

Taking Stock after *Li*

A Comment on Professor Gummow's Essay

Justin Gleeson SC

Introduction

I congratulate Professor Gummow on his excellent contribution. I would like to start here with a comment on the width of discretions, a point engaged by Professor Gummow early on. Then I will explore certain aspects of the High Court's decision in *Minister for Immigration and Citizenship v Li (Li)*,¹ against the backdrop of the themes discussed in the essay.

Good public administration does not always require narrow discretions

A point of general importance made early in Professor Gummow's essay is that good public administration does not always require narrow discretions. It is part of Parliament's job to give close thought, when approving the terms of each statute that confers an administrative discretion, to the type and extent of discretion that is appropriate in the given case. The arguments of counsel need to attend to the precise statutory choice in the given case and not start with *a priori* assumptions that Parliament has made the same choices as under prior statutes in the field. From the court's perspective, I would suggest that there is no general principle that requires the court to assume, or strive to reach a result, that the statute is construed to produce the narrowest possible discretion in the given case.²

To take a recent example, in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*,³ the High Court considered whether the Minister's designation of Papua New Guinea (PNG) as a regional processing country (RPC) under s 198AB of the *Migration Act 1958* (Cth)

1 (2013) 249 CLR 332.

2 Putting aside the operation of the principle of legality in circumstances where a broad reading of the relevant power would infringe fundamental rights.

3 (2014) 309 ALR 29; 88 ALJR 690.

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