along these lines was made and applied in *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274, [45] and affirmed in *R v Ford* (2009) 273 ALR 286, 306–7 [76].

<sup>14</sup> As to sufficiency of weight, see, eg, *Australian Coal & Shale Employees’ Federation v Commonwealth* (1953) 94 CLR 621, 627; *Gronow v Gronow* (1979) 144 CLR 513, 519–20 (Stephen J), 537 (Aicken J).

<sup>15</sup> Isaacs J had earlier identified the relationship between specific and inferred error. He said that a court would interfere with a sentence if the sentencing judge had ‘proceeded on a wrong principle or given undue weight to some of the facts’: *Skinner v The King* (1913) 16 CLR 336, 342, quoting *R v Sidlow* (1908) 24 TLR 754, 754. This connection was also made by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360.

### C Application of the House Rules in Analogous Situations

The rules derived from *House* have been followed and applied (although not always with reference to *House*) in a variety of different contexts where the decision under review has been characterised as involving the exercise of a discretion. These include criminal sentencing,<sup>16</sup> civil penalties,<sup>17</sup> quantum of damages,<sup>18</sup> custody and family law proceedings,<sup>19</sup> apportionment of responsibility,<sup>20</sup> industrial relations,<sup>21</sup> the valuation of property,<sup>22</sup> granting relief following judicial review,<sup>23</sup> costs,<sup>24</sup> a stay of proceedings,<sup>25</sup> and general matters of practice and procedure.<sup>26</sup> The rules have also been applied in related contexts, including in the following situations.

More recently, in *Dinsdale v The Queen* (2000) 202 CLR 321, 325–6 [6], Gleeson CJ and Hayne J said that it may not be possible to identify specific error or go beyond reaching a conclusion that a decision is ‘unreasonable or plainly unjust’.

<sup>16</sup> *Dinsdale* (n 15) 324–6 [3]–[6] (Gleeson CJ and Hayne J), 329 [21]–[22] (Gaudron and Gummow JJ), 339–40 [58]–[59] (Kirby J).

<sup>17</sup> *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560, 563 [10] (Gray J), 576–7 [74]–[75] (Graham J), 578 [83] (Buchanan J).

<sup>18</sup> *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1, 13, where Dixon J said: ‘The standards by which the amount of general damages is to be fixed are indefinite and uncertain, and to estimate the sum to be awarded involves the exercise of a form of discretionary judgment’. See also *Miller v Jennings* (1954) 92 CLR 190, 196 (Dixon CJ and Kitto J).

<sup>19</sup> *Lovell v Lovell* (1950) 81 CLR 513, 519–20; *Mace v Murray* (1955) 92 CLR 370, 378; *Norbis* (n 8) 518.

<sup>20</sup> *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 532.

<sup>21</sup> *Coal & Allied Operations* (n 8) 205 [21].

<sup>22</sup> *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336, 381, where Mason J said: ‘As with the assessment of damages ... the valuation of property by a court has many of the characteristics of a discretionary judgment. ... It certainly involves the making of a value judgment in the metaphorical as well as the literal sense.’

<sup>23</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 47–8. Mason J said a court will not interfere with the exercise of a discretion on the basis of a ‘mere preference for a different result, when the question is one on which reasonable minds may come to different conclusions, the decision of the judge ... falls within a reasonable range, and no error on his part can be shown’: at 48.

<sup>24</sup> *Australian Coal & Shale Employees’ Federation* (n 14) 626–9. See also the exhaustive treatment in *Russo v Russo* [1953] VLR 57, 65, which includes a description of the elements of a discretionary judgment: at 62.

<sup>25</sup> *R v Glennon* (1992) 173 CLR 592, 600–1.

<sup>26</sup> *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 176–7. See also *Re Will of Gilbert* (1946) 46 SR (NSW) 318, 323, where, without referring to *House*, Jordan CJ stated the need to keep ‘a tight rein ... upon interference with the orders of Judges of first instance’ where the orders concern ‘an

### 1 *Decision-Maker's 'Satisfaction'*

Related to circumstances where the tribunal must exercise a discretion are situations where, under legislation, the tribunal, before making a decision, is required to be 'satisfied' or 'of the opinion' that certain conditions have been met. The conditions may be susceptible of precise and objective identification. Alternatively, the conditions may refer to broad concepts such as 'the public interest' and 'the interests of justice'. The principles concerning when a court may interfere with such decisions are effectively the same as the *House* rules.

In *Avon Downs Pty Ltd v Federal Commissioner of Taxation*, the company taxpayer, in order to obtain a deduction for past years' losses, was required to establish certain matters relating to its shareholding to the 'satisfaction' of the Commissioner.<sup>27</sup> The Commissioner rejected the claimed deduction without giving reasons. In a passage which is frequently quoted in this context, Dixon J explained (without reference to *House*) that it was for the Commissioner, not the Court, to be satisfied.<sup>28</sup> Nevertheless, the Commissioner's state of satisfaction might be reviewed for specific error or inferred error.

In *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission*, the High Court considered an appeal from a decision of the Australian Industrial Relations Commission.<sup>29</sup> A protracted dispute between a mine owner and several unions led to a member of the Commission exercising a power to terminate a 'bargaining period'. This was on the basis that he was 'satisfied' that certain statutory criteria had been met: namely, that the industrial action was 'threatening to endanger the welfare of part of the population' and 'threatening ... to cause significant damage to the Australian economy or an important part of it'.<sup>30</sup> The mine owner appealed to the Full Bench of the Commission, which allowed the appeal. When the matter

exercise of discretion on a point of practice or procedure [as opposed to] an exercise of discretion which determines substantive rights'.

<sup>27</sup> *Avon Downs* (n 15). See also *Buck v Bavone* (1976) 135 CLR 110, 118–19, an appeal from a magistrate's decision where Gibbs J, without reference to *House*, included as grounds for appeal specific error and error based on *Wednesbury* unreasonableness. Both *Avon Downs* and *Buck* were relied upon in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 275–6, a case which concerned the exercise of a power conferred by the *Migration Act 1958* (Cth) that was conditioned on the Minister's 'satisfaction' that a person was a refugee.

<sup>28</sup> *Avon Downs* (n 15) 360.

<sup>29</sup> *Coal & Allied Operations* (n 8).

<sup>30</sup> *Construction, Forestry, Mining and Energy Union v Coal & Allied Operations Pty Ltd* (1997) 77 IR 269, 281, 284, quoted in *ibid* 199 [3].



reached the High Court,<sup>31</sup> the reasons for judgment of the plurality (Gleeson CJ, Gaudron and Hayne JJ) proceeded in stages. First, the plurality noted that the appeal to the Full Bench was a rehearing and as such required the identification of appealable error in the tribunal's decision.<sup>32</sup> Next, they addressed the nature of a 'discretionary decision', stating that the concept 'refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result". Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made.'<sup>33</sup> They described the Commission's required state of satisfaction as being one which involved a degree of subjectivity such that the decision that the relevant statutory criteria had been met could, in a 'broad sense', be described as a discretionary decision.<sup>34</sup> Given that the Commission had been satisfied that the statutory criteria had been met, it then had to make a second discretionary decision: namely, whether the bargaining period should be terminated. It followed that the correctness of the Commission's decision could only be challenged on appeal by showing error of the kind identified in *House*.<sup>35</sup>

## 2 *Application of the Law to the Facts (Limited Appeals)*

Another situation where the court grants the tribunal a 'margin of error' and requires a finding of specific or inferred error is where the issue concerns the tribunal's application of the law to the facts and only a limited appeal is available. Where it is established that the tribunal has made no evident mistake of fact, has correctly stated the law and has reached a decision upon the application of that law to the facts found, the tribunals' decision will not be set aside unless it is beyond the bounds of 'reasonableness' (ie unless error can be inferred). Where the decision is said to involve issues of fact and degree, the question will be treated as one of fact within which the tribunal has a margin of error outside the reach of a limited appeal. The principles were summarised by Jordan CJ in *The Australian Gas Light Co v Valuer-General*:

<sup>31</sup> Following the decision of the Full Bench, the unions made an application to the High Court (remitted to the Federal Court), seeking constitutional writs. Relief was granted by the Federal Court. From that decision the mine owner appealed to the High Court.

<sup>32</sup> *Coal & Allied Operations* (n 8) 204 [18].

<sup>33</sup> *Ibid* 204–5 [19], quoting *Jago v District Court (NSW)* (1989) 168 CLR 23, 76.

<sup>34</sup> *Ibid* 205 [20].

<sup>35</sup> The plurality described how the Full Bench might be said to have demonstrated such error, so as properly to have allowed the initial appeal.

[I]f the facts inferred by the tribunal from the evidence before it are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law. If, however, the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a tribunal of fact cannot be disturbed by a superior Court which can determine only questions of law.<sup>36</sup>

The leading authority in England is the judgment of Lord Radcliffe in *Edwards v Bairstow*.<sup>37</sup> The respondent taxpayers were assessed for income tax upon profit from a single purchase and resale of machinery, as arising from ‘an adventure in the nature of trade.’<sup>38</sup> An appeal was limited to error of law and the issue was whether, contrary to the tribunal’s finding, the transaction was in fact ‘an adventure in the nature of trade.’ Lord Radcliffe explained that while the legislation ‘la[id] down limits within which it would be permissible to say that a “trade” ... does or does not exist ... there [were] many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or another.’<sup>39</sup> He described ‘cases in which the facts warrant a determination either way as questions of degree and therefore as questions of fact.’<sup>40</sup> In the circumstances, in the absence of an identifiable legal error, the decision would only be ‘erroneous in point of law’ if ‘the true and only reasonable conclusion contradicts the determination.’<sup>41</sup>

The judgments of Jordan CJ in *Gas Light* and Lord Radcliffe in *Edwards v Bairstow* were relied upon by the High Court in *Vetter v Lake Macquarie City Council*.<sup>42</sup> An employee, driving home from work, called in to see a relative. Upon resuming her trip, she lost control of her car and suffered injury. Under the *Workers Compensation Act 1987* (NSW), employees were entitled to compensation for injuries received on certain work-related journeys. The question was whether the employee had been on a journey to which the compensation scheme applied when she was injured. The tribunal considered

<sup>36</sup> (1940) 40 SR (NSW) 126, 138 (citations omitted). See also *Dennis v Watt* (1942) 43 SR (NSW) 32, 32 (Jordan CJ).

<sup>37</sup> [1956] AC 14. See also Timothy Endicott, ‘Questions of Law’ (1998) 114 *Law Quarterly Review* 292.

<sup>38</sup> *Edwards v Bairstow* (n 37) 32.

<sup>39</sup> *Ibid* 33.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid* 36.

<sup>42</sup> (2001) 202 CLR 439, 450 [24]–[25].

that she had. An appeal lay in ‘point of law’ and the New South Wales Court of Appeal allowed an appeal on the basis that the tribunal had erred in finding that the employee had been on a single journey from work to home, as opposed to two separate journeys.<sup>43</sup> In the High Court, Gleeson CJ, Gummow and Callinan JJ considered that the question whether certain facts satisfy statutory criterion will very often be a question of law, but that ‘not all questions involving mixed questions of law and fact are, or need to be susceptible to one correct answer only.’<sup>44</sup> It will be a question of law where, on the facts found, only one conclusion is open, but the position will be different where the question is a mixed one of fact and law. The plurality held that ‘the trial judge’s description or characterisation [of the journey] was one reasonably available description’, so the judge made no error of law.<sup>45</sup>

### 3 *Judicial Review of Discretionary Administrative Decisions*

The application of the *House* rules has also been considered in the context of judicial review of a discretionary administrative decision. The issues were recently examined in *Minister for Immigration and Citizenship v Li*,<sup>46</sup> a decision described as ‘a landmark in Australian administrative law.’<sup>47</sup> In the course of a hearing for the review of an application for a skilled residence visa, the applicant asked the tribunal to delay its decision to allow consideration of a forthcoming revised report of an assessment of her skills. The tribunal refused the request on the ground that the applicant had been provided with enough opportunities to present her case and it was not prepared to delay further. Each of the members of the High Court held that the power to adjourn, being a statutory discretionary power, was one which the legislature intended to be exercised ‘reasonably.’<sup>48</sup> The joint judgment (Hayne, Kiefel and Bell JJ) reasoned that the area within which the tribunal had a discretion to delay its decision was bounded by the legal standard of ‘reasonableness’, as determined by the scope and purpose of the statutory provisions granting the discretion.<sup>49</sup> Their Honours considered that this legal standard should not be

<sup>43</sup> *Lake Macquarie City Council v Vetter* (1999) 18 NSWCCR 34.

<sup>44</sup> *Vetter* (n 42) 450 [24].

<sup>45</sup> *Ibid* 453 [31].

<sup>46</sup> *Li* (n 1).

<sup>47</sup> Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6<sup>th</sup> ed, 2017) 372.

<sup>48</sup> *Li* (n 1) 351 [29] (French CJ), 362 [63] (Hayne, Kiefel and Bell JJ), 370 [88]–[89] (Gageler J).

<sup>49</sup> *Ibid* 363–4 [66]–[67].

regarded as limited to *Wednesbury* unreasonableness.<sup>50</sup> Further, an inference of unreasonableness might be drawn where no specific (jurisdictional) error is identified, as in the case of appellate review of a judicial discretion.<sup>51</sup> Their Honours said that judicial review of administrative and judicial decisions includes for specific error and inferred error (going to jurisdiction) all such errors being capable of being described in terms of unreasonableness.<sup>52</sup> Gageler J also made reference to the close analogy between reasonableness for the purposes of judicial review (but, in his judgment, confined to *Wednesbury* unreasonableness, unless the statutory provisions demanded a modified standard) and appellate review (inferred error under *House*).<sup>53</sup>

The references in *Li* to the principles derived from *Wednesbury* and *House* draw attention to the similarities between *Wednesbury* unreasonableness and the concept of inferred error identified in the appeal in *House* (error inferred where a decision is ‘unreasonable or plainly unjust’).<sup>54</sup> This connection raises questions about the scope of the overlap between appellate review of judicial discretion (as described in *House*) and judicial review of administrative discretion. In principle, the inquiry in each case is the same — what are the circumstances in which the court will interfere with the exercise of the decision-maker’s exercise of discretion? Also common is the central importance of the statutory provisions conferring the discretionary power and regulating the scope of appeal or review. Passages in decisions of the High Court and Federal Court mentioned in this article provide support for the view that the overarching concepts of reasonableness (and, possibly, propor-

<sup>50</sup> *Ibid* 364 [68].

<sup>51</sup> *Ibid* 367 [76].

<sup>52</sup> That is unlikely to mean that the distinction between these forms of unreasonableness will cease to be important. More recently it has been said that legal unreasonableness will cover decisions which, by reference to the scope and purpose of the statutory power, may be ‘described as “plainly unjust”, “arbitrary”, “capricious”, “irrational”, “lacking in evident or intelligible justification” and “obviously disproportionate”’: *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158, 172 [65].

<sup>53</sup> *Li* (n 1) 376 [110]; see also at 375 [106], quoting Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 10<sup>th</sup> ed, 2009) 295–6: ‘The label “*Wednesbury* unreasonableness” indicates “the special standard of unreasonableness which has become the criterion for judicial review of administrative discretion”’. Note that Gageler J regarded the ‘[i]mplication of reasonableness as a condition of the exercise of a discretionary power conferred by statute [as] no different from implication of reasonableness as a condition of an opinion or state of satisfaction required by statute’: at 370 [90].

<sup>54</sup> *House* (n 5) 505.

tionality as a criterion of reasonableness) and rationality are likely to become increasingly important in justifying intervention in both forms of review.<sup>55</sup>

Justice Maxwell, writing extra-judicially, has proposed that, following *Li*, '[t]here is no difference in principle between appellate review of judicial discretion and judicial review of administrative discretion'.<sup>56</sup> Other commentators have been more cautious. Justice Basten, discussing the reference to *House* in the joint reasons in *Li*, has cautioned against the use of analogous principles and has referred to the different functions of courts in appeals and judicial review.<sup>57</sup> That would seem to be a reference to the differences between the court in a supervisory capacity reviewing a discretionary decision for jurisdictional error and, on a rehearing, allowing an appeal from a discretionary decision based on legal or factual error. In a different context, the High Court has said only that the principles articulated in *House* are 'somewhat akin' to those governing judicial review of a discretionary administrative decision.<sup>58</sup>

### III THE STATE OF THE HOUSE

The principles governing appeals from discretionary decisions as outlined above are well established; however, they give rise to a number of difficulties. First, although the *House* rules are almost invariably invoked in appeals from discretionary decisions, the rules themselves provide no guidance on how the approach in appeals from discretionary decisions differs from the approach in general or limited appeals where no element of discretion is involved. Second,

<sup>55</sup> 'Proportionality' was adverted to in *Li* (n 1) 352 [30] (French CJ), 366 [74] (Hayne, Kiefel and Bell JJ). It is a concept which has been utilised in an appeal from a discretionary decision. In *Cranssen v The King* (1936) 55 CLR 509, 520–1 Dixon, Evatt and McTiernan JJ refer to the sentence imposed being 'out of all proportion to any view of the seriousness of the offence which could reasonably be taken' and to it 'bearing no proportion either to the impropriety of the applicant's conduct or the kind of penalty which would suffice as a deterrent'.

<sup>56</sup> Justice Chris Maxwell, 'The Statutory Implication of Reasonableness and the Scope of *Wednesbury* Unreasonableness' (Paper, ANU Public Law Weekend, 28 October 2016) 2. Notwithstanding the High Court's comprehensive examination of the subject in *Li*, no member of the High Court was prepared to go as far as this. As Justice Maxwell notes, in *G v G* [1985] 1 WLR 647, 653, Lord Fraser said that the test applied in an appeal from a discretionary judicial decision was not the same as the test applied in a review of a discretionary administrative decision. Brennan J, on the other hand, considered that while there existed a distinction in practice, there was no distinction in principle: *Norbis* (n 8) 540–1.

<sup>57</sup> John Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 35, 44–5.

<sup>58</sup> *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124, 138 [39].

where a right of appeal by rehearing is provided, the assumption that the court should exercise restraint in interfering with a tribunal's exercise of discretion is not axiomatic.<sup>59</sup> The need to justify restraint appears to increase as the scope of discretionary decisions is broadened to cover states of satisfaction, opinions, evaluations and matters of fact and degree. Third, there has been intermittent support for the proposition that the exercise of a 'discretion' should be distinguished from the making of a 'value judgment'.<sup>60</sup> This has led (or contributed) to considerable uncertainty and inconsistency in the case law concerning the circumstances in which this distinction applies and the extent to which the distinction should affect a court's approach on appeal. These issues have been considered in other jurisdictions.<sup>61</sup> In New Zealand, the category of 'discretionary decisions' has been closely confined and appeals from 'value judgments' have been treated in the same manner as general appeals. There is also evidence of a reassessment of the rules governing discretionary decisions in England.

#### A *A House Built on Sand?*

As noted above, under the *House* rules the notion of 'specific error' covers error of law, a mistake as to the facts, and the relevancy grounds. 'Inferred error' is available where, absent identification of specific error, the decision might be described as unreasonable or clearly unjust. However (as explained in the next section), these are necessary conditions for *any* appeal by rehearing. Specifically, under a general appeal, the appellant must identify a mistake of fact or an error of law. Disclosure of an error of law is a necessary condition for any limited appeal, although this will include a finding of fact unsupported by any evidence.<sup>62</sup> The relevancy grounds will provide a basis for error of law under either form of appeal. Inferred error will again be generally available.<sup>63</sup>

<sup>59</sup> See Part IV.

<sup>60</sup> See Part V.

<sup>61</sup> See Part VI.

<sup>62</sup> *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 418 [91].

<sup>63</sup> This proposition is contemplated by Kirby J in *Vetter* (n 42) 465 [73]. There appears to be no reason in principle why, under a general or limited appeal, in the absence of identifiable specific error, a finding that an outcome is unreasonable or clearly unjust would not be a sufficient basis to overturn the decision. In principle, inferred error will, or will generally, arise because of some unidentified specific error. In *Kostas* (n 62) 396 [16], with respect to a limited appeal, French CJ spoke of the incompatibility of the decision under appeal with 'a rational process of decision-making according to law'. And under an appeal from the AAT on a question of law, it was held sufficient for the court to intervene on a finding that

It follows that, in this respect, the rules articulated in *House* for challenging a discretionary decision do no more than describe rules which apply to appeals by rehearing generally.

To support this argument, it is necessary to make a brief discursion into the principles governing such appeals.

### B *The Court's Approach Generally on Appeals*

Appeal courts in Australia, taking their lead from England, have always proceeded on the basis that on an appeal by rehearing (including an appeal in the strict sense), they would only intervene in the event the decision below was shown to be based upon error on the facts or the law.<sup>64</sup> That is, it was necessary for the appellant, upon whom an onus lay, to show that the decision was 'wrong', and that an alternative outcome 'ought to have been pronounced'.<sup>65</sup> Such an approach was subject to recognition of the advantages of the tribunal, and the weight to be accorded its decision, where issues of credibility were involved.

In the High Court in the 1960s, this condition for a successful appeal by rehearing was put in stronger terms. Particular judges took the view that the court ought not reverse the decision appealed from if the decision was reasonably open, but only where 'convinced that it was wrong'.<sup>66</sup> That limitation was applied whether the finding was in relation to primary facts or the inferences drawn from those facts.<sup>67</sup>

the decision under appeal was 'irrational': *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315, 386–9 [209]–[218], citing *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611. A finding of 'irrationality', like 'unreasonableness', is a form of inferred error, more obviously where the outcome (as opposed to the reasoning) is identified as irrational.

<sup>64</sup> Writing shortly after appeals at common law were introduced in England in 1854, Lord Westbury LC said: 'An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below': *A-G v Sillem* (1864) 10 HL Cas 704, 724; 11 ER 1200, 1209.

<sup>65</sup> *Dearman v Dearman* (1908) 7 CLR 549, 560 (Isaacs J); see also at 553 (Griffith CJ).

<sup>66</sup> *Edwards v Noble* (1971) 125 CLR 296, 304 (Barwick CJ); see also at 312–13 (Windeyer J); cf at 318 (Walsh J). This position was forcefully criticised in Justice FC Hutley, 'Appeals within the Judicial Hierarchy and the Effect of Judicial Doctrine on Such Appeals in Australia and England' (1976) 7 *Sydney Law Review* 317.

<sup>67</sup> *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505, 506.

Since then, however, the High Court has reverted to the position that it will intervene where the decision is shown to be ‘wrong’,<sup>68</sup> this requiring the identification of ‘error’.<sup>69</sup> Moreover, in relation to findings of fact, the High Court in *Warren v Coombes* (a claim for damages for injuries following a collision allegedly caused by the defendant’s negligence) confirmed the distinction between a court reviewing the primary facts, where considerations of the credibility of witnesses might be decisive against intervention, and the tribunal drawing inferences from those facts, where the appellate court may be in as good a position as the tribunal to draw the appropriate inferences.<sup>70</sup> That distinction was affirmed in *Fox v Percy*, again an action in damages for negligence following a collision.<sup>71</sup> Whilst the judge’s finding of credibility favoured the plaintiff’s version of events, the objective facts (the skid marks of the defendant’s vehicle) formed the basis for the defendant’s successful appeal.

Importantly for present purposes however, the principles from *Warren v Coombes*, in relation to the drawing of inferences, have been held to not apply in the case of an appeal from a discretionary decision. *Gronow v Gronow* concerned a decision of the Family Court which had made a discretionary order granting custody of a child to the father.<sup>72</sup> The Full Family Court reversed the order, granting custody to the mother. The father appealed. In the High Court, the mother, seeking to support the initial appeal and order,

<sup>68</sup> *Warren v Coombes* (1979) 142 CLR 531, 552. See also *Fox v Percy* (2003) 214 CLR 118, 125–8 [23]–[28].

<sup>69</sup> *Commonwealth v Reeve* (1949) 78 CLR 410, 423. This has more recently been described as the requirement, on a rehearing, to demonstrate ‘legal, factual or discretionary error’: *Allesch v Maunz* (2000) 203 CLR 172, 180 [23], citing *CDJ v VAJ* (1998) 197 CLR 172, 201–2 [111]. See also *Coal & Allied Operations* (n 8) 203–4 [14]; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, 435–8 [24]–[30].

<sup>70</sup> *Warren* (n 68) 536–51. In relation to the issue of negligence, Gibbs ACJ, Jacobs and Murphy JJ said that ‘the trial judge can enjoy no significant advantage in deciding [whether the facts found do or do not give rise to the inference that a party was negligent] ... The fact that judges differ often and markedly as to what would in particular circumstances be expected of a reasonable man seems to us in itself to be a reason why no narrow view should be taken of the appellate function’: at 552. See also, in relation to an appeal from a finding of negligence in this context, the analysis by Basten JA in *Costa v Public Trustee of NSW* (2008) 1 ASTLR 56, 86–7 [103]–[105].

<sup>71</sup> *Fox* (n 68) 125–6 [23]. It has subsequently been acknowledged that this decision involved a shift in emphasis in acknowledging the obligation of an appeal court to provide a ‘real and substantive’ appellate review by rehearing, even where issues of credibility are involved: *CSR Ltd v Maddalena* (2006) 224 ALR 1, 8 [19] (Kirby J). See also *Robinson Helicopter Co Inc v McDermott* (2016) 331 ALR 550, 558–9 [43].

<sup>72</sup> *Gronow* (n 14).



argued that the *House* rules were displaced by the principles established in *Warren v Coombes*, such that in drawing an inference contrary to that of the tribunal, the court might substitute its own discretionary decision for that of the tribunal. The argument was rejected. Mason and Wilson JJ treated the issue of the court drawing an inference from established facts as ‘very different’ from an appeal from a discretionary judgment.<sup>73</sup> The Court held that nothing in *Warren v Coombes* was intended to depart from the *House* rules.<sup>74</sup>

### C *The House Rules Reconstituted*

This brief analysis shows that in determining when a court will intervene to reverse a decision on appeal, the *House* rules apply equally to all appeals.<sup>75</sup> In that context, the decision in *House* may be understood as confirming the conventional position that the court will intervene only where error of fact or law or inferred error is discernible, including in relation to discretionary decisions. It will be evident also that, notwithstanding the general terms in which the *House* rules are expressed (‘error of fact or law’), where only a limited right of appeal is provided, a mistake of fact will not be sufficient

<sup>73</sup> Ibid 526.

<sup>74</sup> Ibid 525–6 (Mason and Wilson JJ), 532 (Murphy J), 539–40 (Aickin J). Arguably, *Warren v Coombes* does not ‘apply’ in the sense that it is not open to the court to draw a contrary inference on the issue which is the subject of the discretion: ie if the effect is to transfer the discretion to the court. That will not preclude the court drawing a contrary inference on a secondary fact sufficient to satisfy the *House* rules: see the distinction made by Brooking JA in *Mobilio* (n 9) and discussed in Part V(C). Nor does it preclude a finding of inferred error under the *House* rules.

<sup>75</sup> When considering general and limited appeals the basic division is between error of fact and error of law and at this level ‘the combination of the two formulations exhausts the whole of the relevant sphere of discourse’: *A-G (NSW) v X* (2000) 49 NSWLR 653, 661 [32] (Spigelman CJ). It is the case that in discussing appeals by rehearing the High Court has spoken of the need to demonstrate that the order the subject of the appeal is the result of some legal, factual or discretionary error: see the cases cited in n 69. In *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 532, the High Court quoted *British Fame v Macgregor* [1943] AC 197, 201, where Lord Wright said that a finding on a question of apportionment is a finding upon ‘a question ... not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations’. However, taken literally, such an interpretation would mean abandoning the *House* rules, because they envisage, as a condition of the court intervening in a discretionary judgment, findings of specific error of fact or law, including where inferred from the decision reached. What is meant by this trinitarian division (fact, law, discretion) is that on appeal a discretion as such is not reviewed as if it were an issue of fact or law. It is subject to the ‘discretionary rule’: see Part V.

except where a finding is made without supporting evidence. A tribunal's reliance upon certain facts may also preclude such an appeal by constituting the decision as one based on an inextricably mixed question of fact and law.<sup>76</sup>

It remains that an appeal against the exercise of a discretion will constitute either a general or a limited appeal and in general attract the principles governing such appeals. Only where the appellant can identify an error of law, or (on a general appeal) a material mistake of fact (including a secondary fact affecting the exercise of discretion), or inferred error, can the decision be reversed. What is required, therefore, is a more precise identification of the features which distinguish the court's approach on appeals against a discretionary judgment. The answer suggested by the cases discussed in Part II is this.<sup>77</sup> Where the appeal lies against such a decision the appellant is restricted as to the grounds of appeal. The nature of the tribunal's decision means that there is no uniquely correct answer. Whilst the court might differ in its opinion and prefer an alternative outcome, the tribunal's exercise of discretion may nevertheless be accepted as not unreasonable. In these circumstances, the court will not be able to identify error, so as to be able to pronounce the decision 'wrong', or the discretion 'improperly exercised'.<sup>78</sup> Were it to interfere, it would simply be substituting one maintainable decision for another. That will often be in circumstances where the court would be inclined to apportion different weight to the factors involved in the decision making but cannot say that the law *requires* such weight to be attributed. Whilst the test for intervention in a discretionary decision remains the same as the test applied in general appeals, the court approaches the matter in a different manner because the scope for finding error is significantly reduced. There is some parallel with the court's approach on judicial review of administrative decisions, where the concern is with jurisdictional error (on appeal, a mistake of fact or error of law); investigation of the merits of the decision is impermissible. As in the case of an appeal against a finding of fact where

<sup>76</sup> Where identification of a question of law governs the appeal, the appellant will need to demonstrate a specific error of law under *House* to displace a discretionary judgment: *Allandale Blue Metal Pty Ltd v Roads and Maritime Services* (2013) 195 LGERA 182, 202 [75]; see also at 208–17 [106]–[152].

<sup>77</sup> See especially *Norbis* (n 8) 518–19; *Peko-Wallsend* (n 23) 47–8; *Coal & Allied Operations* (n 8) 204–5 [19] (Gleeson CJ, Gaudron and Hayne JJ), 223–4 [72] (Kirby J). See also *Dinsdale* (n 15) 339–40 [57]–[60] (Kirby J).

<sup>78</sup> 'There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised': *Cranssen* (n 55) 519 (Dixon, Evatt and McTiernan JJ).

credibility is involved, the court will approach the matter with ‘caution and restraint’.<sup>79</sup>

If that is the basis upon which the court distinguishes its approach on appeals from discretionary decisions, it says something in general terms about the court’s approach to appeals generally. Whilst on a rehearing the appellant bears an onus of demonstrating error of fact or law such that the decision may be described as ‘wrong’, there is no restricted zone within which the tribunal may reach an unassailable, if less preferred, decision.<sup>80</sup> If the facts are properly found and the law correctly identified and applied, there is in legal theory, only one correct answer. If, having given respect and weight to the tribunal’s views, the court favours a different outcome on the merits, that will necessarily demonstrate error which the court will be capable of articulating.<sup>81</sup> Establishing such error (objectively) may involve no more than the court attaching different weight to the factors involved than did the tribunal.

On that basis, the *House* rules might be distributed between rules identifying the forms of error (specific error and inferred error) governing an appeal by rehearing generally (the ‘appeal rules’), and the rule operating in the case of appeals from discretionary decisions, precluding the court from identifying error in the form of an alternative and preferred exercise of discretion (the

<sup>79</sup> *Coal & Allied Operations* (n 8) 223 [72] (Kirby J).

<sup>80</sup> If (at the risk of overworking the image), the ground floor of the *House* encompasses specific error and the first floor contains inferred error, there is beneath the building a basement. The entrance to this is inscribed ‘discretion — appellate courts keep out’, access being conditioned upon ‘the prevention of injustice’, to adopt the expressions of Kirby P in *Fuller v Galvin* (New South Wales Court of Appeal, Kirby P, Mahoney and Powell JJA, 7 April 1995).

<sup>81</sup> That is more obviously the position where the appeal involves the determination of a legal issue (eg the construction of a statute or contract) and only one ‘correct’ answer is permissible. It is a matter of ‘legal theory’ because there are no bright lines separating: (1) discretionary decisions from related categories; (2) what is an ‘error’ from what is ‘correct’ (absent a precise statutory or common law formula); and (3) the court’s ‘preference’ for a different outcome from its ‘conviction’. As to (1), see, eg, *Dwyer* (n 58) 138 [37] (discussed in Part V(B)), the extract from *Kacem v Bashir* [2011] 2 NZLR 1, 17 [32] quoted in Part VI(B), and *Templeton v Australian Securities and Investments Commission* [2015] FCAFC 137, [23]. As to (2), in *Costa* (n 70) 75–87 [53]–[105], Basten JA provides instances where it is inaccurate to speak of finding ‘error’ (eg a miscarriage of justice) and questions whether it is sufficient if the court simply disagrees with the tribunal. As to (3), in *Subesh v Home Secretary* [2004] Imm AR 112, 131–4 [42]–[49], Laws LJ distinguishes between the court’s *preference* for a different view and the situation where the tribunal’s reasoning, and application of the law, *require* the court to adopt a different view. In his view, the distinction between a general appeal and an appeal from a discretionary judgment is that in the case of a discretionary judgment the court must search for error ‘as if that were an exercise hermetically sealed from its own appreciation of the merits of the case’: at 133 [45]. See also *Branir* (n 69) 435–6 [24]–[25], 437 [28].

‘discretionary rule’). Within this framework, it is helpful to further refine the appeal rules. In the case of a general appeal, an error of fact may involve consideration of: (1) the ‘primary fact rule’ — namely, that the court will review the primary facts but generally defer to the decision of the tribunal where the tribunal has advantages denied to the court, such as where issues of credibility are involved (a principle often associated with *Fox v Percy* although also discussed in *Warren v Coombes*);<sup>82</sup> and (2) the ‘secondary fact rule’ — that is, that the court will often be in as good a position as the tribunal in drawing inferences from the undisputed or found primary facts, including on the ‘ultimate issue’ (a principle generally associated with *Warren v Coombes* although forming the basis of the decision in *Fox v Percy*). These rules apply equally in the case of appeals from discretionary decisions, save that in some circumstances the secondary fact rule will give way to the discretionary rule.<sup>83</sup>

#### IV CRITICISM OF THE COURT’S RESTRICTIVE APPROACH

Although the principles governing the approach of the court to discretionary and analogous decisions, as formulated in *House*, are the subject of ritual incantation, they have not gone unchallenged.

##### *A Hutley’s Analysis*

Justice Hutley, in an article in 1976, criticised the High Court’s (then) restrictive approach to overturning findings of fact.<sup>84</sup> In that context, he made several observations about appeals from discretionary decisions. He noted that the precise nature of such decisions had seldom been discussed, but in his view conferral of a discretion constituted, in essence, a form of power.<sup>85</sup> As such, he questioned why a review of discretion, except where expressed in absolute terms, was treated differently from an appeal from any other power, saying that ‘it is hard to see why on a rehearing the discretion is not transmitted to the appellate court for it to come to its own decision in the light of the material before it in the same way and on the same basis as it reviews any other factual issue.’<sup>86</sup> That would not preclude the court reaching the view that

<sup>82</sup> *Fox* (n 68) 125–6 [23]. See also *Warren* (n 68) 536–51.

<sup>83</sup> See Part VII(B).

<sup>84</sup> Hutley (n 66).

<sup>85</sup> *Ibid* 322.

<sup>86</sup> *Ibid* 323.

in some circumstances (for example, the assessment of damages) it might not be possible for the court to say that the tribunal's decision was wrong. But it is meaningless to say that in such circumstances the decision is to be treated as discretionary because it is a subject on which minds may differ, because that might be said of almost any decision.<sup>87</sup> Provided that allowance is made for the tribunal's 'margin of error' and provided that there is acknowledgement of the advantages of the tribunal seeing the witnesses, the tribunal has no special advantage when a conventional assessment is to be made. On the contrary, the advantage is with a court comprised of several judges reviewing the matter.<sup>88</sup> In equity, the foundation of which lay in individual justice, a system of principles was built up to guide the courts in the exercise of discretionary judgments. Such a system of precedent is necessary also where discretions are conferred by legislation, for example, in relation to the distribution of matrimonial property, custody of children, awards of damages for personal injury, and testator's family maintenance.<sup>89</sup>

<sup>87</sup> An example perhaps being statutory and contractual interpretation, where judges regularly differ up to, and within, the High Court.

<sup>88</sup> Callinan J has described this as 'the collective knowledge and experience of no fewer than three judges armed with an organised and complete record of the proceedings, and the opportunity to take an independent overview of the proceedings below, in a different atmosphere from, and a less urgent setting than the trial': *Fox* (n 68) 163 [142]. See also *Yarrabee Coal Co Pty Ltd v Lujans* (2009) 53 MVR 187, 188 [3], in which Allsop P describes the appellate advantage as one of 'synthesis and perspective'. The complexity of the law in this area may be demonstrated by reference to *Royal Bank of Scotland Plc v Carlyle* 2015 SC (UKSC) 93, 100 [22], where Lord Hodge suggests that an appeal court's 'perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence' such that the tribunal is more likely to have reached the appropriate conclusions of fact. Contrast the recital of the fact-finding advantages of the tribunal over the court, identified in the joint judgment in *Fox* (n 68) 125 [23], with the circumstances requiring further analysis of findings where credibility is involved, described by Kirby J in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588, 620–2 [93]. Contrast also *Pigłowska v Pigłowski* [1999] 1 WLR 1360, 1372, where Lord Hoffmann pointed out that the tribunal's advantages in seeing the witnesses extended beyond primary facts to the evaluation of those facts. See to similar effect *Housen v Nikolaisen* [2002] 2 SCR 235, 251–6 [19]–[25].

<sup>89</sup> Hutley (n 66) 327 suggests that in *House*, the High Court was faced with the problem of dealing with an appeal from a sentence of a federal court without the powers of a modern court of criminal appeal. It resolved the issue by adopting contemporary English authority relating to appeals from discretionary decisions. Note, however, that: (1) the Court itself recognised the point and adopted this approach; (2) earlier decisions of the High Court also treated sentencing as a discretionary exercise and based their approach on existing English authority (see, eg *Skinner v The King* (n 15) 342–3 (Isaacs JJ)); and (3) the High Court has continued to endorse the use of the *House* rules by both courts of appeal having such powers and the High Court itself (*Dinsdale* (n 15) 324–5 [3] (Gleeson CJ and Hayne J), 329 [21] (Gaudron and Gummow JJ), 339–40 [58]–[60] (Kirby J)).

### B *Discretionary Creep*

Individual judges of the High Court have also expressed concern about the extent to which the courts adopt this restrictive approach. These include Dixon CJ. The appeal in *Pontifical Society for the Propagation of the Faith v Scales* concerned a claim under testators' family maintenance legislation.<sup>90</sup> A father had not provided for his estranged adult son, but left the bulk of his estate to charities. The Chief Justice was concerned that recent decisions under the legislation had so intruded upon the testator's intentions that the real testamentary power had been assumed by the tribunal:

Perhaps this Court and other Courts of Appeal have attached too much significance to the discretionary aspects of orders under appeal and have accordingly allowed orders to stand which no member of the Court of Appeal would himself have made, had he sat at first instance.<sup>91</sup>

Whilst, as mentioned, in *Gronow v Gronow* Murphy J made plain he did not regard *Warren v Coombes* as intended to apply to discretionary judgments, he was of the view that

the appellate function should not be diminished in relation to discretionary judgments. In some of the cases, there are statements which would incorrectly transform the appellate function into a supervisory function. In a true appeal, the duty of the appellate court, whether a matter be discretionary or otherwise, is to give the judgment that it thinks is warranted and not to defer to the court below when it thinks otherwise.<sup>92</sup>

Callinan J has pointed out that courts upholding discretionary judgments in various contexts do so by reference to a decision in a criminal case concerned with the principles governing sentencing (ie *House*):

In principle there is no reason why the views of a majority of appellate judges as to the exercise of the discretion in those [other contexts], and perhaps other

<sup>90</sup> (1962) 107 CLR 9. (What judge would interfere with a bequest to an organisation celebrating under such a glorious title?)

<sup>91</sup> Ibid 19. This passage was relied upon by Toohey J (dissenting) in *Singer v Berghouse* (1994) 181 CLR 201, 219.

<sup>92</sup> *Gronow* (n 14) 532. Murphy J nevertheless thought that a court should not generally intervene in custody cases because the primary judge's normal advantage in observing the witnesses and assessing the personalities of the parties and the child is so significant to the proper decision to be made: at 532–3.

cases when judges are performing their unqualified appellate function, should not prevail over the discretionary view of a single judge.<sup>93</sup>

His Honour suggested as reasons why courts adopt this restrictive approach, ‘expediency, judicial defensiveness [and] fear of the collapse of floodgates limiting the flow of appeals.’<sup>94</sup>

Justice Hutley’s arguments assume greater force where the tribunal’s powers are ‘evaluative’ rather than ‘discretionary’. In the context of determining whether a contract was ‘unjust’ for the purposes of legislation, Samuels JA has said:

To my mind the finding that a contract is unjust is no more discretionary in character than a finding that an act or omission was negligent, a conclusion about which different minds may also take different views. But the fact that it may be difficult to determine a factual conclusion does not mean that it is to be perceived as inhabiting an area in which the fullest rein is to be given to the predilections of individual judges without the wholesome restraint of uniformity which the attentions of an appellate court is designed to provide.<sup>95</sup>

### C ‘Discretion’ Properly So Called

Judges have also made statements raising questions as to whether the generally recognised categories of ‘discretionary decisions’ are properly so described. In *Dinsdale v The Queen*, Kirby J, in a paragraph which referred to *House*, said that ‘[b]ecause the imposition of a sentence involves the exercise of judgment and evaluation upon which minds can differ, it bears close similarities to the making of a discretionary decision.’<sup>96</sup> And in *CDJ v VAJ*, Gaudron J described decisions as to determining the best interests of a child as ‘based on value judgments’ which, together with ‘discretionary judgments’, were governed by the *House* rules.<sup>97</sup>

<sup>93</sup> *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 322 [223]. His Honour drew a parallel with the excessive deference earlier paid to tribunals on issues of fact.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256, 270.

<sup>96</sup> *Dinsdale* (n 15) 339 [58].

<sup>97</sup> *CDJ* (n 69) 182 [40].

## V DISCRETIONS AND VALUE JUDGMENTS AND CONFUSION

A distinction has sometimes been drawn between a ‘discretion’ strictly so called (where legislation provides that a tribunal may choose within a range or between several courses and, given the subjective content of the decision, there is no single correct answer) and where legislation provides for the exercise of a ‘value judgment’ (where an objective assessment or evaluation of the facts is required or a balancing exercise is undertaken and there is in theory at least only one correct answer, even where because of the flexible nature of the concepts under review rational minds might arrive at different answers).<sup>98</sup>

When either form of decision is under appeal, the appeal rules (requiring a finding of error) will apply. However, whereas the discretionary rule (limiting the scope of the appeal) applies to the tribunal’s exercise of discretion, the rule may not apply where a value judgment is under consideration. In the latter case, whilst the court will give respect and weight to the tribunal’s decision, its obligation is to arrive at the ‘correct’ answer.<sup>99</sup>

### A *England’s (Sometimes) Distinction*

In England, the distinction made in the context of an appeal is that the court will intervene against a discretionary decision only where the decision is ‘plainly wrong’, whereas in the case of the exercise of a value judgment, it will do so where the decision is characterised as ‘wrong’.<sup>100</sup>

This approach is evident in a series of decisions applying the rules which govern a libel action. These rules provide that such actions should be tried by

<sup>98</sup> See Francis Bennion, ‘Distinguishing Judgment and Discretion’ [2000] *Public Law* 368; Francis Bennion, ‘Judgment and Discretion Revisited: Pedantry or Substance?’ [2005] *Public Law* 707. Bennion distinguishes between ‘discretion’, open and closed, and ‘judgment’, along these lines, but without specifically addressing the court’s approach on appeal. Rosemary Pattenden, *Judicial Discretion and Criminal Litigation* (Clarendon Press, 2<sup>nd</sup> ed, 1990) 1–2, 7–9 uses the terms ‘overt discretion’ (as in, ‘the tribunal may do *a* or *b*’), where the courts are reluctant to interfere, and ‘concealed discretion’, where there are ‘value qualified precepts’ involved (eg ‘reasonable’ and ‘just’) which are too flexible to compel a particular result, but the courts more readily set aside the decision. Both authors acknowledge inconsistency by English courts in the use of the terms.

<sup>99</sup> For example, to the extent the question whether the defendant was ‘negligent’ is treated as an evaluative judgment, this proposition was established by *Warren* (n 68) 552–3. Campbell JA in *Ford* (n 13) 308–11 [81]–[92] discusses the intersection between the *House* rules and the principles from *Warren v Coombes* and *Fox v Percy* (the secondary fact rule) in an appeal from a tribunal applying an evaluative standard to the facts: see Part VII.

<sup>100</sup> See *Viscount de L’Isle v Times Newspapers Ltd* [1988] 1 WLR 49.



a jury unless the court is ‘of the opinion’ that the hearing would require prolonged examination of documents not conveniently made with a jury, or, irrespective of that position, the court ‘in its discretion’ orders it be tried with a jury.<sup>101</sup> In *Viscount de L’Isle v Times Newspapers Ltd*, the defendant newspaper appealed against the Master’s ruling for trial by judge alone.<sup>102</sup> The initial appeal was dismissed by a single judge who undertook an examination of the merits of the issue. The defendant further appealed, under a general right of appeal, to the Court of Appeal. In opposing the appeal, the plaintiff argued that the task of the judge in forming his ‘opinion’ was essentially no different from his exercising a discretion. That is, as the cases cited by the Court explained, it was not enough that the judge who dismissed the initial appeal may have exercised the discretion differently; it had to be convinced that the decision was ‘plainly wrong’ or that it exceeded the ‘generous ambit within which a reasonable disagreement was possible.’<sup>103</sup> The Court rejected the plaintiff’s argument on the basis that the initial question was not to be compared with the exercise of a ‘discretion.’<sup>104</sup> In May LJ’s view, such an exercise was confined to the situation ‘where, upon the facts found ... and on the law correctly stated’, the tribunal ‘is required ... to decide between two or more courses of action without any further rules governing the decision which [it] should make, other than that [it] should act judicially.’<sup>105</sup> He regarded the question raised by the relevant rule as requiring a ‘value judgment’ based upon the material before the judge, the submissions made and her or his experience at the Bar and on the Bench.<sup>106</sup> The court would intervene in such a decision where it believed that the decision reached was ‘wrong’ (as it found in this instance). The value judgment was to be compared with the residual ‘discretion’ provided for under the rules, where the recognised principles governing a discretion applied. In a subsequent case, again challenging the tribunal’s decision under the same rule, the Court of Appeal once more distinguished between the judge’s ‘opinion’, where the Court was prepared to intervene as in the ordinary case (ie where it regarded the decision as ‘wrong’) and the exercise of the ‘discretion’, where the Court

<sup>101</sup> *Supreme Court Act 1981* (UK) ss 69(1), (3), as considered in *ibid*.

<sup>102</sup> *Viscount de L’Isle* (n 100), cited in *Pattenden* (n 98) 7.

<sup>103</sup> *G v G* (n 56) 651–2, cited in *ibid* 56. See also *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191.

<sup>104</sup> *Viscount de L’Isle* (n 100) 57 (May LJ), 62 (Balcombe LJ)

<sup>105</sup> *Ibid* 57.

<sup>106</sup> *Ibid*.

would intervene only if it regarded the decision as ‘plainly wrong.’<sup>107</sup> These cases, and those following them, draw a (somewhat elusive) distinction between the court’s approach to the exercise of a discretion (‘plainly wrong’) and the making of a value judgment (‘wrong’), but do not appear to distinguish between the court’s approaches where a value judgment is involved and where there is a general appeal by rehearing: both require that the tribunal’s decision be ‘wrong.’<sup>108</sup>

### B *Value Judgments in the High Court*

There is a slender strand of High Court authority which, contrary to those decisions giving an expansive description of the concept of ‘discretion’ as outlined above (eg to include states of satisfaction), has recognised the distinction between discretions and value judgments.<sup>109</sup> These cases do not, however, provide a uniform set of principles applicable to an appeal from the exercise of a discretion and from such a ‘judgment’.

In *Singer v Berghouse* an appeal was brought against a decision made under testators’ family maintenance legislation.<sup>110</sup> The Court held that the legislation involved a two-stage process.<sup>111</sup> The first stage was the question whether the applicant had been left with adequate provision, which was said

<sup>107</sup> *Aitken v Preston* [1997] EMLR 415, 419 (Lord Bingham CJ). See also Lord Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) pt 1 ch 3. In a different context, the Court of Appeal in *AWG Group Ltd v Morrison* [2006] 1 WLR 1163, 1170 [19]–[20] held that a determination of whether or not there was a real possibility of bias was not the exercise of a discretion but a matter of assessment capable of being reviewed by the Court. However, in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, 580 [16], Clarke LJ considered that ‘conclusions of fact [that] involve an assessment of a number of different factors which have to be weighed against each other ... [are] often a matter of degree upon which different judges can legitimately differ’, stating: ‘Such cases may be closely analogous to discretionary decisions and, in my opinion, appellate courts should approach them in a similar way.’ That passage was approved in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325, 1347–8 [46]. See also *Re B* [2013] 1 WLR 1911, discussed in Part VI(A).

<sup>108</sup> In *Fiddes v Channel Four Television Corporation* [2010] 1 WLR 2245, 2248 [10], Lord Neuberger MR said that although the question as to the appropriateness of a jury trial in a libel action did not involve an issue of discretion, ‘an appellate court should be slow before it interferes with a first instance assessment of this nature’.

<sup>109</sup> The High Court has distinguished between a discretionary power and an evaluation in contexts other than those described in the text: see, eg, *Hinch v A-G (Vic)* (1987) 164 CLR 15, 43 (Wilson J), 77 (Toohey J), 85 (Gaudron J). However, it has elsewhere used the term ‘discretionary value judgment’: *O’Sullivan* (n 9) 216.

<sup>110</sup> *Singer* (n 91).

<sup>111</sup> *Ibid* 208.

to be a question of objective fact, although involving a value judgment. The second stage was whether the court should order provision in favour of the applicant, which was said to be a discretionary decision, evident from the term ‘may’ used in the statute. However, with respect to both stages, the Court held that the principles from *House* applied.<sup>112</sup> The rationale for doing so at the first stage was that, unless restraint were shown, courts would be encouraged to make an alternative decision which ‘objectively speaking, may be no better than the first’, and which would diminish the finality of litigation.<sup>113</sup>

A different approach was taken in *Dwyer v Calco Timbers Pty Ltd*.<sup>114</sup> Under the relevant legislation, an injured worker could not bring a claim for damage at common law unless she or he obtained leave to do so based on having suffered ‘serious injury’.<sup>115</sup> The revised legislation provided that, on appeal, the court should ‘decide for itself whether the injury is a serious injury’.<sup>116</sup> However, in line with earlier decisions, the Court of Appeal had required a finding that the tribunal’s decision was ‘wrong’ by reason of specific error and had generally shown considerable deference to the ‘specialist’ tribunal’s determination of the question.<sup>117</sup> The High Court, in relation to earlier references in such decisions to the principles in *House*, noted that ‘[t]he varied use of the term “discretion” is apt to create a legal category of indeterminate reference’.<sup>118</sup> Quoting Dyson LJ, the Court said: ‘It is “a somewhat protean word” which “connotes the exercise of judgment in making choices”, and, in a sense, “most decisions involve the exercise of discretion”’.<sup>119</sup> The judgment referred to the exercise of a ‘judicial discretion’ as described in *House*, which in a general appeal attracts principles ‘somewhat akin to those developed in public law’;<sup>120</sup> namely, the judicial review of discretionary decisions. They regarded as ‘rather different ... the situation where statute creates a legal norm, in this litigation that of a “serious injury”, and does so in terms which require for their operation in a given dispute the identification and evaluation

<sup>112</sup> *Ibid* 212.

<sup>113</sup> *Ibid*, quoting *Golosky v Golosky* (New South Wales Court of Appeal, Kirby P, Handley and Cripps JJA, 5 October 1993) 13.

<sup>114</sup> *Dwyer* (n 58).

<sup>115</sup> *Accident Compensation Act 1985* (Vic) s 134AB(2).

<sup>116</sup> *Ibid* s 134AD, as repealed by *Accident Compensation Amendment Act 2010* (Vic) s 60.

<sup>117</sup> *Dwyer* (n 58) 140 [47].

<sup>118</sup> *Ibid* 138 [37].

<sup>119</sup> *Ibid*, quoting *Carty v Croydon London Borough Council* [2005] 1 WLR 2312, 2319 [25].

<sup>120</sup> *Ibid* 138 [39].

of facts.<sup>121</sup> The scope of an appeal in such circumstances depended upon the particular statutory provisions and was not assisted by describing the decision as ‘discretionary’.

### C A House Divided

At a state level, the extent to which the *House* rules are applied to discretionary and analogous situations, including those involving a ‘value judgment’, and the introduction of the concept of a statutory legal norm requiring the evaluation of facts, has resulted in uncertainty as to the relationship between the various concepts and the applicable rules attaching to each of them.<sup>122</sup>

In *Mobilio v Balliotis* (a case considered in *Dwyer v Calco*), the plaintiff had sought leave to bring proceedings at common law on the basis of ‘serious injury’.<sup>123</sup> Upon leave being refused, she appealed. Brooking JA described the question for the tribunal as involving ‘elements of fact, degree and value judgment’<sup>124</sup> where the court would interfere ‘less readily’ than otherwise.<sup>125</sup> His Honour recognised that not every such decision was to be equated with discretionary decisions. Nevertheless, reasoning by analogy with discretionary and ‘quasi-discretionary’ cases, he regarded the issue as governed by the *House* rules.<sup>126</sup> However, the other judges either were not prepared to categorise the issue as ‘discretionary’ (Winneke P and Ormiston JA),<sup>127</sup> or doubted that, where the application of a statutory test was in issue, what was involved was properly regarded as a discretionary judgment, or that there was any utility in so describing it (Phillips JA and Charles JA).<sup>128</sup> They were nevertheless all of the opinion that the court would not intervene except in the case of specific error or where the decision was plainly wrong or wholly erroneous.<sup>129</sup>

<sup>121</sup> Ibid 138 [40].

<sup>122</sup> See *R v Skinner* (2016) 126 SASR 120, 137 [84].

<sup>123</sup> *Mobilio* (n 9) 835.

<sup>124</sup> Ibid 836, quoting *Fleming v Hutchinson* (1991) 66 ALJR 211, 211.

<sup>125</sup> Ibid 837.

<sup>126</sup> Ibid 842.

<sup>127</sup> Ibid 835 (Winneke P), 853 (Ormiston JA).

<sup>128</sup> Ibid 859 (Phillips JA), 860 (Charles JA).

<sup>129</sup> Phillips JA said that unlike discretionary judgments, the question whether there was serious injury, although it involved elements of fact, degree and value judgment, ultimately required a ‘yes’ or ‘no’ answer: ibid 859. See also *Ford* (n 13) 313 [101]; *Sio v The Queen* (2015) 249 A Crim R 533, 542 [30].

The approach of Phillips JA was preferred in *Nigro v Secretary to the Department of Justice*, concerning the making of a supervision order where release of the offender posed an ‘unacceptable risk’ to the community.<sup>130</sup> This was treated as ‘a question of value judgment based on a matrix of fact and degree’, rather than being discretionary.<sup>131</sup> The test was said to derive from the nature of the statutory task rather than the application of principles from discretionary decisions. As such, it could only be set aside if ‘plainly wrong’ or ‘wholly erroneous’,<sup>132</sup> although (it appears) these concepts included a finding of specific error.<sup>133</sup> This issue was distinguished from the ultimate discretion involved as to whether, unacceptable risk being established, a supervision order should be made, to which the *House* rules applied.<sup>134</sup> Although the distinction between the two issues was made, again the *House* rules were, in effect, applied to both issues.

*Perpetual Trustee Co Ltd v Khoshaba*<sup>135</sup> involved an appeal from a judge’s finding under the relevant legislation that a contract was ‘unjust’ and his giving relief under a provision that a court might make consequential orders ‘if it considers it just to do so.’<sup>136</sup> The Court held the legislation contemplated a three-stage process which governed its approach on appeal.<sup>137</sup> First, the judge’s findings of fact generally would be reviewed under the principles in *Fox v Percy* (the primary fact rule) and *Warren v Coombes* (the secondary fact rule). Second, whether the contract was unjust involved the making of an ‘evaluative judgment’ as to whether the facts as found satisfied the statutory description. This equated to the drawing of an inference and was therefore reviewable under the principles in *Warren v Coombes*.<sup>138</sup> Third, the judge’s

<sup>130</sup> (2013) 41 VR 359.

<sup>131</sup> *Ibid* 371 [41].

<sup>132</sup> *Ibid* 365 [13], 371 [41], 376 [55], 377 [64], 416 [224].

<sup>133</sup> *Ibid* 376 [57], 415 [220], 416–17 [226] (irrelevant consideration), 417 [227] (misconstruing the statute).

<sup>134</sup> *Ibid* 365 [13], 376 [55], 377 [64].

<sup>135</sup> (2006) 14 BPR 26639.

<sup>136</sup> *Contracts Review Act 1980* (NSW) s 7(1).

<sup>137</sup> *Perpetual Trustee* (n 135) 26655 [99] (Handley JA), 26656 [106] (Basten JA).

<sup>138</sup> Spigelman CJ referred to the conflict of authority as to whether the second issue was discretionary and attracted the *House* rules, or whether it was merely the subject of restraint: *ibid* 26647 [31]. He suggested a preference for the *Warren v Coombes* approach but did not resolve the issue, observing that in most cases application of either test would lead to the same result: at 26648 [40]. Both Handley JA and Basten JA took the position that the issue did not involve the exercise of a discretion but the drawing of an inference, or an equiv-

decision whether to grant relief involved the exercise of a discretion reviewable under the *House* rules.

In *DAO v The Queen*, the accused brought an application for leave to appeal against an interlocutory decision of the trial judge, who had refused to order separate trials in circumstances where the Director of Public Prosecutions had indicated that he would use tendency evidence relating to each complainant.<sup>139</sup> The legislation provided first, that such evidence was not admissible to prove that a defendant had a tendency unless ‘the court thinks’ that such evidence had significant probative value;<sup>140</sup> and second, that tendency evidence could not be adduced unless the probative value substantially outweighed its prejudicial effect.<sup>141</sup> There were (again) conflicting judgments as to whether an appeal from a decision under these provisions was governed by *House* or by *Warren v Coombes*. As to the first issue, Spigelman CJ (Kirby J agreeing) said that the language used was closely analogous to that where the tribunal was to be ‘satisfied’ of certain matters, so the test was of the same order as where a discretion applied (ie the *House* rules).<sup>142</sup> He acknowledged the strength of the alternative view.<sup>143</sup> Allsop P (Kirby J agreeing), who regarded the issue as governed by the refusal to order separate trials,<sup>144</sup> said the review would be of a character analogous to that discussed in cases such as *Shrimpton v Commonwealth*,<sup>145</sup> and there was likely to be little difference between this approach and the application of the *House* rules.<sup>146</sup> Simpson J (Schmidt J agreeing) referred to the conflicting positions but regarded the matter as governed by *House*.<sup>147</sup> As to the second issue, Allsop P

alent process, and the exercise was reviewable in accordance with *Warren v Coombes*: at 26655 [100] (Handley JA), 26656 [107] (Basten JA).

<sup>139</sup> (2011) 81 NSWLR 568.

<sup>140</sup> *Evidence Act 1995* (NSW) s 97(1)(b).

<sup>141</sup> *Ibid* s 101(2).

<sup>142</sup> *DAO* (n 139) 576 [28], 577 [34].

<sup>143</sup> *Ibid* 577 [34].

<sup>144</sup> *Ibid* 585 [81].

<sup>145</sup> (1945) 69 CLR 613. In this case, the appellant claimed that wartime regulations gave the Treasurer an absolute discretion and were therefore ultra vires. The Court upheld the validity of the relevant regulation on the basis that the regulation was to be interpreted such that the discretion must be exercised bona fide and in accordance with its objects.

<sup>146</sup> *DAO* (n 139) 589 [100]. Allsop P said that ‘[t]he essence of the difference between the two [approaches] ... is the extent to which the matter involved is one of degree and evaluation leaving room for legitimate differences of view (and thus is akin to a type of discretion ... ) or is one of logic and evaluation as to the meeting of a legal standard’: at 586 [87].

<sup>147</sup> *Ibid* 599 [157].

(Kirby J agreeing) said that the predominant view in New South Wales was that this involved a balancing exercise to be reviewed under the *House* rules, but that the same result would follow applying *Warren v Coombes*.<sup>148</sup> Simpson J said that (to the extent this was a question which might be separated from the first) this was a judgment reviewable under the *House* rules.<sup>149</sup> In the result, the united view was that the trial judge had correctly weighed up the competing considerations and there was no misapplication of principle.

The appeal in *Vines v Australian Securities and Investments Commission* was against findings of breaches of duties of care under the *Corporations Law 1991* (Cth) and, relevantly, the judge's refusal to relieve against liability in that respect.<sup>150</sup> Section 1317JA(2) provided that where a person is alleged to have contravened a civil penalty provision but: (a) 'the person has acted honestly' and (b) 'having regard to all the circumstances of the case ... the person ought fairly to be excused', 'the court may relieve the person ... from liability'. Insofar as the ultimate discretion was concerned ('the court may relieve the person ... from liability'), the Court found that no grounds for overcoming the 'well-known restraints' (ie those based upon the *House* rules) were made out.<sup>151</sup> However, the threshold issue (whether the person 'ought fairly to be excused') was characterised as calling for the formation of a value judgment where the principles of *Warren v Coombes* (the secondary fact rule) rather than the *House* rules might be invoked. This was described as a 'less restrictive' approach.<sup>152</sup>

An examination of the principles governing appeals from decisions involving a discretion and analogous situations, and the application of a common test (derived from *Wednesbury*), was undertaken in *Attorney-General (NSW) v X*.<sup>153</sup> The Attorney-General sought a declaration that the defendant was guilty of criminal contempt in publishing newspaper articles about the drug-running conduct of the defendant, then facing criminal charges of supplying heroin. The tribunal found that the detriment to the administration of justice was outweighed by the public interest in the freedom of communication.<sup>154</sup> From this decision the Attorney-General appealed, the qualifying question of

<sup>148</sup> Ibid 590 [104]–[105].

<sup>149</sup> Ibid 601 [167]–[170].

<sup>150</sup> (2007) 73 NSWLR 451.

<sup>151</sup> Ibid 549 [556] (Spigelman CJ).

<sup>152</sup> Ibid 550 [561]. In the event, the Court (Santow JA dissenting) was not prepared to intervene.

<sup>153</sup> (2000) 49 NSWLR 653.

<sup>154</sup> *A-G (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318.

law ultimately being limited to whether it was reasonably open to the tribunal to make its finding. Spigelman CJ said the balancing exercise as between the two interests involved the making of a judgment by a process of evaluation, a process distinguishable from but having ‘a close analogy with fact finding and the exercise of a discretion.’<sup>155</sup> The scope of the relevant considerations involved elements about which a wide range of legitimate opinions might exist. He referred to the formulations ‘matter of fact and degree’, ‘reasonably open’ (meaning ‘open’ as a matter of law) and ‘capable of decision either way’, which had frequently appeared in related contexts.<sup>156</sup> The question was whether the limits to the legitimate opinion of the tribunal had been exceeded. In the view of the Chief Justice, an appropriate standard was a stringent test of ‘something overwhelming’ (from *Wednesbury*)<sup>157</sup> which could be derived from analogous case law including: (1) judicial review of administrative decisions for error of (non-jurisdictional) fact where issues of weight were involved (only available where the decision was ‘manifestly unreasonable’ so constituting an error of law);<sup>158</sup> (2) appeals on questions of law (not available even where the decision on the facts was perverse or not reasonably open);<sup>159</sup> (3) appeals as to whether the facts as found answered a statutory description or fell within a range within which reasonable minds might differ (no error of law);<sup>160</sup> and (4) review of the exercise of a discretion (eg a ruling on the admissibility of prejudicial evidence) where the outcome was a factual matter for the tribunal, unless there was something ‘overwhelming’ in the decision reached.<sup>161</sup> The judgment suggests that where a balancing of interests is involved, a limited appeal will be restricted in a similar manner as for a discretionary decision, or in relation to findings of fact, or as to whether facts meet a statutory description, each of which (it is said) require in effect a finding of *Wednesbury* unreasonableness.<sup>162</sup>

<sup>155</sup> *A-G (NSW) v X* (n 153) 661 [35]; see also at 661 [33], quoting *Hinch* (n 109) 43 (Wilson J): ‘a decision which is the outcome of the balancing process is not a discretionary judgment. It is the result of an evaluation, consistently with accepted judicial principle, of competing matters of fact.’

<sup>156</sup> *Ibid* 666 [55].

<sup>157</sup> *Ibid* 667 [127].

<sup>158</sup> *Ibid* 676–7 [120]–[122].

<sup>159</sup> *Ibid* 677 [123]–[125].

<sup>160</sup> *Ibid* 677–8 [126]–[128].

<sup>161</sup> *Ibid* 678–9 [129]–[135].

<sup>162</sup> This last conclusion may, as a generalisation, require reconsideration in the light of *Li* (n 1) 364 [68] (Hayne, Kiefel and Bell JJ) where, in the judgment of the plurality, the law recognis-



## VI DISCRETIONARY DECISIONS: A REVISED APPROACH

There is evidence that in England, whilst there remains a significant division of views, the Supreme Court is seeking to bring some order to the subject. In doing so, it has made reference to the approach adopted in New Zealand (considered in the following section).

*A England's (Current) Approach*

The recent decision of the UK Supreme Court in *Re B* concerned an application by a local authority that, because the child under consideration was likely to suffer 'significant harm' attributable to the care given or likely to be given by her parents (the 'threshold issue'), she should be placed in care with a view to adoption (the 'welfare issue').<sup>163</sup> The tribunal allowed the application. The Court of Appeal (England and Wales) dismissed the mother's appeal on the basis that, with respect to neither issue, did it fall 'outside the generous ambit within which reasonable disagreement is possible'.<sup>164</sup> In dismissing the mother's further appeal, the Supreme Court held by a majority that the threshold issue was not a question of law or of fact or of the exercise of discretion, but constituted a 'value judgment',<sup>165</sup> whereas the welfare determination was an exercise of judicial discretion, but one affected by considerations of proportionality.<sup>166</sup> In the case of a 'value judgment', the Court regarded it as sufficient to intervene where the decision could be described as 'wrong', confining reference to 'the generous ambit of reasonable disagreement' to the review of an exercise of 'discretion' as in private family law proceedings.<sup>167</sup> As to the exercise of the discretion (the welfare issue), whilst

es a broader notion of 'unreasonableness'. That concept may well be extended to appellate, as well as judicial, review of discretionary decisions.

<sup>163</sup> *Re B* (n 107). Note in the rules governing the appeal that a 'review' equates to a rehearing, and a 'rehearing' equates to a hearing de novo: see, eg, *EI du Pont de Nemours & Co v ST Dupont* [2006] 1 WLR 2793, 2799 [94], 2799 [96].

<sup>164</sup> *Re B* (n 107) 1964 [174], quoting *Re B* [2012] EWCA Civ 1475, [148].

<sup>165</sup> *Ibid* 1930 [44] (Lord Wilson SCJ), 1934 [57] (Lord Neuberger P), 1936 [66], 1947 [109] (Lord Kerr SCJ), 1971–2 [199] (Baroness Hale SCJ, dissenting, but not on this point).

<sup>166</sup> *Ibid* 1925 [34] (Lord Wilson SCJ), 1941 [84]–[85] (Lord Neuberger P), 1954 [136] (Lord Clarke SCJ).

<sup>167</sup> *Ibid* 1930 [44] (Lord Wilson SCJ), 1935 [61] (Lord Neuberger P), 1947 [110] (Lord Kerr SCJ), 1954–5 [138]–[139] (Lord Clarke SCJ), 1973 [203] (Baroness Hale SCJ). Lord Neuberger P said that, because reliance on credibility varied, there was no single rule applying to decisions involving an evaluation: at 1935 [60]. Further, he considered that 'the reasons which justify a

the principles from earlier cases were confirmed and these might reveal that the decision was wrong (ie based on the relevancy grounds, error of law, application of a wrong principle or extreme irrationality), because of the requirements of proportionality it was again held sufficient to intervene that the decision below was regarded as ‘wrong’.<sup>168</sup>

In the course of his judgment in *Re B*, Lord Wilson SCJ made a passing reference to an ‘interesting suggestion’ of the Supreme Court of New Zealand in *Kacem v Bashir*,<sup>169</sup> that a custody dispute involved an evaluative, rather than a discretionary, decision.

### B *The New Zealand Model*

In New Zealand, a more radical approach has been adopted. The concept of a discretionary judgment attracting the equivalent of the *House* rules,<sup>170</sup> has been closely confined and no special consideration is given to an evaluative judgment. The leading authority, preceding *Kacem*, is *Austin, Nichols & Co Inc v Stichting Lodestar*.<sup>171</sup> This involved a series of appeals from the initial decision of the Commissioner of Trade Marks who had allowed an application by Stichting Lodestar for the registration of a trade mark (‘Wild Geese’). This had been opposed by Austin, Nichols & Co, which had registered the trade mark ‘Wild Turkey’, on the grounds of likely deception or confusion. Austin, Nichols & Co first appealed under a general right of appeal to the High Court,

very high hurdle for an appeal on an issue of primary facts apply, often with somewhat less force, in relation to an appeal on an issue of evaluation’.

<sup>168</sup> *Ibid* 1930–1 [45]–[46] (Lord Wilson SCJ), 1941–3 [88]–[92] (Lord Neuberger P), 1954–5 [138]–[142] (Lord Clarke SCJ); see also at 1943 [93] (Lord Neuberger P). Absent proportionality, Lord Neuberger P regarded this issue as ‘an evaluative exercise’: at 1940 [80], whereas Lord Kerr SCJ treated the issue as one of discretion and governed by the ‘generous ambit’ test: at 1948 [112]–[113], 1949 [118]. Lord Kerr SCJ and Baroness Hale SCJ held it was for the appellate court itself to decide whether the care order was proportionate: at 1949 [116] (Lord Kerr SCJ), 1976–8 [215]–[224] (Baroness Hale SCJ).

<sup>169</sup> *Ibid* 1927 [38], citing *Kacem* (n 81) 17 [32]. As noted in Part IV(C), Gaudron J, in terms of categorisation, has also adopted this position.

<sup>170</sup> See *May v May* (1982) 1 NZFLR 165, 170, concerning an appeal from an application to extend time. The Court of Appeal held that in an appeal ‘of this kind’ where a balancing exercise is involved and ‘[t]wo Judges may arrive at different conclusions on the same points without it being said that either one is wrong’ the appellant must show that the tribunal has: (1) ‘acted on a wrong principle’; (2) ‘failed to take into account some relevant matter’; (3) taken into account ‘some irrelevant matter’ or (4) reached a decision that was ‘plainly wrong’.

<sup>171</sup> [2008] 2 NZLR 141. The decision has been criticised as lacking guidelines as to when a decision is to be treated as discretionary: MB Rodriguez Ferrere, ‘The Unnecessary Confusion in New Zealand’s Appellate Jurisdictions’ (2012) 12 *Otago Law Review* 829.

which allowed the appeal on the basis that whilst the Commissioner had correctly identified the relevant legal principles, the decision was wrong as a matter of ‘evaluation’.<sup>172</sup> Stichting Lodestar’s further appeal to the Court of Appeal was allowed, including on the basis that the matter was one which called for an evaluative judgment and the conclusion reached by the Commissioner was entitled to weight and could not fairly be described as wrong.<sup>173</sup> When the matter reached the Supreme Court on Austin’s further appeal,<sup>174</sup> the judgment was given by Elias CJ. As regards the approach of the Court to such an appeal, the Chief Justice referred to statements in the decision under appeal, and in earlier Court of Appeal decisions, to the effect that weight must be accorded to the tribunal’s decision and that the court’s approach should be restrained where a value judgment was involved.<sup>175</sup> The Chief Justice regarded this approach as misstating the role of the appellate court on a general appeal. The matter did not call for caution in differing from the tribunal’s assessment, given there was no question of credibility, nor of the exercise of discretion:

Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court’s opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.<sup>176</sup>

This principle was applied in *Kacem* in relation to a custody dispute. The mother wished to relocate two children from Auckland to Sydney against the wishes of the father. The joint judgment of the Supreme Court reasoned:

[T]he important point arising from *Austin, Nichols* is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and

<sup>172</sup> *Austin, Nichols* (n 171) 148 [9], citing *Austin, Nichols & Co Inc v Stichting Lodestar* (2005) 11 TCLR 265.

<sup>173</sup> *Stichting Lodestar v Austin, Nichols & Co Inc* [2007] NZCA 61.

<sup>174</sup> The Supreme Court’s reference to the final appeal being by Stichting Lodestar must, I think, be a slip: *Austin, Nichols* (n 171) 146 [2].

<sup>175</sup> *Ibid* 150–1 [13]–[15].

<sup>176</sup> *Ibid* 151 [16]. This passage may be intended to mean that it is sufficient for the court to intervene if it *subjectively* regards the decision as wrong. During the hearing of the appeal, Elias CJ said to counsel for the intervenor: ‘Well “wrong” means that the Appeal Court comes to a different conclusion. ... That’s what hierarchy means, it isn’t that it’s necessarily objectively wrong, it’s just wrong in the estimation of the Court’: Transcript of Proceedings, *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSCTrans 18.

degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. ... The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary.<sup>177</sup>

The application of these principles in New Zealand has meant that decisions of tribunals involving matters of fact and degree, and the evaluation and balancing of facts and issues, are regarded as matters of 'judgment' rather than 'discretion' and need only be shown to be 'wrong' (ie in accordance with the appeal rules). This applies, for example, to the decisions of tribunals in disciplinary proceedings as to whether the facts meet the test of misconduct, and as to the appropriate penalty.<sup>178</sup>

## VII SUMMARY: 'FORMULAE OF FUTILE CASUISTRY'

### A *The Existing Formulae*

It is apparent that there is support in the case law in Australia for a distinction in the court's approach to appeals by rehearing where a discretion is exercised, where a value judgment is under consideration, and on the law and the facts generally. In *Warren v Coombes*, the Court quoted a passage from an earlier decision of Jacobs P:

Thus if by judicial restraint is meant ... that respect and weight is given to the opinion of the judge below, then it is something always to be sought. The effect of that respect and weight will vary depending upon the subject matter and will be greatest where the opinion involves a discretionary judgment and next where the subject matter is one of conclusion or evaluation drawn or made from the facts found.<sup>179</sup>

<sup>177</sup> *Kacem* (n 81) 17 [32] (citations omitted).

<sup>178</sup> *Sisson v Standards Committee 2 Canterbury-Westland Branch* [2013] NZAR 416, 420 [15]. Cf, in Australia, *Myers v Medical Practitioners' Board of Victoria* (2007) 18 VR 48, 62 [51] (misconduct); *Khosa v Legal Profession Complaints Committee* [2017] WASCA 192, [45], [76] (Buss P), [179], [185], [223] (Murphy and Beech JJA) (penalty). The Supreme Court of New Zealand in *Austin, Nichols* (n 171) 147 [5] did recognise that the Court might be reluctant to interfere on an appeal from a tribunal with special advantages (hearing the witnesses, expertise).

<sup>179</sup> *Cashman v Kinnear* [1973] 2 NSWLR 495, 499, quoted in *Warren* (n 68) 549.

There would seem little benefit, in this context, in distinguishing between an appeal from the tribunal's exercise of a 'discretion' (narrowly defined) and from the tribunal making a 'value judgment', if the same approach is adopted. Equally, there is little advantage in distinguishing between the court's approach to a decision involving a value judgment and to decisions generally, if the same principles apply. However, statements to the effect that a particular rule (eg the discretionary rule) applies in other circumstances (eg where a value judgment is under consideration) but 'with somewhat less force',<sup>180</sup> although not easily improved upon, seem so vague as to be unhelpful. And distinctions based upon the decision being one 'upon which reasonable minds may differ', or involving 'matters of fact and degree', or involving balancing different considerations, are unlikely to provide reliable guides. Again, reference to the primacy of the legislative provisions governing the appeal, and to their scope and purpose, will often be of little assistance because in themselves they may provide no guidance as to the court's approach.

Underlying these questions is the scope of discretionary decisions.<sup>181</sup> The passage quoted from *Norbis v Norbis* in Part II(A) as to the nature of a discretionary decision is wide enough to cover both discretions and evaluative judgments. In *Coal & Allied Operations*, the issue for the satisfaction of the Commission was, according to the description given above,<sup>182</sup> a matter for a value judgment rather than of discretion. In *Singer v Berghouse*, the distinction between these concepts is made, but the same rules applied. The decision in *Dwyer v Calco* recognises a distinction between a 'judicial discretion' and the situation where the 'statute creates a legal norm ... in terms which require for [its] operation ... the identification and evaluation of facts' (ie a form of value judgment).<sup>183</sup> How far the distinction adopted proves useful is likely to depend upon the scope and nature of the prescribed legal norm.

The New Zealand approach meets several of these difficulties by confining the scope of discretionary decisions and the rules applying to them. But the effect is to eliminate the distinction between appeals from decisions involving a value judgment and from decisions generally. This seems too high a price for the reduction in complexity of the applicable rules. The distinguishing feature

<sup>180</sup> *Re B* (n 107) 1935 [60].

<sup>181</sup> Beyond the fact that the legislature has conferred a discretionary power on the tribunal, the court's approach to discretionary decisions is largely regulated by judicial policy rather than anything sourced in the relevant legislation: see, eg, *Coal & Allied Operations* (n 8) 223–4 [72] (Kirby J); *DAO* (n 139) 586 [88] (Allsop P).

<sup>182</sup> See Part V.

<sup>183</sup> *Dwyer* (n 58) 138 [40].

of a value judgment (eg a finding of negligence or injustice) is that it involves matters of ‘evaluation’ and ‘judgment’, originally conferred on the tribunal, and where a range of outcomes may be regarded as ‘reasonable’, even if ultimately there is, in law, only one correct answer. So much distinguishes them from a conventional appeal against findings of fact or law. It is an area where, because of the nature of the issue and the composition of the tribunal and the advantages it may enjoy, the decision appealed from may be entitled to significant ‘respect and weight’.<sup>184</sup> Unless some restraint is imposed where a value judgment is involved, the court at each level of appeal may reverse the decision below without being able (at least convincingly) to articulate the reasons why its judgment affords greater justice. (The decision in *Austin, Nichols* itself provides an example.) The possibility of the court being able to intervene because it *subjectively* prefers an alternative outcome, without necessarily being able to demonstrate the respects in which the tribunal’s decision is unsound (as passages in *Austin, Nichols* contemplate),<sup>185</sup> merely highlights the unsatisfactory nature of the exercise. Such an outcome would seem calculated to offend (if unequally) both respondent, who, in the absence of clearly articulated reasons loses both the benefit of the judgment below and costs, and the appellant, who succeeds, but faces the prospect of a further and unpredictable appeal.

It would be possible to draw the boundary, and the respective rules, between discretions, including value judgments, and appeals generally. But provided the applicable rules for each can be formulated, there would seem to be value in keeping the distinction in this context between a ‘discretion’ narrowly defined, where the statute provides that the tribunal has a choice, and a ‘value judgment’, where the statute provides some formula (‘serious injury’, ‘negligence’) or criteria (‘appropriate’, ‘just’), even if expressed in general or qualitative terms.<sup>186</sup> In the latter case, upon making its ‘value judgment’, the tribunal has no ‘discretion’ other than to act on it. Where such a statutory formula or criterion is provided, the court on appeal will have a more secure foothold to invoke principles of interpretation and make a relatively objective assessment. So much will provide a guide in future cases. Where no such formula or criterion exists and a power of choice is provided,

<sup>184</sup> *Cashman* (n 179) 499.

<sup>185</sup> See, eg, *Austin, Nichols* (n 171) 151 [16].

<sup>186</sup> Hoffmann LJ in *Re Grayan Building Services Ltd (in liq)* [1995] Ch 241, 254 said that the difficulty of identifying error for the purposes of allowing the appeal will vary, including by reference to the precision with which the statutory or common law standard to be applied is expressed.

the exercise of discretion is likely to involve a more subjective judgment, based upon the particular circumstances, and, correspondingly, the exercise of the discretion is likely to have reduced value as a precedent. A reversal in such circumstances will obviously be rare. For example, whereas in the case of a value judgment the tribunal's decision may be found in error based upon inappropriate weight being given to a factor, something more will generally be required to upset a purely discretionary decision. It is likely to involve a finding of an injustice against the appellant.

### B *Reworking the Formulae*

These propositions may only be stated at a theoretical level. Clearly decision-making takes place along a continuum from decisions in which the tribunal exercises the broadest (judicial) discretion to those in which the decision is closely regulated by the empowering statute and applicable case law. For this reason, and because of the complexity of the concepts involved, it is not possible to resolve the issues by attempting precise definitions and devising categories and applying precise formulae to each. Moreover, there is a degree of fluidity necessarily involved in applying the concepts. For example, a value judgment may have been formed by a specialist body in reliance upon findings of credibility. It may have been an interlocutory decision made by a judge in the course of a trial. It may have been a decision (eg costs) which, although discretionary, is closely bounded by principles evolved from the case law.

There are therefore significant limitations in attempting to formulate principles governing the subject in the abstract. But insofar as the courts have adopted rules in this area, these might be reviewed with a view to bringing better order to the *House*.<sup>187</sup> Some suggestions to that end follow, under the (additional) caveats that they are subject to the specific legislative requirements regulating both the tribunal's powers and the nature of the appeal,<sup>188</sup>

<sup>187</sup> It has been suggested that rather than retain the complex classification of appeals and the somewhat incoherent principles accompanying them, the classifications might be abandoned in favour of a single approach to all appeals based upon a flexible concept of 'deference' as applied in Canada: *Rodriguez Ferrere* (n 171) 839–40.

<sup>188</sup> In *Kostas* (n 62) 418 [89], Hayne, Heydon, Crennan and Kiefel JJ deprecated the practice of identifying the subject appeal (question of law) within one of the recognised categories of such appeals, because the proper starting point for considering the nature of the appeal was the language of the empowering statute. However, given the standard terms in which such statutory provisions are commonly expressed and the court's search for guidance in

and that, as indicated in the following section, a level of flexibility in their application is inevitable and desirable.

First, describing appeals as against decisions on ‘facts, law and discretions’, with the implication that each operates under discrete rules, may be misleading. There are two broad categories of appeal by rehearing (as here described), namely a general appeal and a limited appeal. An appeal by rehearing against a discretionary decision will necessarily fall within one of these categories.

Second, there are general rules governing these two broad categories of appeal. In each case the appellant bears the onus of establishing that the tribunal’s decision is affected by ‘error’ and is therefore ‘wrong’. In a general appeal, that will include identifying a material mistake of fact or error of law. In a limited appeal, it will be confined to showing error of law. Where specific error of this nature cannot be identified, the decision might still be reversed under either form of appeal where the decision is unjust or ‘unreasonable’. In this context, whether the decision is ‘unreasonable’ will be dependent upon the context, particularly the statutory context, in the sense explained in *Li*.<sup>189</sup> It may involve consideration of a proportionate response by the tribunal to the issues before it.

Third, a particular difficulty confronts the appellant where the decision involves the exercise of a ‘discretion’, ie where the legislation empowers the tribunal to exercise a choice within a range or between two or more alternatives. In such circumstances, the discretion is not simply transferred to the court for it to exercise. Rather, under the discretionary rule, the appellant must persuade the court not merely that an alternative outcome is open and might be preferred, but that the tribunal’s decision is demonstrably wrong. In such an appeal, the court is likely to consider factors material to the intensity of its review. That may include the extent to which the tribunal had advantages not enjoyed by the court and more generally whether the court is better placed to conclude the matter than the tribunal. Only exceptionally will a difference between the tribunal and the court as to the weight to be attributed to relevant factors be sufficient for intervention.

Fourth, similar caution will be required where the decision involves a ‘value judgment’, ie where the appeal is from a decision involving the evaluation of facts by reference to a statutory formula which will often give rise to a ‘yes’ or ‘no’ answer. The court will again give consideration and respect to the tribunal’s opinion. However, where a potential error of fact or law or inferred

its approach to the appeal, that practice seems likely to continue, albeit with appropriate qualifications.

<sup>189</sup> *Li* (n 1) 363–4 [67].



error is alleged, the court must in effect undertake the same task as the tribunal and reach its own answer to the issue, by a process of analysis, logic and reasoning. Where the court's conclusion differs from that of the tribunal, it will still be required to disclose the objective 'wrongness' of the decision, which may include that the tribunal incorrectly attributed (or failed to attribute) weight to the relevant factors.

Fifth, the primary fact rule (concerning findings of credibility explained in *Fox v Percy*) and the secondary fact rule (concerning inferences permitted under *Warren v Coombes*) are, as a matter of judicial policy, central considerations when the court is reviewing findings of fact. The effect of the primary fact rule, as with the discretionary rule, will be to qualify the court's power to reverse the decision, for reasons relating to policy, cost, delay and practicality.<sup>190</sup> In relation to the secondary fact rule, the court may, in the circumstances described in these cases, draw a contrary inference including on the ultimate issue (eg whether the primary facts support a finding of negligence, or professional misconduct or refugee status).

Sixth, it is misleading to regard the application of either the primary fact rule or the secondary fact rule as inapplicable where a discretionary decision is under review. These rules apply to appeals by rehearing, which include appeals against that form of decision. The court hearing an appeal from a discretionary judgment is not precluded in the usual way from drawing inferences of secondary facts contrary to those of the tribunal, and on that basis reaching a different conclusion.<sup>191</sup> There is one limited qualification. In an appeal from a discretionary decision the court may not apply the secondary fact rule in a manner which, without more, displaces the tribunal's exercise of discretion with its own. In the absence of specific error in the primary facts, for the court to reach a different outcome on the ultimate issue (where should the child reside, what is the appropriate sentence, what costs

<sup>190</sup> In relation to the reasons for limiting appeals from primary facts, Lord Neuberger, in *Re B* (n 107) 1933 [53], identifies 'policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)'.

<sup>191</sup> The references in *Gronow* (n 14) 526 (Mason and Wilson JJ), 539–40 (Aickin J) to the inapplicability of *Warren v Coombes* is capable of being so understood. Note that in *Mobilio* (n 9) 842 Brooking JA, having recorded the prohibition in *Gronow v Gronow* as to drawing a contrary inference where the appeal is against a discretionary decision, distinguished between the court drawing a contrary inference in relation to an (interim) secondary fact and the 'ultimate discretionary evaluation' (governed by *House*).

order should be made), the court must find that the discretionary decision is unreasonable (or disproportionate), or irrational, or manifestly unjust.

### C *The 'Dao' of Appellate Review of Discretionary Decisions*

It is apparent that such suggested 'rules' cover only a limited category of situations which might arise upon appeal by rehearing of a discretionary decision. They might be radically affected by the relevant legislation, which may be drafted without regard to the conventional format providing for appeals by rehearing. Moreover, none of such rules can be applied mechanistically. Spigelman CJ pointed out in *DAO* that whilst the distinction between a discretionary decision and a value judgment might be useful, the elements involved constitute a spectrum rather than a duality; as did the degree of judicial restraint.<sup>192</sup> And in the same case, Allsop P explained:

The degree of intensity of review on appeal of any particular question depends upon a number of things — the terms of the statutory provision providing for appellate review, the nature of the question under review, the need to discern error, the respective advantages and disadvantages of the court below and the appeal court and, implicitly, a degree of legal policy (though the last matter is rarely explicated). I strongly agree with the Chief Justice that labels are apt to mislead in this context, most particularly the word 'discretion' and the phrase '*House v The King* review' as an alternative to '*Warren v Coombes* review' as the exhaustive universe of alternatives (which they are not).<sup>193</sup>

The decisions of the New Zealand Supreme Court in *Austin, Nichols*, of the United Kingdom Supreme Court in *Re B* and (to some extent) of the High Court of Australia in *Dwyer v Calco*, suggest that this is an area of law undergoing revision. And the unsettled state of the law, as reflected in the identified decisions in New South Wales and Victoria, suggest that further direction from the High Court is required. Whilst acknowledging Frankfurter J's foreboding,<sup>194</sup> practising lawyers will hope such revision leads to a set of guiding principles, capable of being regularly applied, whilst avoiding all casuistry.

<sup>192</sup> *DAO* (n 139) 578 [46], 579 [50].

<sup>193</sup> *Ibid* 586 [88]. In *Eden* (n 52) 172 [65], Allsop CJ also disapproved the use of 'particular definitions, fixed formulae, categorisations or verbal descriptions' in determining whether a statutory discretionary power may be judicially reviewed as being legally unreasonable.

<sup>194</sup> *Universal Camera Corp* (n 1) 488–9.