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LEGAL REASONABLENESS: AN ORIGIN STORY

I INTRODUCTION

This paper considers the question 'Is the duty to act legally reasonably sourced in statute, or elsewhere?'. The reason this question holds such interest is the implications of such a finding on the availability of judicial review.

In judicial review, the ground of legal reasonableness governs the exercise of power and aims to prevent abuse of that power.[1] It is undisputed that legal reasonableness can operate a limit on statutory power in Australia. [2] But it is less clear whether a duty to act legally reasonably exists outside statute and can therefore operate as a limit on non-statutory powers.

The High Court of Australia has recently been caused to consider the source of this duty. At the time of writing, the High Court has reserved its judgment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*Davis*').[3] This paper seeks to address the source of legal reasonableness with particular reference to the arguments put forth in *Davis,* those being the most contemporary arguments being advanced on this topic. Although brief mention will be made to private power, this essay will focus on non-statutory government power.

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[1] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 [123] (Gummow J) ('*Eshetu*').

[2] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [29] (French CJ) quoting *Kruger v The Commonwealth* (1997) 190 CLR 1, 36 (Brennan CJ), [63] (Hayne, Kiefel and Bell JJ), [88]-[91] (Gageler J) ('*Li*').

[3] *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Ors* (High Court of Australia, M32/2022, commenced 12 May 2022) ('*Davis*').

The paper proceeds as follows. Part II begins by briefly describing the content of the duty of legal reasonableness in Australia, before explaining the significance that the duty's source holds for non-statutory government power and private power. Part III analyses some of the most salient arguments put forward in support of reasonableness being sourced in statute alone. These include the methodology of the High Court in cases concerning reasonableness, the difficulty in identifying justiciable limits on power without a statute to construe, and the purported adequacy of other mechanisms to address unlawful exercise of non-statutory powers. Each of these arguments will be refuted and it be concluded that legal reasonableness is a duty that exists outside of statute. Two potential other sources of the duty will be discussed but not determined: the common law, and the relevant grant of power.

II THE DUTY OF LEGAL REASONABLENESS

A *The Duty*

The duty of legal reasonableness is founded in the principle that discretionary powers should be exercised reasonably.[4] In policing this ground of review courts tread a fine line between adjudicating the lawfulness of a decision and deciding its merits.[5]

Reasonableness in the context of statutory powers is discussed authoritatively in *Minister for Immigration and Citizenship v Li* ('*Li*').[6] In that case the High Court confirmed the presumption that Parliament intends for discretionary powers conferred by statute to be exercised reasonably.[7] Hayne, Kiefel and Bell JJ clarified and re-formulated the notion of 'reasonableness' set out in *Associated Provincial Pictures House Ltd v Wednesbury Corporation* ('*Wednesbury*'). Their Honours explained that a decision is unreasonable if no

4 *Rooke's Case* (1597) 5 Co Rep 99b, 100b (Coke LJ); *Associated Provincial Pictures House Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene MR) ('*Wednesbury*').

5 *Li* (2) [66] (Hayne, Kiefel and Bell JJ).

6 *Li* (n 2).

7 *Li* (n 2) [29] (French CJ) quoting *Kruger v The Commonwealth* (1997) 190 CLR 1, 36 (Brennan CJ), [63] (Hayne, Kiefel and Bell JJ), [88]-[91] (Gageler J).

reasonable decision maker, who had appropriate understanding and regard of the power in question, would have reached the same decision.[8] This broad concept encompasses a number of 'more specific errors' including where the decision maker has accorded more or less weight than was reasonably necessary to various factors.[9] Such an error might reveal itself in the decision being an obviously disproportionate response when measured against the scope and purpose of the discretionary power.[10] In this way a court might find a decision to be unreasonable even where the reasons for the decision are inscrutable. The decision will be unreasonable if it 'lacks an evident and intelligible justification.'[11] A decision that is legally unreasonable can be an error that goes to jurisdiction.[12]

B *Significance of the question*

If the duty of reasonableness is sourced outside of statute, then a broader range of powers and decisions may be susceptible to judicial review. Two other sources of power are considered in this section. They are private power and non-statutory executive power.

Where non-governmental bodies engage in quasi-judicial decision making, questions have been raised about whether those decisions should be subject to judicial review on the established grounds of review. These questions have arisen across common law jurisdictions. In Canada, some courts have allowed judicial review for decisions of churches and other voluntary organisations.[13] However, the Supreme Court of Canada recently restricted that position by clarifying that decisions need to be public in a legal sense, and must concern

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8 *Li* (n 2) [71] (Hayne, Kiefel and Bell JJ).
9 *Li* (n 2) [72] (Hayne, Kiefel and Bell JJ).
10 *Li* (n 2) [71]-[74] (Hayne, Kiefel and Bell JJ).
11 *Li* (n 2) [76] (Hayne, Kiefel and Bell JJ).
12 *Li* (n 2) [85] (Hayne, Kiefel and Bell JJ).
13 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall* [2018] 1 SCR 750 [17] (Rowe J) ('*Jehovah's Witnesses v Wall*').

questions of rule of law in order to be susceptible to review.[14] The Court was also at pains to note that courts should not decide matters of religious dogma.[15]

The decisions of organised sporting bodies or their tribunals have also been called into question by applicants seeking judicial review. Such cases include a decision by a club to exclude a certain member of the public.[16] More recently and closer to home, participants have sought review of disciplinary sanctions imposed by their sporting organisation. In *White v SA Amateur Football League Inc* ('*White*')[17] an Australian Rules football player sought a quashing order in relation to a suspension on grounds that he was denied procedural fairness.[18] There was dispute about the Supreme Court's jurisdiction to grant orders in the nature of judicial review, since the decision-maker was a voluntary sporting body.[19] As the Court was able to rely on its statutory power to issue binding declarations[20] it was unnecessary to decide the judicial review issue.[21] The following month a similar argument was raised by an equestrian seeking the quashing of a suspension handed down by Equestrian Australia.[22]

A murkier issue arises when private bodies exercise public power. The position in the United Kingdom differs to, and contributes to, the uncertainty of the law in Australia. At present it is sufficient to note that in that jurisdiction *R v Panel on Takeovers and Mergers; Ex parte Datafin* ('*Datafin*')[23] has determined that such bodies, when exercising non-statutory public

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14 *Jehovah's Witnesses v Wall* (n 13) [16]-[22] (Rowe J).
15 *Jehovah's Witnesses v Wall* (n 13) [36] (Rowe J).
16 *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242.
17 [2022] SASC 85 ('*White*').
18 Ibid [1]-[4] (Tilmouth AUJ).
19 Ibid [29] (Tilmouth AUJ).
20 *Supreme Court Act 1935* (SA) s 31.
21 *White* (n 17) [29] (Tilmouth AUJ).
22 *Thomas v Equestrian Australia Limited* (Supreme Court of South Australia, directions hearing, commenced 9 September 2022); Sean Fewster, 'Rider blasts 'unfair' ban', *The Advertiser* (Adelaide, 24 September 2022).
23 [1987] 1 QB 815 ('*Datafin*').

power, may be subject to judicial review on the traditional grounds.[24] The applicability of *Datafin* to Australian administrative law is uncertain.[25] The High Court has thus far avoided answering this question.[26] A determination that legal reasonableness exists as a free-standing duty outside of statute goes some way to bringing *Datafin* into Australian law, as it opens the door to review of powers not sourced in statute.

Most recently, the High Court has considered the source of legal reasonableness in relation to the non-statutory powers of the Executive Government being exercised directly by the Executive. In *Davis* the purported decision was a decision by a departmental official not to refer to the Minister some requests that the Minister consider exercising his non-compellable 'dispensing power'[27] to substitute a decision of the Administrative Appeals Tribunal with one more favourable to the applicants.[28] Previous High Court authority has held that such decisions by departmental officers are 'anterior' to the statutory process and therefore non-statutory decisions.[29]

This category of non-statutory executive power is not a prerogative power in the sense of the 'true' prerogative, those being powers 'which the King enjoys alone'.[30] Unlike prerogative powers, non-statutory non-prerogative powers are said to be consensual in nature, and

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24 *Datafin* (n 23) 839 (Donaldson MR), 847 (Lloyd LJ).

25 *Khuu & Lee Pty Ltd v Adelaide City Corporation* (2011) 110 SASR 235 [30] (Vanstone J, Sulan J and Peek J agreeing); *L v South Australia* (2017) 129 SASR 180 [137]-[154] (Kourakis CJ, Parker J and Doyle J agreeing); *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 [74]-[81] (Basten JA).

26 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 [51] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Offshore Processing Case*').

27 *Migration Act 1958* (Cth) s 351.

28 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 [5] (Kenny J), [176]-[183] (Charlesworth J) ('*Davis* Full Court').

29 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 [46], [52] (French CJ and Kiefel J), [91] (Gummow, Hayne, Crennan and Bell JJ) ('*Plaintiff S10*'); *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 [47] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ) ('*SZSSJ*').

30 *Davis v The Commonwealth* (1988) 166 CLR 79, 108 (Brennan J) quoting William Blackstone, *Commentaries on the Laws of England, Book 1*) (1765) 232.

incapable of unilaterally affecting legal rights.[31] Also called third source powers, these capacities encompass the freedom of the government to do all things that are not legally prohibited including, inter alia, writing reports, curating or disseminating information and entering into contracts.[32] It is submitted that even if third source powers cannot affect rights, after appreciating the types of activities that can be classified as third source powers it becomes clear that those powers can affect interests. For instance, the writing of a report about a particular individual, using non-coercive means, could be an exercise of a third source power. If such a report cast the subject in a negative light it would be capable of impacting the subject's reputation and prospects. If the exercise of these non-statutory powers is conditioned by a duty of legal reasonableness then the existence of that duty would provide an important protection for individuals who are affected by the might of 'human machinery' that implements executive power.[33] Such powers have been reviewable in traditional grounds of judicial review in the United Kingdom since the decision of *Council of Civil Service Unions v Minister for the Civil Service* ('*CCSU*').[34]

III ANALYSIS

The starting point for determining the source of the duty of reasonableness is that 'all power of government is limited by law.'[35] This is a matter of first principles.[36] The enquiry then asks whether legal reasonableness operates as a limit on all powers that are not granted by statute. Arguments put against this proposition are numerous. Three will be considered by this paper:

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31 *Clough v Leahy* (1904) 2 CLR 139, 156-7 (Griffith CJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 [135]-[136] (Gageler J) ('*Plaintiff M68*'); BV Harris, 'The "third source" of authority for government action' (1992) 108(Oct) *Law Quarterly Review* 626, 626-7.

32 Harris (n 31) 626-7; Fiona Wheeler, 'Judicial Review of Prerogative Power', (1992) 14(4) *Sydney Law Review* 393, 443.

33 *Comcare v Banerji* (2019) 267 CLR 373 [67] (Gageler J).

34 [1985] AC 374.

35 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon)

36 Ibid [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon).

first, the proposition that legal reasonableness is a principle of statutory construction only;[37] second, the argument that no sufficiently identifiable legal limits can be discerned by courts in the absence of a statute and therefore no legal standard of reasonableness is capable of being enforced in relation to non-statutory powers;[38] and third, that assertion that an expansion of judicial review is rendered unnecessary by other legal and constitutional means of limiting non-statutory power.[39] In order to establish that legal reasonableness exists outside of statute the first proposition will be proved to be incorrect, and the last two will be shown to be no reason to deny legal reasonableness as a condition on non-statutory powers.

A *The case for a statutory source*

The High Court's methodology in determining legal limits and jurisdictional error has consistently called for a process of statutory construction by reference to the text, context and purpose of the power.[40] This methodology has underpinned arguments that legal reasonableness arises as an implication of legislative intent.[41] The proposition rejects a free-standing common law limit.[42] The plainest response to this assertion is that the Court has couched their approach in terms of statutory construction because the cases at hand concerned statutory powers. It would be simple enough for the Court in *Davis* to distinguish

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37 Secretary of Department of Home Affairs and Attorney-General of the Commonwealth of Australia, 'Submissions of the first Respondent and the Attorney-General of the Commonwealth of Australia' submission in *DCM20 v Secretary of Department of Home Affairs*, M32/2022, 1 August 2022, [43]-[44] ('Cth submissions').

38 Attorney-General of New South Wales, 'Submissions of the Attorney-General of New South Wales (Intervening)' submission in *Davis v Secretary of Department of Home Affairs*, M32/2022, 15 August 2022, [9] ('NSW submissions').

39 Cth Submissions (n 37) [29].

40 *Li* (n 2) [24], [26] (French CJ), [67] (Hayne, Kiefel and Bell JJ) [88]-[90] (Gageler J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 [40]-[41] (Gaudron and Gummow JJ); *Eshetu* (n 1) [124]-[127] (Gummow J); *Kioa v West* (1985) 159 CLR 550, 610-11 (Brennan J); *Minister for Immigration and Border Protection v SZVFW* (2018) CLR 541 [131] (Edelman J); *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

41 Wheeler (n 32) 463.

42 *L v South Australia* (n 25) [104] (Kourakis CJ, Parker J and Doyle J agreeing); *Kioa v West* (n 40) 610 (Brennan J).

those authorities on that basis. The text of section 75(v) of the *Constitution* contains no requirement restricting the jurisdiction of the High Court to statutory powers.[43]

The assertion that legal reasonableness arises only by way of statutory construction is difficult to reconcile with the principle that in Australia justiciability is no longer determined by reference to the source of the power.[44] Granted, that is not the same as saying that a traditional ground of judicial review automatically exists as a free-standing principle sourced in the common law or elsewhere. But where a non-statutory power is highly analogous to a power that could be conferred by statute because its affectation and subject matter are clearly administrative and individualised, it is difficult to see why that power should not be subject to review on reasonableness grounds.[45] This is especially so when a power is closely related or anterior to a statutory power, as in *Davis*. It would be incongruous if the Minister exercising the statutory power personally would be bound by reasonableness, but his officers would not be so bound when they process the very same requests for his attention.[46]

The statute-only argument is further eroded by recognition that grants of power in other areas of law can be conditioned by legal reasonableness.[47] Discretionary powers granted under a trust, contract or will can attract the duty.[48] Indeed, Gummow J held that the condition of reasonableness implied by statutory construction has evolved by analogy to the principles involved in control of private law discretions.[49]

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43 *Davis* Full Court (n 28) [300] (Charlesworth J).

44 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278 (Bowen CJ), 280 (Sheppard J), 303-4 (Wilcox J) ('*Peko-Wallsend*'), applying *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

45 Wheeler (n 32) 472.

46 *Jabbour v Secretary, Department of Home Affairs* (2019) 269 FCR 438 [101] (Robertson J) ('*Jabbour*'); *Davis* Full Court (n 28) [295], [305] (Charlesworth J).

47 Attorney-General of South Australia, 'Submissions of the Attorney-General of South Australia (Intervening)' submission in *Davis v Secretary of Department of Home Affairs*, M32/2022, 15 August 2022 [28] ('SA submissions').

48 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 [134 (Edelman J); *Bundanoon Sandstone v Cenric Group* (2019) 373 ALR 591 [154] (Gleeson JA); *Re Marsella (No 2)* [2019] VSC 65.

49 *Eshetu* (n 1) [124] (Gummow J).

B *Identification of legal limits*

It has been argued that without the benefit of a statutory text, context and purpose to construe, no sufficiently justiciable legal limits on power can be identified and therefore there is no basis for a court to determine that the decision maker has acted unreasonably.[50]

For simplicity it is assumed that a Commonwealth officer's source of power in respect of non-statutory decisions is the *Constitution,* being either section 61 alone or sections 61 and 64 read together. The powers conferred by section 61 are diverse.[51] The language therein describes but does not define executive power, which can be understood only in its historical and structural context.[52] Therefore any limits on power that could be policed by a duty of legal reasonableness would need to be discerned from the express or implied conditions of the *Constitution.* If the limits are located at such a high-level it follows that those limits, beyond which a decision maker would act unreasonably, are extremely non-specific. The Federal Court has not been troubled by this obstacle, holding that determining reasonableness by reference to the decision-making process is possible.[53] Obviously this becomes difficult where no reasons for the decision are extant. Such broad limits means that grounds for review on reasonableness grounds will be narrow. But a narrower basis for review compared to statutory decisions does not mean that judicial review is unavailable.[54]

An argument that could reside in either this section or the next is that the identification of legal limits is unnecessary since the powers in question are by their nature self-limiting.[55] As mentioned above, third source powers are consensual, unable to unilaterally affect legal rights

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50 Attorney-General of Victoria, 'Submissions of the Attorney-General of Victoria (Intervening)' submission in *Davis v Secretary of Department of Home Affairs*, M32/2022, 15 August 2022, [35]-[43] ('Vic submissions').

51 Bradley Selway, 'All at Sea – Constitutional Assumptions and 'the Executive Power of the Commonwealth"' (2003) 31(3) *Federal law Review* 495, 506.

52 *Plaintiff M68* (n 31) [129] (Gageler J).

53 *Jabbour* (n 46) [102] (Robertson J); *Davis* Full Court (n 28) [118] (Mortimer J), [62], [96] (Griffiths J), [298] (Charlesworth J).

54 *Jabbour* (n 46) [92] (Robertson J).

55 NSW Submissions (n 38) [10], [12]; SA Submission (n 47) [29]-[30].

and are susceptible to control by Parliament.[56] It can be said that powers that are so restricted in their capability to interfere with others do not merit the interference of judicial review.[57] Whilst this might be true for third source powers, it is not true for the coercive powers of the true prerogative.[58] Therefore it cannot be broadly said on this basis that there is no need for judicial review of non-statutory powers.

C *Alternative remedies*

It might be said that not every problem of public law requires an administrative law solution. New South Wales asserted in *Davis* that 'not every power and function rooted in the *Constitution* is cognizable by the courts, and the legislature and the Executive may be final interpreters of some duties.'[59] The human machinery of government functions against the backdrop of inherent political accountability.[60] It has been held that ministerial accountability, disciplinary action, and other public-law accountability mechanisms such as the Ombudsman provide sufficient governance over non-statutory decision makers.[61] This ignores the practical reality that 'the increasing activities of government affecting citizens has led to a situation where ministerial responsibility is not able to reach down far enough to supervise the detailed dealings of government with members of the public.'[62] Ministerial responsibility alone cannot provide sufficient accountability in modern government.[63] *Davis* provides an excellent example. The very scheme concocted by Parliament in section 351 of the *Migration Act 1958* (Cth) is intended to shield the Minister from these requests by making the power non-compellable. By 'reaching down' far enough to supervise every request made under a dispensing provision the Minister runs the risk of making a procedural

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56 *Plaintiff M68* (n 31) [128] (Gageler J).
57 *Griffith University v Tang* (2005) [79]-[80], [96] (Gummow, Callinan and Heydon JJ).
58 *Plaintiff M68* (n 31) [135] (Gageler J).
59 NSW submissions [19] quoting WH Moore, *The Constitution of the Commonwealth of Australia*)2nd ed, 1902) 212.
60 *Comcare v Banerji* (n 33) [67] (Gageler J).
61 *L v South Australia* (n 25) [103] (Kourakis CJ, Parker J and Doyle J agreeing).
62 *Peko-Wallsend* (n 44) 277 (Bowen CJ).
63 Wheeler (n 32) 438.

decision and enlivening the statutory power and its associated duties. Naturally he would seek to avoid this result.

Alternatively, since third source capacities are those held in common with private citizens, is it argued that general law remedies provide ample protection.[64] Such protections might lie in actions for defamation, breach of contract, negligence[65] and other areas of the civil and criminal law.[66] The House of Lords in *Datafin* has attempted to explore private remedies in order to avoid law-free zones.[67]

Alas, exercises of public power and the spending of public monies are not indistinguishable from private power and funds and should not be treated as such.[68] *Davis* provides a stark example that other remedies are insufficient where a non-statutory decision maker acts unreasonably and exceeds their jurisdiction. The departmental officers who screen applications made to the Minister may be subject to disciplinary action, or the Minister may be sanctioned by Parliament. However, this provides no remedy for the affected applicant. A remedy in the nature of judicial review is required to deliver justice to the applicants.

D *Islands of power*

In determining whether non-statutory decision makers are limited by the duty of legal reasonableness, the essential enquiry really becomes whether such bodies are 'above the law.'[69] The avoidance of 'islands of power immune from supervision or restraint' has been a prevalent refrain for courts considering the ambit of judicial review.[70] It is telling that Brennan J, who outright rejected free-standing common law grounds of judicial review in

64 Cth Submissions (n 37) [29].
65 *Clough v Leahy* (n 31) 155-6 (Griffith CJ).
66 *Plaintiff M68* (n 31) [135] (Gageler J).
67 *Datafin* (n 23) 839 (Donaldson MR).
68 Wheeler (n 32); *Williams v The Commonwealth (No 1)* (2012) 248 CLR 156.
69 *Datafin* (n 23) 827 (Donaldson MR).
70 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Kioa v West,[71] was still troubled by the creation of review-free powers.[72] Of course, to accept that the creation of areas where 'the King's writ does not run'[73] is an unacceptable proposition does not automatically stand as authority for the proposition that non-statutory powers will be amenable to judicial review. But when considered in conjunction with the insufficiency of general law remedies demonstrated above it establishes the need for judicial review in defence of the citizenry.

III POSSIBLE OTHER SOURCES

Two possible other sources of the duty of legal reasonableness will be briefly noted, although no submission is made about which may be correct.

The appellants in *Davis* argued that the theoretical underpinning of legal reasonableness is the common law.[74] This argument has support in the Federal Court.[75] It recognises that the common law principle of statutory construction is judge-made law and the same values that underpin that principle can extend to the creation of a free-standing duty in the common law.[76] A similar understanding was contemplated in *Kioa v West.*[77]

Another possibility is that the duty comes from the particular grant of power.[78] This proposition accords with the imposition of reasonableness by wills, trusts and contracts and draws support from *R v Criminal Injuries Compensation Board, Ex parte Lain*.[79] It is unclear what the grant of power would be in *Davis*. It may be the non-statutory ministerial guidelines

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71 *Kioa v West* (n 40) 610.
72 Ibid 611, Wheeler (n 32) 464.
73 *Datafin* (n 23) 828 (Donaldson MR).
74 Martin Davis, 'Appellant's submissions' submission in *Davis v Secretary of Department of Home Affairs*, M32/2022, 30 June 2022, [19] ('Appellant's submissions').
75 *Jabbour* (n 46) [101] (Robertson J); *Davis* Full Court [294] (Charlesworth J).
76 Ibid.
77 *Kioa v West* (n 40) Brennan J 611; Wheeler (n 32) 464.
78 SA Submissions (n 37) [40]; Attorney-General of South Australia, 'Outline of Oral Submissions of the Attorney-General of South Australia (Intervening)' submission in *Davis v Secretary of Department of Home Affairs*, M32/2022, 20 October 2022, [6].
79 [1967] 2 QB 864.

on the processing of these types of requests,[80] the officer's status as an employee, the *Public Service Act 1999* (Cth) or the *Constitution*.

IV CONCLUSION

The duty to act legally reasonably is a high bar in Australian administrative law. Although simple on its face, the content of the duty has evolved since its enunciation in *Wednesbury.* Most notably the High Court straightened out the various manifestations of the duty in *Li.* A decision can be shown to be legally unreasonable with reference to both the result and the decision-making process.[81] This ground of review provides an important protection to ordinary people who are vulnerable to the might and disinterest of the Executive Government, especially in the migration space. However, the authorities have to date provided no clear answer on whether this protection exists in respect of government decision making that lacks a statutory basis.

Much of the judicial discussion of legal reasonableness has focussed on the necessity of statutory construction. That does not say definitively that legal reasonableness exists only as an implication of legislative intent and cannot be sourced elsewhere. After accepting that the justiciability of a decision is not determined by reference to its source of power, the natural corollary is that some grounds of review must exist outside statute.

If any of the traditional grounds are sourced outside of statute, reasonableness is among the most likely candidates. All government power is ultimately sourced from the *Constitution.* The doctrines of responsible government and separation of powers founded in the *Constitution* create the inescapable understanding that the *Constitution* does not intend that any power should be exercised unreasonably. The drawing of broad limits on power from

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80 *Jabbour* (n 46) [91] (Robertson J).

81 *Li* (n 2) [68], [76] (Hayne, Kiefel and Bell JJ).

section 61 of the *Constitution* shows a healthy respect for the separation of powers by limiting the scope for review and ensuring that a free-standing duty of legal reasonableness does not allow courts to substitute a decision of the executive with one of their own.[82] Other accountability mechanisms, such as ministerial accountability and general law remedies do not provide the same protection as judicial review. Nor do they properly acknowledge that the utilisation of public power and funds is not the same as a private person's spending or exercise of their faculties. Even non-statutory executive action carries the might of the government behind it.

Whether the source of legal reasonableness is the common law, the terms of a grant of power or a combination of sources has not been determined. But the duty does not reside in statute alone. It is noted that the answer to this paper is not completely congruent to the question asked. It has been established that a duty of legal reasonableness can condition powers that are non-statutory, but that is not to say that reasonableness is sourced at a single point and therefore applies everywhere. As a theoretical basis, it is possible that legal reasonableness has developed independently and separately in different areas of law.

It is entirely possible that no judicial answer to this question is forthcoming. It has been optimistically predicated for thirty years that the High Court will adopt *CCSU* and extend the traditional grounds of review to all types of executive power.[83] This has not transpired. The High Court has been at some pains in the past to avoid the reviewing non-statutory power on traditional grounds. The efforts to exclude procedural fairness in *Plaintiff S10*, and to find a statutory basis in the *Offshore Processing Case* have been somewhat gymnastic. *Davis* may be decided on other grounds unrelated to legal reasonableness. That said, a bench that is

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82 *Li* (n 2) [66] (Hayne, Kiefel and Bell JJ).

83 Wheeler (n 32) 442.

much changed since *Plaintiff S10* appeared open to re-visiting a key holding from *Plaintiff S10*[84] so it is possible that we might hope for clarity soon.

[84] Transcript of Proceedings, *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (High Court of Australia, M32/2022, Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ, 19 October 2022) 5185-5305.