

Before the High Court

Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*

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Abstract

In *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, the High Court held that there is no general duty to provide reasons for administrative decisions. The rule in *Osmond* has been criticised by scholars and greatly qualified by the introduction of statutory duties to give reasons. This 'Before the High Court' examines the rule established in *Osmond*, the case for and against a general common law duty to provide reasons, and the various statutory duties to provide reasons. It also considers the recent law of several other common law jurisdictions, by which the courts have recognised limited duties to provide reasons for administrative decisions. The pending case of *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA Trans 105 ('*Kocak*'), for which special leave was granted on 10 May 2013, provides an occasion for limited but important change to the law.

I Introduction

Every decision is made for a reason, so it ought to be simple and logical for reasons to be given for decisions. The principles governing reasons suggest otherwise. The law proceeds on the assumption that all decision-makers have reasons, but it imposes no universal rule to disclose reasons. The law governing reasons also differs greatly according to the character of a decision-maker. The requirements for the exercise of judicial power dictate that judges will normally provide reasons for decisions.¹ That general duty does not extend beyond the courts. In *Public Service Board of NSW v Osmond*,² the High Court held that administrative officials are not subject to a general common law duty to provide reasons for their decisions.

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¹ This requirement is not absolute. In *Wainohu v New South Wales* (2011) 243 CLR 181, 215, French CJ and Kiefel J noted that the judicial duty to provide reasons 'does not apply to every interlocutory decision, however minor' and that the detail required in reasons 'will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision'. An example is the brief reasons given by the High Court when determining special leave applications. The brevity of those reasons makes the Court's workload more manageable. More detailed reasons might also blur the distinction between applications for special leave and substantive hearings.

² (1986) 159 CLR 656 ('*Osmond*').

Many administrative officials provide reasons, whether by statutory obligation, common law duty or simply for good practice, but questions can arise if those reasons are judged inadequate. What is the legal consequence of inadequate reasons? What is rendered invalid by inadequate reasons? The substantive decision, or just the flawed reasons? The High Court has recently granted special leave in a case that raises these very questions: *Kocak v Wingfoot Australia Partners Pty Ltd and Goodyear Tyres Pty Ltd*.³ That case involved the assessment of the injuries of a worker by a medical panel appointed under the *Accident Compensation Act 1985* (Vic). The panel was referred questions about the worker's injuries under s 45 of the Act.⁴ The panel duly provided a report under s 68(3), which requires a panel to 'provide its written opinion and a written statement of reasons for that opinion'. The worker claimed that the reasons of the panel were inadequate and therefore legally flawed. That claim was rejected by the judge at first instance,⁵ but accepted by the Victorian Court of Appeal. That court accepted that the panel had given reasons but concluded these were clearly inadequate and should be quashed by the issue of certiorari.⁶ The employer appealed to the High Court, arguing that the reasons given by the panel were adequate in the circumstances and that any inadequacy of its reasons were not such that they should be quashed.

This column considers the questions facing the High Court and whether the case might enable the Court to settle wider principles governing the requirements for adequate reasons and the effect of inadequate reasons. Before examining those issues, it is useful to explain the common law rule that there is no general duty to provide reasons for administrative decisions, the statutory obligations to provide reasons for decisions and how those wide-ranging duties have greatly lessened the need for significant change to the common law of Australia. But first this article will examine the point which underlies any determination about the adequacy of reasons, namely the purposes of reasons.

II What Are Reasons and What Must They Contain?

A statement of reasons is not always easy to identify. It can often be hard to distinguish between material provided in advance of a decision and reasons given for a decision. Officials attentive to common law requirements of disclosure and notice may provide all the information expected in a statement of reasons well before making a decision.⁷ The distinction between notice that a decision might be

³ (2012) 295 ALR 730 ('*Kocak v Wingfoot*') Special leave granted: *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA Trans 105 (10 May 2013) ('*Kocak*').

⁴ The questions were referred at the request of the employer under *Accident Compensation Act 1985* (Vic) s 45(1)(b), which allows any party to request matters be referred to a panel. The court may refer issues to a panel of its own motion under s 45(1)(a).

⁵ *Kocak v Wingfoot Australia Partners Pty Ltd* [2011] VSC 285 (27 June 2011).

⁶ The Court of Appeal held that the reasons formed part of the record and concluded that this increased the case for the issue of certiorari to quash the reasons.

⁷ On requirements of adequate notice and disclosure, see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 517–49. The often fine distinction between giving reasons and notice is explained in Harry Woolf et al, *De Smith's Judicial Review* (Sweet and Maxwell, 7th ed, 2013) 447–8.

made and the reasons why it was made can become unclear if notice is detailed and contains the same information about relevant facts and a possible decision as would be expected in reasons. Although occasional cases blur that distinction,⁸ the courts maintain that reasons logically follow decision-making.⁹

Reasons should also come from the actual decision-maker. Problems arise when decision-makers do not provide reasons but rely heavily on a document prepared by an adviser or assistant.¹⁰ In *Palme*,¹¹ Kirby J cited Canadian authority in support of a suggestion that reasons must come from the decision-maker rather than an adviser. That suggestion is at odds with *Baker v Canada (Minister for Immigration and Citizenship)*,¹² where the Supreme Court of Canada held that notes made by an immigration officer who interviewed Ms Baker constituted a de facto statement of reasons for the decision made by another officer to refuse Baker's visa application. That finding was influenced by the absence of a formal statement of reasons from the decision-maker and the provision of the notes in response to a request for reasons.¹³

Australian courts have accepted that the reasoning offered in an advising document may be inferred to be the reasons of a decision-maker who adopts or follows the recommendation of the advising document.¹⁴ The point is ultimately one of fact.¹⁵ Many advising documents outline the issues in a balanced way, explain the different decisions that could be made and make no recommendation in favour of a particular decision.¹⁶ Such documents are hard to accept as reasons because they do not record the key issue of why the subsequent decision was made.¹⁷ In *Palme*,¹⁸ McHugh and Kirby JJ found that such a document did not constitute a statement of reasons. Gleeson CJ, Gummow and Heydon JJ similarly held that the detailed advice explained the several possible decisions the Minister could make, but neither the advice nor the Minister's endorsement of it expressed

⁸ See, eg, *Watson v South Australia* (2010) 208 A Crim R 1, 30 where the court referred to repeated applications for parole from the same prisoner in which the decision-maker would consider successive applications based on the same material.

⁹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Palme* (2003) 216 CLR 212, 225 (Gleeson CJ, Gummow and Heydon JJ), 227 (McHugh J) ('*Palme*').

¹⁰ This is different to a case where lawyers are involved in 'settling' the reasons of bureaucrats. The dangers of that practice are explained in Stephen Lloyd and Donald Mitchell, 'Statements of the Decision Maker's Actual Reasons' (2010) 59 *Administrative Review* 56.

¹¹ (2003) 216 CLR 212, 246 (citing *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 66-7).

¹² [1999] 2 SCR 817 ('*Baker*').

¹³ *Ibid* [44]. The official's repeated use of underlining and exclamation marks, which were strongly disapproving of Ms Baker, led the Court to set aside the decision on the ground of apprehended bias: at 849-51 (L'Heureux-Dubé J, Gonthier, McLachlin, Bastarache and Binnie JJ agreeing).

¹⁴ A possibility acknowledged in *Commissioner of Police v Ryan* (2007) 70 NSWLR 73, 83 (Basten JA).

¹⁵ *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 126 FCR 152, 164; *Minister for Immigration and Multicultural Affairs v W157/2002* (2002) 125 FCR 433; *Long v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 610 [32]-[52]; *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 (9 March 2007) [17].

¹⁶ See, eg, the ministerial brief described in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 7.

¹⁷ *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 (9 March 2007) [17].

¹⁸ (2003) 216 CLR 212, 227 (McHugh J), 242, 244 (Kirby J).

‘the essential ground or grounds’ of the Minister’s decision.¹⁹ The different judgments in *Palme* imply that an advising document can constitute reasons if it meets the general requirements explained below. The need for reasons to explain why the particular decision at hand was reached means that decision-makers who rely on advising documents cannot simply tick a box in an advising document. They must explain why they ticked that box.

The implicit point of the majority in *Palme* is that a defining feature of reasons is an explanation of a decision. An advising brief or other detailed document might suggest one or more paths of reasoning open to a decision-maker but will not normally explain the crucial issues of why the decision-maker chose one particular path. It follows that reasons must also do more than simply list evidence and state the decision reached.²⁰ They must explain the logic or ‘intellectual process’ by which evidence was used to reach the decision.²¹ The cases suggest reasons must be sufficiently detailed rather than exhaustive, and that the level of sufficiency will depend very much on context.²² Reasons are typically directed to people concerned with an issue rather than the public at large, so they may assume a level of knowledge about the issues,²³ or use technical terms those people would be expected to understand.²⁴

In *Campbelltown City Council v Vegan*,²⁵ Basten JA explained how a medical panel could satisfy those requirements when assessing the level of impairment of a claimant for workers’ compensation. The following guidance his Honour provided is capable of more general application:

Where it is necessary ... to make findings of fact, in order to reach a particular conclusion as to the existence, nature and extent of any [key issue], it may be expected that the findings of material facts will be set out ... When facts are in dispute, it may be necessary to refer to evidence or other material on which findings are based, but the extent to which it is necessary will vary from case to case. More importantly, where more than one conclusion is open, it will be necessary ... to give explanation of [the] preference for one conclusion over another.²⁶

¹⁹ Ibid 223–4. Their Honours also held the detailed nature of the advice made it impossible to conclude that the Minister had no good reason for his decision. Kirby J stressed the open-ended nature of the options outlined in the brief, which implies that the different possible decisions open to the Minister made it hard to decide if he had good reasons for the chosen decision: at 245.

²⁰ See, eg, *Hill v Repatriation Commission* (2004) 39 AAR 103; *Preston v Secretary, Department of Family and Community Services* (2004) 39 AAR 177; *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 253 ALR 263. In all these cases, the reasons provided were held to be so obscure that it was impossible for the courts to decide why the decision was reached.

²¹ *Garrett v Nicholson* (1999) 21 WAR 226 [73].

²² *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500, 507; *South Bucks District Council v Porter* [2004] 1 WLR 1953 [36].

²³ *South Bucks District Council v Porter* [2004] 1 WLR 1953 [36].

²⁴ *Telstra Corporation Ltd v ACCC (No 2)* (2007) 97 ALD 652.

²⁵ (2006) 67 NSWLR 372.

²⁶ Ibid 397.

This passage confirms several key aspects of reasoning. First, the required content and level of detail depends greatly on the circumstances of each decision.²⁷ Second, issues that must be settled in order for a decision to be made must themselves be explained. In other words, if findings must be or were made to reach a decision, their explanation is a necessary part of the reasons for that decision.²⁸ That does not mean reasons must address every single issue.²⁹ It is enough that the key ones are identified and explained. Finally, where issues are disputed, reasons should explain how that dispute was resolved.³⁰ Basten JA used the example of a medical panel. Extensive reasons were not normally required when a panel made a professional judgment but greater detail was required if a panel reached an assessment different to that set out in medical reports provided to it, or decided issues where the relevant medical science was controversial.³¹

III The Reasons for and against Reasons

Several arguments can be made for a duty to give reasons.³² Reasons can focus the mind of decision-makers upon the correct issues and show those involved that this has occurred.³³ The availability of reasons ensures justice is done and seen to be done.³⁴ A more refined version of this argument is the dignitarian one that giving reasons, particularly to those who may be disappointed, provides people with a necessary level of dignity.³⁵ People are more likely to accept an outcome if they believe the process by which it was reached was fair and logical.³⁶ Reasons can provide useful guidance to other cases, much like a form of administrative

²⁷ *Sabag v Health Care Complaints Commission* [2001] NSWCA 441 (16 November 2001) [43]–[45]; *South Bucks District Council v Porter* [2004] 1 WLR 1953 [36]; *Byrne v Legal Services Commissioner* (2010) 27 VR 674, 695.

²⁸ But decision-makers need only set out and explain the issues they did decide, not what perhaps they should have decided: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 331–2 (Gleeson CJ), 349 (McHugh, Gummow and Hayne JJ). See also *Appellant V324 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 259 (20 September 2004) [8]; *Gilkinson v Repatriation Commission* (2008) 104 ALD 406 [14].

²⁹ For example, issues not disputed by the parties may not need to be addressed in reasons: *L & B Linings Pty Ltd v Workcover Authority of NSW* [2012] NSWCA 15 (20 February 2012) [58] (Basten JA).

³⁰ *Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 [65]–[67]; *Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No 1)* (2000) 16 FCR 465, 481.

³¹ *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 397.

³² Elliott has noted that many arguments for reasons align with those for fairness: Mark Elliott, ‘Has the Common Law Duty to Give Reasons Come of Age Yet?’ [2011] *Public Law* 56, 63. That suggestion is supported by the arguments for a duty of fairness given in Robert French, ‘Procedural Fairness — Indispensable to Justice?’ (Speech to the University of Melbourne Law Students’ Society, 7 October 2010) 1.

³³ *R v Higher Education Funding Council; Ex parte Institute of Dental Surgery* [1994] 1 WLR 242, 256 (‘*Institute of Dental Surgery*’).

³⁴ *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, [15].

³⁵ TRS Allan, ‘Procedural Fairness and the Duty of Respect’ (1998) 18 *Oxford Journal of Legal Studies* 497, 499.

³⁶ This is described by psychologists as ‘the fair process effect’: K van den Bos, H Wilke and E Lind, ‘When Do We Need Procedural Fairness? The Role of Trust in Authority’ (1998) 75 *J Personality & Social Psychology* 1449.

precedent.³⁷ They can also alert parties to any errors by the decision-maker.³⁸ Reasons that are clearly based on the evidence and soundly drafted may minimise review proceedings because such reasons might sometimes make people realise that the decision was right or simply might survive challenge.³⁹

These various arguments in favour of reasons might explain why some courts have identified a ‘growing expectation that people affected by administrative conduct will know why it is they have been so affected’.⁴⁰ That expectation arguably reflects the ‘culture of justification’ suggested almost 20 years ago by the South African scholar, Mureinik. While our modern ‘culture of complaint’ sees people eager to voice dissatisfaction about almost anything, a culture of justification is a more positive vision of government, which connects the justification of official action to its legitimacy. Mureinik’s idea was particularly apt as South African society moved from a racist, authoritarian regime to an inclusive and democratic one. He explained that this new culture was one:

in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions.⁴¹

This notion has been championed by many public law scholars, who argue that democratic and rule of law values require public officials to provide reasoned arguments for their decisions.⁴² Sir Anthony Mason has suggested that *Osmond* ‘does not sit well with the culture of justification as a democratic value’.⁴³ Although a contrary argument is provided later in this column, it must be conceded that the normative basis of the culture of justification provides an overarching principle that can encompass many specific arguments made for a general duty to provide reasons.

There are, however, several contrary arguments to a general common law duty to provide reasons. One is that it would impose a burden upon administrative officials, which in turn would create costs and delays in administration.⁴⁴ Those who favour introduction of a general duty often seek to counter this problem by suggesting that any duty would be a contextual one,⁴⁵ which implies that the

³⁷ *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, [15].

³⁸ *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 623 [33] (Gummow ACJ and Kiefel J).

³⁹ A hopeful possibility offered in Commonwealth Administrative Review Committee, *Prerogative Writ Procedures: Report of Committee of Review*, Parl Paper No 56 (1973) [34] (reproduced in *Habib v Minister for Foreign Affairs and Trade* (2010) 192 FCR 148, 161 [51]).

⁴⁰ *L & B Linings Pty Ltd v WorkCover Authority of NSW* [2011] NSWSC 474 (24 May 2011) [108]. The Victorian Court of Appeal made similar remarks in *Sherlock v Lloyd* (2010) 27 VR 434, 437 [14].

⁴¹ Etienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 31, 32. The concept became more widely known when championed in David Dyzenhaus, ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ (1998) 13 *South African Journal of Human Rights* 11.

⁴² See, eg, Paul Craig, *Administrative Law* (Sweet & Maxwell, 7th ed, 2012) 41; Michael Taggart, ‘Proportionality, Deference and *Wednesbury*’ [2008] *New Zealand Law Review* 423, 461–5. These arguments are often made about proportionality but are clearly applicable elsewhere.

⁴³ Sir Anthony Mason, ‘Reply to David Dyzenhaus’ in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 54.

⁴⁴ Arguments that weighed heavily on Gibbs CJ in *Osmond* (1986) 159 CLR 656, 668.

⁴⁵ An argument well made in Elliott, above n 32, 65–8.

standard of reasons required could take account of the burden of their production. Another argument against a general duty is that it might discourage candour.⁴⁶ It might require a false appearance of unanimity in decisions involving many officials where in fact there was disagreement and diversity.⁴⁷ Reasons could also require disclosure of information that should remain confidential, particularly in cases involving national security or other such sensitive issues.⁴⁸ A general duty might also create problems in cases where officials relied upon value judgments that were not capable of easy expression.⁴⁹

Proponents of a duty to provide reasons concede it should not be universal because reasons are sometimes inappropriate. Such exceptions implicitly concede the force of contrary arguments but provide no guiding principle.⁵⁰ The problem finds curious expression in the *Administrative Law Act 1978* (Vic) s 8(5), which enables decision-makers to refuse to provide reasons if giving them would be against ‘public policy’ or the interests of the person primarily affected by the decision. The latter can be justified on pragmatic grounds where reasons could be damaging or intrusive to the relevant person. The power to withhold reasons on the basis of public policy reflects the criteria that advocates of a general duty would invoke to guide any exception, but the paucity of Victorian decisions suggests such cases are rare. In one such case, Gillard J held that the time and expense normally required to draft reasons would not alone make their production contrary to public policy because production would usually require officials to articulate the deliberative process they had used. That, his Honour concluded, would ‘not involve added expense of any substance’.⁵¹ Gillard J suggested that requiring reasons could be contrary to public policy if ‘the cost was so prohibitive that it could not have been in the contemplation of Parliament’.⁵²

While the approach of Gillard J is sensible, it provides no clear guidance about when and why policy considerations might place a case outside the scope of the duty to provide reasons. The same problem would likely occur in any judicially created duty to provide reasons which was qualified by public policy or exceptional circumstances. Such concerns can easily be overstated. After all, courts have long moderated general rules with criteria of policy or exceptional circumstances. A contextual approach to a general duty to provide reasons would be another example. They have also long examined context specific questions on other aspects of reasons, such as when reasons are adequate in the circumstances. Finally, if there is a good case to refuse reasons, why should it not be stated?⁵³

⁴⁶ *Osmond* (1986) 159 CLR 656, 668 (Gibbs CJ)

⁴⁷ *Institute of Dental Surgery* [1994] 1 WLR 242, 257.

⁴⁸ A point noted in Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, 2012) 155–6.

⁴⁹ *Ibid.*

⁵⁰ See, eg, William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 439, where it is argued courts should impose a general duty to give reasons ‘subject only to specific exceptions to be identified in such cases’.

⁵¹ *Lewenberg v Victoria Legal Aid* (2005) 22 VAR 354 [73].

⁵² *Ibid* [74].

⁵³ A point that influenced the Supreme Court of Ireland in *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 [74] (*‘Mallak’*).

IV *Osmond*, the Common Law and its Exceptions

The leading Australian case of *Osmond*⁵⁴ may have held that there was no general duty to provide reasons for administrative decisions, but the qualified nature of that finding makes it useful to revisit the case. *Osmond* was a veteran public servant whose application for the position of head of a statutory board failed. He appealed the decision to another board, which was created under public service legislation. *Osmond* was told orally that his appeal had failed. The New South Wales Court of Appeal declared *Osmond* was entitled to written reasons from the Board.⁵⁵ The leading judgment of Kirby P held that the common law rules of fairness ‘normally’ imposed upon officials empowered ‘to make discretionary decisions affecting others, an obligation to state the reasons for their decisions’.⁵⁶ Kirby P acknowledged exceptions to this general rule, notably cases where giving reasons would breach confidentiality or privacy, but held that none was established in the case at hand. His Honour held that the obligation to provide reasons would ‘normally’ arise where a right of appeal existed because that right would essentially be defeated if reasons were not available. He also suggested that duty to provide reasons would exist where the absence of reasons ‘would diminish a facility to have the decision otherwise tested by judicial review’.⁵⁷ Priestley JA also accepted that natural justice required reasons be provided in the circumstances of the case at hand but did not endorse the more general propositions that the existence of a right of appeal or efficacy of supervisory review could support a general duty to give reasons.⁵⁸

The High Court unanimously held that there was no general duty to provide reasons for administrative decisions or cause to require them in this particular case. Gibbs CJ, with whom the other judges agreed, also rejected each of the several justifications that Kirby P provided in favour of a general duty.⁵⁹ The first was the analogy drawn with the judicial duty to provide reasons. Gibbs CJ acknowledged that reasons were a normal and expected feature of the judicial function but concluded the justifications for this practice were not ‘necessarily applicable’ outside the courts.⁶⁰ Second, Gibbs CJ held that a closer inspection of the various Australian authorities invoked by Kirby P revealed that they did not support the far reaching duty adopted by Kirby P.⁶¹ Third, he held that the various overseas authorities that Kirby P relied upon were either not directly relevant to questions of

⁵⁴ (1986) 159 CLR 656.

⁵⁵ *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447.

⁵⁶ *Ibid* 467.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* 480–1.

⁵⁹ Brennan and Dawson JJ simply agreed with Gibbs CJ. Wilson and Deane JJ agreed with Gibbs CJ but each wrote separate judgments.

⁶⁰ *Osmond* (1986) 159 CLR 656, 667.

⁶¹ *Ibid* 665 (holding that earlier Australian cases did not support a common law duty to provide reasons or one constructed on fairness), 667–8 (holding that several tax decisions of the High Court provided no support for a duty to provide reasons. Priestley JA expressly disclaimed reliance on those cases: [1984] 3 NSWLR 447, 480).

reasons or should be treated cautiously because of the very different constitutional structure of those countries.⁶²

The Chief Justice held that the creation of statutory rights to obtain reasons did not justify the development of similar common law requirements where statutory duties did not apply. Gibbs CJ reasoned that statutory innovations in one jurisdiction could not provide a coherent basis to change the common law of another.⁶³ Wilson J added that the absence of such legislation governing the case at hand, particularly in light of the detailed work that preceded enactment of the legislation under which the decision was made, suggested that Parliament had chosen not to impose a duty to provide reasons.⁶⁴ That made the judicial creation of one all the more inappropriate. By contrast, Deane J held that the creation of general duties to provide reasons in other Australian jurisdictions should make courts 'less reluctant' to discern an implied legislative intention to require reasons for the exercise of statutory powers.⁶⁵

Gibbs CJ accepted that reasons might be required in some instances but not the one at hand. He doubted that the requirement of fairness, which governs the decision-making process, could be 'affected by what is done after the decision had been made'.⁶⁶ In other words, how would the fairness of a process be impugned or satisfied by providing reasons after that process ended? The Chief Justice held that any such possible exception did not apply in this case because the issues were 'simple and well defined' and known to Osmond, the question before the Board straightforward and Osmond could easily identify the basis of the decision.⁶⁷ In my view, that reasoning confuses the ability of Osmond to decide *what* was decided with *why* it was decided. Osmond could easily have inferred that the Board thought the other candidate was superior, but not *why* it reached that conclusion. Deane J agreed that the circumstances of *Osmond* did not make it an exceptional one and appeared to adopt the analysis of Gibbs CJ on this point.⁶⁸ Deane J also held that, if special circumstances or fairness required reasons, the statute under which a decision was made should be construed to imply such a duty unless the legislation showed a clear contrary intention.⁶⁹

The difference between Gibbs CJ and Deane J on the circumstances that might require reasons lies in their preparedness to find such a case exists. The point remains largely unexplored in later cases, perhaps because the basis of an exception was not clearly explained in *Osmond* itself.⁷⁰ Cases where the exception

⁶² *Osmond* (1986) 159 CLR 656, 666 (holding that the Canadian cases cited by Kirby P concerned the content of notice rather than giving reasons), 668 (holding that cases Kirby P drew from the United States and India required cautious treatment without a full understanding of their wider context).

⁶³ *Ibid.*

⁶⁴ *Ibid* 673–4.

⁶⁵ *Ibid* 676.

⁶⁶ *Ibid* 670.

⁶⁷ *Ibid.*

⁶⁸ *Ibid* 676–7.

⁶⁹ *Ibid* 676.

⁷⁰ Later cases seem to restate the vague one given in *Osmond*. See, eg, *Re Commercial Registrar of the Commercial Tribunal (WA); Ex parte Perron Investments Pty Ltd* [2003] WASC 198 (17 October 2003) [23], where Wheeler J held the exception required something 'either in the statutory scheme or in the nature of the decision or in some other circumstance particular to the

was held not to be established include: when providing reasons might not be overly difficult;⁷¹ when an applicant obtained sufficient information by discovery;⁷² and where a tribunal or decision-maker exercised powers that may greatly affect a person.⁷³

Some cases have suggested that decisions with particularly serious consequences, such as forced divestiture of shares, might support an exception.⁷⁴ In *Watson v South Australia*,⁷⁵ Hill J suggested that considerations of personal liberty might support the exception envisaged by *Osmond*. That case involved the repeated refusal of the Governor in Council to accept recommendations of a parole board to grant parole. Doyle CJ held that the reasons could not be required simply because they might assist the court in considering the prisoner's challenge to the Governor's decision.⁷⁶ Peek J considered that the Executive Council's repeated rejections of strongly favourable recommendations by the parole board made it difficult for prisoners to identify what they could do to gain a favourable decision, or for courts to determine if the Governor's decision was infected by error.⁷⁷ He thought an exception to *Osmond* might arise if the board continued to make favourable recommendations that the Governor in Council continued to reject without providing reasons. In my view, the case for an exception might strengthen with the length of such an administrative stalemate but difficult questions would remain. What would be decisive? The number of failed applications, or the overall length of any stalemate, or a mixture of the two? The complex and contextual nature of such issues suggest that an exception to *Osmond* might be as much a question of fact as law.

Osmond was decided before the widespread use of the supervisory judicial review jurisdiction of the High Court entrenched in s 75(v) of the *Constitution*, but it is useful to note that a right to reasons has not arisen in that jurisdiction. While reasons which disclose error may attract remedies under s 75(v),⁷⁸ there is no direct authority that a right to reasons arises from that supervisory jurisdiction itself. Heydon J reasoned that it was 'not possible' to infer a right to reasons from s 75(v) because the section 'is a grant of jurisdiction ... not a source of substantive law governing the conduct of Commonwealth officers in relation to their reasoning processes'.⁷⁹ That reasoning does not preclude implication of a right to reasons under s 75(v), particularly if the implication is based upon broader notions related

case, to suggest that the case is so out of the ordinary that the general rule in relation to the provision of reasons does not apply'.

⁷¹ *Ibid.*

⁷² *Western Australian Rural Counselling Association Inc v Minister for Agriculture, Fisheries and Forestry* [2008] FCA 986 (1 July 2008) [29].

⁷³ *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104, 115.

⁷⁴ *Canwest Global Communications Corporation v Treasurer of Commonwealth of Australia* (1997) 147 ALR 509, 535–6.

⁷⁵ (2010) 208 A Crim R 1, 30.

⁷⁶ *Ibid.* 27.

⁷⁷ *Ibid.* 30. Peek J conceded that implying a duty to give reasons was difficult because the Board was expressly required by legislation to give reasons but the Governor was not: at 29.

⁷⁸ *Palme* (2003) 216 CLR 212, 224 (Gleeson CJ, Gummow and Heydon JJ), 228 (McHugh J).

⁷⁹ *Minister for Home Affairs v Zentai* (2012) 246 CLR 213, 249.

to the rule of law.⁸⁰ There are, however, many difficulties in the path of attempts to equate broad normative values with constitutional requirements.⁸¹ Those problems might be avoided if the High Court decided that the ‘centrality, and protective purpose’ of its entrenched supervisory role required the provision of reasons for decisions that fell within that jurisdiction. Reasons would be conceived under this approach as a functional rather than normative requirement of s 75(v), but the High Court has given no indication it would take such a step.⁸²

Such novel steps also seem outside the scope of the principle of legality, which has featured heavily in judicial review cases in the High Court after *Osmond*. The principle of legality is a strong interpretive rule that presumes Parliaments do not intend to remove or significantly limit fundamental rights. The presumption is enforced by a requirement that legislation can only succeed in removing such rights if expressed with ‘irresistible clearness’.⁸³ There is uncertainty about how rights are deemed fundamental and therefore protected,⁸⁴ but it has not been suggested the principle should move from protecting to creating rights. In the wake of *Osmond*, there is no right to reasons that the principle of legality might protect.⁸⁵

V Developments in other Common Law Jurisdictions

While later parts of this column will argue that the statutory rights to reasons that exist in most Australian jurisdictions greatly narrow the imperative for a common law right to reasons, common law developments elsewhere should not be ignored. This section examines the different approaches taken in England and Canada, but a recent change to Irish law should also be noted. In *Mallak*⁸⁶ the Supreme Court of Ireland unanimously imposed a general duty upon administrative officials to provide reasons. The Supreme Court held that a range of ‘converging legal sources strongly suggest’ an evolving right of people ‘affected by administrative decisions to have a right to know the reasons on which they are based’.⁸⁷ The Supreme Court relied upon factors peculiar to Ireland, notably the broad right to reasons for

⁸⁰ See, eg, Jeremy Kirk, ‘The Entrenched Minimum Provision of Judicial Review’ (2004) 12 *Australian Journal of Administrative Law* 64. Kirk argues that the jurisdiction anchored in s 75(v) can support many rule of law values drawn from beyond the text of the *Constitution*.

⁸¹ See the caution of McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23.

⁸² The same logic could see reasons held as essential to the entrenched supervisory jurisdiction of state Supreme Courts that was recognised in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

⁸³ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). The principle is examined in Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449; Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37(2) *Melbourne University Law Review* (forthcoming).

⁸⁴ See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, 46 (French CJ); *Australia Crime Commission v Stoddart* (2011) 244 CLR 554, 619 (Heydon J).

⁸⁵ Sir Philip Sales has argued that there are ‘powerful constitutional reasons’ why the presumption cannot be invoked to protect a right that was not clearly established when legislation affecting it was enacted: ‘A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*’ (2009) 125 *Law Quarterly Review* 598, 605.

⁸⁶ [2012] IESC 59 (Supreme Court of Ireland, 6 December 2012).

⁸⁷ *Ibid* [74].

decisions contained in Irish freedom of information legislation,⁸⁸ European laws requiring reasons in particular instances,⁸⁹ and principles of Irish ‘constitutional justice’.⁹⁰ It held that these domestic factors provided ‘compelling evidence’ that it was now ‘unusual for a decision-maker to be permitted to refuse to give reasons’.⁹¹ The Court also noted that neither applicants nor review courts could gauge the validity of decisions if no reasons were provided and concluded that ‘[a]t the very least, the decision-maker must be able to justify the refusal’.⁹² This approach reverses *Osmond* by creating a general rule in favour of reasons but allows them to be withheld in special circumstances.

A Incremental Fairness in England

English law does not recognise a general common law duty to provide reasons for decisions,⁹³ but has accepted an increasing number of instances where they are required.⁹⁴ In the influential early case of *Cunningham*,⁹⁵ the Court of Appeal held that fairness required a statutory board to give reasons for awarding an amount of compensation that seemed very low in the circumstances and in comparison to similar cases. The Court also placed weight on the following: there was no appeal from decisions of the Board; the Board exercised a judicial function; the Board was susceptible to judicial review; and providing reasons would not be contrary to any statute, the code under which the Board operated or the public interest.⁹⁶ Those factors were approved in *Doody*,⁹⁷ where the House of Lords held that the Home Secretary was required to give reasons when departing from the recommendation of a trial judge in fixing the ‘penal element’, or minimum term served, of a discretionary life sentence for those convicted of murder. The Lords placed particular weight on the requirements of fairness, which were sharpened by the serious impact of the decisions in issue.⁹⁸ The Lords held that reasons in this case should explain the key features of the recommendations provided to the Minister

⁸⁸ Ibid [68]. The provision noted by the Court was *Freedom of Information Act 1997* (Ireland) s 18(1), which requires officials to provide reasons for actions affecting applicants: at [21]. The provision is unique. Freedom of information legislation typically requires disclosure of information, not the creation of reasons.

⁸⁹ Ibid [69], referring to the *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) art 296.

⁹⁰ *Mallak* [2012] IESC 59 (Supreme Court of Ireland, 6 December 2012) [44]–[45], [52]. The Court did not explain the content of that principle.

⁹¹ Ibid [74].

⁹² Ibid.

⁹³ *R v Civil Service Appeal Board; Ex parte Cunningham* [1991] 4 All ER 310, 317 (Lord Donaldson MR), 325–6 (Leggatt LJ) (‘*Cunningham*’); *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531, 564 (Lord Mustill, with whom the other Lords agreed) (‘*Doody*’); *Stefan v General Medical Council* [1999] 1 WLR 1293 [22] (PC).

⁹⁴ The categories where reasons are required is clearly not closed: *R (on the application of Hasan) v Secretary of State for Trade and Industry* [2009] 3 All ER 539 [19].

⁹⁵ [1991] 4 All ER 310, 319 (Lord Donaldson MR), 322 (McGowan LJ), 323, 325–6 (Leggatt LJ).

⁹⁶ Ibid 322–3.

⁹⁷ [1994] 1 AC 531, 564.

⁹⁸ Ibid 560–3. At one point Lord Mustill inverted that question, asking whether it was fair to refuse reasons, rather than whether fairness required that reasons be given: at 564–5.

about the penal element, including some indication of how those recommendations were reached.⁹⁹

Cunningham and *Doody* suggest that reasons can be required by considerations of fairness, particularly where the decision has a serious effect, or is somehow aberrant.¹⁰⁰ An example of the former was a decision to administer involuntary treatment to an adult patient who was competent to refuse treatment.¹⁰¹ An example of an aberrant decision was the refusal of the Director of Public Prosecutions to commence a prosecution against a prison officer, even though a coronial inquiry returned a verdict of unlawful killing against the officer for his role in the incident that caused the prisoner's death.¹⁰² A common theme between each category is the lack of precision on when cases will trigger their requirements.

The primary English rule that denies reasons may still be valid but is being hollowed out by a growing list of exceptions.¹⁰³ Courts continue to acknowledge the underlying common law rule,¹⁰⁴ but have begun to concede it might now be more honoured in the breach.¹⁰⁵ These decisions appear to be 'proceeding on a case by case basis'.¹⁰⁶ One court recently remarked that the continued run of such cases suggested that 'English law is inching towards a general duty to give reasons'.¹⁰⁷ Professor Taggart surmised the creep of English law more boldly when he suggested that 'it seems only a matter of time before the exceptions swallow the hoary general rule that reasons need not be given'.¹⁰⁸ That may be true, but a coherent basis for these final steps has not yet appeared. Sedley J wondered long ago if a coherent principle might simply emerge after a general rule was adopted.¹⁰⁹ That prediction has not yet been borne out, nor has the suggestion of

⁹⁹ Ibid 563–4. Lord Mustill made clear such information need not be disclosed verbatim.

¹⁰⁰ These characterisations of *Doody* and *Cunningham* were made in *Institute of Dental Surgery* [1994] 1 WLR 242, 258, 263. The decision in that case was one to rate academic research institutions and had significant funding implications. The Court acknowledged the serious impact of the decision but held it did not fall within either of the two identified categories requiring reasons. Reasons were held as not required for another competitive funding decision (to allocate funds from the national lottery) in *R (on the application of Asha Foundation) v Millennium Commission* [2002] EWHC 916, [36].

¹⁰¹ See, eg, *R (Wooder) v Feggetter* [2003] QB 219. See also *R (on the application of Oldcorn) v West London Mental Health NHS Trust* [2005] EWHC (Admin) 604 (involuntary detention in a psychiatric hospital).

¹⁰² See, eg, *R v DPP; Ex parte Manning* [2001] QB 330.

¹⁰³ There are several particular statutory requirements to provide reasons, which are detailed in Woolf et al, above n 7, 448–9.

¹⁰⁴ The Privy Council seemed sorely tempted in *Stefan v General Medical Council* [1999] 1 WLR 1293 [22] but concluded that case was an unsuitable vehicle to review the issue.

¹⁰⁵ Ibid. See also *Institute of Dental Surgery* [1994] 1 WLR 242, 256–7. A slightly different view is taken in Woolf et al, above n 7, 444, where the authors suggest that the many exceptions to the general rule mean it is 'meaningless', except in that it demonstrates that a duty to be fair (which those authors see at the main basis for any need to give reasons) does not necessarily or automatically equate to a duty to give reasons.

¹⁰⁶ *R (on the application of Hasan) v Secretary of State for Trade and Industry* [2009] 3 All ER 539 [19].

¹⁰⁷ *R (on the application of Birmingham City Council) v Birmingham Crown Court* [2010] 1 WLR 1287 [46].

¹⁰⁸ Taggart, above n 42, 462.

¹⁰⁹ *Institute of Dental Surgery* [1994] 1 WLR 242, 257.

the Privy Council that the *Human Rights Act 1998* (UK) might 'cause a re-appraisal of the whole position'.¹¹⁰

The effect of reasons that are judged inadequate is also unsettled in English law. Many cases have accepted that decisions cannot be quashed simply for a failure to provide reasons or adequate reasons.¹¹¹ One more recent case suggested that quashing decisions in cases where the only problem lay in the adequacy of reasons was 'likely to be a disproportionate and inappropriate response to a failure to give adequate reasons'.¹¹² The decisions in both *Doody* and *Cunningham* were set aside, though not because any error was found by the court in the reasons provided by the decision-maker.¹¹³ There are, however, other cases where the decision was set aside but the only ground of challenge that succeeded was based upon the reasons.¹¹⁴ The ambivalence of English law is illustrated by the influential case of *Institute of Dental Surgery*.¹¹⁵ Sedley J accepted that, if the only remedies were to quash inadequate reasons or order the production of reasons, justice could be frustrated if orders were not obeyed. He suggested that problem:

powerfully suggests that the obligation to give reasons, where it is established, is an independent and enforceable legal obligation and hence a ground of nullity where it is violated. Such an outcome would have a satisfactory symmetry with the ordinary consequence with a statutory requirement to give reasons. In both cases the discretion as to remedy would remain.¹¹⁶

This suggestion invites several criticisms. First, a survey of English cases does not suggest that government agencies regularly ignore court orders about reasons. The value of any solution to a problem that does not exist should be doubted. Second, it would operate if reasons were required and therefore does not clarify the pressing question of when the obligation arises. Third, Sedley J's acceptance that the discretion to refuse relief would remain confirms that the issue should not be governed by rigid rules, but seems to undermine the strength of the 'independent and enforceable' obligation he envisages. Finally, the suggestion aligning common law principles to the statutory ones governing reasons is at odds with Australian law on the nature and effect of statutory duties to provide reasons.

B Reasons and Reasonableness in Canada

Canadian law has no general common law duty to provide reasons for decisions but has long recognised wide-ranging exceptions to this principle, which seem broadly similar to English law. In the leading Canadian case of *Baker*, the Supreme

¹¹⁰ *Stefan v General Medical Council* [1999] 1 WLR 1293 [22] (PC).

¹¹¹ See, eg, *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498; *R v Legal Aid Area No 8 (Northern) Appeal Committee; Ex parte Angell* (1991) 3 Admin LR 189. Contra Woolf et al, above n 7, 460 who suggest that the remedy for inadequate reasons is 'usually' an order to set aside the substantive decision.

¹¹² *Adami v Ethical Standards Officer of the Standards Board of England* [2005] EWCA Civ 1754 [26].

¹¹³ In *Doody*, the prisoners were held to be denied natural justice because they were not allowed to make representations about their case. In *Cunningham* the decision was held irrational because the amount awarded seemed at odds with the facts of the case and other comparable ones.

¹¹⁴ See, eg, *R v City of London Corporation; Ex parte Matson* [1997] 1 WLR 765.

¹¹⁵ [1994] 1 WLR 242, 258, 263.

¹¹⁶ *Ibid* 257–8.

Court held that fairness could require reasons in ‘certain circumstances’.¹¹⁷ The Court held that the content of fairness, including any duty to provide reasons, was shaped by: the nature of the decision and the process by which it was made; the terms of the relevant statute; the importance of the decision to the people affected by it; the legitimate expectations of those affected people; and any procedural choices made by the decision-maker.¹¹⁸ The Supreme Court also made clear that the standard of reasons should take account of the ‘day-to-day realities of administrative agencies’.¹¹⁹

The *Baker* criteria proved a mixed blessing in determining if fairness required reasons. Their breadth enabled consideration of all relevant factors, but that same breadth provided only general guidance. Some subsequent decisions of the Supreme Court appeared to take an expansionary approach to the *Baker* criteria.¹²⁰ The duty to give reasons became entangled in the difficult and central issue of Canadian administrative law, namely the appropriate standard of review. Canadian law long allowed the decisions of administrative officials and tribunals to be reviewed according to three standards: patent unreasonableness, reasonableness *simpliciter* and correctness.¹²¹ Each standard attracted different levels of deference from a reviewing court.¹²² Determining the appropriate standard of review was notoriously difficult.¹²³ When reasons were examined, the problem became twofold. First, it was necessary to establish whether, according to the criteria of *Baker*, reasons were required, and second, to establish the standard of scrutiny to which the reasons should be subject.

The Supreme Court eventually acceded to the repeated complaints of lower courts and scholars about the vagaries of the three differing standards of review by collapsing them into two (correctness and reasonableness) in *Dunsmuir v New Brunswick*.¹²⁴ That decision also clarified how reasons should be assessed upon review. The Supreme Court explained:

¹¹⁷ *Baker* [1997] 2 SCR 817, 849.

¹¹⁸ *Ibid* 837–40. The Court stressed this list was not exhaustive. It affirmed that point in *Canada (Attorney-General) v Mavi* [2011] 2 SCR 504, 523–4.

¹¹⁹ *Baker* [1997] 2 SCR 817, 849.

¹²⁰ See, eg, *Suresh v Canada (Minister for Citizenship and Immigration)* [2002] 1 SCR 3, 66–8 (*per curiam*); *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)* [2004] 2 SCR 460, 657–60, 689–91 (McLachlin CJ, Iacobucci, Binnie, Arbour and Fish JJ agreeing).

¹²¹ Reasonableness *simpliciter* was adopted in *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748. When the Supreme Court of Canada collapsed patent unreasonableness and reasonableness *simpliciter* into a single category, it appeared to concede their elusive difference was essentially one of degree: *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 216–19 (Bastarache and LeBel JJ, McLachlin CJ, Fish and Abella JJ agreeing).

¹²² Patent unreasonableness attracted the most deference; correctness none at all. Reasonableness *simpliciter* sat somewhere in the middle.

¹²³ The problems prior to *Dunsmuir v New Brunswick* [2008] 1 SCR 190 are explained in David Mullan, ‘Establishing the Standard of Review: The Struggle for Complexity?’ (2004) 17 *Canadian Journal of Administrative Law and Practice* 59.

¹²⁴ [2008] 1 SCR 190. The case and its consequences are explained in David Mullan, ‘*Dunsmuir v New Brunswick* Standard of Review and Procedural Fairness to Public Servants: Let’s Try Again’ (2004) 21 *Canadian Journal of Administrative Law and Practice* 117; Matthew Groves, ‘The Differing and Disappearing Standards of Judicial Review in Canada’ (2009) 16 *Australian Journal of Administrative Law* 211.

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.¹²⁵

This passage acknowledged that any scrutiny of the content or quality of reasons could easily become conflated with review of the substantive quality of the decision itself, but made clear that review of either should focus on whether the decision was ‘justified, transparent and intelligible’. It also suggested that reasons would meet this standard if they explained how the decision was reached and whether it was one of several plausible options in the circumstances, rather than the only one that could be reached. That approach confirmed that reasons would normally be reviewable on the lower standard of reasonableness rather than the higher one of correctness.¹²⁶

Such an interpretation did not take root in Canadian law because subsequent cases were ‘mixed as to whether the adequacy of reasons are to be assessed in the reasonableness standard ... or whether inadequate reasons violate the requirement of fairness described in *Baker*’.¹²⁷ The latter category of cases found that inadequate reasons provided a separate ground of review, under which courts could set aside substantive decisions.¹²⁸ Although strict scrutinising of reasons in the guise of fairness was clearly at odds with the deferential approach of *Dunsmuir*, some commentators suggested that lower courts were willing to do so because detailed examination of the analysis within reasons, and any evidence upon which reasons were based, is the natural terrain of courts.¹²⁹

The increasing tendency of lower courts to set aside decisions on the basis of inadequate reasons drew a sharp response from a unanimous Supreme Court in *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador*.¹³⁰ The Court made clear *Dunsmuir* did not support a principle that inadequate reasons were ‘a stand-alone basis for quashing a decision’ or to undertake any ‘discrete analysis’ of reasons and decisions.¹³¹ It also strongly affirmed the deference adopted in *Dunsmuir* and made clear that reasons need not include ‘all the arguments, statutory provisions, jurisprudence or other details’ a court might wish to see, or make an express finding on every issue before stating the final

¹²⁵ *Dunsmuir v Brunswick* [2008] 1 SCR 190, 220–1.

¹²⁶ There are exceptions, notably constitutional and jurisdictional questions, interpretation of legislation that falls outside the expertise of the decision-maker and general questions of law.

¹²⁷ *Mitzel v Alberta (Law Enforcement Review Board)* [2010] ABCA 336 [29] (Hunt and O’Brien JJ).

¹²⁸ Examples are examined in Williams Shores and David Jardine, ‘Administrative Law Jurisprudence Relating to Reasons’ (2012) 25 *Canadian Journal of Administrative Law and Practice* 253, 259–64. Those authors describe this approach as the ‘judicial can opener era’, in which courts examined reasons in a technical but strict manner to open up underlying decisions to review.

¹²⁹ *Ibid* 260.

¹³⁰ [2011] 3 SCR 708.

¹³¹ *Ibid* 715 (Abella J, writing for a unanimous court).

conclusion.¹³² ‘In other words’ the Supreme Court explained, reasons were sufficient if they enabled a court ‘to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes’.¹³³ The Court also subsequently made clear that reasons should be read ‘as an organic whole, not as a line by line treasure hunt for error’.¹³⁴

The Supreme Court also affirmed a more novel aspect of deference to reasons it accepted in *Dunsmuir*. That was Dyzenhaus’ suggestion that a deferential approach to reasons required ‘respectful attention to the reason offered or *which could have been offered* in support of a decision’.¹³⁵ This possibility may amplify judicial deference to reasons but the idea that deference to an agency may take the form of supplementing or moving beyond its reasons seems counterintuitive.¹³⁶ The Court did precisely that in *Information and Privacy Commissioner v Alberta Teachers’ Association*,¹³⁷ when it examined other decisions an agency made in similar cases to understand the particular decision before it.¹³⁸ Some commentators have suggested that Canadian courts may still be tempted to continue to use reasons given for a decision as a vehicle to examine that underlying decision when ‘uncomfortable’ with that decision.¹³⁹ That temptation may be inevitable given that reasons normally ‘straddle procedure and substance’.¹⁴⁰ If so, an assessment of reasons by more formalist principles may still struggle to avoid examination of the substantive content of the decision. Perhaps so, but the Supreme Court of Canada clearly stands ready to guard against the practice.

C Conclusions on Common Law Developments Elsewhere

The evolving law in England and Canada shows that a common law duty to provide reasons is not easily reached. The English cases that followed *Doody*

¹³² Ibid 716. At the same time, the Court stressed any examination of reasons should be mindful they were drafted for the benefit of parties rather than courts of review: at 718.

¹³³ Ibid 716. This approach is more pronounced in cases involving indeterminate concepts, such as ministerial decisions involving the ‘national interest’: *Agraira v Canada (Public Safety and Emergency Preparedness)* [2013] SCC 36 [89]–[92] (Le Bel J, writing for a unanimous court).

¹³⁴ *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd* [2013] SCC 34, 54 (Lebel, Fish, Abella, Cromwell, Karakatsanis and Wagner JJ).

¹³⁵ *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 221 [48] (emphasis added, citing David Dyzenhaus, ‘The Politics of Deference: Judicial Review and Democracy’ in Michael Taggart (ed), *The Province of Administrative Law* (1997) 286).

¹³⁶ Grant Huscroft, ‘From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review’ in Colleen Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery, 2nd ed, 2013) 179.

¹³⁷ [2011] 3 SCR 654, 685–92 (Rothstein J, McLachlin CJ, Le Bel, Fish, Abella and Charron JJ concurring).

¹³⁸ The UK Supreme Court took a similar approach in *Uprichard v Scottish Ministers* [2013] UKSC 21 [46]. It held that reasons for a planning decision should be examined on the basis that they were directed to people familiar with wider issues and therefore need not justify the wider policies or issues settled previously. The implication is that some decisions can and should be understood in light of other decisions and information from officials.

¹³⁹ Shores and Jardine, above n 128, 267.

¹⁴⁰ Audrey Macklin, ‘The Standard of Review: Back to the Future?’ in Flood and Sossin, above n 136, 318–19.

appear to follow the incremental approach so typical of the common law, though the absence of significant new principles or a fully formed duty to provide reasons suggests a slowing rate of change. In *Watson v South Australia*,¹⁴¹ Peek J suggested the English approach was not so different to Australia except that English courts have allowed more exceptions to the general rule. In my view, that difference can be explained by the absence of any English equivalent to the wide-ranging statutory rights to reasons in Australia, which are explained below. That difference makes any comparison to recent English trends inexact. It also makes the failure of English cases to extend the important step taken in *Doody* all the more puzzling.

The difficulties in the Canadian cases are largely due to the problems caused by ever-changing standards of review, which dominate and confuse Canadian law much as jurisdictional error does in Australia. The Canadian cases do, however, usefully illustrate the temptation for courts to over analyse reasons and blur the merits/review divide. Perhaps these problems can be traced to a common feature of the early cases in each jurisdiction, which held that fairness required reasons in some but not all cases. The result was confusion about precisely when and why reasons were required. The Irish solution places that problem squarely in the hands of administrative officials by forcing them to explain why reasons should not be provided. It remains to be seen if requiring reasons about refusing reasons will actually simplify the law.

VI Statutory Requirements to Give Reasons

No statutory duty to provide reasons applied in *Osmond*. The reasoning of the High Court does not preclude enacting such a duty, and many Australian jurisdictions have done so. The first such right was s 28(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*'), which enables people entitled to appeal a decision to the Administrative Appeals Tribunal ('AAT') to obtain 'a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision'.¹⁴² Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') creates a broadly similar right.¹⁴³ Both provisions require that any request be made within specified time limits and both allow for restrictions on the right to obtain reasons.¹⁴⁴ Importantly, neither requires

¹⁴¹ (2010) 208 A Crim R 1, 27.

¹⁴² *Acts Interpretation Act 1901* (Cth) s 25D extends similar standards to any other official or body required to provide reasons under Commonwealth law. Gleeson CJ noted that an opportunity to explore the section was missed in *Re Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 216 CLR 212, 217.

¹⁴³ The right to obtain reasons is expressed in s 13(1) of the *ADJR Act* to apply to decisions under s 5. That clearly excludes conduct or a failure to decide, respectively reviewable under ss 6–7.

¹⁴⁴ *AAT Act* s 28(1A)–(1B) (specifying time limits to demand reasons), s 28(2)–(3A) (enabling information to be excluded from a statement of reasons if the Attorney-General certifies disclosure would be contrary to the public interest); *ADJR Act* s 13(5)(5) (providing time limits to demand reasons), s 13(8)–(10) (providing that duty to provide reasons does not extend to decisions or statutes listed in sch 2 of the Act), s 13(11)(a) (reasons not required where right to obtain reasons

that a substantive application for review be commenced. It is enough that a decision for which reasons are sought is amenable to review under the relevant Act and is not subject to any restriction on that duty.¹⁴⁵

Similar rights are contained in the statutes governing the merits review tribunals of general jurisdiction that now exist in the majority of states and territories,¹⁴⁶ and the judicial review statutes that exist in Victoria, the Australian Capital Territory, Queensland and Tasmania.¹⁴⁷ No such right exists in New South Wales but the *Uniform Civil Procedure Rules 2005* (NSW), which govern the conduct of cases in the Supreme Court of that State, enable applicants in judicial review cases to seek a statement of reasons from the public authority that made the decision under challenge.¹⁴⁸ This provides a right to reasons in judicial review cases, although only after proceedings have been commenced.¹⁴⁹ A very similar rule was recently introduced by the Supreme Court of Western Australia.¹⁵⁰

The right contained in the *ADJR Act* has attracted the most analysis and therefore provides a useful model to consider the effect of such provisions. Two aspects of the judicial interpretation of the right to reasons in the *ADJR Act* have enhanced its scope. The courts have accepted that the remedial nature of right to reasons supports a wide interpretation.¹⁵¹ At the same time, they have suggested that exceptions to the right should be approached narrowly.¹⁵² A President of the AAT suggested that the right to reasons introduced by the *ADJR Act* has proved

under *AAT Act* applies), s 13A (confidential information can be withheld from reasons), s 14 (Attorney-General can provide certificate allowing information to be withheld).

¹⁴⁵ The Administrative Review Council noted that making reasons available only after an application for review was lodged would be costly, time consuming and contrary to the remedial nature of the Act: Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977 — Exclusions Under Section 19, 1978* (Report No 1, 1978) [29]–[30].

¹⁴⁶ *Administrative Appeals Tribunal Act 1989* (ACT) s 26; *Administrative Decisions Tribunal Act 1997* (NSW) ss 49–54; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 45–7 (replacing the similar right in *Administrative Appeals Tribunal Act 1984* (Vic) s 29); *State Administrative Tribunal Act 2004* (WA) ss 21–3; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 158. Such a right is also contained in the South Australian Civil and Administrative Tribunal Bill 2013 (SA) cl 35(2)(a).

¹⁴⁷ *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 13; *Judicial Review Act 1991* (Qld) pt 4; *Judicial Review Act 2000* (Tas) ss 3, 31. Reasons requested under the *Administrative Law Act 1978* (Vic) must be provided ‘within a reasonable time’: s 8(5). This vague requirement differs markedly from the specific time limits to answer requests contained in most other statutes.

¹⁴⁸ *Uniform Civil Procedure Rules* (NSW) r 59.9(1)(2). A similar power was previously contained in Practice Note SC CL 3 (cl 23). A claim that the Note was an invalid exercise of power designed to overturn *Osmond* was dismissed in *Whalley v Commissioner of Police* [2003] NSWSC 273 (7 April 2003).

¹⁴⁹ The rule-making power covers proceedings in the Supreme Court: *Supreme Court Act 1970* (NSW) s 124. The Chief Justice of Western Australia has noted that an equivalent rule-making power of his court could not authorise rules requiring production of reasons unless proceedings were commenced: Wayne Martin, ‘Judicial Review of Administrative Decisions in Western Australia — Procedural Reform’ (Speech given at the University of Western Australia, 24 February 2012) 5 <http://www.supremecourt.wa.gov.au/files/Judicial_Review_of_Administrative_Decisions_in_WA_24022012.pdf>.

¹⁵⁰ *Rules of the Supreme Court 1971* (WA) O56 r 5(2). This rule commenced on 7 May 2013.

¹⁵¹ See, eg, *Minister for Immigration v Taveli* (1990) 94 ALR 177, 192–4; *Allen Allen & Hemsley v Australian Securities Commission* (1992) 27 ALD 296.

¹⁵² See, eg, *Secretary, Department of Foreign Affairs v Boswell* (1992) 36 FCR 367.

more important than the wider codification of judicial review achieved by that Act because, while judicial review is available at common law, reasons are not.¹⁵³

VII Inadequate Reasons Given under a Statutory Duty

Statutes that require reasons to be given, or enable them to be requested, do not normally state the intended consequence of any failure to provide reasons. An exception arose in *Palme*, where a Minister did not provide reasons for cancelling Mr Palme's visa. Mr Palme did not seek enforcement of the duty to give reasons but instead argued the decision was invalid because it failed to comply with that duty. A majority of the High Court thought this strategy put the cart before the horse. McHugh J observed:

It is not easy to accept the notion that a decision is made without authority because subsequently the decision-maker fails to give reasons for the decision. Nevertheless, it is always possible that a statutory scheme has made the giving of reasons a condition precedent to the validity of a decision.¹⁵⁴

That possibility was stymied by a further clause stating that the validity of the decision was not affected by any failure to provide reasons or comply with several other statutory requirements.¹⁵⁵ The majority made clear that the obligation to provide reasons did not simply succeed a decision to cancel a visa, it was also a distinct and separate part of the process.

That distinction is much clearer when a decision is made by power granted in one statute and reasons are sought by a duty imposed under another. It also applies to the avenues to obtain reasons of general application, which were examined in the previous section of this article. Those various avenues contain an important feature that was absent from the specific duty examined in *Palme*, which is a means to obtain better or further reasons if those provided are deemed inadequate.¹⁵⁶ The few mechanisms that do not include a separate avenue to obtain better reasons are drafted in terms that clearly empower the supervising court or tribunal to order the production of more adequate reasons.¹⁵⁷

The Victorian Court of Appeal explained the consequence of such provisions in *Sherlock v Lloyd*,¹⁵⁸ another case about reasons from a medical panel

¹⁵³ *Yang v Minister for Immigration and Multicultural Affairs* (2003) 132 FCR 571, 582.

¹⁵⁴ *Palme* (2003) 216 CLR 212, 227. Gleeson CJ, Gummow and Heydon JJ adopted similar reasoning: at 225–6.

¹⁵⁵ *Migration Act 1958* (Cth) s 501G(1) (imposing a duty to provide reasons), s 501G (4) (stating that non-compliance with that and other duties did not affect validity).

¹⁵⁶ *AAT Act* s 28(5); *ADJR Act* s 13(7); *Administrative Law Act 1978* (Vic) s 8(4); *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 13(10); *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 22D(2); *Rules of the Supreme Court 1971* (WA) O56 r 5(2)(c); *Judicial Review Act 1992* (Qld) s 40; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 160; *Administrative Decisions Tribunal Act 1997* (NSW) s 52; *Judicial Review Act 2000* (Tas) s 37.

¹⁵⁷ The general powers to require reasons appears to provide power to demand adequate reasons in: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 47(1)–(3); *State Administrative Tribunal Act 2004* (WA) s 22; New South Supreme Court, Practice Note SC CL 3 (cl 23); South Australian Civil and Administrative Tribunal Bill 2013 (SA) cl 35(5).

¹⁵⁸ (2010) 27 VR 434.

assessment of the impairment of an injured worker. The Court of Appeal drew a distinction between the compensation statute, under which the assessment was made, and the *Administrative Law Act 1978* (Vic), under which reasons were sought. The Court reasoned that the statutory duty to provide reasons under the latter was not 'a step in the giving of the decision' under the former. The right to reasons was 'separate from, and subsequent to, the making and communication of the decision itself'.¹⁵⁹ The Court of Appeal also held that the inclusion in the judicial review statute of a mechanism to obtain reasons strongly suggested that the only remedies intended to be available if no reasons, or inadequate reasons, were provided, was the exercise of that mechanism.¹⁶⁰ Accordingly, the failure to provide reasons or adequate reasons when requested under the judicial review statute was not itself an error of law affecting the substantive decision.

Breaches by the AAT of the statutory obligation to provide reasons for its decisions have provoked mixed responses. Some cases have held that inadequate reasons given by the AAT constitute an error of law, which falls within the right to appeal on a question of law.¹⁶¹ Other cases have adopted reasoning similar to *Palme* and *Sherlock v Lloyd*, holding that inadequate reasons could warrant the relief to compel the AAT to provide more complete reasons, or support inferences that it had committed errors such as failing to take account of relevant considerations, but do not themselves render the AAT decision invalid.¹⁶² In *Civil Aviation Authority v Central Aviation Pty Ltd*, Perram J explained that was because reasons were distinct and 'derivative from the decision to which they were appurtenant'.¹⁶³ His Honour continued:

Once that derivative nature is understood it must follow that the legal requirements attending the production of reasons need have no necessary connexion with the legal requirements attending the decision. A decision accompanied by perfectly adequate reasons may be riddled with legal errors just as a decision which is accompanied by inadequate reasons may be legally impeccable. The fallacy in the view that the provision of reasons is an error of law springs from the conflation of rules concerned with the making of the decision itself with rules concerned with the provision of reasons.¹⁶⁴

The Administrative Review Council sought to overcome this issue when it recommended that reasons and any related relevant issues should be recorded when decisions are made.¹⁶⁵ Reasons written at the time a decision is made may more accurately reflect the thinking that led to the decision but that would not overcome the problem identified by Perram J. Reasons drafted at the same time as a decision

¹⁵⁹ Ibid 444.

¹⁶⁰ Ibid. The Court affirmed the reasoning on this issue of Kyrou J in *Sherlock v Lloyd* (2008) 30 VAR 105 [25] and overruled eleven contrary decisions of the Supreme Court of Victoria.

¹⁶¹ See, eg, *Dornan v Riordan* (1990) 24 FCR 564; *Muralidharan v Minister for Immigration and Ethnic Affairs* (1990) 62 FCR 402. The Administrative Appeals Tribunal is obliged to provide reasons by s 43(2) of the *AAT Act*. The right of appeal is contained in s 44(1).

¹⁶² An early decision to this effect was *Bushell v Repatriation Commission* (1985) 155 CLR 422, 445–6 (Brennan J). See also *Comcare v Lees* (1997) 151 ALR 647, 658–9.

¹⁶³ (2009) 253 ALR 263, 271.

¹⁶⁴ Ibid.

¹⁶⁵ Administrative Review Council, above n 48, 158–9. See also Administrative Review Council, *Best Practice Guide No 4 Decision Making: Reasons* (2008) 10.

remain legally distinct. That difference is amplified if reasons are produced pursuant to a duty to produce them which is not located in the statute under which the decision is made. This is why the mechanisms to obtain either reasons or better reasons that are included in all general rights to reasons strongly suggest that the only remedy for inadequate reasons, or a failure to provide reasons, is an order to compel the production of adequate reasons.

The many statutory avenues to obtain reasons for decisions are also relevant to the continued force of *Osmond*. The sheer number and breadth of statutory rights to reasons clearly limit both the need for a common law right to reasons and the possibility that a suitable vehicle to reconsider *Osmond* may present itself to the High Court. The statutory avenues to obtain reasons are also relevant to Kirby P's argument that the common law should develop along similar lines. Whether and when legislative action can justify equivalent common law change is a difficult issue, though most would accept that the case for some common law innovation is easier when Parliament has refrained from legislative action.¹⁶⁶

Australian Parliaments have not refrained from legislative action in the area of reasons for decisions. Ten of the 13 statutory avenues to obtain reasons examined earlier were introduced after *Osmond*. The only rights to reasons predating *Osmond* are those contained in the *AAT Act* (1975), the *ADJR Act* (1977) and the *Administrative Law Act 1978* (Vic). All the general rights to reasons introduced after *Osmond* are limited. The relevant judicial review statutes are limited by their application to decisions of 'an administrative character'.¹⁶⁷ Each also contains a means to limit the right to reasons, enabling review but without reasons. The rules of court which allow courts to order production of reasons apply only when substantive applications for review are commenced.¹⁶⁸ The rights contained in merits review statutes are subject to the inherent limit of merits review; that merits review is entirely a creature of statute and is not available unless expressly conferred. The jurisdictions that have established a general merits review tribunal have excluded many decisions from the jurisdiction of that tribunal and the associated duty to provide reasons.

Gibbs CJ suggested in *Osmond* that the introduction of a general duty to provide reasons was the type of departure from existing law that should be decided by Parliaments rather than the courts.¹⁶⁹ The rights introduced since *Osmond* suggest that Parliaments have done just that. The limited duties they have enacted mean a general common law duty could be at odds with the legislative decisions to exclude some decisions from a duty to provide reasons. That problem is not resolved by the inclusion of policy-based exceptions that proponents of a common

¹⁶⁶ Such an argument is made by Lord Robert Walker in 'Developing the Common Law: How Far Is Too Far?' (2013) 37 *Melbourne University Law Review* 232. Lord Walker notes that, while courts must decide justiciable cases in the absence of legislative action, they proceed with great caution in controversial areas.

¹⁶⁷ See, eg, *Judicial Review Act 1991* (Qld) s 4(a).

¹⁶⁸ These rules are not made directly by Parliament but have its imprimatur because they are made under legislative authority and can be disallowed by a House of Parliament.

¹⁶⁹ *Osmond* (1986) 159 CLR 656, 669. See also *Minister for Home Affairs v Zentai* (2012) 246 CLR 213, 249. Heydon J suggested that s 13 of the *ADJR Act*, which predates *Osmond*, presumes there is no common law duty to give reasons.

law suggest.¹⁷⁰ Parliaments have made precisely such decisions when enacting limited statutory duties.

Such considerations clearly influenced recent recommendations of the Administrative Review Council. The Council concluded that the rights contained in the *ADJR Act* and *AAT Act* were ‘sufficient’ for the operation of judicial and merits review and that a more general statutory duty to provide reasons should not be introduced because it might have ‘unintended consequences’ for decisions made in the exercise of non-statutory powers.¹⁷¹ The Council proceeded on the assumption that any further expansion of the duty to provide reasons was a decision best left to Parliament. Similar reasoning can arguably be applied to the states and territories, most of which have adopted wide but not unlimited duties to provide reasons.

VIII Expanding the Duty to Give Reasons by Statutory Implication

The distinction between judicial and administrative power is generally clear but can blur in many areas. One is when non-judicial bodies make decisions that are binding or somehow determine key disputed issues. That issue has arisen in many workers’ compensation schemes because medical bodies are often empowered to decide and report upon specialist issues to the courts. Such arrangements can be convenient, efficient and provide a sensible way to decide technical issues, but they have also caused an extraordinary amount of litigation about the proper role of such bodies, including whether they should provide reasons. That issue will shortly come before the High Court in *Kocak*,¹⁷² but that case can only be understood by a brief explanation of the similar problem that has arisen in cases about the workers’ compensation schemes of Victoria and New South Wales.

A convenient starting point is principle established by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*,¹⁷³ where the High Court held that the question of whether a statute has made the observance of a particular procedure a precondition for the valid exercise of power was an interpretive one that depends on the particular power in question and the scope and purpose of the whole statute.¹⁷⁴ The High Court applied that test in *Palme* when it held that migration legislation did not make the provision of reasons a necessary condition to the valid exercise of the power to cancel a visa. Importantly, the reasoning by which a duty to give reasons was rejected in *Palme* implicitly conceded the possibility of its implication in other statutory contexts.

¹⁷⁰ Kirby P recognised the need for exceptions to any common law duty in *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447, 467–8.

¹⁷¹ Administrative Review Council, above n 48, 157.

¹⁷² Special leave granted: [2013] HCA Trans 105 (10 May 2013).

¹⁷³ (1998) 194 CLR 355.

¹⁷⁴ *Ibid* 390–1.

The New South Wales Court of Appeal made such an implication in *Campbelltown City Council v Vegan*,¹⁷⁵ where dispute arose about the reasons of an appeal panel that made a medical assessment in a compensation case. The panel was not expressly obliged to provide reasons but the Court inferred an obligation from the statute under which the panel was constituted and the functions it exercised. Handley JA based that inference on two factors. The first was that panels sat on appeal from individual medical specialists who were expressly obliged to give reasons. His Honour thought a panel that corrected the errors of specialists should 'do what the specialist should have done, that is make the right decision and give proper reasons for it'.¹⁷⁶ The second basis to imply reasons was that it would enable a separate power to direct further assessments to be exercised on an informed basis.¹⁷⁷ Basten JA reached a similar conclusion but did so by finding that the key function of the panel:

involves the application of a statutory test, by which legal rights as between an employee and employer are determined. Accordingly, it is an exercise in the nature of a judicial function, whatever the precise name or status of the Appeal Panel itself.¹⁷⁸

This reasoning hinted that the function of the panel was sufficiently akin to a judicial one that *Osmond* could be distinguished and the imperatives that required reasons for the exercise of judicial power became more pressing.

Much about this duty remains unsettled. The Court of Appeal has held that, as decisions of the panel can only be challenged in the Supreme Court:

its reasons should be transparent to lawyers advising a claimant and to the Court. On the other hand, the reasons will resolve 'a medical dispute' and it is thus inevitable that they may adopt terminology and reach conclusions in terms which will not be fully comprehensible to persons without medical training or experience.¹⁷⁹

Such an awkward blend of legalese and medical terminology only confuses the requirements for reasons and seems to invite further litigation. In a later case the Court of Appeal left open the question whether the calculation of compensation premiums payable by employers was subject to an implied duty to give reasons, but stated that, even if such a duty operated, it 'would not extend to a requirement to give weighting to particular indicators, or combinations of indicators' or particular detail on how and why workers were categorised for the purpose of calculating premiums.¹⁸⁰

Such decisions demonstrate that the judicial implication of a duty to give reasons may not create certainty. It is also clearly undesirable that some important decisions made under the same Act may be subject to an implied duty, while others

¹⁷⁵ (2006) 67 NSWLR 372.

¹⁷⁶ *Ibid* 377.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid* 394. Basten JA held that these functions might not constitute judicial ones in the strict sense but could still be characterised as judicial in nature: at 396.

¹⁷⁹ *Ibid* (Basten JA, McColl and Handley JJA agreeing).

¹⁸⁰ *L & B Linings Pty Ltd v WorkCover Authority of NSW* [2012] NSWCA 15 (20 February 2012) [67] (Basten JA, McColl and Whealy JJA agreeing).

are not. While such differences may be an inevitable consequence of statutory interpretation, parties who do not receive the benefit of an implied duty to give reasons would understandably question the legitimacy of a process that allows the courts to imply rights to some decisions but not others. The interpretive process that leads the courts to imply a duty to give reasons in some cases but not others is so obscure that courts cannot attribute the uneven consequences to Parliament. The problem is as much one of obscurity in judicial interpretation as it is obscurity of parliamentary language.

The Victorian Court of Appeal appeared mindful of such problems in *Sherlock v Lloyd*¹⁸¹ when it distinguished *Vegan* and held that a specialist medical panel established under Victorian workers' compensation legislation was not required to provide reasons. The Victorian panel did not have an express obligation to provide reasons and the Court of Appeal gave three reasons why one should not be implied. First, the legislative framework in which the panel operated 'lacked the indicia' crucial to *Vegan*.¹⁸² An opinion given by a panel could not be re-opened or appealed, and was not considered in any subsequent judicial determination of a claim.¹⁸³ Second, Victorian panels serve a different function to their New South Wales counterparts. Victorian panels did not consider any form of appeal over medical assessments. They instead expressed opinions on 'specific medical questions referred by the Court', which placed panels in a position similar to a court appointed expert.¹⁸⁴ The Court of Appeal also questioned the finding of Basten JA that New South Wales panels performed a judicial function by their 'application of a statutory test, by which legal rights are determined'. The Court of Appeal explained:

We accept, of course, that this is an important aspect of the judicial function. But judges are not the only decision-makers who perform this task. We would have thought this criterion would apply to decisions of a variety of public officials whose functions would not ordinarily be thought of as judicial.¹⁸⁵

This reasoning does not deny the implication of a duty to provide reasons but it casts strong doubt over attempts to base such an implication on an interpretive process that seeks to characterise selected functions of administrative bodies and officials as judicial in order to strengthen the case for the implication of a duty to provide reasons. Put another way, it cautions against 'double-barrelled' interpretation that would imply a duty to provide reasons and imply a judicial character to the function subject to that duty. Such double-barrelled interpretation should arguably be avoided because the credibility of judicial implication may decline as the amount of judicial implication rises. The more practical reason against such double-barrelled interpretations is to avoid chimerical reasoning that may only serve to confuse already complex legislation. It is also worth noting that

¹⁸¹ (2010) 27 VR 434.

¹⁸² Ibid 439 (Maxwell P, Ashley JA and Byrne AJA).

¹⁸³ This last point is the result of *Lianos v Inner Health Care Network* (2001) 3 VR 136, 144 (Chernov JA, Tadgell and Batt JJA agreeing).

¹⁸⁴ *Sherlock v Lloyd* (2010) 27 VR 434, 439 (Maxwell P, Ashley JA and Byrne AJA). The duty of panels to form opinions on referred questions and certify their response to the court arises from the *Accident Compensation Act 1985* (Vic) s 68.

¹⁸⁵ Ibid 439.

such reasoning is so obscure and context dependent that it cannot yield a coherent general approach to the implication of a duty to provide reasons.

The legislature had intervened before a differently constituted Victorian Court of Appeal faced similar issues in *Kocak v Wingfoot*.¹⁸⁶ Amendments made to the *Accident Compensation Act 1985* (Vic) will ensure that the High Court will consider legislative requirements governing compensation decision-making that have been carefully amended in light of previous judicial decisions. The legislation was amended in response to *Sherlock*, to require that panels provide a statement of reasons at the same time as they provide opinions to a court.¹⁸⁷ Importantly, during this period the High Court also held that the opinions of medical panels were binding for the purposes of determining questions or issues under compensation legislation.¹⁸⁸ The Court of Appeal reasoned that these changes greatly affected the standard of reasons required. It suggested that, ‘rightly or wrongly’, there was ‘significant history of judicial legislation’ that sought to relieve panels from the need to justify every aspect of their reasoning. The Court also suggested this approach was taken because opinions of panels had long been binding upon courts and tribunals that were required to take account of panel reports.¹⁸⁹ The Court of Appeal was clearly uncomfortable with the lower standard of reasons previously expected of panels but explained that:

although Medical Panel Opinions were determinative for the purposes of establishing entitlements to statutory benefits, it was not conceived that they would be made binding on all courts and tribunals in relation to all matters and questions arising under or out of the Act, and thus in effect be binding upon the keeper of the gateway to common law proceedings.¹⁹⁰

The Court of Appeal concluded that the introduction of an express requirement to provide reasons, and the further legislative change which made those findings now binding, were each crucial changes to the law. The compulsory nature of the role of panels and the binding nature of their opinions demanded a high standard of reasons. The Court explained:

[i]f a statutory decision-maker exercising public power is enabled by law to make decisions capable of affecting the rights and liabilities of the subject, more by way of reasons was and is ordinarily required. And the justice of that is obvious. It is one thing for parties to resolve a private dispute on the basis of a mutually agreeable expert’s opinion. If they do, then presumably neither of them expects to receive anything more than the opinion. It is quite another thing to expect a claimant for a statutory benefit meekly to accept the *ipse dixit* of a state appointed expert as sufficient reason for the rejection of his claim.¹⁹¹

In other words, reasons were both required, and required to meet a high standard. The Court held that the competing and contested nature of many medical questions meant panels should ‘meet the standard required of any other statutory

¹⁸⁶ (2012) 295 ALR 730.

¹⁸⁷ Requirements contained in *Accident Compensation Act 1985* (Vic) s 68(2)(3).

¹⁸⁸ *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647.

¹⁸⁹ *Kocak v Wingfoot* (2012) 295 ALR 730, 741.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

decision-maker exercising a comparable quasi-adjudicative/investigative function'.¹⁹² That standard required panels to: state findings on material questions of facts; identify the evidence or other material upon which those findings were based; and provide an 'intelligible explanation of the reasoning' by which the panel used evidence to reach particular findings and ultimate conclusion.¹⁹³ The Court made clear that particular detail was required when a panel did not accept an expert opinion relied on by one party. Panels could not simply say they had rejected that opinion. They must also provide a 'comprehensible explanation ... for preferring one or more expert medical opinions over others'.¹⁹⁴

The reasoning of the Court of Appeal highlights two important and related issues that must be decided by the High Court in *Kocak*. One is the extent to which a panel, or similarly placed decision-makers, should detail or explain their reasoning. This issue raises the subtle but crucial question of the extent to which a requirement that decision-makers must explain their reasoning can itself be explained. A second and related issue is the extent to which the requirements for reasons in compensation cases might apply more generally. The reasoning of the Victorian Court of Appeal in *Kocak v Wingfoot* offers useful guidance on both issues. While it appears to eschew the categorisation by Basten JA of some functions as judicial, it uses a more subtle approach to follow a similar path. The emphasis on the binding nature of opinions from panels draws upon the effect attributed to them by legislation rather than a judicially ascribed label. That approach arguably involves a subtle shift of emphasis to the effect of decisions. The suggestion that reasons of panels should meet the standards required of other decision-makers exercising quasi-adjudicative/investigative functions may also enable a level of uniformity in the standard of reasons expected from a range of bodies. There is no reason why the standard of reasons expected of medical panels should differ radically from other bodies and officials who determine issues that are contested and have important consequences. Some alignment of these standards may enable the energetic litigation in workers' compensation to provide guidance to other areas. An example is the requirements of the Court of Appeal for the rejection of one medical opinion in favour of another. There seems no reason why the same reasoning should not apply more generally, to require decision-makers who prefer one expert opinion over another to move beyond a mere rejection of one to explain *why* that course was taken.

IX Conclusions

Kocak is not likely to provide a complete consideration of the rule from *Osmond* because the panel whose decision is challenged is subject to an express duty to provide reasons. The introduction of that duty does, however, provide a striking reminder of the role of the legislature. The decision of *Sherlock*, which held that panels were not strictly required to provide reasons, was quickly reversed by legislation. The nature and speed of that change vividly illustrates the point of

¹⁹² Ibid 742.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

Gibbs CJ in *Osmond* that the introduction of a statutory right to reasons may be the proper province of the legislature. The very particular legislative amendments made in light of *Sherlock* arguably suggest that the introduction of a requirement to give reasons can and should be left to the legislature in areas that are complex and extremely litigious.

In the absence of legislative action, the basis upon which courts could and should adopt different common law exceptions must be questioned, particularly if any exceptions are based upon the culture of justification.¹⁹⁵ How can courts rely upon a principle with a democratic rationale to change the common law if that change appears at odds with decisions taken by democratically elected Parliaments? The answer may lie in the demanding standards imposed by the Court of Appeal in *Kocak*, which build upon the legislative duty to provide reasons but do so in a way that may be of general guidance. Such standards may provide an alternative to the ‘culture of justification’, in the form of a ‘culture of compliance’. If the compliance required with existing or new duties to provide reasons strikes a balance that is demanding, but sensibly directed to the issues at hand, legislatures and decision-makers may see that the circumstances to which *Osmond* still applies can and should be narrowed further by legislation.

¹⁹⁵ Elliott, above n 32, 66–7 argues that courts can supplement legislative duties to provide reasons by the natural justice implication principle. Elliott’s argument was made in the context of English law, which does not contain general statutory duties to provide reasons.