An Impasse in New Zealand Administrative Law: How Did We Get Here?

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Variable intensity or standards of review is an issue that has long vexed many Commonwealth courts and commentators. New Zealand is no exception, and a rigorous debate about the desirability of a structured approach to variable intensity of review has taken place in that jurisdiction for over a decade. Lacking in this debate, however, is any clear direction or guidance from the Supreme Court of New Zealand, which has remained silent on the issue. This article argues that this silence is a departure from the traditional approach of New Zealand’s highest courts being at the vanguard of administrative law developments, and that there was a missed opportunity to contribute to the debate when the High Court decision of Wolf v Minister of Immigration was released in 2004. The inaction from New Zealand’s highest courts in the years since risks the issue becoming mired in confusion.

INTRODUCTION

In recent times, administrative law in New Zealand has reached somewhat of an impasse. A multiplicity of approaches to determining the intensity of judicial review has led the High Court, where all applications for review originate, to cry for more direction and guidance from its senior counterparts in the Supreme Court. That Court, however, has “determinedly refused” to consider adopting a particular approach. Instead, the Chief Justice has wondered extra-judicially “whether the inescapably contextual assessment of when to intervene by way of judicial review is greatly assisted by attempting to articulate standards of review”. This is despite the High Court viewing such contextualism as “hardly a useful guide to future judicial decisions” – an approach that heightens the very real risk of this area of the law becoming “chaotic, unprincipled, and results-oriented”.

This article traces the history behind this impasse. On the same occasion, the Chief Justice remarked: “There may be something in the criticism that the New Zealand courts have tended to be light on doctrine and that our administrative law jurisprudence is underdeveloped.” If that is indeed a tendency of the New Zealand administrative law canon, it is only a recent one. The first part of the article explicates what the author has termed the “Cooke approach” – a period in New Zealand history where Lord Cooke of Thorndon and his approach to developing administrative law provided clarity in direction. The second part looks at the 2004 decision in Wolf v Minister of Immigration, which, despite only being at the High Court level, represents a watershed: New Zealand’s first explicit and

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2 Delu v Connell [2016] NZAR 475, [6].


4 Delu v Connell [2016] NZAR 475, [7].


6 Elias, n 3, 22.

7 Wolf v Minister of Immigration [2004] NZAR 414.

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ring endorsement of variable intensity of review and firm rejection of the monolithic standard of Wednesbury unreasonableness. This article argues that Wolf represented an “administrative law moment” by choosing to accelerate New Zealand jurisprudence down the road of variable intensity of review. The third part shows that, despite significant willingness on the part of the High Court of New Zealand to follow Wolf’s lead, in the 13 years since it was decided New Zealand’s highest courts – the Court of Appeal and Supreme Court – have decided against travelling down that road of doctrine, meaning that New Zealand’s approach to variable intensity of review has become fractured and incoherent. It is ultimately argued that the current impasse in New Zealand administrative law with regards to intensity of review was entirely preventable had those higher courts taken Wolf more seriously, and that the present situation demands action.

The Cooke Approach

This part provides historical context to show how New Zealand has arrived at the administrative law impasse described above. As it is argued that Wolf represented a watershed in New Zealand administrative law, it is useful to look at the decisions that preceded it and caused the pressure for change.

For much of the 20th century, New Zealand administrative law marched in lockstep with English administrative law. In his survey of New Zealand’s post-war administrative law journey, the authorities and developments that Joseph recounts are overwhelmingly English.9 Although New Zealand had its own landmark administrative law cases,10 the various conundrums that plagued English administrative law similarly afflicted New Zealand.11 New Zealand’s first indigenous administrative law text was not published until 1967,12 and even then a contemporary review of the text noted: “It is interesting but rather depressing to find that the law in New Zealand relating to judicial control is with minor variations the same as in England.”13

Perhaps fittingly for a nation so geographically distant from its motherland, this jurisdiction marched to the same tune but a few miles back. An extreme example was Wednesbury, which was first cited by a reported case in New Zealand in 1964, some 16 years after its delivery in England.14 The delays were usually more modest: the “trilogy of famous cases”15 of 1960s English administrative law – Ridge v Baldwin,16 Padfield v Minister of Agriculture17 and Anisminic Ltd v Foreign Compensation Commission18 – were all dutifully adopted and followed in this jurisdiction only a few years after they were decided.19 Anisminic first appeared in the New Zealand Law Reports the same year it was decided in England, cited by Robin Cooke QC in his argument as counsel for the appellant in Public...
This was perhaps unsurprising given Cooke’s doctoral thesis at Cambridge was on jurisdiction, a concept that lay at the heart of Anisminic. Upon appointment to the judiciary, Cooke’s adherence to— but modification of— English authority did not waver and set the scene for New Zealand’s approach to administrative law for the next 20 years.

Cooke’s contribution to administrative law was immense; during his time on the New Zealand bench, he sat on 35% of all administrative law cases appearing in the New Zealand Law Reports. As Knight notes, this allowed him to craft a distinctly New Zealand approach to administrative law, cautioning against the “automatic adoption of English administrative law cases without an appreciation of the different procedure and theory of judicial review in New Zealand.” Nevertheless, under Cooke’s watch, the significant developments in English administrative law also became significant developments in New Zealand administrative law, adjusted for New Zealand conditions. For example, he was the first judge to adopt and apply Anisminic. After Lord Diplock created the tripartite expression of the grounds of review in Council of Civil Service Unions (CCSU) v Minister for the Civil Service in 1984, Cooke mimicked and simplified the statement extra-judicially before applying it in a series of decisions. Similarly, Cooke adopted the House of Lords’ acceptance in CCSU of the potential amenability of prerogative powers to review in Burt v Governor-General. He subsequently used the successor to Ridge v Baldwin in terms of natural justice fundamentals — Chief Constable of the North Wales Police v Evans — as the basis for holding “it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them.” His eagerness to accept but refine English developments was not always shared by his brothers on the bench. While he argued in Daganayasi v Minister of Immigration that the House of Lords’ decision in Secretary of State for Education and Science v Tameside Borough Council

23 Knight, n 22, 102, citing Budget Rent A Car Ltd v Auckland Regional Authority [1985] 2 NZLR 414 (CA), 418.
25 Council of Civil Service Unions v Minister for the Civil Service [1984] AC 374 (HL), 410; “illegality, irrationality and procedural inappropriateness”.
27 Knight, n 26, fn 31. Knight cites New Zealand Fishing Industry Assn Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 (CA), 552; Minister of Energy v Petrocorp Exploration Ltd [1989] 1 NZLR 348 (CA), 352; Jensen v Director-General of Agriculture and Fisheries (Unreported, Court of Appeal of New Zealand, Cooke P, Richardson and Thomas JJ, 16 September 1992) 3.
30 Fraser v State Services Commission [1984] 1 NZLR 116, 121 (CA).
31 Daganayasi v Minister of Immigration [1980] 2 NZLR 130 (CA). See also New Zealand Fishing Industry Assn Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 (CA).
provided a “strong foundation” for mistake of fact as a ground of review, his colleagues preferred to “defer discussion of this difficult and developing area of the law to another day” – a discussion that would never truly occur.

For the purposes of discussing the precursors to Wolf, however, two of Cooke’s judgments have particular pertinence. In Webster v Auckland Harbour Board and Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd, following English precedent, Cooke attempted to address arguably the most vexed administrative law problem of the era: the issues arising from a singular standard of unreasonableness. Webster involved a challenge to the validity and reasonableness of a decision by the Auckland Harbour Board to increase its fees for a foreshore licence from $4 to $640 per annum. Discussing the requirements of reasonableness, Cooke P (as he then was) held that nothing significant was gained by referring to “reasonableness in the Wednesbury sense”:

An unreasonable decision in the ordinary sense is one outside the limits of reason. Or, in other words, one that no reasonable body could reach .... In my opinion steady and unvarnished adherence to the ordinary sense just mentioned is all that is needed in principle. As with many other principles of law, the real difficulties arise when particular sets of facts have to be scrutinised. These difficulties have to be grappled with by judgment and are not eased by [sic] semantics.

Faced with English authorities that had varying conceptions of unreasonableness, Cooke preferred to strip Wednesbury of any particular significance and, instead of reformulating the test, he simplified the approach by focusing on an ordinary definition of unreasonableness – i.e., the Harbour Board’s decision was not unreasonable because it was explained and justified. Cooke was not, however, blind to the fact that this singular standard of unreasonableness was devilishly difficult to meet. Instead, he preferred a release valve in the form of a different ground of review.

In Thames Valley, a paper mill challenged the distribution of shares in a newly established publicly-owned electricity company on the basis that no regard was given to the company being a substantial user of electricity in the area. Basing his decision on many English authorities – but most notably, Re Preston, Wheeler v Leicester City Council and R v Panel on Take-overs and Mergers: Ex p Guinness plc – Cooke P held that “substantive unfairness” was a recognised and “legitimate ground of judicial review, shading into but not identical with unreasonableness.” Such a ground of review meant, “whatever the verbal formula of review adopted, that the quality of an administrative decision as well as the procedure is open to a degree of review” and, as Lord Donaldson MR in Guinness phrased it, when successfully pleaded meant “something had gone wrong of a nature and

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33 Daganayasi v Minister of Immigration [1980] 2 NZLR 130, 148.
34 Daganayasi v Minister of Immigration [1980] 2 NZLR 130, 149 (Richardson J).
35 The Supreme Court in Rizk v Landcorp Farming Ltd [2016] 1 NZLR 1056, fn 57 accepted that “[o]nly in the 1980s was it suggested in New Zealand that mistake of fact could be an independent ground of review”, citing G Taylor, Judicial Review: A New Zealand Perspective (LexisNexis, 3rd ed, 2014) (15.12)-(15.20).
36 Webster v Auckland Harbour Board [1987] 2 NZLR 129 (CA).
40 Webster v Auckland Harbour Board [1987] 2 NZLR 129, 133.
41 Re Preston [1985] AC 835 (HL).
42 Wheeler v Leicester City Council [1985] AC 1054 (HL).
43 R v Panel on Take-overs and Mergers; Ex p Guinness plc [1990] 1 QB 146 (England and Wales Court of Appeal – Civil Division).
degree that required the intervention of the court". Its chief advantage was "that it allows a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked". The flexibility allowed the Court to give closer or less scrutiny according to the circumstances. As Cooke P explained:

At times it becomes necessary to give especial weight to human and civil rights, including class or group rights [citing Bromley] and of course in New Zealand race rights. At times the emphasis will be more on non-interference with the legitimate exercise of governmental or other administrative discretion.

"Substantive unfairness" was thus a precursor to the contemporary concept of variable intensity of review. Read alongside Webster, despite "shading into" reasonableness, Cooke’s view is clear: it was a ground of review distinct from reasonableness, which was a singular standard that meant what it said. This was, of course, not a stance he held for long. Famously, Lord Cooke (as he would become) held in R (Daly) v Secretary of State for the Home Department that Wednesbury "was an unfortunately retrogressive decision in English administrative law ... The depth of judicial review and the deference due to administrative discretion vary with the subject matter". While sitting on the New Zealand Court of Appeal, however, in 1994 Cooke sought a mechanism other than reasonableness to take the heat of the capriciousness of it as a singular and unattainable standard of review. In doing so, he exemplified what the author terms "the Cooke approach": following and adopting developments in England but adjusting them in a simplified, somewhat pragmatic fashion for New Zealand conditions.

The Shift in England

Cooke retired from the New Zealand Court of Appeal and became a life peer in April 1996. This was a pivotal time for English administrative law. The UK’s incorporation of the European Convention on Human Rights (the Convention) into domestic law via the Human Rights Act 1998 (UK) would have a profound impact in many areas of administrative law, but the impact on Wednesbury unreasonableness was acute.

Writing at the time, Elliott argued that the traditional and institutionalised policy of judicial deference in substantive review was exemplified by Wednesbury, but remained a hallmark of English administrative law long after that decision. In the 1970s, Wednesbury ruled, and that status was cemented further when it was re-stated by Lord Diplock in CCSU. Such a longstanding attachment to such a high standard of reasonableness reflected a specific vision of how to balance decision-makers’ autonomy with judicial control and, indeed, a vision of the respective provinces of judicial and executive branches government. Even before the enactment of the Human Rights Act, however, courts had “adapted” the singular standard of Wednesbury "to the human rights context". By 1996, the pretence of Wednesbury amounting to a singular, monolithic standard was all but abandoned, and

50 R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 (HL), [32].
55 Elliott, n 53, 304.
the test for reasonableness became a variable one: "The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable." 57

Accordingly, the enactment of the Human Rights Act proved no great shock to this area of administrative law – that “the intensity of review in a public law case will depend on the subject-matter in hand” was a “settled principle of the common law, one which is entirely independent of our incorporation of the Convention by the Human Rights Act 1998.” 58 Within a decade, variable intensity of review was formalised, operating within the rubric of reasonableness. The problem was, however, as Le Sueur noted in 2003, that demanding such flexibility of Wednesbury unreasonable “heaped too much onto” it: “Wednesbury unreasonableness is in danger of imploding under the weight of expectations.” 59

The pressure was not helped by the presence of a potential successor (or usurper, depending upon one’s opinion) to reasonableness as the vehicle for variable intensity of review – proportionality. Proportionality was not a new concept; it had arguably been waiting in the wings for a number of years and, as a principle, had been applied implicitly in numerous areas of the law. 60 However, it was a recognised principle of interpretation and a recognised application of the Convention 61 and thus came to the fore upon the enactment of the Human Rights Act. 62 It was at this point that debate raged as to whether Wednesbury reasonableness ought to be retired or whether the two grounds of review could co-exist. Elliott argued that “it would be an overreaction to suppose that proportionality should simply replace Wednesbury in every context,” 63 whereas Le Sueur believed that, in the face of proportionality, “unreasonableness is struggling to survive as a coherent and useful ground of review.” 64

Lord Steyn in Daly, decided shortly before the commencement of the Human Rights Act, held that the two approaches may “yield different results,” 65 indicating that the two could co-exist. However, only three years later, Dyson LJ for the Court of Appeal in Association of British Civilian Internes, 66 while acknowledging the tests were different, held: “The Wednesbury test is moving closer to proportionality, and in some cases it is not possible to see any daylight between the two tests ... [W]e have difficulty in seeing what justification there now is for retaining the Wednesbury test.” 67 That Court declined to perform Wednesbury’s “burial rites” 68 and, 13 years later, those rites remain unperformed. 69 The debate continues, unabated.

57 R v Ministry of Defence; Ex p Smith [1996] QB 517 (England and Wales Court of Appeal – Civil) (Sir Thomas Bingham MIR).
58 R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, 18 (England and Wales Court of Appeal – Civil Division) (Laws LJ).
60 J Jowell and A Lester, “Proportionality: Neither Novel Nor Dangerous?” in J Jowell and D Oliver (eds), New Directions in Judicial Review (Stevens, 1988) 51.
61 Jowell and Lester, n 60, 58.
63 Elliott, n 53, 335.
64 Le Sueur, n 59, [40].
65 R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, 28.
67 R (Association of British Civilian Internes (Far East Region)) v Secretary of State for Defence [2003] QB 1397, [34].
68 R (Association of British Civilian Internes (Far East Region)) v Secretary of State for Defence [2003] QB 1397, [35].
69 Lord Carnwath, n 54, 458.

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The Pressure on New Zealand

Meanwhile, in the same year as Cooke retired from the Court of Appeal in New Zealand, that Court decided to double-down on the Wednesbury test. In its decision in Wellington City Council v Woolworths New Zealand,70 after reviewing the modern applications of Wednesbury, Richardson P held:

For the ultimate decisions to be invalidated as “unreasonable”, to repeat expressions used in the cases [Nottinghamshire County Council v Secretary of State for the Environment and Council of Civil Service Unions v Minister for the Civil Service],71 they must be so “perverse”, “abnormal” or “outrageous in [their] defiance of logic” that Parliament could not have contemplated such decisions being made...

Harrison noted that at the time this decision seemed to indicate a commitment by New Zealand courts to “full blown” Wednesbury unreasonableness.72 However, Woolworths nevertheless included subtle indications that the pressure in England to reform the Wednesbury test was also being felt in New Zealand and was not necessarily alleviated by Cooke’s innovation of substantive unfairness. Woolworths was a challenge to rates (property taxes) levied by a city council. In coming to his conclusion of why the high standard of reasonableness was necessary when assessing such a decision, Richardson P noted: “Rating requires the exercise of political judgment by the elected representatives of the community. The economic, social and political assessments involved are complex.”73 This was a nod to the possibility that a different set of contextual factors might justify a different standard of reasonableness.

Any subtlety on the issue was eschewed a year later in the Court of Appeal’s decision in Waitakere City Council v Lovelock.74 The decision involved another challenge against a city council’s rating decision, and thus the Court naturally applied the approach it took in Woolworths. However, in a remarkable piece of obiter dictum, Thomas J opined for over 20 pages and 13,500 words about the unsatisfactory state of unreasonableness in New Zealand.75 Critical to this discussion was Thomas J’s acceptance of the House of Lords’ approach in Budgey v. The standard of reasonableness, or unreasonableness, demanded by the Courts will vary depending on the subject-matter.”76 Later that year, this position was further entrenched in the Court of Appeal’s decision in Pharmac v Roussel Uclaf Australasia Pty Ltd, where Blanchard J noted, once again in obiter, that the Court’s approach in Woolworths was not universal:

In some cases, such as those involving human rights, a less restricted approach, even perhaps, to use the expression commonly adopted in the United States, a “hard look”, may be needed. … The law in this country applicable to situations of that kind will no doubt be developed on a case by case basis.77

Despite Blanchard J’s indication that New Zealand would approach the issue on a case-by-case basis, this would be the last time the Court of Appeal considered variable intensity of review for many years. Nevertheless, the High Court started to apply such an approach. The clearest instance of this was by Baragwanath J in Ports of Auckland Ltd v Auckland City Council, which dealt with (inter alia) a decision by a city council not to notify the application for resource consent for a proposed residential development. He held:

70 Wellington City Council v Woolworths New Zealand Ltd (No 2) [1996] 2 NZLR 537 (CA).
72 Wellington City Council v Woolworths New Zealand Ltd (No 2) [1996] 2 NZLR 537, 552.
74 Wellington City Council v Woolworths New Zealand Ltd (No 2) [1996] 2 NZLR 537, 553.
75 Waitakere City Council v Lovelock [1997] 2 NZLR 385.
76 Waitakere City Council v Lovelock [1997] 2 NZLR 385, 399–419.
The present case is towards the opposite end of the spectrum considered by the President in Wellington City Council v Woolworths. I prefer therefore to employ the lower-level test applied in Re Erebus Royal Commission ... of whether the decision is "based upon an evident logical fallacy".\footnote{\textit{Ports of Auckland Ltd v Auckland City Council} [1999] 1 NZLR 601, 606, quoting Re Erebus Royal Commission [1983] NZLR 662 (PC), 681.}

By acknowledging a spectrum of decisions that would demand a different approach to Wednesbury/Woolworths reasonableness and actually applying a lower test, Baragwanath J became the first judge to replicate what was occurring in England. However, given the Court of Appeal’s comments on variable intensity of review were in obiter and Baragwanath J’s approach only obliquely referred to the concept, there was still pressure on New Zealand to give it a clear endorsement. Five years after \textit{Ports of Auckland} was decided, at the same time as debate over the continued viability of Wednesbury unreasonableness in England was at its peak, the stage was set for Wild J to do so in \textit{Wolf v Minister of Immigration}.\footnote{\textit{Wolf v Minister of Immigration} [2004] NZAR 414, [11], [5].}

\textbf{Wolf v Minister of Immigration}

\textbf{Background}

It is fitting that the case that represents an administrative law moment should have such a colourful factual background. Mr Willi Heinz Wolf was a German fugitive. He was convicted in 1982 for robbery and sentenced to six years’ imprisonment, but escaped and entered New Zealand in 1986 on a false passport.\footnote{\textit{Wolf v Minister of Immigration} [2004] NZAR 414, [6]-[8].} He married a New Zealand resident in 1988, had his first child in 1989, was granted permanent residency in 1990, and had his second child in 1992.\footnote{\textit{Wolf v Minister of Immigration} [2004] NZAR 414, [10], [11].} When he separated from his wife in 1997, she and her new partner informed authorities of his true identity and, as a result, in 2000 the Minister of Immigration revoked Mr Wolf’s residence permit.\footnote{\textit{Pursuant to Immigration Act 1987 (NZ) s 22.}} Mr Wolf appealed against this decision to the Deportation Review Tribunal on the basis that it would be harsh or unjust for him to lose his right to remain in New Zealand indefinitely.\footnote{\textit{Wolf v Minister of Immigration} [2004] NZAR 414, [19].} German authorities had initially requested Mr Wolf’s extradition, and he was arrested and detained in August 2000, but the request was withdrawn in September 2001, whereupon he was released.\footnote{\textit{Pursuant to Immigration Act 1987 (NZ) s 117.}} For various reasons, Mr Wolf’s appeal to the Tribunal was delayed, but in a split decision (2:1) the Tribunal dismissed his appeal and confirmed the Minister’s revocation of his residence permit in June 2002.\footnote{\textit{Wolf v Minister of Immigration} [2004] NZAR 414, [4].}

Mr Wolf appealed to the High Court on the basis that the Tribunal’s decision was erroneous in law.\footnote{\textit{Wolf v Minister of Immigration} [2004] NZAR 414, [11], [5].} Specifically, he argued that a majority of the Tribunal:

- failed to take into account the damage potential deportation would cause to the relationship between him and his children;
- took into account an irrelevant consideration, namely that he had not revealed his true identity to his young children;
- arrived at a demonstrably unreasonable decision; and
- breached his right not to be subjected to disproportionately severe treatment.\footnote{\textit{Wolf v Minister of Immigration} [2004] NZAR 414, [4].}

\textbf{The Decision}

Wild J spared no time in embarking upon the deep legal analysis that characterised his decision overall, beginning with proportionality and a quote from \textit{Re McBride}, which neatly summarised the state of affairs in the UK and is worth restating in full:

\footnote{\textit{Re McBride} [1983] 2 QB 303, 306.}
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One may postulate that the traditional reticence of the courts to intervene in administrative decisions, characterised by the Wednesbury case, requires adjustment to take account of contemporary experience and it may well be that the incorporation of the European Convention on Human Rights into our domestic law, importing as it does the principle of proportionality, has helped to allow a loosening of the straitjacket of that doctrinaire approach.86

Wild J accepted that the winds of change were blowing in the UK, ushered in by the Convention and specifically s 6 of the Human Rights Act, which “necessitated a change to United Kingdom domestic public law. Prior to s 6, the Wednesbury test was universally applied by British Judges reviewing administrative decisions alleged to be unreasonable”.89 This is, of course, not technically correct in that variable intensity of review was applied as a gloss on the Wednesbury test. However, it still captures the significance of the impact of the Convention on the orthodox approach. Wild J went on to discuss the contemporary debates in the UK on the extent to whether proportionality could (or should) be differentiated from unreasonableness, referring to Daly and R (Mahmood) v Secretary of State for the Home Department,90 before referring to New Zealand’s extremely limited experience with proportionality. Summarising, Wild J applied the Daly approach:

As the law in New Zealand currently stands, I think it best to take the cautious approach of acknowledging that traditional (Wednesbury) grounds of review and proportionality are different, and may therefore produce different outcomes.91

Reinforcing that conclusion, Wild J held that proportionality did not have any “real application to Mr Wolf’s case” because it involved a question of law as to whether it would be harsh or unjust for Mr Wolf to lose the right to remain in New Zealand indefinitely, not a determination as to whether such a decision was a proportionate response to the relevant legislative aim.92

Having dispensed with proportionality93 and a corollary claim based on the New Zealand Bill of Rights Act 1990 (NZ),94 Wild J turned to the focus of his judgment – reasonableness.95 Relying upon Cooke P’s statement in Thames Valley and Lord Steyn’s judgment in Daly, counsel for Mr Wolf had argued that, given the impact on Mr Wolf’s rights, a deviation from the orthodox standard of reasonableness was required, and the case demanded “close or anxious scrutiny”.96 Opposing counsel submitted, instead, that the Wednesbury test – as reformulated in CCSU and Woolworths – was “applicable in every situation in New Zealand, including this one”.97

Wild J did not accept this submission, holding in grand fashion that:

I consider the time has come to state – or really to clarify – that the tests as laid down in [CCSU] and Woolworths respectively are not, or should no longer be, the invariable or universal tests of “unreasonableness” applied in New Zealand public law.98

89 Wolf v Minister of Immigration [2004] NZAR 414, [26].
90 R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840 (England and Wales Court of Appeal – Civil) (Laws LJ).
91 Wolf v Minister of Immigration [2004] NZAR 414, [35].
92 Wolf v Minister of Immigration [2004] NZAR 414, [36].
93 Wolf v Minister of Immigration [2004] NZAR 414, [25]–[36].
94 Wolf v Minister of Immigration [2004] NZAR 414, [37]–[40].
95 Wolf v Minister of Immigration [2004] NZAR 414, [41]–[72].
96 Wolf v Minister of Immigration [2004] NZAR 414, [43].
97 Wolf v Minister of Immigration [2004] NZAR 414, [45].
98 Wolf v Minister of Immigration [2004] NZAR 414, [47].
Instead, the standard of reasonableness was variable, depending upon the nature of a decision, who made it, by what process, what the decision involved and its importance to those affected; by Wild J’s own admission a “rather long-winded way of saying, as Lord Steyn so succinctly did in Daly: ‘In administrative law context is everything’.”

Wild J’s reasons for departing from Wednesbury as representing a universal and invariable test of reasonableness were fourfold:

1. The passage of time had affected the relevance of Wednesbury as a precedent. As Wild J noted, “ten years earlier [1937], the Lord Chief Justice of England, Lord Hewart, had denounced the term ‘administrative law’ as ‘continental jargon’”, and, over 50 years later, with both the New Zealand Bill of Rights Act and the UK’s Human Rights Act enacted, Wednesbury would almost certainly have been decided differently.

2. Variable intensity of review had been recognised in New Zealand, by that point, for over 20 years. Wild J cited Cooke P’s 1987 comments in Webster about the malleability of Wednesbury, before citing Woolworths, Pharmac and Ports of Auckland as all indicating the variability of reasonableness.

3. He noted that all major academic commentators had accepted variable intensity of review existed, and for some it sounded the death knell for Wednesbury.

4. Other, comparable jurisdictions had embraced the concept of intensity of review, citing the English precedent of Mahmood and Baker v Canada (Minister of Citizenship and Immigration) and Suresh v Canada (Minister of Citizenship and Immigration), the key precedents for a varying standard of reasonableness in Canadian administrative law at the time.

Wolf thus became the first decision to explicitly adopt variable intensity of review in New Zealand.

Regarding the case at hand, counsel for Mr Wolf argued, first, that the Tribunal “had seriously understated the independent and unchallenged evidence of the deeply loving relationship between the appellant and his children, and had then neutralised that finding by employing an unfair and untenable reasoning process.” Secondly, counsel argued that the Tribunal had taken an incorrect approach to the balancing exercise by not taking into account Mr Wolf’s interests. Opposing counsel argued that this amounted “to an allegation of unreasonableness arising from alleged wrong inferences or conclusions drawn from the evidence” and that the Court could not interfere with the Tribunal’s balancing exercise or the weight it placed on certain factors unless it “was unreasonable in the administrative law sense.”

The arguments thus demanded a choice by the Court. The alleged errors by the Tribunal were not unreasonable in the strict Wednesbury sense, since they simply challenged one possible (and legitimate) view of the evidence and the weighting of the various factors. The Tribunal’s decision on each point would only become reviewable under increased scrutiny. In the event, Wild J did not accept the second argument advanced by Mr Wolf – that the Tribunal did not approach the balancing exercise.

99 Wolf v Minister of Immigration [2004] NZAR 414, 47, actually misquoting Lord Steyn in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, 28, where his Lordship simply stated: “In law context is everything.”

100 Wolf v Minister of Immigration [2004] NZAR 414, 48.


103 R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, 18 (England and Wales Court of Appeal – Civil) (Laws LJ).

104 Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817.

105 Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3.


107 Wolf v Minister of Immigration [2004] NZAR 414, 60.


correctly — because it was based on a false premise, namely that the Tribunal overlooked Mr Wolf’s interests. Accordingly, there was no necessity to address the appropriate standard of reasonableness.

Regarding Mr Wolf’s primary challenge against the Tribunal’s reasoning process and treatment of the evidence advanced for Mr Wolf, Wild J accepted that if an orthodox standard of reasonableness was applied, the ground would fail, since the decision was not “so perverse or outrageous or illogical that no sensible tribunal could have reached it”. However, as Wild J stated, this was not the appropriate approach:

I consider that a lesser test is appropriate here, because the decision involves the deportation of the appellant, and the consequent breakup of a New Zealand family unit. The appellant would be parted, at least for a number of years, from his two children. That consequence, coupled with New Zealand’s obligations under the international treaties [that the New Zealand Immigration Service cited in its submission to the Minister] in my view oblige this Court to scrutinise the DRT’s decision carefully and closely.

Moreover, Wild J held that “[t]he factors which influenced the Court of Appeal in Woolworths — of an elected body making a decision on subject matter having a high policy content — are both absent here” and that the Court was well-placed to apply the relevant statutory test. Applying that higher level of intensity, Wild J held that the Tribunal’s decision “does not survive close scrutiny” for three reasons:

1. the Tribunal failed to take adequate account of the effect of Mr Wolf’s deportation on his children;
2. the evidence that the Tribunal relied upon was from a non-objective and unreliable source — ie Mr Wolf’s ex-partner; and
3. the Tribunal drew an illogical and unavailable inference from the fact that Mr Wolf concealed his true identity from his children and it acted unfairly by not allowing Mr Wolf to respond to this adverse inference.

On this basis, Wild J allowed Mr Wolf’s appeal and quashed the Minister’s deportation order.

A Continuation of the Cooke Approach

In analysing Wild J’s decision, it is noteworthy that while he was doubtless correct that the Tribunal’s decision would have survived Wednesbury-level scrutiny it is arguable that a higher intensity of review was not necessary to find errors in the Tribunal’s process; other grounds of judicial review would have sufficed. For example, if adverse findings were not put to Mr Wolf for comment, this would have been a breach of natural justice principles — as Wild J noted — and that breach would not have been dependent on any higher intensity of review. That this decision was actually an appeal on a question of law rather than an application for judicial review might explain why this was not a pleaded ground, however, the type of proceeding — which the author has argued elsewhere is essentially irrelevant — does not explain why Wild J could not have simply allowed the appeal on the basis that the Tribunal

1010 Wolf v Minister of Immigration [2004] NZAR 414, [62].
1011 Wolf v Minister of Immigration [2004] NZAR 414, [64].
1012 Wolf v Minister of Immigration [2004] NZAR 414, [11(b)]. Wild J noted that the New Zealand Immigration service had referred “to New Zealand’s obligations under international law, particularly the International Covenant on Civil and Political Rights 1966, the Optional Protocol to that Covenant and the Convention on the Rights of the Child 1989, including the reservation New Zealand had entered to that Convention”.
1013 Wolf v Minister of Immigration [2004] NZAR 414, [65].
1014 Wolf v Minister of Immigration [2004] NZAR 414, [72].
1015 Wolf v Minister of Immigration [2004] NZAR 414, [66].
1016 Wolf v Minister of Immigration [2004] NZAR 414, [66]-[71].
1017 Wolf v Minister of Immigration [2004] NZAR 414, [77].
committed an error of law. As was admitted by the counsel acting for the Crown, if the inference that Mr Wolf hid his true identity from his children meant he did not care for them was unavailable to the Tribunal, as Wild J held that it was, this was an error of law, hence no close scrutiny needed. Counsel presented a false dichotomy: this was not necessarily a proceeding that depended upon higher intensity of review to succeed, yet Wild J was presented with a choice of either applying Wednesbury unreasonableness or accepting that this was not a universal standard and accepting variable intensity of review. The third option was not considered: that the Tribunal simply committed orthodox errors of law. However, notwithstanding this false dichotomy, it is hard to resist that Wild J was correct in his conclusion that the context demanded higher intensity; the nature of the decision-maker, its decision, and the decision’s impact upon Mr Wolf are all positive indicators for such a conclusion. Even if it was not required, the case presented an excellent example of the circumstances that would justify closer scrutiny in judicial review.

While Wild J provided a thorough explanation for why higher intensity of review was justified, the corollary explanation of how “close and careful” scrutiny worked in practice was absent. This was not, for example, a straightforward substitution of the Court’s view for the Tribunal’s, since Wild J’s core concerns with the Tribunal’s decision were procedural: it did not properly take evidence into account; it did not afford Mr Wolf a right of reply. Nor, however, was it clear that further and detailed justification by the Tribunal would have assuaged Wild J’s concerns. It appeared he was troubled by the Tribunal’s conclusions, regardless of how it reached them. Wild J’s failure to articulate a methodology for how a higher intensity of review operates in practice would affect Wolf’s legacy.

Minor quibbles aside, the most important aspect of this decision is its revival and continuation of the Cooke approach. In referring to – and relying upon –

R v Ministry of Defence, ex parte Smith, R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions, and, most importantly, Daly, Wild J described the latest developments in English administrative law and applied them to the New Zealand context in a pragmatic fashion. More than any other judgment that preceded Wolf, Wild J’s cataloguing of those developments and the parallel developments in New Zealand gives this decision the tenor of a judgment from a much higher court. Providing four independent and detailed reasons for why monolithic adherence to Wednesbury nearly 60 years after its delivery was inappropriate, Wild J was able to single-handedly change the course of New Zealand administrative law in a way not seen since the retirement of Cooke from the New Zealand bench. However, as discussed below, the degree of change it fomented was muted; its legacy was unfulfilled.

**WOLF’S LEGACY**

In hindsight, as the first decision in New Zealand to endorse and apply variable intensity of review, Wolf set a trend that was followed by a multiplicity of High Court judgments. However, the higher courts, in long declining to endorse Wolf, notwithstanding a chorus of approval in the courts below, fractured New Zealand’s approach, causing a great deal of inertia, and making Wolf a missed opportunity.

**The Impact of Wolf**

The Minister of Immigration did not appeal Wild J’s decision in Wolf. Soon after it was decided, however, the same judge began to cement its impact. In Heretaunga Residents Assn Inc v Hutt City

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119 Wolf v Minister of Immigration [2004] NZAR 414, [56].
120 Taylor, n 33, [15,10]; Lord Woolf et al, n 62, [11-050], both referring to the second manifestation of error of law in Edwards v Bairstow (1956) AC 14, [61]-[62].
121 R v Ministry of Defence, ex parte Smith [1996] 1 All ER 257 (England and Wales Court of Appeal).
123 R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840 (England and Wales Court of Appeal – Civil) (Laws LJ).
Council. Wild J applied his approach in Wolf to a local authority’s decision not to notify a resource consent granted to a large-scale development. Noting that the Court of Appeal had indicated that variable intensity of review might sometimes be appropriate, he held:

In Pring v Wanganui District Council, the Court of Appeal rejected a submission that the Wednesbury test was unsatisfactory in a resource management setting. However, the Court … indicated that more careful scrutiny “and with a less tolerant eye” will be appropriate where neighbours and users of adjoining streets may well be adversely and directly affected by a development. I respectfully agree with and have adopted that approach. It accords exactly with the view I expressed last month in Wolf v Minister of Immigration …

Twelve months later, he accepted that variable intensity of review was applicable to an appeal against a decision of the Broadcasting Standards Authority and, soon after that, cited and applied Wolf in an application for review against a decision of the Waitangi Tribunal. Although Wild J decided each of these proceedings on grounds other than reasonableness, variable intensity of review had now been applied in four – very different – contexts with case.

Other judges in the High Court were, at first, reticent to adopt the approach. Four months after Wolf was decided, it was relied upon by counsel in another immigration appeal. France J in that decision stopped short of “endorsing” Wolf, but noted that the decision at issue would survive a higher intensity of review. It is noteworthy in itself, however, that the judge felt it necessary to mention the decision at all – this arguably indicates that Wolf represented a new approach. There were similar indications that other judges treated Wolf as representing an innovation. At the end of 2004, Miller J twice noted Wolf as helping establish the proposition that “the more substantial the interference with human rights, the more searching the Court’s scrutiny”. However, it was not until October 2005 that there was a full endorsement of Wolf. Winkelmann J in a successful judicial review of a decision by the Refugee Status Appeals Authority held:

I am satisfied that the time has come when the Wednesbury test of “unreasonableness” is no longer to be regarded as the invariable or universal test in New Zealand public law. The intensity with which a Tribunal’s decisions are scrutinised will vary according to the subject matter in hand. I respectfully agree with Wild J’s useful observations in Wolf v Minister of Immigration.

Since this point, Wolf has become a mainstay of the variable intensity of review architecture, and, in the 13 years since it was decided, Wolf has been cited in 52 different judgments of the High Court. As Knight noted in 2008, Wolf “sought to put the question of the sliding-scale of unreasonableness beyond doubt” and, alongside Ports of Auckland, lay the groundwork that meant, four years after it was decided, “variable intensity or standards of review has now become commonplace in the High Court; a sliding-scale of unreasonableness has replaced the previously

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124 Heretaunga Residents Aotearoa Inc v Hutt City Council (Unreported, High Court of New Zealand, Wild J, 17 February 2004).
125 Heretaunga Residents Aotearoa Inc v Hutt City Council (Unreported, High Court of New Zealand, Wild J, 17 February 2004) [56], quoting Pring v Wanganui District Council [1999] NZRMA 519, 524.
126 Television New Zealand Ltd v Viewers for Television Excellence Inc (2005) NZAR 1 (HC), [20].
127 Chambers v Waitangi Tribunal (Unreported, High Court of New Zealand, Wild J, 23 February 2005) [27].
128 Moe v Minister of Immigration (Unreported, High Court of New Zealand, France J, 13 May 2004).
129 Moe v Minister of Immigration (Unreported, High Court of New Zealand, France J, 13 May 2004) [59].
130 Television New Zealand Ltd v Broadcasting Authority (Unreported, High Court of New Zealand, Miller J, 13 December 2004) [31]; Bleakley v Environmental Risk Management Authority (2005) 11 ELR NZ 289 (HC), [12]. In Bleakley, Miller J expressed the proposition slightly differently, stating that “the more serious the interference with human rights, the closer the Court’s scrutiny”.
131 A v Chief Executive of the Department of Labour (Unreported, High Court of New Zealand, Ronald Young J, 19 October 2005).
132 Search of Westlaw New Zealand, 10 October 2017.
all-embracing Wednesbury standard”. That it lay this groundwork explains why, in 2017, it is Wolf that is cited as authority for the proposition that “the standard of unreasonableness may vary depending on the subject-matter, and more rigorous examination may be required in cases involving fundamental human, civil and political rights”.  

In successive work, Knight’s view has been that Wolf “stands as the leading decision” on variable intensity of review and, most recently, he noted that his endorsement of a sliding-scale of unreasonableness has “assumed particular currency”. The author agrees with Knight and would argue further that it has assumed currency for two key reasons. First, it acted as a pressure release valve – with momentum building both in New Zealand and in the UK to address the unsuitability of Wednesbury, it was the first decision to squarely confront the issue. Secondly, the depth of its analysis made it an attractive decision for other judges to refer to, simply co-opting the reasoning employed by Wild J; no decision since has engaged in such a thorough consideration of the relevant issues. It was this combination of factors that gave it such prominence and allowed it to have the effect that it has. In this way, its significance makes it an administrative law moment.  

Momentousness, however, is not necessarily universally positive and, viewed from another perspective, Wolf ushered in a period – which still continues – of “terminological congestion” Baragwanath J, for example, reiterated and extended the approach he first took in Ports of Auckland, embarking upon a journey similar to that of Wild J. He proposed a “relatively complicated continuum” of approaches in Progressive Enterprises v North Shore City Council and, in Mihos v Attorney-General, without citing Wolf, he proposed a set of factors that would determine the relevant intensity of review. Inspired, but unbound, by either Wolf or Baragwanath J’s judgments, other High Court decisions engaged in their own parallel developments of variable intensity of review. The effect of different judges talking past one another and not following one singular approach was that, by 2006, Taggart could identify eight different standards that could apply under variable intensity of review and, by 2010, Joseph could identify 11 “confounding” and “ostensibly differing” standards in operation. Today, 13 years after Wolf was decided, the position of variable intensity of review is concisely summarised by Palmer J in the recent decision of Deliu v Connell, whose comments appear in the introduction of this article:  

The intensity of the standard of judicial review that should be applied has vexed the New Zealand courts in recent years. There is now a considerable body of academic commentary confirming that common law courts do and should apply variable, variegated or sliding standards of review depending on the context, such as the interests at stake. As Dean Knight has demonstrated, New Zealand courts clearly do so, though they do not always acknowledge it explicitly. A number of High Court decisions and the occasional Court of Appeal decision have invoked American “hard look” or British “anxious scrutiny” language in relation to judicial review, particularly of decisions that affect human rights. Yet the ultimate judicial authority in New Zealand, the Supreme Court, has determinedly refused to adopt any such approach.

134 Knight, n 133, 133.  
135 Smith v Attorney General [2017] NZHC 136 (HC), [114].  
137 Knight, n 26, 79.  
139 Knight, n 133, 130.  
141 Mihos v Attorney-General [2008] NZAR 177 (HC), [107].  
143 Joseph, n 138, 82.  
New Zealand’s clear acceptance of variable intensity of review is largely due to the impact of *Wolf*. However, as Palmer J alludes to above, and as Knight noted shortly after remarking upon *Wolf’s* currency, that impact is limited to the High Court; it has never received endorsement by New Zealand’s higher appellate courts. 145 146 Despite the significant impact *Wolf* has had in the High Court, it has only been cited by the Court of Appeal four times and never by the Supreme Court, the latter of which – as Palmer J notes and discussed below – has never engaged in analysis of variable intensity of review or even explicitly mentioned the concept in its judgments. This has led to the curious situation of judgments having to qualify a proposition as follows: “A line of primarily High Court cases has held that where cases touch on human rights, a greater intensity of review may be required.”146 *Wolf* was cited as the first authority for this proposition, because 13 year after it was decided, there was no higher court authority to take its place.

The Court of Appeal first cited *Wolf* five years after it was decided, in Ye v Minister of Immigration.147 Although it was only mentioned by one judge – Glazebrook J – in a separate judgment, it was by no means a negative reference:

Wild J held [in *Wolf*] that, because the decision involved the break up of the family coupled with New Zealand’s obligations under international treaties, the Court was obliged to scrutinise the decision carefully and closely.146

It is, however, disappointing that this passing reference to *Wolf* is the only analysis it received, given that Glazebrook J had earlier held: “As this is a case involving the fundamental human rights of children, it is one where the courts should apply the standard of ‘anxious scrutiny’.”149 Glazebrook J, in making this statement and citing precedents that had supported variable intensity of review, implicitly accepted the concept, without explicitly endorsing it. Given Glazebrook J accepted the validity of Wild J’s close scrutiny of the decision in *Wolf*, it would have been straightforward to accept this “leading decision” and co-opt his reasoning. That neither the Court nor Glazebrook J did not do so only indicated a reluctance to officially embrace the concept of variable intensity of review.

The second Court of Appeal decision to reference *Wolf* was Huang v Minister of Immigration.150 However, the Court only cited *Wolf* for its analysis of proportionality in the New Zealand context and, in fact, pulled back from Glazebrook J’s limited endorsement of intensity of review.151 The third decision, Singh v Chief Executive, Ministry of Business, Innovation and Employment,152 simply adopted the analysis in Huang (and its treatment of *Wolf*) and noted that the new legislative environment surrounding immigration decisions (that had changed significantly since *Wolf* was decided) effectively limited the Court to a *Wednesbury* unreasonableness inquiry.153

Interestingly, however, the most recent Court of Appeal decision to reference *Wolf* amounted to a firm endorsement both of its approach and variable intensity of review. Quake Outcasts v Minister of Canterbury Earthquake Recovery,154 as the name suggests, related to the devastating earthquakes in the Canterbury region in 2010 and 2011 and, specifically, the government’s response to those landowners who had uninsured properties in areas that were deemed unsalvageable “red zones”. The government offered those uninsured landowners compensation for the value of their land, but not improvements on that land, whereas insured landowners in the same zones were offered compensation.

145 Knight, n 26, 80.
146 Ye v Minister of Immigration [2009] 2 NZLR 596.
147 Ye v Minister of Immigration [2009] 2 NZLR 596, [314].
148 Ye v Minister of Immigration [2009] 2 NZLR 596, [303] (references omitted).
149 Huang v Minister of Immigration [2009] 2 NZLR 700.
150 Huang v Minister of Immigration [2009] 2 NZLR 700, [67].
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for both land and improvements. Although the history and litigation behind the decision is complicated, the central question for the Court was simple: whether the relevant Minister’s decision to discriminate by insurance status was unreasonable. In answering that question, the Court of Appeal held that legislation constrained the Minister’s powers by subjecting them to an objective and judicially reviewable standard of reasonableness; and while merits review should be avoided and the Court should give such weight as it thought fit to the Minister’s expertise and opinion, the standard of review was higher than Wednesbury unreasonable.

The Court also held that this analysis recognised that “the standard of review for reasonableness may vary with context”, before citing and quoting Wild J’s analysis in Wolf as authority for this proposition. The Court of Appeal concluded that the decision was unreasonable, and that the lower court’s application of the Wednesbury standard was in error.

Quake Outcasts was delivered on 1 August 2017, and its reliance on Wolf – a decision of a lower court delivered in 2004 – is revealing. Not only does it affirm Wolf’s status as the leading decision on variable intensity of review, but given there was no higher appellate authority to which it could turn it is also a reflection of the Court of Appeal’s hitherto tepid acceptance of the concept. While the Court of Appeal has certainly applied variable intensity of review, there has been no consistency in (and often little discussion about) that application. This inconsistency is demonstrated by that Court’s decision in Tamil X v Refugee Status Appeals Authority, involving decisions by the Refugee Status Appeals Authority denying refugee status to X and Y. Baragwanath J engaged in an “extensive survey” of decisions to determine the appropriate intensity of review, including adopting the approach he took in Mihos and citing a range of English and Canadian decisions, arriving at a conclusion that a “correctness” standard of review was appropriate in cases involving fundamental human rights. This was, and remains, the most thorough assessment of variable intensity of review that the Court of Appeal has undertaken. However, Baragwanath J’s two brothers on the bench, although agreeing on the result, did not mention the concept once, deciding the relevant issues via a different route. This means that the one Court of Appeal decision that cites Tamil X – Singh – is only notable for its undermining of that analysis:

Baragwanath J rejected Wednesbury in favour of “correctness” as the standard for judicial review of a decision affecting a person’s fundamental human rights. Insofar as the Judge did that, his remarks are not part of the ratio decidendi of Tamil X. They are obiter observations, not supported by the other two members of that Court. Nor, to the best of our knowledge, and, we assume, counsel’s, have they received subsequent endorsement.

The irony of this conclusion, which essentially maligns Baragwanath J’s valuable and extensive discussion of variable intensity and renders it irrelevant, is that it was penned by Wild J – the judge in Wolf, since elevated to the Court of Appeal. Thus, writing in 2010, Knight’s observation that there was a mixed approach to variable intensity of review at the Court of Appeal compared to the High Court’s

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155 The history behind this litigation is provided by Quake Outcasts v Minister of Canterbury Earthquake Recovery [2017] NZCA 332, [7].
156 Quake Outcasts v Minister of Canterbury Earthquake Recovery [2017] NZCA 332, [69].
158 Quake Outcasts v Minister of Canterbury Earthquake Recovery [2017] NZCA 332, [73].
159 Quake Outcasts v Minister of Canterbury Earthquake Recovery [2017] NZCA 332, [92], [77]. The Crown has since settled with the landowners, and is not appealing the judgment to the Supreme Court.
160 Tamil X v Refugee Status Appeals Authority [2010] 2 NZLR 73.
161 Knight, n 136, 406.
162 Tamil X v Refugee Status Appeals Authority [2010] 2 NZLR 73, [272].
full embrace of the concept has only persisted.\textsuperscript{164} One can only hope that \textit{Quake Outcasts} represents the beginning of the reversal of that trend, and not simply an aberration. The outlook is not bright, however, for it still does not provide the depth of analysis required to provide clear and universal guidance for successive cases, and there is a very real risk that it may be confined to its peculiar factual background.

If the Court of Appeal, however, is tepid with regards to its acceptance of variable intensity, New Zealand's highest court has altogether poured cold water on the concept. Both of the Court of Appeal's decisions in \textit{Ye} and \textit{Huang} discussed above were appealed to the Supreme Court, but its judgments mention neither \textit{Wolf} nor variable intensity of review.\textsuperscript{165} Indeed, the Supreme Court has considered variable intensity of review only once, in \textit{Discount Brands Ltd v Westfield (New Zealand) Ltd},\textsuperscript{166} which was decided a year after \textit{Wolf} and, like \textit{Herteaunaga Residents Assn} that followed \textit{Wolf} a month later, involved review of a decision of a local authority not to notify an application for resource consent. The Supreme Court was aware of \textit{Wolf}; the case was raised in argument by counsel for the appellant when it applied for leave to appeal. The interchange is illustrative:

\begin{quote}
\textit{Farmer}: … you'll know the case, I haven't given it to you but I don't think I need to give it to you although we could if you want it. In the House of Lords recently in the \textit{Daly} case.

\textit{Elias CJ}: Those are substantive decisions aren't they? They're not directed at this sort of point.

\textit{Farmer}: I know, it's just a dictum I want to refer to where Lord Steine [sic] said, "In administrative law context is everything" and Justice Lord Cooke [sic] in the same case said something to the same effect and has made the same point elsewhere, a number of Judges have made that point. It's not a new point.

It's referred to more subsequently by Justice Wild in \textit{Wolf v Minister of Immigration} but context is everything and so what we're really saying here is this context that we're dealing with here is the particular context of notification or non-notification decisions ...
\end{quote}

Thus, the Court was aware of \textit{Wolf} and \textit{Daly}, and while, for her part, Elias CJ appeared to distinguish those decisions on the basis that they were "substantive", the argument that a contextual approach in judicial review was appropriate was advanced before them. Thus, it is rather surprising that, while Keith and Blanchard JJ appeared to adopt that argument and apply a more searching standard of review than \textit{Wednesbury}, they did not go so far as to explicitly refer to the concept or discuss it in much depth.\textsuperscript{168} The Chief Justice, on the other hand, declared the analysis unhelpful:

I do not consider that answers are helpfully advanced by consideration of the scope and intensity of the High Court's supervisory jurisdiction to ensure reasonableness in substantive result in the exercise of statutory powers.\textsuperscript{169}

The Supreme Court has stood fast to this position. Knight notes that in the transcript of argument by counsel in \textit{Ye} the Supreme Court "vividly demonstrates\textsuperscript{170}" that it "discloses strong objection to degrees of unreasonableness or attempts to explicitly structure variable intensity of review".\textsuperscript{171} Further, despite the composition of the Court having changed significantly in the past six years (the

\textsuperscript{164} Knight, n 136, 405–407.
\textsuperscript{165} Ye v \textit{Minister of Immigration} [2010] 1 NZLR 104; Huang v \textit{Minister of Immigration} [2009] NZSC 77.
\textsuperscript{166} Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] 2 NZLR 597 (SC).
\textsuperscript{168} Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] 2 NZLR 597. See Knight, n 136, 404–405.
\textsuperscript{169} Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] 2 NZLR 597, [5].
\textsuperscript{171} Knight, n 136, 399.
\textsuperscript{172} Knight, n 136, 401.
Chief Justice is the only judge who was in Ye remaining on the Court), the Supreme Court has not discussed the issue in any of its decisions since.\(^{73}\)

The confusing state of play is as follows: \textit{Wolf} initiated a spate of decisions at the High Court that adopted variable intensity of review such that the concept is now a standard part of the administrative law architecture in New Zealand. Thus, at High Court level, the impact of \textit{Wolf} was significant. Variable intensity of review has been recognised and adopted by the Court of Appeal, but not particularly whole-heartedly and, with the exception of the derided \textit{Tamil X} decision, without any deep analysis of the concept that was found in \textit{Wolf}. Nevertheless, that Court’s recent adoption of \textit{Wolf} in \textit{Quake Outcasts} shows that, not only did \textit{Wolf} give currency to variable intensity of review, it remains one of the leading authorities on the concept. The Supreme Court, on the other hand, has only ever alluded to the concept once, 12 years ago, and has not revisited the issue in an administrative law context, nor does it seem to have any inclination to do so. The impact of \textit{Wolf} in the Supreme Court has been zero, since that Court has both ignored the decision and the momentum it helped create.

\textbf{Wolf as a Crossroads}

From one perspective, it might be easy to put the foregoing analysis down to an acute case of sour grapes; the Supreme Court is under no obligation to adopt the approaches of lower courts. Had the Crown appealed \textit{Wild J}’s decision in \textit{Wolf}, perhaps the Court of Appeal and even the Supreme Court would long ago have had to squarely confront the issue of variable intensity of review and whether \textit{Wild J}’s formal, explicit adoption of the concept was correct in law. The Crown did not appeal, however, and thus it only makes sense that \textit{Wolf} did not have the same immediate impact in the Court of Appeal and the Supreme Court – decisions from the High Court rarely do. Postulating alternative universes where \textit{Wolf} had more of an impact, or was appealed, is simply unproductive navel gazing.

This part argues that the treatment of \textit{Wolf}, viewed in context, represents the start of the problems that have led to the impasse in administrative law today, and indeed the author does not believe that, had the Crown appealed in \textit{Wolf}, New Zealand’s administrative law landscape would be much different. Two claims are made: first, that the failure of higher appellate courts to adopt \textit{Wolf} represented a deliberate departure from the Cooke approach outlined above; and secondly, that such a departure is deeply problematic.

\textbf{A Departure from the Cooke Approach}

There are numerous indications that the failure of the Supreme Court and, until recently, the Court of Appeal to adopt \textit{Wolf}’s approach is not simply the machinations of stare decisis. The first indication is that while those higher appellate courts are not bound by \textit{Wolf} – or even under a duty to consider the decision – it is still on their radars. This is evidenced by counsel citing the case in argument before the Supreme Court in \textit{Discount Brands} and, obviously, the Court of Appeal in \textit{Quake Outcasts} explicitly adopting and relying upon \textit{Wolf} as authority for variable intensity of review. Although it took the Court of Appeal 13 years to do so, its adoption of a case with “particular currency”\(^{74}\) shows that there is no formal reason why the Supreme Court cannot also give it due consideration, even if it is simply High Court authority.

The second indication is the raft of decisions that followed \textit{Wolf} and its approach – it is telling that cases today still refer to \textit{Wolf} as a leading case justifying variable intensity of review.\(^{75}\) While \textit{Wolf} itself was not appealed, some of the decisions that endorsed the \textit{Wolf} approach referred to above were. One of these, \textit{Powerco Ltd v Commerce Commission,}\(^{76}\) is illustrative. Although it was an interlocutory application for better discovery and for cross-examination of witnesses, \textit{Wild J} – the

\(^{73}\) The concept of intensity of review was mentioned by Tipping J in \textit{Hansen v R} [2007] 3 NZLR 1 (SC), [115]. However, this was not an administrative law case, but rather a criminal appeal involving the \textit{New Zealand Bill of Rights Act 1990} (NZ), and thus his use of the concept is arguably inappropriate: see H Wilber, “The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment” (2013) 25(4) New Zealand Universities Law Review 866, 892–893.

\(^{74}\) See, eg, \textit{Smith v Attorney General} [2017] NZHC 136 (HC).

\(^{75}\) \textit{Powerco Ltd v Commerce Commission} (Unreported, High Court of New Zealand, \textit{Wild J}, 9 June 2006).
same judge in *Wolf* - provided a thorough analysis of the relevant substantive issues. While *Wolf* was only cited for its proportionality analysis,\(^{177}\) since the "proceedings rather test the bounds of judicial review",\(^{178}\) Wild J re-embarked on a further analysis of the state of variable intensity of review in New Zealand. He held, just as he did in *Wolf*, that "unreasonableness has undoubtedly, and the author’s view correctly, moved away from the single Wednesbury standard or test, to an intensity of review appropriate to the subject matter".\(^{179}\) Wild J then cited a number of decisions and commentators that agreed with this view.\(^{180}\) The decision was appealed, and in the Court of Appeal’s judgment, while both parties agreed that "Wild J has set out the relevant principles and properly acknowledged the scope of judicial review",\(^{181}\) the Court did not express any view as to whether they too were in agreement. The Court *alluded* to variable intensity of review being a recognised concept when it agreed with Wild J that "matters such as the proper scope of judicial review and of the standard of review will be determined at trial as will whether any unreasonableness or irrationality has reached the required threshold",\(^{182}\) but never actually recognised the concept. Once again, this might be put down to a lack of necessity – this was an appeal against an interlocutory decision of the High Court and not the occasion for a thorough analysis of substantive principles. However, it was still an opportunity to give the issue at least some consideration rather than make vague allusions to it, and yet the Court chose the latter course. Similarly, *Quake Outcasts* does little more than adopt *Wolf*. Its analysis of determining the standard of review is helpful but limited, and its application of that standard is only implicit; substantive, universal guidance and deep analysis on variable intensity of review was possible in this case, but it did not eventuate.

It is not only the High Court that has put the Court of Appeal and Supreme Court on notice that the issue of variable intensity of review requires deeper analysis. As Knight notes on the various approaches of each court to the issue: "This mixed – and quite polemic – set of judicial views sits uncomfortably with the recognition of variable intensity by the local academic and professional authors."\(^{183}\) New Zealand’s administrative law community mirrored its English counterpart by making variable intensity of review its cause célèbre in the years following *Wolf*. Taggart first outlined his "rainbow” analogy for analysing variable intensity of review shortly after the *Powerco* cases were decided in 2006.\(^{184}\) He noted that, given the various developments at the High Court level, "the hope must be that a stage will be reached when there are enough dots to allow our higher courts to connect them and reveal a coherent picture. At the moment the law is dotty".\(^{185}\) Two years later, in producing his seminal "Proportionality, Deference, *Wednesbury*",\(^{186}\) he was rather more direct: "The law at present is messy, not to say chaotic. The New Zealand Supreme Court needs to address these issues urgently."\(^{187}\) Two years after Taggart’s piece, the *New Zealand Law Review* dedicated an entire issue

\(^{177}\) *Powerco Ltd v Commerce Commission* (Unreported, High Court of New Zealand, Wild J, 9 June 2006) [14].

\(^{178}\) *Powerco Ltd v Commerce Commission* (Unreported, High Court of New Zealand, Wild J, 9 June 2006) [18].

\(^{179}\) *Powerco Ltd v Commerce Commission* (Unreported, High Court of New Zealand, Wild J, 9 June 2006) [23].

\(^{180}\) *Powerco Ltd v Commerce Commission* (Unreported, High Court of New Zealand, Wild J, 9 June 2006) [23]; [25].

\(^{181}\) *Commerce Commission v Powerco Ltd* (Unreported, Court of Appeal of New Zealand, Glazebrook, Robertson and Ellen France JJ, 9 November 2006) [37].

\(^{182}\) *Commerce Commission v Powerco Ltd* (Unreported, Court of Appeal of New Zealand, Glazebrook, Robertson and Ellen France JJ, 9 November 2006) [33].

\(^{183}\) Knight, n 136, 408.

\(^{184}\) Taggart, n 142, 82.

\(^{185}\) Taggart, n 142, 89.

\(^{186}\) Taggart, n 5.

\(^{187}\) Taggart, n 5, 481.
in its honour (and Taggart’s significant contribution to the field generally). As Taggart noted in 2008, there was a “torrent of discussion on this topic”, one that has not abated.\textsuperscript{188}

The Supreme Court did not heed Taggart’s call and, until recently, the Court of Appeal has been milquetoast in its recognition and discussion of variable intensity of review. Each forum has had the opportunity to consider the issue in depth, but has consistently declined to do so. The explanation for declining this opportunity – particularly at the Supreme Court level – is more difficult to ascertain. Certainly, it is partly out of disdain for the debate; the Chief Justice’s remarks make it clear that her view is that discussion over the concept is akin to “dancing around on the heads of pins”\textsuperscript{189} and is “a New Zealand perversion of recent years”.\textsuperscript{190} However, her disliking the debate surrounding the concept is only part of the answer.

Although the Chief Justice’s disdain could be taken as indicating she instead favours the old, monolithic approach of Wednesbury as a singular standard, quite the opposite in fact is true – the Chief Justice has indicated extra-judicially that she is in favour of unstructured contextualism without the need for any formal, structured inquiry.\textsuperscript{191} Upon revealing this preference at the Sir David Williams Lecture, which she delivered in Cambridge in May 2008 at the same time the “torrent” of discussion Taggart referred to was occurring, the Chief Justice indicated that she preferred a more indigenous approach to resolving the issue. Thus, while she noted that “[a]n antipodean perspective will not be startling because New Zealand law is generally comparable to United Kingdom administrative law”,\textsuperscript{192} it was not identical, and:

At the risk of being taken to admit an anti-intellectual strand in New Zealand law, it is necessary to acknowledge that we have tended to pick our way by the simpler path, as Lord Cooke of Thorndon always urged …\textsuperscript{193}

Cooke, she argued, had a straightforward approach: the grounds for review were simple and there was no need for any amplification of reasonableness, since it took its shape from context.\textsuperscript{194} The Chief Justice was “not sure why we have strained so long at this. Contextual standards apply throughout the law”.\textsuperscript{195} More recently, in the comments referenced above, she has reiterated that view, proclaiming that she comes “from a jurisdiction which, although long in scholarly tradition in public law, has a judicial tradition which has generally taken the simple path of optimistic contextualism and is thought to be short in doctrine”.\textsuperscript{196} Thus, a more complete answer to the lack of Supreme Court input in the discussion over variable intensity of review is its disdain for doctrine: it believes any discussion was unnecessary at best, unhelpful at worst. Why have a discussion on an issue that is resolved so simply with a focus on context?

If this is the Antipodean approach favoured by the Chief Justice – one that apparently takes its lead from the guidance of Cooke himself – then there is a significant irony in her adoption of that approach: it fundamentally undermines the Cooke approach. As outlined above, the Cooke approach


190 Transcript of Proceedings, Astrazeneca Ltd v Commerce Commission, Supreme Court of New Zealand (SC 91/2008, Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ, 8 July 2009) 52, quoted by Knight, n 136, 402; Rodriguez Ferrere, n 189, 204.


192 Elias, n 191, 48.

193 Elias, n 191, 48–49.

194 Elias, n 191, 65–66, citing Cooke, n 26; S: R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, 549.

195 Elias, n 191, 66.

196 Elias, n 3, 1.

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had two constituent parts: first, the explicit adoption of leading English authority; and secondly, the simplification or adaptation of that approach to suit the New Zealand context. The Chief Justice, in taking only the latter part of the Cooke approach – simplification – has, in the author’s opinion, forgotten the other constituent element: the Court has to adopt an approach in order to simplify it. Thus, while Cooke stated 30 years ago that “[t]he time has probably come to emphasise that New Zealand administrative law is significantly indigenous”, 197 he could not have denied that more often than not that indigeneity starts with English precedent as its bedrock. This approach was demonstrated in Cooke’s own cases, as shown above.

In this way, the author believes the refusal to discuss or refer to Wolf is a departure from the Cooke approach. As argued above, Wild J’s judgment encapsulates the Cooke approach: a review and an acceptance of leading English authority, applied and simplified in the New Zealand context. The Supreme Court, in refusing to either discuss relevant authorities or the approaches referred to in Wolf, let alone adopt them, has not satisfied the condition precedent for engaging in the simplification process the Chief Justice has advocated for.

The Danger of Departing from the Cooke Approach

The foregoing discussion of Wolf’s legacy reveals the danger in departing from the Cooke approach: disarray at the High Court level. Although it may seem elementary to state as such, Wild J’s decision in Wolf was – and could only ever represent – persuasive authority in the High Court. It did not bind his colleagues on the bench; they were free to ignore his approach, follow it in its entirety or, as many did, apply a hybrid of those two options. As identified above, one problematic aspect of Wolf is its lack of explanation as to how a higher level of intensity operates in practice; other High Court decisions were left to fill that gap and did so in a less than consistent manner. Without binding Court of Appeal precedent as to the rationale for and approach to variable intensity of review and without Supreme Court precedent even discussing the issue, the High Court was left without any guidance to follow, and the theoretical chaos that Taggart lamented was an inevitability.

The author has written elsewhere about the problems that result from a failure by the Supreme Court to provide clear guidance on the approach to appeals against discretionary decisions. 198 On that issue, the author argued that “incomplete guidance from the Supreme Court has led to confusion in lower courts on how to classify appeals and apply that guidance”. 199 Regarding the issue of variable intensity of review, however, the guidance is not just incomplete, it is completely absent. As Knight notes, while there may be debate on whether the Supreme Court should explicitly endorse the concept – as the High Court has done – “[t]he strong commitment of New Zealand courts to contextualism means techniques which involve different degrees of scrutiny are inevitable”. 200 A preference for such contextualism – as exhibited by the Chief Justice, for example – means that variable intensity of review is already part of the architecture in New Zealand administrative law, the horse has already bolted. However, “the courts are generally quite coy about explicitly embracing the notion of variability or providing any firm scaffolding for its deployment”, 201 and it is this policy of neither confirming nor denying its existence – let alone how it should operate – that is the cause of the inconsistency in the lower courts.

Joseph, a proponent of contextualism, argues that New Zealand should abandon its examination of variable intensity review:

Judicial review suffers from terminological congestion and is in need of simplification. How might this be achieved? Answer: Jettison the Wednesbury ground of review and its variegated applications

197 Budget Rent A Car [1985] 2 NZLR 414 (CA), 418.


199 Rodríguez Ferrere, n 198, 840.

200 Knight, n 136, 399.

201 Knight, n 136, 399.
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(variable intensity review). *Wednesbury* and variable intensity review remain the primary source of pedagogical confusion in administrative law today. 202

He argues that the various standards and terminology used by lower courts “lack methodological coherence” and “clutter the administrative law curriculum but offer no guidance for bench or bar”. 203 However, the “wholesale pruning” 204 he argues is necessary – the abandonment or jettisoning he argues is preferable – still requires action from the Supreme Court. Whether it chooses to provide scaffolding – as Knight would prefer – or chooses to pull that scaffolding down – as Joseph would prefer – the Supreme Court needs to make a choice, and the longer it refrains from doing so, the more complicated and confused the situation will become.

Is this inaction itself a deliberate choice? Perhaps it represents an assumption by the Supreme Court that so long as it does not make a clear choice on New Zealand’s approach to variable intensity of review, the complication and the confusion in the lower courts will eventually subside and fade. Certainly, by not making a choice it avoids talking about the issue, which is a “saving grace”, according to Joseph. 205 Since variable intensity of review requires calibration of that intensity or deference, how to best engage in that calibration process has occupied the minds of many jurists and practitioners; however, this is something that, for Joseph, fortunately does not occur in New Zealand:

“New Zealand lawyers are spared the extraordinary complexities English lawyers have dreamed up in their unrequited quest for doctrinal formalism ... Happily, deference scholarship has not afflicted the New Zealand courts or academy.” 206

If inaction by the Supreme Court is a deliberate choice in order to avoid this affliction, this certainly represents an indigenous and unique approach to the issue, but not in the way that Cooke would have advocated. It is a very risky approach. As long as the issue is analysed openly and thoughtfully in English courts, academic commentators and lower courts in New Zealand will continue to analyse the issue. But without any firm guidance from New Zealand’s highest court that analysis will be unmoored and directionless.

On the other hand, if the Court chooses to engage in the issue, the affliction of complexity Joseph refers to is not an inevitability. It is avoidable by taking the Cooke approach. If the Supreme Court looks to English precedent in all its complexity and confusion and proposes a simplified approach to variable intensity of review, it will be following in the footsteps of Cooke and, at the same time, will clear all the uncertainty that is rife in the lower courts. Unwittingly, by failing to apply the Cooke approach in this instance – and accepting and extending Wild J’s approach in *Wolf* – New Zealand has departed from its traditional approach of following then simplifying the English approach to administrative law, and it is all the poorer for it.

CONCLUSION

This article has explained the circumstances that have led to the current affliction facing administrative law in New Zealand. Until 1996, the Cooke approach operated to create an indigenous and unique canon of administrative law, but one that still used English precedent as its lodestar. Following the departure of Cooke, rapid developments in England put pressure on New Zealand to review the continuing suitability of *Wednesbury* reasonableness. While there were whispers at many levels about abandoning it as a monolithic standard, the roar came in the form of *Wolf*. Wild J’s comprehensive analysis and continuation of the Cooke approach by accepting English precedent and modifying variable intensity of review for the New Zealand context represented the most significant shift in New Zealand administrative law since the departure of Cooke in 1996. *Wolf*’s thoroughness started a conversation – one that invited higher courts to participate and determine New Zealand’s approach to the issue.

202 Joseph, n 138, 81.
203 Joseph, n 138, 82.
204 Joseph, n 138, 82.
205 Joseph, n 138, 86.
However, that conversation was one that the Court of Appeal has rarely engaged in and the Supreme Court has refused to acknowledge. A multitude of High Court decisions approved Wild J’s approach in *Wolf* or developed their own approaches to variable intensity of review, and this momentum — coupled with the clamour from the academe — made the case and the issue near impossible to ignore. Yet ignore it those Courts did. Muted acknowledgement by the Court of Appeal was only outdone by the deafening silence from the Supreme Court on what New Zealand’s approach to variable intensity of review ought to look like. There are indications that this decision is deliberate and that the Supreme Court believes that simple but covert contextualism is the right approach. They are, however, only indications. In refusing to deal with the issue, the Supreme Court has failed to provide any clear guidance that could resolve the confusion that has now proliferated at the High Court level. This silence represents a risky departure from the Cooke approach; there are a plethora of approaches and precedents from England from which to choose and modify for the New Zealand context, just as Wild J did in *Wolf*. Creating an indigenous approach by omission is simply not following in the footsteps of Cooke, regardless of how simple that technique might be.

The Chief Justice has remarked extra-judicially: "[W]e cannot expect this area of law to stand still. And although I acknowledge with gratitude the illumination provided by good scholarship in this area, of which there is much, is the search for better doctrine … ultimately doomed."

307 Elias, n 3, 23.

332 (2017) 28 PLR 310