*Christopher Chiam**

THE RIGHT TO REASONS AND THE COURTS' SUPERVISORY JURISDICTION

Abstract

In *Osmond*,[1] the High Court held that there is no common law rule that generally requires administrative decision-makers to give reasons for their decisions. This article adds to the body of literature arguing that this rule should be revisited. In this article, I argue that the constitutionally entrenched supervisory jurisdiction of ch III courts provides a basis to argue that the rule in *Osmond* needs to be reconsidered. This argument has three strands. The first strand is that giving reasons facilitates the courts' exercise of their supervisory jurisdiction, and hence reasoning analogous to *Pettitt v Dunkley* [1971] 1 NSWLR 376 may be applicable. The second strand is that the High Court's jurisprudence on the validity of legislation seeking to limit that jurisdiction has recognised that judicial review must be practically effective, and that a duty to give reasons would be consistent with such recognition. The final strand is that the High Court has conceptualised the supervisory jurisdiction as playing an accountability role, which lends constitutional support to the idea of a developing 'culture of justification'.

I Introduction

In *Osmond*, the High Court held that administrative decision-makers do not have a general duty to provide reasons for their decisions. This ruling has been the subject of much academic criticism. Commentators have raised three main arguments in support of decision-makers being required to give reasons.[2] The first is that the giving of reasons leads to better quality decisions by focusing a decision-maker's

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1 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 ('*Osmond*').

2 Genevra Richardson, 'The Duty to Give Reasons: Potential and Practice' [1986] (Autumn) *Public Law* 437, 445.

attention on the key issues that they need to consider.[3] The second is that giving reasons facilitates appeals, whether that be an appeal to a court or merits review.[4] The final main argument is that the rules of procedural fairness should require decision-makers to provide reasons. The thrust of that argument is that providing reasons is often necessary to ensure that the decision-making process is both apparently and actually fair.[5]

While *Osmond* remains good law,[6] there has been increasing recognition that in some circumstances reasons do need to be provided. Chief Justice Gibbs' leading judgment in *Osmond* assumed (but did not decide) that, in 'special circumstances', principles of natural justice may require a decision-maker to give reasons.[7] Some Australian judges have also suggested that the statute in question may require this result.[8] However, an approach based on the individual circumstances of each case has its own difficulties. As Michael Taggart points out, this approach creates uncertainty as to what is required of decision-makers in particular cases.[9] In addition, an approach based on special circumstances implies that reasons will not always be required, which means their benefits will not be universally obtained. Finally, as those categories of exceptions expand, there is a a growing tension in maintaining that there is no general duty to provide reasons.[10]

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3 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 242 [105] (Kirby J) ('*Palme*'); GT Pagone, 'Centipedes, Liars and Unconscious Bias' (2009) 83(4) *Australian Law Journal* 255, 261; Laurene Dempsey, 'Western Australia State Administrative Tribunal: A Long Time Coming — Worth the Wait' (2005) 13(1) *Australian Journal of Administrative Law* 47, 58; Margaret Allars, 'Of Cocoons and Small "c" Constitutionalism: The Principle of Legality and an Australian Perspective on *Baker*' in David Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing, 2004) 307, 318.

4 David Dyzenhaus and Michael Taggart, 'Reasoned Decisions and Legal Theory' in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press, 2007) 134, 148.

5 Justice Chris Maxwell, 'Is the Giving of Reasons for Administrative Decisions a Question of Natural Justice?' (2013) 20(2) *Australian Journal of Administrative Law* 76, 83–7.

6 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 497–8 [43] (French CJ, Crennan, Bell, Gageler and Keane JJ) ('*Wingfoot*').

7 *Osmond* (n 1) 670. See also *Sydney Ferries v Morton* [2010] NSWCA 156, [78] (Basten JA) ('*Morton*').

8 *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 377 [25] (Handley JA), 396 [117] (Basten JA) ('*Vegan*').

9 Michael Taggart, '*Osmond* in the High Court of Australia, Opportunity Lost' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Perspectives* (Oxford University Press, 1986) 53.

10 See, eg, John Basten, 'Judicial Review: Recent Trends' (2001) 29(3) *Federal Law Review* 365, 381, citing *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531; *R v Higher Education Funding Council; Ex parte Institute of Dental Surgery* [1994] 1 WLR 242.

While there is nothing unusual about a legal rule with exceptions, this article argues that the common law should develop a duty to provide reasons. This proposition has been argued before.[11] However, the novelty of my argument is that it relies on rules and values relating to the supervisory jurisdiction entrenched in ss 73 and 75(v) of the *Constitution*.[12] This article has three substantive parts. In Part II, I argue that the *Constitution* not only embodies formal rules, but also substantive values that can influence the development of the common law. In Part III, I develop the three core strands of the argument. The first strand is that decision-makers should be required to give reasons to facilitate the courts' exercise of their entrenched supervisory jurisdiction. The second strand is that the High Court has recognised that Parliament cannot legislate in a way that substantially curtails the supervisory jurisdiction. This reasoning may reflect a constitutional value that recognises that judicial review must be practically effective and not just available as a matter of form, which is furthered by the provision of reasons. The third strand is that these provisions of the *Constitution* embody values of accountability which support a 'culture of justification' in Australian public law.[13] These last two strands deploy the method of reasoning that I outline in Part II. They rely on substantive values derived from the reasoning in constitutional cases concerning the entrenched supervisory jurisdiction, to argue that the common law should develop a duty to provide reasons. In Part IV, I rebut some responses that may be put against my argument. I leave for another day the question of what consequences may flow from a failure to provide reasons. However, unless and until the High Court further refines the concept of materiality, it is unclear how a failure to give reasons could amount to jurisdictional error because it is difficult to demonstrate how a failure to give reasons could have affected the outcome of the decision itself.[14]

II The Common Law and the *Constitution*

In this Part I seek to make two points. The first is that inherent in, and following from, the text of the *Constitution* are what I will call 'constitutional values'. The second point is that these constitutional values can influence the development of the common law, and not just in the paradigm case where the common law must develop to conform with the *Constitution*.

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11 See, eg, Matthew Groves, 'Before the High Court: Reviewing Reasons for Administrative Decisions' (2013) 35(3) *Sydney Law Review* 627, 631–2.

12 Groves briefly mentioned this idea, but did not fully develop the argument: ibid 636–7.

13 Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36(1) *Federal Law Review* 1, 14. Taggart acknowledges that the term was first used in Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31.

14 See *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ). Compare *Palme* (n 3) 250 [127]–[128] (Kirby J). See also John Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85(5) *Australian Law Journal* 273, 299.

A *Formal Rules and Substantive Values*

My starting point is to draw a distinction between 'formal rules' and 'substantive values'. Drawing upon Patrick Atiyah and Robert Summers, a 'formal rule' is a reason or rule upon which courts are 'empowered or required' to base their decision.[15] However, there are often economic, political, or social considerations that lie behind or explain these formal rules.[16] These considerations are what I will call 'substantive values'. While I draw upon Atiyah and Summers' work, this is not a novel idea and was suggested as early as 1908 by Roscoe Pound.[17]

One example that illustrates this point in the *Constitution* is s 116. The formal rule contained in that section precludes Parliament from making laws establishing any religion or religious observance, or prohibiting the free exercise of any religion. When a case involving s 116 arises, the Court is required to determine whether the legislation in question is contrary to that section. In doing so, the Court is required to apply the formal rule in s 116, which means that legislation will not be invalid merely if it is morally objectionable (such as if it compels a person to do something contrary to their religion).[18] However, it may be said that the formal constitutional rule in s 116 embodies the more general value of religious freedom. Therefore in *Evans v New South Wales*, the Court referred to s 116 in the context of suggesting that 'freedom of religious belief and expression' is 'generally accepted' in Australian society.[19] Although it is not clear how this value affected the ultimate result in *Evans*, the Court appeared to suggest that the formal rule in s 116 supported the recognition of a broader substantive value of freedom of religious belief and expression, even though that section does not provide a general protection of religious freedom. Nonetheless, I propose to call this a 'constitutional value' because it apparently owes its existence at least in part to a formal constitutional rule.

While the distinction between formal rules and substantive values has a long history, traditional thinking about the *Constitution* may still be sceptical about the idea of substantive 'constitutional values'. This is because the *Constitution* is often thought of as being an example of 'thin' constitutionalism, in the sense that its focus is on establishing federal institutions and allocating power within the federation, rather than embodying fundamental values.[20] Certainly unlike equivalent instruments of

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15 Patrick S Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987) 2.

16 Ibid 5.

17 Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383, 385–6. See also Jack Beatson, 'Has the Common Law a Future' (1997) 56(2) *Cambridge Law Journal* 291, 298–9.

18 *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ).

19 *Evans v New South Wales* (2008) 168 FCR 576, 596 ('*Evans*').

20 Elisa Arcioni and Adrienne Stone, 'The Small Brown Birds: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60, 60.

other countries, the *Constitution* lacks an explicit statement of constitutional values.[21] However, Rosalind Dixon has argued that there are some substantive values that find support from the text, history and structure of the *Constitution*.[22] While her focus is on how those values are deployed by courts when making constitutional decisions,[23] the necessary premise of that argument is that such values exist and are identifiable within our constitutional framework.[24]

How do we determine the constitutional values that exist in relation to a formal constitutional rule? The simple answer is: with difficulty. Like many legal questions, the common law can and will admit many different answers. Justice Gordon, writing extra-curially, describes an example of this in the statutory context.[25] In *PGA v The Queen* ('*PGA*'), the High Court had to determine whether the common law recognised that sexual assault could occur between spouses.[26] All of the judges held that there was a historical rule that rape could not occur within a marriage because a wife gave irrevocable consent to her husband to engage in intercourse. However, the key question was whether that rule still existed in Australia in 1963, which is when the relevant conduct occurred.[27] The Court was referred to statutes conferring various rights on women, including the right to vote and own property, and also legislation extending the grounds on which a divorce could be obtained. The majority used these statutes to conclude that a wife could choose to revoke a term of the 'marriage contract' in the same way that she could exercise her right to dissolve that union. That right also flowed from the fact that these legislative changes meant that women were largely on equal terms as men.[28] On the other hand, Heydon J, in dissent, confined these statutes to their formal terms and did not find that they evinced broader substantive values that displaced this historical rule.[29] By analogy, the task of working out the constitutional values contained in a formal rule is not necessarily uncontroversial. Even when those values are identified, it is not always clear at what level of generality they should be expressed.[30] The surest guide, therefore, is a careful analysis of what the courts have said about these formal rules, and an examination of how far they extend.

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21 Rosalind Dixon, 'Functionalism and Australia Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury Publishing, 2018) 3, 3.

22 Ibid 12–13.

23 Ibid 4.

24 See generally Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury Publishing, 2018), which contains a series of essays considering how these values should be identified and what some of them may be.

25 See Justice Michelle Gordon, 'Analogical Reasoning by Reference to Statute: What Is the Judicial Function' (2019) 42(1) *University of New South Wales Law Journal* 4, 10–13.

26 (2012) 245 CLR 355.

27 Ibid 364 [1]–[2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

28 Ibid 384 [63]–[65].

29 Ibid 395 [109], 399 [122] (Heydon J).

30 GFK Santow, 'Aspects of Judicial Restraint' (1995) 13(2) *Australian Bar Review* 116, 143.

B *Role in Common Law Reasoning*

Assuming that these constitutional values are identified, can they be used to influence the common law? It is clear that the *Constitution* can influence the development of the common law. In *Lange v Australian Broadcasting Corporation* ('*Lange*'),[31] the then Prime Minister of New Zealand commenced defamation proceedings against the Australian Broadcasting Corporation ('ABC'). The ABC argued that the relevant publications were protected by the defence of qualified privilege.[32] The High Court ultimately held that this common law defence must 'conform' with the *Constitution* and the implied freedom of political communication,[33] and that therefore the defence must be expanded to protect communications relating to a political matter.[34]

However, this method is not relevant here because I do not argue (and I do not think it can be argued) that the conclusion in *Osmond* demonstrates nonconformity with the *Constitution*. Having said that, it is reasonably clear that the *Constitution* can influence the common law even where the need for conformity does not *require* such a change. First, that is in fact what happened in *Lange*. Taken at its highest, the implied freedom of political communication only required the defence of qualified privilege to be made available with respect to government and political matters that affect the people of Australia.[35] However, the common law was extended further than this to also cover the United Nations and other countries.[36] Second, in the early 2000s Adrienne Stone developed her account of how the High Court's reasoning in *Lange* did not necessarily preclude the *Constitution* from guiding the direction of the common law even where it did not require a change.[37] This idea, which Stone called the 'guidance' or 'mere influence' model,[38] has received support from a number of later writers and has not been seriously doubted.[39] Finally, it has been argued that

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31 (1997) 189 CLR 520 ('*Lange*').

32 Ibid 551.

33 Ibid 566.

34 Ibid 571.

35 Ibid.

36 Ibid.

37 Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 404–6; Adrienne Stone, 'The Common Law and the Constitution: A Reply' (2002) 26(3) *Melbourne University Law Review* 646, 648–50.

38 Stone, 'The Common Law and the Constitution: A Reply' (n 37) 648.

39 See, eg, Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action: The Search Continues' (2002) 30(2) *Federal Law Review* 217, 232; Kathleen Foley, 'The Australian Constitution's Influence on the Common Law' (2003) 31(1) *Federal Law Review* 131, 145–9; Sir Anthony Mason 'Choosing Between Laws' (2004) 25(2) *Adelaide Law Review* 165, 168; WMC Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79(3) *Australian Law Journal* 167, 180–1.

substantive values derived from statute can develop the common law.[40] An example of this has been outlined previously with reference to *PGA*. If that is correct, there is no reason in principle why a similar process of reasoning cannot be based on substantive values derived from the *Constitution*, especially given that the common law is subject to both the *Constitution* and legislation.

III Constitutional Values and the Requirement to Provide Reasons

In Part III, I develop the central argument of this article, which is that developments in constitutional law post-*Osmond* may provide a basis to reconsider that decision. This argument has three strands. The first strand is that administrative decision-makers should be required to provide reasons to facilitate the courts' exercise of their entrenched supervisory jurisdiction. In making that point I address the case law that suggests this logic is only applicable when judicial or quasi-judicial bodies are subject to statutory appeals. The second and third strands of the argument draw on substantive constitutional values in the manner outlined in Part II. The second strand of the argument is that the High Court's decisions in *Bodruddaza v Minister for Immigration and Multicultural Affairs* ('*Bodruddaza*')[41] and *Graham v Minister for Immigration and Border Protection* ('*Graham*')[42] reflect a substantive constitutional value that recognises that judicial review must be practically effective. The final strand is that the supervisory jurisdiction embodies notions of accountability, and that this provides support for a 'culture of justification' which can in turn support a duty to provide reasons.

A *Constitutional Entrenchment of a Minimum Judicial Review Jurisdiction*

The first strand of the argument relies on the existence of the courts' supervisory jurisdiction, rather than any substantive values underlying it. At the federal level, in *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157*') the High Court stated that the jurisdiction conferred on the Court in s 75(v) to engage in judicial review for jurisdictional error cannot be taken away by Parliament.[43] While this is not a new idea,[44] a more novel development is the conclusion in *Kirk v Industrial*

40 Gordon (n 25) 4; Pound (n 17) 385–6; Beatson (n 17) 298–9, 307–8, 312.

41 (2007) 228 CLR 651 ('*Bodruddaza*').

42 (2017) 263 CLR 1 ('*Graham*').

43 (2003) 211 CLR 476, 511–12 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*').

44 See, eg, *Waterside Workers' Federation of Australia v Gilchrist Watt and Sanderson Ltd* (1924) 34 CLR 482, 526 (Isaacs and Rich JJ), 531, 551 (Starke J); *Ince Bros and Cambridge Manufacturing Co Pty Ltd v Federated Clothing and Allied Trades Union* (1924) 34 CLR 457, 464 (Isaacs, Powers and Rich JJ); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Ltd* (1914) 18 CLR 54, 68 (Barton J); *Federated Engine Drivers and Firemen's Association of Australasia v Colonial Sugar Refining Company Ltd* (1916) 22 CLR 103, 108 (Griffith CJ).

Court (NSW) ('*Kirk*').[45] In an influential judgment, the majority held that '[legislation] which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power'.[46] The Court reasoned that s 73 of the *Constitution* required there to be bodies fitting the description of state supreme courts, and at federation one of the 'defining characteristics' of such bodies was their jurisdiction to grant prohibition, certiorari, mandamus and habeas corpus in response to jurisdictional errors.[47]

My argument is that the High Court's affirmation that the supervisory jurisdiction is entrenched means that administrative decision-makers should be required to give reasons to facilitate the courts' ability to engage in judicial review. This is a variation of Kirby P's reasoning in *Osmond* in the Court of Appeal. President Kirby found that one basis for the duty to give reasons is to facilitate the courts' ability to engage in judicial review.[48] Put another way, a failure to give reasons would render that review 'nugatory'.[49] President Kirby drew an analogy with the decision in *Pettitt v Dunkley*,[50] and in particular the judgment of Moffitt JA who held that a judicial officer is obliged to give reasons so far as is necessary to allow the case to be considered by an appellate court.[51] Simply put, the force of Kirby P's reasoning has arguably increased in light of the High Court's recent affirmation that the courts' supervisory jurisdiction is inalienable at both a federal and state level. These developments may give rise to an argument that the High Court's decision in *Osmond* should be revisited.

In the High Court, Gibbs CJ highlighted three difficulties with Kirby P's reasoning on this point. Respectfully, I do not find these objections persuasive. The first was that there was 'no justification' for finding that rules applicable to judicial functions necessarily apply to administrative functions. This meant that the principle in *Pettitt v Dunkley* that judicial officers must give reasons to facilitate an appeal did not necessarily apply to administrative decision-makers.[52] The second point was to draw a distinction between appeals and judicial review, as simply because a judge should give reasons when an *appeal* was possible did not necessarily mean that administrative decision-makers should do the same when *judicial review* is possible.[53] The final point was that extending the principle to require reasons to be given to facilitate

45 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 ('*Kirk*').

46 Ibid 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

47 Ibid 580–1 [96]–[100].

48 *Osmond v Public Service Board of NSW* (1984) 3 NSWLR 447, 467 (Kirby P).

49 Ibid 467.

50 [1971] 1 NSWLR 376 ('*Pettitt v Dunkley*').

51 *Osmond v Public Service Board of NSW* (n 48) 456 (Kirby P), citing ibid 388.

52 *Osmond* (n 1) 667 (Gibbs CJ), citing *Housing Commission (NSW) v Tatmar Pastoral Co* [1983] 3 NSWLR 378, 386 (Mahoney JA), though compare Hutley JA's observation at 381: 'A court must not nullify rights of appeal by giving no or nominal reasons, but there is no duty to expound reasons so as to facilitate appeals.'

53 *Osmond* (n 1) 667 (Gibbs CJ).

judicial review would 'undermine' the rule that reasons do not form part of the record for the purposes of certiorari.[54]

In terms of the first of Gibbs CJ's reasons, it is true that the principles applying to judicial decision-making should not automatically apply to administrative decision-makers. However, that does not necessarily mean that the same principles cannot apply. For example in *Ridge v Baldwin*, the House of Lords held that principles of natural justice could apply to both judicial and administrative decisions.[55] In a similar vein, some writers have suggested that it is unclear why the obligation to provide reasons should be limited to judicial or quasi-judicial functions.[56]

Although the duty of judicial officers to give reasons now appears to be justified on the basis of the institutional integrity of the court, rather than facilitating an appeal or review,[57] recent case law suggests a willingness to apply the reasoning in *Pettitt v Dunkley* to administrative decision-makers. In *Campbelltown City Council v Vegan* ('*Vegan*'),[58] the New South Wales Court of Appeal held that the Appeal Panel constituted under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) was required to give reasons for their decision. For Handley JA, one reason for this was that the Act provided that a further medical assessment could be obtained if the evidence suggested that the assessment was wrong, or that the worker's condition had changed. His Honour's view was that the reasoning in *Pettitt v Dunkley* could apply to administrative decision-makers, and as such the Appeal Panel needed to give reasons to allow a further medical assessment to be obtained if thought necessary.[59] However, Basten JA referred to *Pettitt v Dunkley* and noted that 'the justification for an obligation to give reasons is derived from the right of appeal granted in relation to an exercise of *judicial* power'.[60] Therefore for Basten JA, it was significant that the Appeal Panel exercised functions that were judicial in nature, even though those functions were not strictly of a ch III kind.[61] That label was considered appropriate because the decision of the Appeal Panel involved the application of a statutory test to determine rights as between employer and employee.[62]

54 Ibid 666–7 (Gibbs CJ).

55 *Ridge v Baldwin* [1964] AC 40, 75 (Lord Reid).

56 Bruce Chen, 'A Right to Reasons: *Osmond* in Light of Contemporary Developments in Administrative Law' (2014) 21(4) *Australian Journal of Administrative Law* 208, 219.

57 Luke Beck, 'The Constitutional Duty to Give Reasons for Judicial Decisions' (2017) 40(3) *University of New South Wales Law Journal* 923, 927, citing *Wainohu v New South Wales* (2011) 243 CLR 181, 225 [92] (Gummow, Hayne, Crennan and Bell JJ).

58 (2006) 67 NSWLR 372 ('*Vegan*').

59 Ibid 377 [22]–[30] (Handley JA).

60 Ibid 393 [105] (Basten JA).

61 Ibid 396 [117]–[118] (Basten JA).

62 Ibid 394 [109] (Basten JA).

Subsequent cases have favoured the approach adopted by Basten JA and have found the characterisation of power as quasi-judicial as significant when determining whether there is an implied duty to give reasons.[63] However, their treatment of the requirement that decisions be 'quasi-judicial' or 'judicial in nature' suggests that the strict division between administrative and judicial decisions, advocated by Gibbs CJ in *Osmond*, is being blurred. This is because the characterisation of a decision as 'quasi-judicial' (or similar terminology) has been applied broadly. For a start, contrary to Basten JA's assertion in *Vegan*,[64] the decision of the Appeal Panel did not itself determine rights. The Appeal Panel dealt solely with 'medical disputes', which was defined in the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) to encompass disputes relating to factual matters that turned on the nature and severity of an impairment suffered by a claimant.[65] A dispute would reach the Appeal Panel if first, the Commission referred a medical dispute for assessment under pt 7 of the Act,[66] and second, an appeal was allowed to the Appeal Panel in relation to that assessment.[67] Once the Appeal Panel made its decision in relation to that medical dispute, it issued a certificate of assessment.[68] However, that certificate did not, by itself, determine the rights of the parties and the outcome of the claim. Rather, the ultimate dispute between the parties was resolved by the Commission (not the Appeal Panel), and was done by the Commission issuing a certificate of its determination.[69] When reaching its decision, the certificate of assessment furnished by the Appeal Panel is 'conclusively presumed' to be correct as to a prescribed list of matters, but is otherwise just evidence as to any other matter.[70] Therefore the assessment by the Appeal Panel did not by itself determine the rights of the parties; rather it is the decision of the Commission that did. Even though the Appeal Panel's certificate of assessment was conclusive in respect of matters related to the 'medical dispute', the outcome of the ultimate dispute was to be resolved by the Commission.

The significance of this is that to the extent that *Vegan* stands for the proposition that a decision needs to be 'quasi-judicial' before a duty to give reasons will be implied

63 *Sherlock v Lloyd* (2010) 27 VR 434, 439 [21]; *L & B Linings Pty Ltd v WorkCover Authority of NSW* [2012] NSWCA 15, [53] (Basten JA); *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v Secretary of the Treasury* (2014) 242 IR 318, 330 [45] (Basten JA) ('*Public Service Association and Professional Officers' Association*'); *Soliman v University of Technology, Sydney* (2012) 207 FCR 277, 292 [46]; *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 365 ALR 86, 93 [26] (Basten JA); *NSW Land and Housing Corporation v Orr* (2019) 373 ALR 294, 307 [58]–[59] (Bell P).

64 *Vegan* (n 58) 394 [109].

65 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 319. All references to the Act are to the version as it applied to resolving the dispute in *Vegan*.

66 Ibid s 321.

67 Ibid s 327.

68 Ibid s 328(5).

69 Ibid s 294.

70 Ibid s 326.

in this way, that label may be applied liberally by the courts to encompass decisions that have some legal effect, even if they do not ultimately determine legal rights or obligations. Similarly, in *Public Service Association and Professional Officers' Association*, the Court found that the relevant decision was of a judicial type because it involved the application of a 'broad evaluative standard' which is similar to civil disputes determined by traditional courts.[71] Although it is impossible to precisely define judicial power,[72] applying an 'evaluative standard' is a very broad concept that would embrace a great number of administrative decisions as well as judicial ones. Finally, in *Minister for Health v A*, two judges (with White JA agreeing) apparently found it sufficient to imply a duty to give reasons on the basis that there was a statutory appeal mechanism.[73] None of the judgments expressly considered whether the power exercised by the Minister was judicial in nature. These cases suggest that the significance of the division between judicial and administrative bodies has diminished, both through the creation of a broad category of 'quasi-judicial' functions, and the implicit view in *Minister for Health v A* that characterising a body as 'quasi-judicial' may no longer be a prerequisite for implying a duty to give reasons.[74]

The second of Gibbs CJ's reasons was that 'the principle that judges and magistrates ought to give reasons in any case in which an *appeal* lies from the decision' does not mean that administrative decision-makers must give reasons to facilitate *judicial review*.[75] This appears to be a distinction drawn between statutory appeals and judicial review. However, Gibbs CJ did not explain the significance of this distinction. The essential point in Moffitt JA's judgment in *Pettitt v Dunkley* was that judicial officers must give reasons to enable the appellate court to carry out an appeal if necessary.[76] It is unclear why statutory appeal rights should be treated differently from constitutionally entrenched judicial review in this regard. Although later cases have continued to insist that the existence of judicial review is insufficient to find an implied duty to give reasons, this conclusion is required by the High Court's decision in *Osmond*. In *Sydney Ferries v Morton* ('*Morton*'), Basten JA stated that if the existence of judicial review was significant in finding an obligation to give reasons, then 'it would be inconsistent with the general principle that there is no such obligation'.[77] Intermediate appellate courts of course cannot overrule the High Court. Therefore the continued insistence that the reasoning in *Pettitt v Dunkley* cannot apply to judicial review appears to be a distinction mandated by the High Court in *Osmond*, rather than one required by principle.

71 *Public Service Association and Professional Officers' Association* (n 63) 330 [45] (Basten JA).

72 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ), 267 (Deane, Dawson, Gaudron and McHugh JJ).

73 *Minister for Mental Health v A* [2017] NSWCA 288, [54] (Beazley ACJ), [169] (Sackville AJA).

74 See also *Morton* (n 7) [79] (Basten JA).

75 *Osmond* (n 1) 667 (Gibbs CJ) (emphasis added).

76 *Pettitt v Dunkley* (n 50) 387.

77 *Morton* (n 7) [80].

The last of Gibbs CJ's points can be dealt with briefly. It is unclear why the principle that reasons do not form part of the record would be undermined by a duty of administrative decision-makers to give reasons.[78] One possibility is that his Honour was concerned in ensuring that tribunals retained a genuine choice as to whether they incorporated reasons as part of the record.[79] Since the decision in *Northumberland Compensation Appeal Tribunal; Ex parte Shaw*, there were a series of decisions that took an expansive approach as to what would constitute 'incorporating' reasons into the record.[80] In that context, the effect of requiring decision-makers to give written reasons is that the 'choice' as to whether reasons were incorporated in the record would become illusory, as courts would regularly find that they had been incorporated. If that is the correct reading of Gibbs CJ's reasoning, that concern has disappeared since *Osmond* was decided. In *Craig v South Australia*, the High Court rejected an 'expansive approach' to certiorari with the effect that the definition of the record could only be expended to include the reasons given for a decision through statutory intervention, and that reasons would not be incorporated into the record through merely incidental or introductory references to them.[81] This means that a duty to provide reasons would not, on its own, necessarily expand certiorari's record because it would neither alter the definition of 'the record' at common law, nor automatically require that the reasons be incorporated as part of it.

In light of that, the argument that the reasoning in *Pettitt v Dunkley* cannot apply to administrative bodies is therefore not persuasive. The simplest explanation for why this position has persisted is that *Osmond* remains the law in Australia,[82] and lower courts are therefore bound to follow it. However, it is open to the High Court to overrule it and find that the common law requires administrative decision-makers to give reasons to facilitate the exercise of the Court's entrenched supervisory jurisdiction.

B *Functional Entrenchment of Judicial Review*

The second strand of the argument for reconsidering *Osmond* relies on the reasoning in cases that have held that Parliament is constrained in the extent to which it can practically curtail the entrenched supervisory jurisdiction. The High Court's reasoning in these cases is consistent with a constitutional value recognising that judicial review must be practically effective so that courts can serve their function of enforcing the limits of power conferred by Parliament. This constitutional value can be deployed

78 *Osmond* (n 1) 667 (Gibbs CJ), citing *Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338, 352 (Denning LJ) ('*Northumberland*').

79 *Northumberland* (n 78) 352 (Denning LJ).

80 JW Shaw and FJ Gwynne, 'Certiorari and Error on the Face of the Record' (1997) 71(5) *Australian Law Journal* 356, 364; *Craig v South Australia* (1995) 184 CLR 163, 180 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Craig*').

81 *Craig* (n 79) 180–2 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

82 *Wingfoot* (n 6) 497–8; [43] (French CJ, Crennan, Bell, Gageler and Keane JJ), cited recently in *Li v A-G (NSW)* (2019) 99 NSWLR 630, 624 [48] (Basten JA).

by the common law to shift the focus away from whether review is possible without reasons, to whether it is assisted by their provision.

From early in the 20th century, the High Court has recognised that the jurisdiction conferred by s 75(v) of the *Constitution* could not be removed by Parliament.[83] For example in *Australian Coal and Shale Employees Federation*,[84] the Court held that a provision stating that a decision shall not be 'subject to prohibition, mandamus or injunction, in any court on any account whatever' was ineffective in taking away the High Court's jurisdiction under s 75(v).[85] However, what was less clear was the extent to which Parliament could limit or constrain that jurisdiction without baldly taking it away. In *Ince Brothers v Federation Clothing and Allied Trades Union* ('*Ince Brothers*'), the joint judgment stated, in respect of s 75(v), that 'appropriate legislation [can] limit the cases to which [prohibition] is applicable'.[86] In support of that proposition, their Honours cited *R v Nat Bell Liquors Ltd* ('*Nat Bell Liquors*').[87] It is not entirely clear what their Honours considered to be 'appropriate legislation', and the judgment in *Nat Bell Liquors* is not clear either. Their Honours' discussion in *Ince Brothers* was in the context of the remedy of prohibition, whereas the decision in *Nat Bell Liquors* concerned certiorari.[88] In any case, the issue before the Privy Council was whether the legislation in question had the effect of altering the content of the record, rather than restricting the availability of certiorari (or any other remedy).[89] The notion that Parliament could impose some limitations on the Court's jurisdiction under s 75(v) was also adverted to by Deane and Gaudron JJ in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*.[90] Their Honours stated that while the content of the supervisory jurisdiction could not be diminished, the legislature could prescribe procedural rules to be observed in its exercise.[91]

The lack of case law outlining these boundaries led Pincus J to observe in 1991 that it is not clear about the extent to which Parliament can pass legislation reducing the effectiveness of the jurisdiction under s 75(v).[92] However, in more recent decisions, the High Court has held that legislation that has the 'practical' effect of removing the Court's jurisdiction may also be invalid. This is significant because it shows that the *Constitution* protects the effectiveness of the jurisdiction in s 75(v) to some degree,

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83 See above n 39.

84 *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161 ('*Australian Coal and Shale Employees Federation*').

85 Ibid 176 (Latham CJ), 178 (Rich J), 186 (Starke J), 186 (McTiernan J agreeing with Latham CJ), 192–3 (Williams J).

86 (1924) 34 CLR 457, 464 (Isaacs, Powers and Rich JJ).

87 [1922] 2 AC 128.

88 Ibid 131 (Lord Sumner for the Court).

89 Ibid 161–4.

90 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

91 Ibid 205.

92 *David Jones Finance & Investments Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 484, 507.

and does not just guarantee that it exists. I will consider two decisions that illustrate this point: *Bodruddaza* and *Graham*. While these cases considered the validity of legislation limiting the federal supervisory jurisdiction entrenched in s 75(v), it is safe to assume that the same principles would apply to legislation affecting the supervisory jurisdiction of state courts.[93]

In *Bodruddaza*, what was then s 486A of the *Migration Act 1958* (Cth) provided that an application to the High Court for a remedy granted in its original jurisdiction must be made within 28 days of the applicant being notified of the decision. The section provided that the High Court must not make an order allowing an application to be made outside of that period. The section also included provisions allowing for an extension of time in some circumstances.[94] While the joint majority judgment did not accept that a time limit to make an application under s 75(v) could never be imposed, their Honours held that a law could be invalid if, either directly or as a matter of practical effect, it curtailed or limited the right to seek relief under s 75(v) in a way that was inconsistent with 'the place of that provision in the constitutional structure'.[95] The consequence of this ruling is that s 75(v) of the *Constitution* does not merely protect the High Court's supervisory jurisdiction in the abstract. Rather, it also extends to ensuring that review is practically effective.

The second judgment that illustrates this point is *Graham*. In that case, the High Court held that s 503A(2)(c) of the *Migration Act* was invalid as it imposed a 'substantial curtailment' on the capacity of a court to exercise its jurisdiction under s 75(v). In short, the provision provided that in some circumstances the Minister could not be compelled to provide information relevant to the exercise of a discretionary power to a court or tribunal.[96] The majority held that s 75(v) meant that Parliament could not legislate to deny the courts the 'ability to enforce the legislative limits of an officer's power', with the question of whether there has been a transgression being 'one of substance, and therefore of degree'.[97] The majority held that the 'practical impact' of s 503A(2)(c) was to 'shield the purported exercise of power from review',[98] because if the Minister relied on material that the court could not see then it would not be possible to draw adverse inferences regarding the Minister's process of reasoning.[99] This 'substantial curtailment' was sufficient to render the provision invalid.[100]

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93 See Mark Aronson, 'Retreating to the History of Judicial Review?' (2019) 47(2) *Federal Law Review* 179, 182.

94 *Bodruddaza* (n 41) 661 [17] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

95 Ibid 671 [53].

96 *Graham* (n 42) 18–19 [14]–[16] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

97 Ibid 27 [48].

98 Ibid 28–9 [52]–[53].

99 Ibid 29 [54].

100 Ibid 32 [64].

The formal rule embodied in *Bodruddaza* and *Graham* is that Parliament cannot enact legislation that has the practical effect of substantially curtailing the Court's jurisdiction in s 75(v). It is arguable that beyond this formal rule lies a substantive constitutional value that recognises that courts must be *practically* able to review the legality of a challenged decision. Put another way, the High Court has held that a form of review with substantial practical curtailments would not satisfy the supervisory jurisdiction mandated by s 75(v) (and potentially s 73). However, to reach that conclusion, there is an unexpressed premise that the jurisdiction entrenched by these provisions has a minimum practical content that is not satisfied by simply allowing an applicant to seek judicial review.[101] The constitutional text does not necessarily require that outcome, however, the fact that the High Court has adopted this approach lends support to a constitutional value that acknowledges the significance of judicial review being practically effective. This distinction between review being available and practically effective was recognised in Edelman J's dissenting judgment in *Graham*. His Honour distinguished *Bodruddaza* on the basis that the case imposed a 'condition precedent' that entirely precluded review in some instances, whereas the legislation in *Graham* only 'regulated' the exercise of the Court's supervisory jurisdiction.[102] On the other hand, the majority saw *Bodruddaza* as an analogous case,[103] indicating a rejection of Edelman J's 'narrow conception of the function of s 75(v)', which only prevented the legislature from 'abolishing' the constitutional writs in the sense that they are no longer available.[104]

This constitutional value can be used to support a common law duty to provide reasons. As has been argued on a number of occasions, if a decision-maker gives reasons then this assists an application for judicial review.[105] The reasoning in *Bodruddaza* and *Graham* suggests that the supervisory jurisdiction entrenched in the *Constitution* is protected from legislative interference that purports to render it ineffective even if it does not entirely take it away. That reasoning means that in determining whether the common law should provide for a duty of decision-makers to provide reasons, focus may be shifted to the benefits that reasons provide, rather than trenchantly focussing on the fact that review is possible without them. In *Osmond*, Gibbs CJ suggested that the absence of reasons does not make review impossible, because, for instance, the court may be able to infer that they had no good reasons at all.[106] That is undoubtedly true, however it may be missing the point. If *Bodruddaza* and *Graham* are understood in the way that I have suggested, then Gibbs CJ's focus on the *possibility* of review would become less significant, because emphasis could

101 Cf ibid 44–5 [99] (Edelman J).

102 Ibid 50 [110].

103 Ibid 27 [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

104 Ibid 50 [109] (Edelman J).

105 See, eg, PP Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53(2) *Cambridge Law Journal* 282, 283.

106 *Osmond* (n 1) 663–4. See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360 (Dixon J).

also be placed on the *effectiveness* of review being furthered if decision-makers are required to provide reasons.

In any event it is worth emphasising that I am not arguing that the decisions in *Bodruddaza* and *Graham* require the common law to develop in this way. Strictly speaking, the ratio that can be derived from these cases is that when determining whether legislation impermissibly denies the Court of its supervisory jurisdiction under s 75(v), it is necessary to consider the legislation's practical effect on the ability to enforce the limits of power conferred on an officer of the Commonwealth.[107] However, my argument is that the logic outlined in Part II above can be deployed to show how the reasoning in these cases that led to that conclusion can also support a common law duty to provide reasons. Therefore the question is whether *Bodruddaza* and *Graham* can be read as encapsulating substantive values that go beyond their formal ratio. I concede that it is possible that those cases may be read as not standing for any substantial values beyond what they actually decided. However, it is worth nothing that the Court's judgment in *Graham* demonstrated a continuing commitment to the idea that s 75(v) may not only entrench a minimum jurisdiction of review, but also some substantive principles.[108] That point was illustrated by the majority's emphasis that the question in *Graham* required 'a return to first principles',[109] followed by an examination of a number of ideas including the rule of law.[110] While the judgment did little to emphasise what these principles are, it at least suggests that the Court is alive to the idea that there are important principles that form the foundation of s 75(v), and that as a result the section goes further than merely providing that the Court has jurisdiction to engage in review. Those foundational principles may form a source of material that can influence the growth and development of the common law.

C *Culture of Justification*

The third strand of the argument for revisiting *Osmond* draws upon the 'culture of justification' concept first devised by Etienne Mureinik,[111] but later developed by other writers (most notably David Dyzenhaus).[112] This concept has been deployed to support the common law developing a duty to give reasons. The argument is

107 *Graham* (n 42) 26 [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

108 Leighton McDonald, '*Graham* and the Constitutionalisation of Australian Administrative Law' (2018) 91(1) *Australian Institute of Administrative Law Forum* 47, 50.

109 *Graham* (n 42) 24 [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

110 Ibid 24–6 [40]–[44].

111 Mureinik (n 13).

112 See, eg, David Dyzenhaus, 'The Legitimacy of Legislation' (1996) 46(1) *University of Toronto Law Journal* 129; David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14(1) *South African Journal on Human Rights* 11; David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) *Oxford University Commonwealth Law Journal* 5.

that Australian public law, and modern liberal democracies more generally,[113] have developed to reflect a 'culture of justification'. The developments that supposedly give rise to this culture include freedom of information legislation,[114] the proliferation of statutory duties to give reasons,[115] the establishment of tribunals such as the Administrative Appeals Tribunal,[116] the *Administrative Decisions (Judicial Review) Act 1977* (Cth),[117] the concept of natural justice,[118] parliamentary scrutiny of proposed laws for rights compatibility,[119] and (potentially) unreasonableness as a ground of judicial review.[120] Once that culture has been established, the argument is that the rule in *Osmond* cannot easily be reconciled with it, and that therefore it is susceptible to being overturned if formally challenged.[121] What I want to add to this argument is to suggest that this 'culture of justification' can find some grounding in the High Court's jurisprudence in relation to the entrenched supervisory jurisdiction.

It is necessary to explain a little further what is meant by a 'culture of justification'. Mureinik originally only provided a cursory account of what this term meant, describing it as a 'culture' in which 'every exercise of power is expected to be justified' and where the leadership of the government depends on the 'cogency' of those justifications.[122] However, Mureinik's original focus was analytical rather than conceptual, in that his original work sought to demonstrate that the South African Bill of Rights[123] represented a shift towards a culture of justification, rather than providing a complete treatment of that concept.[124] The concept was developed further by Dyzenhaus, who suggested that the culture embodied the internalisation within a legal system of two aspirational ideals: participation and accountability.

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113 Chief Justice Murray Gleeson, 'Outcome, Process and the Rule of Law' (2006) 65(3) *Australian Journal of Public Administration* 5, 12.

114 Grant Hooper, 'The Rise of Judicial Power in Australia: Is There Now a Culture of Justification?' (2015) 41(1) *Monash University Law Review* 102, 112; Chen (n 56) 226.

115 Dyzenhaus, Hunt and Taggart (n 111) 29.

116 Hooper (n 114) 112; Chen (n 56) 226.

117 Hooper (n 114) 112.

118 Ibid 117–21; Janina Boughey, 'The Use of Administrative Law to Enforce Human Rights' (2009) 17(1) *Australian Journal of Administrative Law* 25, 27.

119 Rosalind Croucher, 'Getting to Grips with Encroachments on Freedoms in Commonwealth Laws: The ALRC Freedoms Inquiry' (2016) 90(7) *Australian Law Journal* 478, 485.

120 Hooper (n 114) 125–8; Janina Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43(1) *Federal Law Review* 59, 84–6; Swati Jhaveri, 'The Survival of Reasonableness Review: Confirming the Boundaries' (2018) 46(1) *Federal Law Review* 137.

121 Sir Anthony Mason, 'Reply to David Dyzenhaus' in Cheryl Saunders and Katherine Le Roy (eds), The Rule of Law (Federation Press, 2003) 52, 54; Taggart, 'Australian Exceptionalism in Judicial Review' (n 13) 16; Chen (n 55) 213–14.

122 Mureinik (n 13) 32.

123 See *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2.

124 Ibid 31–3.

Participation requires that individuals whose rights or interests are affected by state action should be able to participate in the political process to influence those actions, and accountability requires the state to justify its decisions when challenged.[125] Dyzenhaus, Hunt and Taggart went further and explained that accountability in this sense requires more than just a bare duty to provide reasons. Their view was that a culture of justification requires there to be 'good' reasons for the exercise of power, and there must be a mechanism to determine what constitutes a good reason.[126] In other words, a culture of justification cannot exist where a government is free to justify its actions on any basis whatsoever. In this sense, there is a difference between explanation and justification.[127] In a culture of justification, the rationale behind state action must be explained, and the rationale given must conform with the norms of that legal system that define what constitutes an adequate reason.

My point is that the High Court's account of the supervisory jurisdiction emphasises its accountability function, and therefore is consistent with the existence of a culture of justification. James Stellios has argued that s 75(v) was originally inserted into the *Constitution* by Inglis Clark to allocate jurisdiction between original and appellate jurisdiction, and that the accountability function was first raised in the convention debates quite late in the piece.[128] However, as he recognises, the accountability role of s 75(v) has dominated the High Court's analysis in recent years.[129] Thus, in *Plaintiff M68*, Gageler J explained that the purpose of s 75(v) was to ensure that officers of the Commonwealth could be restrained from acting unlawfully.[130] This supports the existence of a culture of justification because it provides that the actions of an officer of the Commonwealth must be lawful, and provides remedies to hold them accountable. In other words, the supervisory jurisdiction allows courts to determine whether an administrative decision is justifiable, with a decision being 'justifiable' if it is lawful. Importantly, judicial review's focus on the legality of administrative action is entirely consistent with Mureinik's culture of justification because he accepted the supremacy of Parliament. Therefore as Grant Hooper has suggested, a form of

125 Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (n 111) 34–5.

126 Dyzenhaus, Hunt and Taggart (n 111) 29. See also Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (Bloomsbury Publishing, 2017) 262–3.

127 Dyzenhaus, Hunt and Taggart (n 111) 29.

128 James Stellios, 'Exploring the Purposes of Section 75(v) of the *Constitution*' (2011) 34(1) *University of New South Wales Law Journal* 70, 72. See also Janina Boughey and Greg Weeks, 'Government Accountability as a "Constitutional Value"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury Publishing, 2018) 99, 103–8.

129 Stellios (n 128) 92.

130 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 95 [126] (Gageler J), quoting *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363 (Dixon J).

review that focuses on the legality of administrative action is not inconsistent with a culture of justification.[131]

At the state level, the accountability role of the supervisory jurisdiction has been made clearer by the reasoning in *Kirk*. There the High Court held that one of the 'defining characteristics' of state supreme courts as at federation was the ability to enforce limits on executive power by granting constitutional writs in cases of jurisdictional error.[132] The weight of academic argument since *Kirk* is that the conclusion cannot be solely justified on the basis of legal history. Commentators have noted that it is doubtful whether the High Court's statement about the legal position at federation was correct,[133] and in any case the Court did not articulate a criterion as to what makes a particular feature of a state supreme court a 'defining characteristic'.[134] This means that the better reading of *Kirk* is that it also involved considerations of constitutional values and policy, rather than a mechanical consideration of legal history.[135] That point was made plain by the majority's reasoning that allowing state parliaments to deprive state supreme courts of their supervisory jurisdiction would allow decision-makers to carry out their role in a way that strained the limits of the powers that Parliament has conferred on them.[136] This part of the reasoning clearly appeals to the accountability function of judicial review, rather than an historical analysis of state supreme courts.

The accountability function of the supervisory jurisdiction can be severely limited. In *Graham*, the majority noted that whether a law breaches the constitutional limitation by denying the High Court the ability to exercise its jurisdiction under s 75(v) is a question 'of substance, and therefore of degree'.[137] This means that Parliament can validly legislate to impose some limitations on the Court's ability to engage in judicial review. Parliament has also achieved that effect through the use of no-invalidity

131 Hooper (n 114) 110–11.

132 *Kirk* (n 45) 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

133 Ronald Sackville, 'The Constitutionalisation of State Administrative Law' (2012) 19(3) *Australian Journal of Administrative Law* 127, 131; Oscar I Roos, 'Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*' (2013) 35(4) *Sydney Law Review* 781; Jeffrey Goldsworthy, '*Kable, Kirk*, and Judicial Statesmanship' (2014) 40(1) *Monash University Law Review* 75, 97.

134 Stephen McDonald, '"Defining Characteristics" and the Forgotten "Court"' (2016) 38(2) *Sydney Law Review* 207, 210; David Rowe, 'State Tribunals within and without the Integrated Federal Judicial System' (2014) 25(1) *Public Law Review* 48, 55.

135 See Gabrielle Appleby and Anna Olijnyk, 'The Impact of Uncertain Constitutional Norms on Government Policy: Tribunal Design after *Kirk*' (2015) 26(2) *Public Law Review* 91, 96; Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of *Hickman*?' (2010) 21(2) *Public Law Review* 92, 100.

136 *Kirk* (n 45) 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Kirk* (n 45) 570–1 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70(6) *Harvard Law Review* 953, 963.

137 *Graham* (n 42) 27 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

clauses, which specify that a decision will not be invalid merely because particular requirements have not been satisfied. In *Commissioner of Taxation v Futuris Corporation Ltd*, the High Court appeared willing to apply such a clause to conclude that noncompliance with statutory conditions would not be a jurisdictional error.[138] Legislative provisions of this kind can significantly impair the accountability function of judicial review by confining the 'limits' on power that the courts are required and permitted to enforce. However, it appears to be equally clear that no-invalidity clauses cannot have the effect of rendering every error as non-jurisdictional.[139] The limits of that have not yet been clearly articulated by the High Court. What is clear, however, is that the courts will continue to have some accountability role to play in declaring and enforcing the limits of the law, even if Parliament has considerable scope to narrow what those limits are.

In short, the understanding that judicial review plays an important accountability function supports the existence of a 'culture of justification', and that culture sits uncomfortably with the decision in *Osmond*. It should be apparent that my argument relies on the full breadth of the concept of justification, in that judicial review is just one aspect of this rich conception of a legal culture that separately includes a duty to give reasons. Therefore one potential response is that even if the supervisory jurisdiction is consistent with a culture of justification, that does not necessarily prove that such a culture exists in its entirety. However, it is not necessary to prove that the supervisory jurisdiction supports a culture of justification on its own. As outlined above, commentators have pointed to a number of other developments that support the existence of such a culture. The High Court's jurisprudence on the entrenched supervisory jurisdiction does not need to sustain this strand of the argument on its own, and I do not suggest that it does. Rather, it represents another reason why it can be fairly said that accountability and justification are important principles in our legal system, and this affects the ongoing persuasiveness of *Osmond*.

IV Arguments in Response

In Part IV, I respond to potential counter-arguments. The first argument I consider is the idea that the common law developing a duty to give reasons may be futile in light of statutory and related common law developments. The second and third arguments arise from Heydon J's judgment in *Minister for Home Affairs v Zentai* ('*Zentai*').[140] In that case the first respondent argued that the relevant decision-maker was required to give reasons because otherwise they would be empowered to make unreviewable decisions, which is contrary to the minimum standard of review prescribed

138 (2008) 237 CLR 146, 156–7 [23] (Gummow, Hayne, Heydon and Crennan JJ).

139 Mark Aronson, 'Between Form and Substance: Minimising Judicial Scrutiny of Executive Action' (2017) 45(4) *Federal Law Review* 519, 537–8; Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21(1) *Public Law Review* 35, 37. This point is considered further at Part IV.C below.

140 (2012) 246 CLR 213 ('*Zentai*').

by s 75(v).[141] Justice Heydon was the only justice who considered this argument, and his Honour rejected it for two reasons. In this Part, I address those points to show that they do not preclude the entrenched supervisory jurisdiction from supporting a common law duty to give reasons.

A *A Futile Development?*

One potential counter argument is that there is no need for the common law to develop a duty of decision-makers to provide reasons. There are now a number of statutory provisions requiring decision-makers to provide reasons.[142] Furthermore, given that the court may infer that a decision was unreasonable where it is not possible for a court to discern how the decision was reached,[143] decision-makers may be encouraged to provide reasons to guard against that inference being drawn even where there is no statutory duty to do so.[144] In light of these developments, it might be arguable that there is no need for the common law to develop in this way. I will make three points in response.

First, while obvious, it is worth mentioning that there are some statutory schemes that do not specify that reasons must be provided for a decision, and where decision-makers do not choose to provide reasons as a matter of course.[145] Even where decision-makers have a 'convention' or 'practice' of providing reasons without any obligation to do so, courts cannot compel decision-makers to provide reasons in the absence of a duty requiring them to do so.[146] Therefore a common law-based duty to provide reasons will have some practical impact. Indeed, given that this development would have to come from the High Court as it involves overruling *Osmond*, and the Court does not have jurisdiction to consider hypothetical questions of law, by definition such a case could only arise where an applicant has no other right to obtain the reasons for a decision. In that sense this development would not be entirely academic, though admittedly it may be relatively narrow given the proliferation of statutory schemes requiring that reasons be given.[147]

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141 Ibid 248 [93] (Heydon J).

142 See, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13; *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

143 *Minister for Immigration v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ).

144 Ronald Sackville, 'The Evolution of the Duty of Decision-Makers to Give Reasons' (2013) 23(3) *Australian Journal of Administrative Law* 128, 136.

145 See, eg, the cases cited in Part III.A where applicants sought reasons for a decision where there was no express statutory requirements to provide them. See also at Administrative Review Council, 'Judicial Review in Australia' (Consultation Paper, April 2011) 87 [4.113]–[4.114] which notes that there are statutory schemes where there is no duty to provide reasons.

146 *A-G (NSW) v Quin* (1990) 170 CLR 1, 40 (Brennan J).

147 Chen (n 56) 215.

Second, a common law duty to provide reasons would simplify and clarify the Court's approach to implying a duty to give reasons in the absence of an express legislative duty. As I have outlined above, the approach of implying a duty to give reasons where the decision in question is judicial or quasi-judicial in nature has raised questions that have not been clearly answered.[148] In short, it is unclear what principled basis justifies this implication being limited to only judicial or quasi-judicial decisions, and the Court's classification of decisions as quasi-judicial compared to administrative has not been entirely satisfactory. A broader common law duty to provide reasons would promote clarity by removing the need for courts to engage in the difficult (and perhaps elusive) exercise of classifying decisions as administrative or judicial.

Finally, the creation of a common law duty to provide reasons leads to the associated democratic benefits of requiring Parliament to squarely confront the choice as to whether reasons should be provided for an administrative decision. If the default common law position is that decision-makers must provide reasons, then a choice by Parliament that reasons should not be provided in a particular context will require the enactment of legislation to that effect. This will mean that Parliament will bear greater responsibility for that decision because it will have to actively intervene to remove the right of an applicant to receive a statement of reasons. This argument is analogous to the rationale for the principle of legality, which states that fundamental rights can only be abrogated by unambiguous language that makes it clear to the electorate what Parliament is doing.[149] Admittedly, the argument would apply with less force here, because assuming that a common law right to reasons is not classed as a fundamental right which the principle of legality would protect,[150] then it could be excluded by an implication drawn from a statute rather than unambiguous language. However this development would increase electoral accountability of Parliament, at least in cases where the right to reasons is displaced by an express statutory provision to that effect, because in those circumstances it will become clear where a duty to provide reasons has been excluded by legislation.[151]

B *Review is Not Impossible*

In *Zentai*, it was argued that decision-makers are required to provide reasons because otherwise their decisions will be unreviewable. Justice Heydon alone considered that argument, and rejected it on the basis that even if a decision-maker fails to provide reasons, that does not necessarily mean their decision is 'unreasoned' or 'unexaminable'.[152] While his Honour acknowledged that the provision of reasons assists those seeking to challenge administrative decisions, they were not essential to

148 See Part III.A above.

149 Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 392–3.

150 Indeed, the fact that for a significant period of time there was no such right strongly suggests against it being classed as a fundamental right.

151 *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 262 [106] (Kirby J).

152 *Zentai* (n 140) 248 [94] (Heydon J).

a challenge. His Honour instead pointed to a number of other mechanisms available to an applicant as an alternative to receiving a written statement of reasons.[153]

That observation does not negate my argument. From the first respondent's written submissions in *Zentai*, it is apparent that they argued that there was a constitutional implication that reasons had to be given, with noncompliance having the effect of invalidating legislation.[154] For a constitutional implication to be drawn, the necessity or essentiality of that implication is a necessary precondition,[155] or at the very least a strong factor that supports drawing such an implication.[156] Hopefully, as should be clear by now, my argument is not that reasons are necessary for judicial review to be undertaken. Rather, my argument is that the entrenched supervisory jurisdiction provides a basis to argue that the common law should develop a prima facie requirement for administrative decision-makers to provide reasons. Being based on a common law development rather than a constitutional implication, this argument has the added benefit of allowing statutory overrule or the development of exceptions in cases where reasons are inappropriate.[157] Therefore it is not to the point that the courts can engage in judicial review even when decision-makers do not provide reasons for their decision.

In light of that, the more relevant point is Heydon J's reference to alternative mechanisms that an applicant can rely on to elicit a decision-maker's reasons. These include notices to produce, interrogatories, subpoenas requiring the decision-maker to give evidence, and cross-examination.[158] Arguably, the existence of these mechanisms means that the common law does not need to develop in the way that I have suggested because there are other ways that an applicant can elicit the reasons for a decision. The obvious response to this is that each of these alternatives pose problems. As Heydon J recognised, interrogatories and subpoenas can generally only be issued once proceedings have commenced.[159] Notices to produce require there to be a document answering the description of a statement of reasons — if there is no duty imposed on a decision-maker to give reasons, then there is no guarantee that such a document exists.[160] Although interrogatories can avoid that issue by allowing questions to be asked rather than documents produced, this may result in a statement of reasons being prepared after the fact in circumstances where the decision-maker is

153 Ibid 248 [94].

154 Charles Zentai, 'First Respondent's Written Submissions', Submissions in *Minister for Home Affairs v Zentai*, P56/2011, 10 February 2012, [43].

155 Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23(1) *Federal Law Review* 37, 44.

156 Daniel Reynolds, 'An Implied Freedom of Political Observation in the Australian Constitution' (2018) 42(1) *Melbourne University Law Review* 199, 206.

157 Groves (n 11) 633.

158 *Zentai* (n 140) 248–9 [94] (Heydon J).

159 Ibid 248–9 [94].

160 See, eg, *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts [No 2]* (2008) 251 ALR 80, 125 [169] (Buchanan J).

put on notice that their decision is being challenged. However, more fundamentally, all of these mechanisms are just alternative ways to obtain the reasons for a decision. In other words, pointing to these alternatives amounts to an implicit concession that reasons are in fact valuable. This assists, rather than undermines, the argument that the common law should develop to require decision-makers to provide those reasons.

C *The Role of Section 75(v)*

The other aspect of Heydon J's reasoning in *Zentai* is the conclusion that s 75(v) is only a grant of jurisdiction, and not a source of substantive law. His Honour held that this meant that it is not possible to derive an implication from it that all decision-makers must give reasons.[161]

Whether ch III of the *Constitution* can be the basis for substantive rights or substantive law depends on how one defines those terms. For example, speaking extra-curially, McHugh J has suggested that ch III does protect some substantive rights, which can be contrasted against procedural rights. His Honour defined a procedural right as 'a right of access to a method of enforcing substantive rights and duties'.[162] From that definition, his Honour concluded that the decisions in *Kable v DPP (NSW)*[163] and *Chu Kheng Lim v Minister for Immigration*[164] were examples of *substantive* rights flowing from ch III,[165] because they did not fit that definition of *procedural* rights. Other authors have also considered these cases to be examples of rights protected by ch III.[166]

It is clear then that the accuracy of Heydon J's assertion, and the correctness of any rebuttal, depends on how one defines 'substantive' law or rights. What I will attempt to do in this section is to justify that ch III, and in particular ss 73 and 75(v), can be considered by the common law to support the development of a duty of executive and administrative decision-makers to provide reasons. That justification requires two parts. The first part is that the substantive constitutional values flowing from the courts' supervisory jurisdiction can be deployed to support the development of a duty imposed on executive and administrative decision-makers. In other words, this part focuses on demonstrating that ss 73 and 75(v) (which concern ch III courts) can have implications for executive and administrative decision-makers. The second part of that justification is to show that those provisions can influence the development

161 *Zentai* (n 140) 249 [95] (Heydon J).

162 Justice Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21(3) *Australian Bar Review* 235, 237.

163 (1996) 189 CLR 51.

164 (1992) 176 CLR 1 ('*Chu Kheng Lim*').

165 McHugh (n 162) 247–9.

166 Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview' (2000) 20(3) *Australian Bar Review* 282, 284ff; Ashleigh Mills, 'Rights and Freedoms under the Australian Constitution: What Are They and Do They Meet the Needs of Contemporary Australian Society?' (2019) 93(8) *Australian Law Journal* 655, 662.

of a substantive duty, even though those provisions on their face merely establish the jurisdiction of the High Court.

The first part of the justification is relatively straightforward. Although ch III is titled 'The Judicature' and contains an 'exhaustive statement' of Commonwealth judicial power,[167] it also affects other branches of government. For example, the Commonwealth Parliament cannot legislate inconsistently with that exclusive grant of judicial power,[168] and neither the executive nor Parliament can authorise detention for a punitive purpose as that is an exclusively judicial function.[169] I submit, therefore, that there is no reason why ch III must be confined to affecting the role of the judiciary. If ch III supports the existence of constitutional values, they can be used to develop the common law in a way that in turn imposes obligations on executive and administrative decision-makers.

The second part of this justification is that even though the supervisory jurisdiction allows courts to enforce the limits of a decision-maker's power, it may also have some role to play when determining the scope of the powers or duties that are conferred on decision-makers. Put another way, I argue that even though s 75(v) (and indirectly, s 73) provides the source of the courts' jurisdiction to enforce the limits of a decision-maker's power, that does not necessarily mean that they have no role to play in determining the scope of a decision-maker's obligations.

First, s 75(v) and the corresponding supervisory jurisdiction of state courts should not be understood as simply entrenching a jurisdiction to engage in judicial review. In *Graham*, the High Court distinguished between laws which are invalid on the basis that they have the effect of denying the court jurisdiction under s 75(v), and laws cast as privative clauses which are valid if they can be read as expanding the scope of power conferred on a decision-maker.[170] That passage does not necessarily mean that s 75(v) (and the corresponding jurisdiction of state supreme courts) has no role to play when determining the duties of a decision-maker. The better view is that the supervisory jurisdiction can also condition the powers and duties of decision-makers, albeit the outer limits of that relationship are undefined. In *Plaintiff S157*, the High Court stated that there is an 'entrenched minimum *provision* of judicial review'.[171] The critical question is what exactly is entrenched. It has been argued that s 75(v) goes further than just protecting the Court's jurisdiction to engage in judicial review, but also provides some limitations on Parliament's power to legislate that compliance with a particular statutory condition is not jurisdictional. The argument goes that the plurality's statements in *Plaintiff S157* that s 75(v) also provides 'significant barriers'

167 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

168 *Chu Kheng Lim* (n 164) 26–7 (Brennan, Deane and Dawson JJ).

169 *Minogue v Victoria* (2019) 372 ALR 623, 628 [13] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

170 *Graham* (n 42) 26 [45]–[46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

171 *Plaintiff S157* (n 43) 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

to 'impair', 'avoid' or 'confine' review, suggest that some substantive principles of review may also be protected.[172] It has been suggested that at a minimum, review cannot be excluded by legislation of a decision infected by fraud or bad faith.[173] The High Court has yet to address this question directly or precisely define what substantive values or grounds of review are entrenched. However, if that is accepted, then it follows that irrespective of what the empowering legislation says, decision-makers will be required to exercise their powers in the absence of fraud, bad faith, and other similar limits because of s 75(v). That means that the supervisory jurisdiction does more than just permit the courts to enforce limits on power, but it also has some role to play in defining the minimum scope of a decision-maker's obligations.

Second, legislative provisions conferring jurisdiction have been construed in some cases as also conferring substantive rights or liabilities. One example of this is 'double function' legislation, which occurs when a statute expressed to only confer jurisdiction or authority is construed to also create substantive rights or obligations.[174] More relevantly, in the cases discussed above in Part III.A (such as *Vegan*), the existence of an appeal mechanism has been relied upon to find an implied statutory duty to give reasons. While similar logic has not yet been applied to the constitutional conferral of jurisdiction, the key point is that Australian courts recognise the idea of developing substantive rights and duties from seemingly procedural or jurisdictional provisions.

It follows that the distinction between procedural and substantive rights may not be as airtight as is sometimes suggested. As such, even if ch III is properly described as a procedural grant of jurisdiction, that does not mean it cannot tell us anything about substantive rights. This logic is reflected in Gleeson CJ's claim that s 75(v) 'secures a basic element of the rule of law',[175] because while on its face that provision merely confers jurisdiction, in doing so it gives individuals a mechanism to protect their right to be free from unlawful interference by the government.[176] While in a later case McHugh and Gummow JJ expressed doubts about employing that analysis to give the rule of law an 'immediate normative operation',[177] that was in response to the specific suggestion that rule of law principles could justify granting relief under s 75(v) where officers of the Commonwealth fail to give effect to a legitimate expectation.[178] Therefore it appears that their Honours did not necessarily foreclose

172 Aronson, 'Between Form and Substance' (n 139) 537–8; Aronson, 'Commentary' (n 139) 37; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2016) 1057 [18.40].

173 Aronson, 'Between Form and Substance' (n 139) 535.

174 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 165–6; Lee Aitken, 'Jurisdiction, Liability and Double Function Legislation' (1990) 19(1) *Federal Law Review* 31, 46–7.

175 *Plaintiff S157* (n 43) 482 [5].

176 See also Chief Justice Murray Gleeson, *Boyer Lectures 2000 — the Rule of Law and the Constitution* (ABC Books, 2000) 3.

177 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 [72] (McHugh and Gummow JJ).

178 Ibid 21 [65] (McHugh and Gummow JJ).

rule of law principles being used to develop the common law in an appropriate case. Expressed more generally, the possibility remains that the substantive values underlying ss 73 and 75(v) can be used to develop the common law.

V Conclusion

In short, this article adds to the growing body of literature that suggests that the High Court's decision in *Osmond* should be reconsidered. It does so by arguing that the supervisory jurisdiction entrenched in the *Constitution* can support the common law developing a duty of decision-makers to provide reasons for their decisions. One potential strength of this approach is that by grounding the argument in constitutional principles, it provides an opportunity to reconsider this question without having to overtly refer to policy considerations.

While there are strong arguments for overruling *Osmond*, it should be kept firmly in mind that only the High Court can take that step. Given the proliferation of statutory provisions requiring decision-makers to give reasons,[179] it may take some time before a suitable case arises where this question must be determined. Nonetheless, the question is still important because these statutory duties are not comprehensive.[180] While I agree that *Osmond* is unlikely to survive a direct challenge 'totally unscathed',[181] only time will tell how the High Court will approach this question.

179 Allars (n 3) 317.

180 Janina Boughey, 'A(nother) New Unreasonableness Framework for Canadian Administrative Law' (2020) 27(1) *Australian Journal of Administrative Law* 43, 51.

181 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24(2) *Australian Bar Review* 114, 129.