REASONS AND THE RECORD – RECONSIDERING *OSMOND* AND CONSTITUTIONAL PERSPECTIVES

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[The author of this article is the joint winner of the 2015 AIAL National Essay Prize. The article by Lucy Jackson, the other winner, was published in Issue 81 of the AIAL Forum.]

The common law provides that a person subject to a decision by an administrator acting under a statutory power is entitled to fairness in decision-making. The doctrine of procedural fairness has generally been split into two elements: the hearing and bias rules.[1] The case of *Public Service Board of New South Wales v Osmond* held that fairness does not extend to the provision of reasons for an administrative decision.[2] In the decades after the decision there has been extensive growth in the number of statutes granting decision-making power. Some jurisdictions have enacted a statutory right to reasons.[3] However, the common law has retained the *Osmond* position.

The lack of an administrative right to reasons may leave a person subject to a decision without justification. This may potentially lead to a lack of confidence in administrators who appear to be exercising their power arbitrarily. In contrast, the judiciary is generally required to provide reasons.[4]

This article examines whether the principle of a right to reasons at common law should be revisited in light of subsequent legal developments. It is argued that the analysis given by the High Court reflects superseded reasoning and does not withstand a critical analysis. The analogy between the judicial and administrative processes, contained in the reasoning of Kirby P in the New South Wales Court of Appeal,[5] is appropriate. However, the analogy must acknowledge that a threshold distinction exists between the judiciary, which is subject to constitutional considerations, and administrative decision-makers, who are not.

Osmond also enunciated the principle that the reasons for a decision are not considered part of the record for the purposes of certiorari unless expressly incorporated.[6] The failure to consider reasons as part of the record limits the capacity of the courts to issue certiorari for a decision tainted by an otherwise reviewable error. I argue that the record should be expanded to include the reasons for a decision. This argument is based on later developments in the judiciary's protection of its supervisory review jurisdiction, entrenched in Ch III of the *Constitution*.[7]

The right to reasons at Common Law

Osmond was a member of the New South Wales public service who unsuccessfully applied for promotion to the position of Chairman of the Local Lands Board. The adverse decision was appealed to the Public Service Board of New South Wales under the *Public Service Act 1979* (NSW). The decision to dismiss the appeal was communicated orally to Osmond. Subsequently, reasons were requested and refused. Osmond sought judicial review before

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the Supreme Court of New South Wales, arguing that his prospects for promotion were important rights giving rise to a legitimate expectation that he would receive the promotion for which he applied.[8] The refusal to provide reasons was arguably a denial of natural justice.[9] Hunt J considered himself bound by precedent in holding that, in the absence of a statutory requirement to do so, the Board was not obliged to provide reasons.[10] This decision was reversed by the Court of Appeal.[11]

The Court of Appeal

It is often stated that it would be advantageous for administrators to be required to provide reasons.[12] The policy arguments in favour of a right to reasons include: the assurance of a reasoned opinion, the promotion of public confidence, a check on the exercise of discretion through increased transparency, the facilitation of appeal or judicial review and the promotion of consistency in administrative decision-making.[13] The giving of reasons also serves a 'dignitarian' function.[14]

The arguments against a right to reasons include the cost and burden on administrators, the nature of some decisions as unreviewable, the imposition of an obligation on an undefined class of decision-makers and the risk of 'standard statements in stereotype form that express little of the decision maker's true reasoning'.[15] Elliot argued that the burden argument is, 'properly understood, an argument in favour of a *suitably flexible duty* to give reasons – not against the *existence of a general duty* in the first place'.[16] It was also argued in *Osmond CA* that this developing area of law should be addressed by parliament, not the courts.[17]

Kirby P's formulation of the right to reasons suggests that his Honour favoured the pragmatic argument of facilitating either appeal or judicial review:

> That obligation will exist where, to do otherwise, would render nugatory a facility, however limited, to appeal against the decision. It will also exist where the absence of stated reasons would diminish a facility to have the decision otherwise tested by judicial review.[18]

This formulation of the administrative obligation is analogous to the general judicial requirement to give reasons.[19]

Kirby P answered the argument that parliament should address this area by emphasising that this enunciation of the right to reasons was merely an elaboration of the principles of procedural fairness. The extent of the obligation is 'what is fair in the particular case'.[20] The breadth of the phrase, 'what is fair in the particular case', allows exceptions to the general rule. Kirby P noted two general exceptions: where the obligation 'would be otiose' or where it would require the disclosure of confidential information.[21] Groves argued that, '[s]uch exceptions implicitly concede the force of contrary arguments but provide no guiding principle'.[22] However, Groves continued by stating that, '[s]uch concerns can easily be overstated. After all, courts have long moderated general rules with criteria of policy or exceptional circumstances'.[23]

The High Court

The High Court overturned the decision of the Court of Appeal. Gibbs CJ stated that a right to reasons was, 'a change which the courts ought not to make, because it involves a departure from a settled rule on grounds of policy, which should be decided by the legislature'.[24] His Honour referred to decisions of the House of Lords and Privy Council as establishing that the rule against reasons was 'so clear as hardly to warrant discussion'.[25] Further reference was made to 'carefully reasoned' decisions of the English Court of

Appeal.[26] With respect, none of these cases justifies the proposition that there is no right to reasons at common law.

In *Sharp v Wakefield*,[27] the renewal of a liquor licence was refused on the grounds of remoteness from police supervision and the character of the neighbourhood. The statute provided that relevant considerations in the grant of a licence included the fitness of the person and the premises to be kept. The appellant argued that these considerations were relevant only to the grant of a licence and not to its renewal. The House of Lords held that these considerations were relevant to both the grant and renewal of a licence. Relevantly, Lord Bramwell stated in the course of his analysis: 'The magistrates have a discretion to refuse; they are not bound to state their reason, and therefore their decision cannot be questioned'.[28] However, a failure to state reasons no longer insulates the decision-maker from review.[29]

Wrights concerned a Canadian taxation statute which empowered the Minister of National Revenue to disallow expenses which he could determine to be 'in excess of what is reasonable or normal for the business'.[30] The Minister disallowed a certain sum of the respondent after receiving a report from the local Inspector of Income Tax. The content of the report was not communicated to the company or, later, to the reviewing courts. The Privy Council reasoned that there was 'nothing in the language of the Act or in the general law which would compel the Minister to state his reasons'.[31] However, the refusal of reasons would not defeat an appeal as holding otherwise would render the statutory right of appeal 'completely nugatory'.[32] Further, it was held that the court was entitled to examine the facts which were before the Minister.[33] If the facts were insufficient in law to support the decision, the inference is that the exercise of discretion was arbitrary.

In *Padfield*, a statutory scheme created a Board to oversee the marketing and pricing of milk in multiple regions. Complaints concerning the scheme were referred to the Minister who had discretion to establish an investigative committee. The Minister refused to refer a particular complaint to committee on the basis that he would be expected to make a statutory order to give effect to the committee's recommendations, that the complaint 'raises wide issues' and that the matter should be resolved through the scheme.[34] Lords Reid, Hodson and Pearce reasoned that the Minister was obliged under the Act to refer relevant complaints concerning the Board, when it was acting outside of the public interest, to committee.[35] Their Lordships reasoned that the Minister had accounted for irrelevant considerations in the exercise of his discretion.[36] Further, their Lordships reasoned that the absence of evidence justifying the Minister's decision gave rise to an inference that the decision was arbitrary.[37]

The case of *Wrights* focused specifically on the frustration of a right of appeal.[38] In contrast, *Padfield* was concerned with the no evidence ground of review. No authority or argument was provided in any of the three cases for the proposition that the common law does not provide a right to reasons. The principle of no right to reasons appears to offend the need for legitimacy in the exercise of power by an empowered State representative in a democratic society. It should be justified on a stronger principle than that of it is 'clear'.[39] Gibbs CJ attempted to find this justification in 'carefully reasoned' decisions of the English Court of Appeal.[40]

The first of these cases was *Payne*.[41] This case concerned a model prisoner whose application for release on licence was refused. Payne sought review on the ground that he was entitled to the reasons for refusal. The Court of Appeal reasoned that the relevant statute formed a comprehensive code of procedural fairness. In particular, the statutory requirement for reasons when the prisoner is recalled from licence demonstrated that the legislation did not intend for reasons to be provided in the initial grant.[42]

In the Australian context, the High Court has considered the statutory codification of procedural fairness in the case of *Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah*.[43] The court reasoned that the common law protects procedural fairness through the principle of legality.[44] The principle of legality is a presumption which provides that express words or necessary intendment are required in a statute in order to displace fundamental common law rights.[45]

In *Miah*, the statute had failed to displace procedural fairness as it was silent on whether it displaced an applicant's rights and did not declare that the 'code' was exhaustive.[46] Further, the statute had expressly excluded natural justice in relation to other provisions, demonstrating an intention to include natural justice in sections where it was not expressly excluded.[47] The statute in *Payne* was similarly silent on displacing common law rights and did not declare the statute an exhaustive code. If *Payne* were reconsidered from this perspective, the words of the statute would be insufficient to codify procedural fairness. Further, *Payne* has later been distinguished, in part because of 'the continuing momentum in administrative law towards openness of decision-making'.[48] This demonstrates a greater willingness on the part of the English courts to impose an obligation to give reasons in fairness, despite the steadfast denial that a general obligation exists.[49]

The second relevant case, *Benaim*,[50] concerned two French nationals who sought a certificate of consent which would entitle them to apply for a gaming licence. The applicants were summoned to an interview. It was clear from the nature of the questions that the Board had acquired information from a confidential external source. The application was later refused. By letter, the Board noted that it was clear from their questioning that they had concerns regarding the applicants' character and activities.[51] The solicitors for the applicants inquired further but were informed that the Board was 'not obliged to give their reasons'.[52]

Lord Denning MR, with whom Lord Wilberforce and Phillimore LJ agreed, reasoned that the Board had acted in fairness by providing the applicant with the necessary information through the interview process while keeping their sources secret.[53] The 'careful reasoning' against a right to reasons was merely the statement that, 'Magistrates are not bound to give reasons for their decisions. Nor should the Gaming Board be bound'.[54] There are two paradoxes in the reliance on this reasoning. First, Australian law binds magistrates and judges to provide reasons in most cases.[55] Gibbs CJ stated in *Osmond*: 'there have been many cases in which it has been held that it is the duty of a judge *or magistrate* to state his reasons'.[56]

Second, Lord Denning MR relied on an analysis of judicial, not administrative, functions. Gibbs CJ drew a distinction between these functions:

> That does not mean that the requirement is an incident of a process which is not judicial but administrative; there is no justification for regarding rules which govern the exercise of judicial functions as necessarily applicable to administrative functions, which are different in kind.[57]

The distinction requires, in his Honour's view, a rejection of the judicial analogy as there is 'no justification' for it.[58] However, in the same reasoning, Gibbs CJ is relying on Lord Denning MR's analogy with a judicial function. This paradox cannot be reconciled within the reasoning of Gibbs CJ.

All of the cases relied upon by Gibbs CJ to reject a right to reasons fail to justify the proposition. They are either without their own authority or reflect superseded reasoning. The net result of this flawed formal reasoning is that the 'basis for the High Court decision was essentially one of policy'.[59] Specifically, whether the imposition of an obligation to give reasons is a decision best left to the legislature.[60] Kirby P and Lacey both reasoned that this

reasoning carries less weight given the increased number of statutory schemes providing an obligation to give reasons.[61] However, there is more than policy in favour of an obligation for administrators to give reasons. There remains an analogy with the judicial requirement to give reasons. The dissonance in reasoning arising from the reliance on *Benaim* by Gibbs CJ can be reconciled through an acceptance of this analogy. The analogy, contrary to *Benaim* and *Osmond*, does not defeat a right to reasons at common law.

The judicial analogy – a constitutional perspective

As noted above, Gibbs CJ rejected the analogy with the judicial requirement of reasons.[62] The justifications for the judicial requirement of reasons include the facilitation of appeal and as an incident of the judicial process.[63] This appears peculiar. Both the judiciary and administrators may be subject to appeal, review and the principles of procedural fairness.[64] This raises the question as to what distinguishes the judiciary and administrators in the context of providing reasons. The answer lies within the constitutional framework of Ch III. However, the distinction does not defeat the analogy. The distinction merely requires an acknowledgement of the differing thresholds of according procedural fairness and reasons.

Judiciary

The importance of the judiciary according procedural fairness and reasons cannot be overstated. It is essential to the exercise of judicial power.[65] Ch III protects procedural fairness as a characteristic of the judiciary at both the State and Commonwealth levels in slightly different ways. This protection is a functional requirement of Ch III.[66]

At the State level, the incompatibility doctrine provides that a State legislature may not confer a function on a State court that is incompatible with its role as a repository of federal jurisdiction under Ch III of the *Constitution*.[67] Functions are incompatible if they infringe the institutional integrity, independence, fairness, openness and impartiality of the court.[68] These characteristics remain essential elements of the courts despite the relevant legislature's capacity to alter their constitution.[69] The application of procedural fairness is one of these defining characteristics.[70] It was not considered in *Wainohu* whether reasons were included as an aspect of procedural fairness, but their provision was nevertheless protected as a characteristic of the State courts.[71]

At the Commonwealth level, Ch III provides the framework for a separation of judicial power from non-judicial powers.[72] The general rule is that a non-judicial power may not be granted to a Ch III court unless it is ancillary to the exercise of judicial power or is directed to some judicial purpose.[73] Judicial power is not limited to the functions of the court. It may extend to 'law[s] of general application' which 'apply in the exercise of its function'.[74] A law which abrogates procedural fairness would likely be imposing a non-judicial power on a Ch III court inconsistent with its exercise of judicial power.[75]

This brief summary demonstrates that procedural fairness and the provision of reasons are defining characteristics of a court under Ch III. The threshold of reasons required by the constitutional implication is high, but it is not an 'inflexible rule of universal application'.[76] The content of the threshold was succinctly stated by Gibbs CJ as the 'express[ion of] the reasons for their conclusions by finding the facts and expounding the law',[77] but this may vary with context.[78] For example, some interlocutory decisions may be exempt from the obligation.[79]

Quasi-judicial decision-makers

In contrast to the judiciary, quasi-judicial decision-makers such as tribunals and administrators are not constitutionally required to obey the principles of procedural fairness. However, this has not prevented the implication of these principles in the decision-making process.[80]

The content of fairness in any given case is determined by the context in which the decision is made. Similarly, the content of a quasi-judicial obligation to give reasons would also be determined by the context of the decision.[81] Elliot convincingly argues that,

> [t]he default position … is that reasons must be 'intelligible' and 'adequate', enabling the reader to understand how the agency reached its conclusions on the principal issues of controversy. From this starting point, particular features of the case may call for a heavier or lighter duty to give reasons.[82]

This bears similarity to the approach later taken by the High Court in *Wingfoot Australia Partners Ltd v Kocak*.[83] In that case, a statutory scheme governed claims for injuries during the course of employment. Medical questions were referrable to a Medical Panel which was statutorily required to provide reasons. The content of this obligation was not expressed by the statute. The High Court reasoned that the two major contextual factors which determined the standard of reasons were the function of the Panel and the legislative history of the scheme.[84] The function of the Panel was not to adjudicate or arbitrate, but to form its own opinion.[85] Its function was not judicial. Nevertheless, the standard of reasons required was to set out, 'the actual path of reasoning by which … the opinion [was] actually formed'.[86] Further, the legislative history of the scheme demonstrated that the policy behind requiring reasons in this context was to enable a court to see whether the opinion involves an error of law.[87] This standard enables affected individuals to obtain certiorari: 'To require less would be to allow an error of law affecting legal rights to remain unchecked. To require more would be to place a practical burden of cost and time on decision-making … for no additional legal benefit'.[88] Further, a failure to provide reasons where it is required is an error of law on the face of the record.[89] While legislative context will vary by statute, the policy behind the provision of reasons at common law would include the detection of errors of law. The High Court's comments remain relevant to a common law obligation. Other possible considerations in determining the content of reasons could include the burden in articulating reasons and public policy such as national security.[90]

'Exceptional Circumstances' Exception

A note should be made of the possible exception to *Osmond*. Despite his Honour's agreement with Gibbs CJ, Deane J appeared sympathetic to the argument that fairness would, in limited circumstances, require the provision of reasons:

> [T]he statutory developments referred to … in the Court of Appeal in the present case are conducive to an environment within which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision-maker should be under a duty to give reasons or to accept that *special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision-maker provide reasons for a decision to a person whose property, rights or legitimate expectations are adversely affected* by it. Where such circumstances exist, statutory provisions conferring the relevant decision-making power should, in the absence of a clear intent to the contrary, be construed so as to impose upon the decision-maker an implied statutory duty to provide such reasons. As has been said however, the circumstances in which natural justice or procedural fair play requires that an administrative decision-maker give reasons for his decision are special, that is to say, exceptional.[91]

Deane J appears to be contradicting the analysis of the Chief Justice: 'The rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see

how the fairness of an administrative decision can be affected by what is done after the decision has been made'.[92] Deane J is expressly stating that exceptional circumstances would allow the fairness of a decision to be affected by the later omission of reasons.

Deane J did not expand on what circumstances would be sufficient to satisfy the exception. Circumstances which did not enliven the exception include: the ease with which reasons could be provided,[93] insufficient provision of information by discovery,[94] a decision not to provide a certificate entitling an injured worker to compensation,[95] and the exercise of a power which may affect a person's liberty.[96] There are few circumstances more adverse to the individual than the deprivation of his or her liberty. Nevertheless, the exception was not enlivened.

This state of affairs demonstrates an unwillingness to depart from the general rule. A reconsideration of the case would be necessary to provide a right to reasons at common law. The right would retain the flexibility of the governing principle of fairness and would be subject to exceptions as necessary. This flexible principle has consistently been applied to the other aspects of procedural fairness – the hearing rule and the bias rule.

Leaving aside the issues concerning the existence and content of a right to reasons, there remains the issue as to the capacity of the court to review errors found within a statement of reasons. The principle remains that reasons do not form part of the record unless incorporated.[97] This principle limits the capacity of the courts to issue certiorari and quash a decision tainted by an otherwise reviewable error.

The record – constitutional minimum of supervisory review

Certiorari will issue in two circumstances: when the decision-maker has made a jurisdictional error,[98] or when the decision-maker has made an error of law patent on the face of the record.[99] In *Osmond*, Gibbs CJ reasoned that a common law right to reasons, 'would undermine the rule, well established at common law … that reasons do not form part of the record, for the purposes of certiorari, unless … incorporate[d]'.[100] Incorporation is where the decision-maker expressly provides that the oral or written reasons are to be included in the record.[101]

The principle from *Osmond* was followed by the High Court in *Craig*.[102] The High Court in *Craig* was wary of 'transforming certiorari into a discretionary general appeal for error of law upon which the transcript of proceedings and the reasons for decision could be scoured and analysed in a search for some internal error'.[103] The suggestion that the record should be expanded to include both reasons and the transcript of the proceedings was rejected by the High Court on policy grounds: '[an expanded record] would represent a significant increase in the financial hazards to which … [litigants] are already exposed'.[104] Ordinarily, therefore, the record would comprise only the documentation which initiates the proceedings, pleadings and the actual order or ruling.[105]

Doubt was cast over the *Craig* and *Osmond* principles, in obiter, in the subsequent case of *Kirk*:

> But the need for and the desirability of effecting that purpose depend first upon there not being any other process for correction of error of law, and secondly, upon the conclusion that primacy should be given to finality rather than compelling inferior tribunals to observe the law.[106]

The High Court went on to observe that prioritising finality over the court's supervisory jurisdiction, 'cannot be determined without regard to a wider statutory and constitutional context'.[107] Further, the High Court in *Kirk* considered that an increase in the availability of

certiorari was not a significant increase in financial hazards where appeal or review is already available under the statute.[108] Lacey argued that these propositions, 'demonstrate a potential willingness to extend the record to include reasons in certain cases where the 'wider statutory and constitutional context' might require that outcome'.[109]

It is therefore necessary to consider the wider constitutional context, particularly the operation of the legislative mechanism mandating decisional finality: the privative clause. This context, contrary to *Craig*, prioritises observance of the law over finality.

The constitutional context

A convenient starting point for examining this context is *Kirk* itself. The decision has been described as 'one of the most important constitutional and administrative law authorities of recent times'.[110] In 2001, an employee of Kirk Group Holdings Pty Ltd was killed when his vehicle overturned. The company and a director of the company, Kirk, were charged jointly under the *Occupational Health and Safety Act 1983* (NSW) for failing to ensure an employee's health, safety and welfare at work. Both Kirk and the company were convicted and penalised by the Industrial Court of New South Wales. The conviction and sentence were appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales, but the appeal was dismissed.[111] Kirk was granted leave to appeal to the Full Bench of the Industrial Court on limited grounds.[112] This appeal was also unsuccessful.[113] Kirk then sought judicial review in the New South Wales Court of Appeal. The application was dismissed.[114] Special leave was granted to appeal the decision to the High Court.

The High Court held that the Industrial Court had misconstrued the governing statute by reasoning that the prosecution did not have to demonstrate that measures should have been taken to obviate the risk.[115] The prosecution had failed to identify the act or omission by the company that had breached the mandated duty.[116] Further, Kirk was called as a witness against his co-defendant, the company.[117] These were errors of law.[118] However, the court was required to consider the effect of a privative provision on the reviewability of these errors.[119]

The High Court reasoned that Ch III requires that there be a body to answer the constitutional description 'Supreme Court of a State'.[120] The 'constitutional corollary' of this is that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.[121] The jurisdiction to grant certiorari for jurisdictional error 'was, and is' a defining characteristic of the State Supreme Courts at federation.[122] This judicial supervisory role may not be abrogated by the State legislatures.[123] It follows that the State legislatures are unable to abrogate judicial review for jurisdictional error by the State Supreme Courts through a privative clause. However, it remains within their legislative power to restrict the reviewability of intra-jurisdictional errors. The effect of applying these principles is not to invalidate the privative clause, but to read it down to exclude its application to jurisdictional error.

At the Commonwealth level, the conclusion is identical by different reasoning. That reasoning is twofold. First, it is outside the legislative power of the Commonwealth to remove the capacity of the High Court to grant relief under s 75(v) of the *Constitution* where there has been jurisdictional error by an officer of the Commonwealth.[124] As the plurality stated in *Plaintiff S157*, '[t]hat section … introduces into the *Constitution* of the Commonwealth an entrenched minimum provision of supervisory review'.[125] The removal of review for jurisdictional error would lower the supervisory jurisdiction of the High Court below the minimum provision. The method by which the court brings a privative provision within this constitutional limit is by 'read[ing] down'[126] the provision, where possible, to only apply to intra-jurisdictional error.

The second limb of reasoning is that the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III.[127] A privative provision which excludes judicial review for jurisdictional error by a non-judicial body would, in effect, be conferring 'a non-judicial body [with] the power to conclusively determine the limits of its own jurisdiction'.[128] The conclusive determination of a body's own jurisdictional limits is a judicial power which, as noted, Ch III requires to be separate from the exercise of non-judicial power.

Privative clauses and the rule of law

A restricted record has the potential to create 'islands of power immune from supervision and restraint'.[129] Intra-jurisdictional errors contained solely in the decision-makers reasons would be immune to review, even in the absence of a privative provision. A right to reasons, for which I have advocated above, would be frustrated if the contents of a statement of reasons could not be scrutinised by a reviewing court for these errors. These considerations sit uneasily with the concept of the rule of law in Australia, which is 'textually reinforce[d]' by s 75(v) of the *Constitution*.[130] The minimum judicial supervisory jurisdiction granted by the section provides an assurance, 'to all people affected that officers of the Commonwealth [and States] obey the law and neither exceed nor neglect any jurisdiction which the law confers upon them'.[131]

In comparing *Plaintiff S157* and *Kirk*, Bateman argued that they provide three 'stable features':

> (i) the maintenance of parity in respect of federal and State privative clauses; (ii) the use of an interpretative approach to read down privative clauses rather than declaring them unconstitutional; and (iii) a concern to avoid arbitrary, or unlimited, power.[132]

Uniformity between the jurisdictions clearly weighed on the High Court in *Kirk*: 'there is but one common law of Australia'.[133] The desirability of continuity and consistency in the law goes without saying and is one of the tenets of the Diceyan rule of law.[134] However, the most noteworthy of the points raised by Bateman is the concern to avoid arbitrary power. Privative clauses present a paradox as they must be read as part of a whole statutory context. The statute provides a legislative intent that decision-making power is to be exercised in accordance with the statute, but if it is not then there can be no questioning of the decision. Read strictly, this would be an arbitrary power. Bateman argued that this is inconsistent with the rule of law, which 'privileges *legal* over *political* accountability'.[135] The High Court's emphasis on the assumption of the rule of law in the *Constitution*,[136] access to court and avoiding 'islands of power' is evidence, according to Bateman, of the influence of the rule of law and its rejection of non-legal accountability.[137]

The preceding argument suggests a measured progression to a substantive approach to the rule of law in Australia.[138] However, the presence of a written constitution in Australia has underpinned 'the dominance of a formal account of the rule of law in Australia'.[139] It remains to be seen whether approaches to the rule of law will be developed in a more substantive manner in the wake of *Plaintiff S157* and *Kirk*.

Limitations of an expanded record

The foregoing analysis is not to imply that an expanded record would apply in all cases. There are two reasons for this. First, the relevant legislature retains the capacity to restrict judicial review for intra-jurisdictional error, irrespective of where the error may appear, through the passing of a privative provision.[140] Second, it will be recalled that the wider statutory context is relevant to whether the record is to be extended in a given case.[141]

Bateman has generally commented on the impact of statutory context:

> The *Constitution* entrenches a model of administrative law that preserves Parliament's capacity to formulate the content of, and therefore the limitations on, a delegated statutory power … Certainly, the judiciary retains a role in imposing implied limitations on statutory powers, via a statute's subject-matter, scope and purpose or the principle of legality, but effect must ultimately be given to Parliament's formulation of the boundaries of legality. The primacy that must be given to statutory text and purpose leads to the conclusion that administrative law cannot always limit plenary provisions and, indeed, that the *Constitution* appears to prevent it from doing so.[142]

On this formulation, it appears that administrative law is being relegated to a merely interpretive role when dealing with an apparently unlimited provision. In some circumstances, the law would be powerless to 'limit plenary provisions'.[143] With respect, administrative law does prevent the exercise of unlimited power. The common law assumes that Parliament intends a jurisdictional limitation on the exercise of power under a statute. Statutes are interpreted in line with this assumption.[144] Decisions extraneous to the limitations are ultra vires. Since *Kirk* and *Plaintiff S157*, even an expressed 'plenary provision' would likely be interpreted as analogous to a privative clause and therefore only protect intra-jurisdictional error from review. The restriction on unlimited power is both constitutional and interpretive.

Bateman is correct in stating that Parliament has the capacity to define the jurisdictional limits on a statutory power. However, this is a different proposition entirely from one that provides the legislature with the capacity to confer truly unlimited powers, free from constitutional restraint, and relegates the courts to mere mouthpieces of Parliamentary will. Lacey has argued that:

> [i]f legislatures move away from privative clauses in favour of careful legislative drafting in an attempt to identify or narrow the list of errors which might be classed as 'jurisdictional', the Court may well find other legal bases upon which certiorari may be granted.[145]

Whether other legal bases to issue certiorari are required would depend on the reach of jurisdictional error. At present, it would appear that the constitutional basis of the doctrine, combined with the courts interpretive role, provides an adequate check on legislative power to confine judicial review.

Conclusion

At its core, administrative law is concerned with the lawful exercise of a statutory decision-making power. This constraint on administrative and judicial power is tempered by deference to legislative intention. It is this legislative intention that should constrain the availability of certiorari, not a common law principle that provides for a restricted record. High Court cases concerning the interpretation of privative clauses have demonstrated that the policy imperative of restraining unlawful decision-making has undermined the policy of finality in decision-making. It follows that the policy central to the reasoning in both *Osmond* and *Craig* is uncertain. The High Court has acknowledged this doubt and hinted at a reconsideration of *Craig*.[146]

The principles of procedural fairness are amongst the most important of administrative law. They act as a safeguard against intrusion on a person's rights, interests or legitimate expectations. A failure to provide reasons after a decision has been made against an ordinary person would foster distrust in the processes of the executive and judiciary. Further, the lack of such a right undermines the role of the judiciary as the overseer of lawful decision-making power. The confinement of reasons and the record appears to be an article of faith in governments which have proven their capacity to over-step their bounds throughout history.[147] This is not a reflection on the democratic system which Australia is

privileged to enjoy, but a comment on the fallibility of human decision-makers. It is time to reconsider the principles of *Osmond* in line with contemporary standards and understanding of constitutional implications.

Endnotes

1 See generally *Annetts v McCann* (1990) 170 CLR 596; *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337; *Minister for Immigration and Ethnic Affairs v Jia Legeng* (2001) 205 CLR 507. In this article, the phrases 'procedural fairness' and 'natural justice' are used interchangeably: *Kioa v West* (1985) 159 CLR 550, 584-5 (Mason J).
2 (1986) 159 CLR 656 (*Osmond*). Gibbs CJ gave the leading judgment, with which Brennan and Dawson JJ agreed. Wilson and Deane JJ assented in separate judgments.
3 *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447, 465 (Kirby P) (*Osmond CA*). See, eg *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13; *Administrative Law Act 1978* (Vic) s 8; *Administrative Appeals Tribunal Act 1975* (Cth) s 28; *Judicial Review Act 1991* (Qld) s 32; *Administrative Decisions Review Act 1997* (NSW) ch 3 pt 2 div 2; *State Administrative Tribunal Act 2004* (WA) s 21.
4 *Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ); *Wainohu v State of New South Wales* (2011) 243 CLR 181, 213-5 [54]-[58] (French CJ and Kiefel J) (*Wainohu*).
5 *Osmond CA* [1984] 3 NSWLR 447.
6 (1986) 159 CLR 656, 667; *Craig v South Australia* (1994) 184 CLR 163, 181 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) (*Craig*).
7 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (*Kirk*). A plurality judgment was given by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. Heydon J dissented on a costs issue.
8 *Osmond v Public Service Board of New South Wales* [1983] 1 NSWLR 691, 693 (Hunt J).
9 Ibid 693-4.
10 Ibid 698.
11 *Osmond CA* [1984] 3 NSWLR 447. Kirby P and Priestley JA, Glass JA dissenting.
12 *Osmond* (1986) 159 CLR 656, 668.
13 *Osmond CA* [1984] 3 NSWLR 447, 463; citing Geoffrey Flick, *Natural Justice: Principles and Application* (Butterworths, 1979) 87. See also PP Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal* 282, 283.
14 TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies* 497, 499-500.
15 *Osmond CA* [1984] 3 NSWLR 447, 464.
16 Mark Elliot, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] *Public Law* 56, 67 (emphasis in original).
17 *Osmond CA* [1984] 3 NSWLR 447, 464-5.
18 Ibid 467.
19 Ibid 456; citing *Pettitt v Dunkley* [1971] 1 NSWLR 376.
20 *Osmond CA* [1984] 3 NSWLR 447, 467.
21 Ibid 468.
22 Matthew Groves, 'Before the High Court – Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*' (2013) 35 *Sydney Law Review* 626, 633.
23 Ibid. An example in the context of procedural fairness is the necessity exception to the bias rule: *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337, 359 [65] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
24 *Osmond* (1986) 159 CLR 656, 669.
25 Ibid 662; citing *Sharp v Wakefield* [1891] AC 173; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (*Padfield*); *Minister of National Revenue v Wrights' Canadian Ropes Ltd* [1947] AC 109 (PC) (*Wrights*).
26 *Osmond* (1986) 159 CLR 656, 663; citing *R v Gaming Board; Ex Parte Benaim and Khaida* [1970] 2 QB 417 (CA), 430-1 (Lord Denning MR) (*Benaim*); *Payne v Lord Harris* [1981] 1 WLR 754 (CA), 765 (Brightman LJ) (*Payne*).
27 [1891] AC 173.
28 *Sharp v Wakefield* [1891] AC 173, 183.
29 *Wrights* [1947] AC 109, 123 (PC); *Padfield* [1968] AC 997, 1032-3 (Lord Reid), 1049 (Lord Hodson), 1053-4 (Lord Pearce), 1061-2 (Lord Upjohn).
30 *Wrights* [1947] AC 109, 117 (PC).
31 Ibid 123.
32 Ibid.
33 Ibid.
34 *Padfield* [1968] AC 997, 1000, 1002.
35 Ibid 1032 (Lord Reid), 1049 (Lord Hodson), 1053 (Lord Pearce).
36 Ibid 1032 (Lord Reid), 1049 (Lord Hodson), 1054-5 (Lord Pearce). 1059-61 (Lord Upjohn).
37 Ibid 1032-3 (Lord Reid), 1049 (Lord Hodson), 1053-4 (Lord Pearce), 1061-2 (Lord Upjohn).

38 PP Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal* 282, 290.
39 *Osmond* (1986) 159 CLR 656, 662.
40 Ibid 663; citing *Benaim* [1970] 2 QB 417, 430-1 (CA) (Lord Denning MR); *Payne* [1981] 1 WLR 754, 765 (CA) (Brightman LJ).
41 *Payne* [1981] 1 WLR 754 (CA).
42 Ibid 757, 762-3, 767 (Lord Denning MR).
43 (2001) 206 CLR 57 (*Miah*).
44 Ibid 83-4 [90] (Gaudron J), 93 [126] (McHugh J), 112-3 [181] (Kirby J).
45 See generally *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19]-[20] (Gleeson CJ); The Hon JJ Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769; Groves, above n 22, 637.
46 *Miah* (2001) 206 CLR 57, 88 [104] (Gaudron J), 94-6 [128]-[129], [131], [139] (McHugh J).
47 Ibid 112 [179]–[180] (Kirby J).
48 *R v Secretary for the Home Department; Ex Parte Doody* [1994] 1 AC 531, 566 (Lord Mustill, Lords Keith of Kinkel, Lane, Templeman and Browne-Wilkinson agreeing) (*Doody*).
49 Ibid 563-6; *R v Civil Service Appeal Board; Ex Parte Cunningham* [1991] 4 All ER 310, 319 (CA) (Lord Donaldson of Lymington MR); *R v Parole Board; Ex Parte Wilson* [1992] QB 740, 750-1 (CA) (Taylor LJ); Craig, above n 38, 296-8; Groves, above n 22, 638-9.
50 [1970] 2 QB 417 (CA).
51 Ibid 427-8 (Lord Denning MR).
52 Ibid 428.
53 Ibid 432.
54 Ibid 431 (citations omitted).
55 *Wainohu* (2011) 243 CLR 181, 213-5 [54]-[58] (French CJ and Kiefel J); *Osmond* (1986) 159 CLR 656, 666; *Osmond CA* [1984] 3 NSWLR 447, 454.
56 *Osmond* (1986) 159 CLR 656, 666-7 (emphasis added).
57 Ibid 667.
58 Ibid.
59 Wendy Lacey, 'Administrative Law' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future – Michael Kirby and his Legacy* (Thomson Reuters, 2009) 81, 90.
60 *Osmond* (1986) 159 CLR 656, 669.
61 *Osmond CA* [1984] 3 NSWLR 447, 465; Lacey, above n 59. See also D St L Kelly, 'The *Osmond* Case: Common Law and Statute Law' (1986) 60 *Australian Law Journal* 513, 513-4.
62 *Osmond* (1986) 159 CLR 656, 667.
63 *Wainohu* (2011) 243 CLR 181, 214 [54]-[55] (French CJ and Kiefel J); *Pettitt v Dunkley* [1971] 1 NSWLR 376, 382 (Asprey JA), 388 (Moffitt JA).
64 *Benaim* [1970] 2 QB 417 (CA), 430 (Lord Denning MR); cited in *Osmond CA* [1984] 3 NSWLR 447, 466.
65 See, eg, *International Finance Trust Company v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54] (French CJ).
66 Groves, above n 22, 637.
67 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
68 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 591 [15] (Gleeson CJ), 595 [32] (McHugh J), 617 [101] (Gummow J), 626 [135] (Kirby J), 655-6 [219] (Callinan and Heydon JJ); *South Australia v Totani* (2010) 242 CLR 1, 45 [66] (French CJ).
69 *South Australia v Totani* (2010) 242 CLR 1, 45 [66] (French CJ).
70 *Wainohu* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J).
71 Ibid 219-220 [68]-[69] (French CJ and Kiefel J), 228-30 [104]-[107], [109] (Gummow, Hayne, Crennan and Bell JJ).
72 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HCA).
73 Ibid 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
74 *Leeth v The Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).
75 Ibid; citing *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 542; [1957] AC 288, 317 (PC) (*Boilermakers*).
76 *Osmond* (1986) 159 CLR 656, 667; quoting *R v Awatere* [1982] 1 NZLR 644, 649 (Woodhouse P).
77 *Osmond* (1986) 159 CLR 656, 666.
78 *Wainohu* (2011) 243 CLR 181, 215 [56] (French CJ and Kiefel J).
79 Ibid.
80 *Benaim* [1970] 2 QB 417, 430 (CA) (Lord Denning MR); cited in *Osmond CA* [1984] 3 NSWLR 447, 466.
81 Elliott, above n 16, 65-8.
82 Ibid 66.
83 (2013) 252 CLR 480 (French CJ, Crennan, Bell, Gageler and Keanne JJ) (*Wingfoot*).
84 Ibid 498 [46].
85 Ibid 498-9 [47].
86 Ibid 499 [48].
87 Ibid 500-1 [53].
88 Ibid 501 [54].

89 Ibid 501 [55].
90 Elliot, above n 16, 67.
91 *Osmond* (1986) 159 CLR 656, 676 (Deane J) (emphasis added).
92 Ibid 670 (Gibbs CJ).
93 *Re Commercial Registrar of the Commercial Tribunal (WA); Ex Parte Perron Investments Pty Ltd* [2003] WASC 198, [22]-[23] (Wheeler J); Groves, above n 22, 636.
94 *Western Australian Rural Counselling Association Inc v Minister for Agriculture, Fisheries and Forrestry* [2008] FCA 986, [29] (Siopis J); Groves, above n 22, 636.
95 *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104, 115-6 (Jerrard JA, McMurdo P and Davies JA agreeing); Groves, above n 22, 636.
96 *Watson v South Australia* (2010) 278 ALR 168, 191-3 (Doyle CJ, Anderson J agreeing), 193-8 (Peek J) (SASCFC); Groves, above n 22, 636.
97 *Osmond* (1986) 159 CLR 656, 667.
98 *Craig* (1994) 184 CLR 163, 175 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Kirk* (2010) 239 CLR 531, 567 [56] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
99 *Craig* (1994) 184 CLR 163, 176; *Kirk* (2010) 239 CLR 531, 567; *Wingfoot* (2013) 252 CLR 480, 492 [26].
100 (1986) 159 CLR 656, 667.
101 *Craig* (1994) 184 CLR 163, 182.
102 Ibid 181.
103 Ibid; citing *Hockey v Yelland* (1984) 157 CLR 124, 142 (Wilson J).
104 *Craig* (1994) 184 CLR 163, 181.
105 Ibid.
106 (2010) 239 CLR 531, 577 [85].
107 Ibid 577-8 [85]-[86].
108 Ibid 578 [87].
109 Wendy Lacey, '*Kirk v Industrial Court of New South Wales* – Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641, 661.
110 Alexander Vial, 'The Minimum Entrenched Supervisory Review Jurisdiction of State Supreme Courts: *Kirk v Industrial Relations Commission (NSW)*' (2011) 32 *Adelaide Law Review* 145, 145. See also Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463, 475; Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175, 201.
111 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151 (Spigelman CJ, Beazley and Basten JJA).
112 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 158 IR 281 (Wright, Boland and Backman JJ).
113 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2007) 164 IR 146 (Wright, Boland and Backman JJ).
114 *Kirk v Industrial Relations Commission (NSW)* (2008) 173 IR 465 (Spigelman CJ, Hodgson and Handley JJ).
115 *Kirk* (2010) 239 CLR 531, 561[34]-[35], [37].
116 Ibid.
117 Ibid 565 [50]-[53].
118 They were also jurisdictional errors, rendering the aforementioned analysis on the nature of the record as obiter.
119 *Kirk* (2010) 239 CLR 531, 581 [101]. In effect, the provision provided that 'a decision of the Industrial Court was final and may not be appealed against, reviewed, quashed or called into question by any court'.
120 Ibid 580 [96].
121 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ); cited in *Kirk* (2010) 239 CLR 531, 580 [96].
122 *Kirk* (2010) 239 CLR 531, 580 [97]-[98].
123 Ibid 581 [98].
124 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 512 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (*Plaintiff S157*); cited in *Kirk* (2010) 239 CLR 531, 579 [95].
125 *Plaintiff S157* (2003) 211 CLR 476, 513 [103].
126 Ibid 510 [91].
127 Ibid 512 [98]. See also *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HCA); *Boilermakers* (1957) 95 CLR 529; [1957] AC 288 (PC).
128 *Plaintiff S157* (2003) 211 CLR 476, 512 [98].
129 *Kirk* (2010) 239 CLR 531, 581 [99].
130 *Plaintiff S157* (2003) 211 CLR 476, 513 [103]; citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).
131 *Plaintiff S157* (2003) 211 CLR 476, 514 [104].
132 Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463, 476.
133 (2010) 239 CLR 531, 581 [99].

134 The Hon Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 178, 181; citing AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 185-93.
135 Bateman, above n 132, 478 (emphasis in original).
136 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).
137 Bateman, above n 132, 478; citing *Plaintiff S157* (2003) 211 CLR 476, 492 [31] (Gleeson CJ); *Kirk* (2010) 239 CLR 531, 581 [99].
138 See generally TRS Allan, *Constitutional Justice – A Liberal Theory of the Rule of Law* (Oxford University Press, 2001); David Dyzenhaus, *The Constitution of Law – Legality in a Time of Emergency* (Cambridge University Press, 2006); Wendy Lacey, *Implementing Human Rights Norms – Judicial Discretion and Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 6.
139 Wendy Lacey, *Implementing Human Rights Norms – Judicial Discretion and Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 6-7. See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1, 23 [72] (McHugh and Gummow JJ).
140 *Kirk* (2010) 239 CLR 531, 581 [100].
141 Ibid 578 [86].
142 Bateman, above n 132, 487.
143 Ibid.
144 See, eg, *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 12 (Stephen J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-40 (Mason J). These example cases demonstrate that the question of whether a decision-maker has failed to consider material factors or whether irrelevant considerations were taken into account is determined by reference to the governing statute.
145 Lacey, above n 109.
146 *Kirk* (2010) 239 CLR 531, 577-8 [85]-[86].
147 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 646 [190] (Kirby J); citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 187-8 (Dixon J).