RECONSIDERING OSMOND

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I INTRODUCTION

While much judicial and scholarly ink has been spilled over the importance and desirability of reasons in Australian administrative decision-making,[1] more than 30 years have passed since the High Court of Australia held in *Public Service Board (NSW) v Osmond ('Osmond')* that the common law in Australia imposes no obligation on administrative decision-makers to provide reasons for their decisions.[2] However, it is clear that Australian administrative law has experienced significant changes since *Osmond* was handed down.[3] In light of these developments, '[i]t seems unlikely, even in the current climate of judicial caution, that the rule in *Osmond* could survive a direct onslaught totally unscathed.'[4] Expanding on previous scholarly and judicial consideration, this paper examines the evolution of two common law principles that are most likely to impact the rule in *Osmond* in the event of a 'direct onslaught' before the High Court, namely legal unreasonableness and natural justice.

II LEGAL UNREASONABLENESS

A *Exercising administrative discretion within the bounds of reasonableness*

Importing standards of reasonableness into administrative decision-making is not a modern juridical phenomenon. As early as the 16th century, in *Rooke's Case*,[5] the Court of King's Bench held that the discretion of the commissioners of sewers 'ought to be limited and bound with the rule of reason and law.' Much later, in *Sharp v Wakefield*,[6] Lord Halsbury LC observed that a discretionary power conferred by statute is intended to be exercised 'according to the rules of reason and justice, not according to private opinion; according to law, and not humour … [and] not arbitrary, vague, and fanciful, but legal and regular.' The modern conception of this principle was most famously enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (Wednesbury)*.[7] In *Wednesbury*, with the avoidance of merits review by the Court in mind, Lord Greene MR held that what was 'unreasonable' so as to warrant the interference by the Court applied to a 'strictly limited class of case',[8] namely those concerning conclusions or outcomes 'so unreasonable that no reasonable authority could ever have come to it'.[9] The standard of review in *Wednesbury* marked the bounds of legal reasonableness within which Australian administrative decision-makers were required to exercise discretion until the decision of the High Court in *Minister for Immigration and Citizenship v Li (Li)*.[10]

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[1] See generally Bruce Chen, 'A Right to Reasons: Osmond in Light of Contemporary Developments in Administrative Law' (2014) 21 *Australian Journal of Administrative Law* 208; Chris Maxwell, 'Is the Giving of Reasons for Administrative Decisions a Question of Natural Justice?' (2013) 20 *Australian Journal of Administrative Law* 76; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, Thomson Reuters 2013) 594–607. Recent examples of judicial consideration include *Minister for Home Affairs v Zentai* (2012) 246 CLR 213, [91]–[98] (Heydon J) and *Sherlock v Lloyd* (2010) 32 VAR 314 (Maxwell P, Ashley JA and Byrne AJA).

[2] (1986) 159 CLR 656 ('*Osmond*').

[3] Maxwell, above n 1, 76.

[4] Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 129. See also Michael Taggart, ' "Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1, 16.

[5] (1597) 5 Co Rep 99b, 100a.

[6] [1891] AC 179, 180.

[7] [1948] 1 KB 223 ('*Wednesbury*').

[8] Ibid 228.

[9] Ibid 234 (Lord Greene MR); William Gummow, 'Rationality and Reasonableness as Grounds of Review' (2015) 40 *Australian Bar Review* 1, 14.

[10] (2013) 249 CLR 332 ('*Li*'); *Kruger v Commonwealth* (1997) 190 CLR 1, 36–37 (Brennan CJ).

B *The emergence of* Li *unreasonableness*

In *Li*, the High Court held that a decision of the Migration Review Tribunal to refuse an adjournment under the *Migration Act 1958* (Cth), in circumstances whereby an applicant sought an adjournment until the outcome of a skills assessment was finalised for the purposes of obtaining a skilled occupation visa, was invalid on the sole ground of unreasonableness. Significantly, in making this finding, the Court in *Li* did not merely apply the unreasonableness ground of review, but rather reformulated it.[11] As noted above, until *Li*, the unreasonableness ground of review in Australia was tethered to the standard of review enunciated in *Wednesbury* and was therefore outcome-focused in its application.[12] However, in *Li*, Hayne, Kiefel and Bell JJ altered this position and noted that '*Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point.'[13] Their Honours held that '[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification'[14] and that '[t]he legal standard of reasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision'[15] but rather that the legal standard of reasonableness was 'the standard indicated by the true construction of the statute.'[16] French CJ similarly stated that the required degree of unreasonableness involved a decision that was 'arbitrary, capricious and to abandon common sense'.[17] The Court also unequivocally held that there is a presumption of law that Parliament intends the exercise of administrative power to be reasonable.[18]

In *Li*,[19] Gageler J explained that the ground of legal unreasonableness may be employed in two distinct contexts:

> Review by a court of the reasonableness of a decision made by another repository of power "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" but also with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

Hayne, Kiefel and Bell JJ also affirmed the principle that, even in circumstances where no reasons are provided, unreasonableness may be an inference drawn from the 'facts and from the matters falling for consideration in the exercise of the statutory power'.[20]

Where there are reasons provided for a particular administrative decision, especially in cases involving the exercise of wide discretion, the Court is able to follow the reasoning process of the decision-maker and identify the divergence, or the factors, in the reasons which may be said to make a decision legally unreasonable.[21] However, in circumstances where no reasons are provided for the exercise of a power or the making of a decision,

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[11] Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *Public Law Review* 117, 117.
[12] Leighton McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' (2015) 37 *Sydney Law Review* 467, 482–483; Ibid 117-118.
[13] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [68].
[14] Ibid [76].
[15] Ibid [68].
[16] Ibid [67].
[17] Ibid [28].
[18] Ibid [29] (French CJ), [63] (Hayne, Kiefel and Bell JJ) and [88] (Gageler J). See also *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 ('*Stretton*') [4]–[5] (Allsop CJ); *Oswal v Commissioner of Taxation* [2015] FCA 1439 ('*Oswal*') [41] (Griffiths J); *Kruger v Commonwealth* (1997) 190 CLR 1, 36 (Brennan CJ); *Wednesbury*, 234 (Lord Greene MR); *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J).
[19] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [105], citing *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 220–221 [47]. See also *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 ('*Singh*') [44] (Allsop CJ, Robertson and Mortimer JJ).
[20] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [76]. See also *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28 ('*Eden*') [60] (Allsop CJ, Griffiths and Wigney JJ); McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review', above n 12, 486–487.
[21] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [45] (Allsop CJ, Robertson and Mortimer JJ); *Oswal v Commissioner of Taxation* [2015] FCA 1439, [48] (Griffiths J); *Kaur v Minister for Immigration and Border Protection* [2014] FCA 915 ('*Kaur*') [110] (Mortimer J).

this will not be possible. In *Minister for Immigration v Singh (Singh)*,[22] the Full Court of the Federal Court of Australia held that in cases where no reasons are provided:

… all a supervising court can do is focus on the outcome of the exercise of power in the factual context presented, and assess, for itself, its justification or intelligibility bearing in mind that it is for the repository of the power, and not for the Court, to exercise the power but to do so according to law.

In *Singh*,[23] the Full Court also considered whether a court conducting review for legal unreasonableness is confined to the reasons of a decision-maker in cases where reasons have been provided. The Full Court noted that this was the approach taken by the High Court in *Li*,[24] and explained that, where reasons have been provided by a decision-maker, the supervising court should look to those reasons in order to understand why the power was exercised or why the decision was arrived at.[25] At least in cases where a discretionary power is involved, for the purposes of determining legal unreasonableness, the intelligible justification must lie within the reasons provided, as it is the administrative decision-maker in whom Parliament has conferred decision-making authority and thus, it is the explanation given by that decision-maker for that decision that should inform review by a supervising court.[26] If a court goes outside such reasons, the court might then be seen to be placing itself in the position of the decision-maker and thus acting impermissibly.[27] The Court in *Li* noted:

> … Where there are reasons, either the reasons given by the decision-maker demonstrate a justification or they do not. It would, we think, be a rare case where the reasons demonstrate a justification but the ultimate exercise of the power would be seen to be legally unreasonable.[28]

This suggests a reluctance of the courts to conclude that a decision is unreasonable if the decision is accompanied by reasons that cross the threshold of intelligibility.[29]

C *Does legal unreasonableness support or infer a duty to provide reasons?*

As the plurality in *Li* held that an administrative decision must have an intelligible justification in order to avoid attracting legal unreasonableness as a ground of review, it may be argued as a corollary of this requirement that administrative decision-makers must provide reasons in order to enable the court to ascertain the intelligibility of their decisions.[30] The question has often been posed: 'how can a court sensibly insist that decision-makers have rational reasons for their decisions, but not that they disclose what their reasons are?'[31] In *Minister for Immigration v SZMDS ('SZMDS')*,[32] Gummow ACJ and Kiefel J recognised the issues associated with determining the legality of administrative decisions based on notions of reasonableness, rationality or logicality in circumstances where no reasons have been provided, noting that in such circumstances a court is faced with 'a process of divination'.[33]

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[22] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [45] (Allsop CJ, Robertson and Mortimer JJ). See also *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28, [60] (Allsop CJ, Griffiths and Wigney JJ); *Kaur v Minister for Immigration and Border Protection* [2014] FCA 915, [110] (Mortimer J).

[23] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [46] (Allsop CJ, Robertson and Mortimer JJ).

[24] Ibid; Noting the reasoning of the Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

[25] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [47] (Allsop CJ, Robertson and Mortimer JJ).

[26] Ibid. See also *Hossain v Minister for Immigration and Border Protection* [2015] FCA 1292 [25] (Beach J).

[27] Ibid. In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [66], Hayne, Kiefel and Bell JJ warned against substituting a court's view as to how a discretion should be exercised for that of a decision-maker. See also *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28, 59 (Allsop CJ, Griffiths and Wigney JJ); *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11, [12] (Allsop CJ) and [58] (Griffiths J); *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 90 ALJR 197 [23] (French CJ, Bell, Keane and Gordon JJ); *Craig v South Australia* (1995) 184 CLR 163 ('*Craig*'), 175 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); McDonald, 'Rethinking Unreasonableness Review', above n 11, 121.

[28] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 [47] (Allsop CJ, Robertson and Mortimer JJ). See also *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28 [64] (Allsop CJ, Griffiths and Wigney JJ); *Huynh v Minister for Immigration and Border Protection* (2015) 232 FCR 497 [85] (Griffiths J).

[29] McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' above n 12, 487.

[30] Aronson and Groves, above n 1, 606–607; Paul Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal* 282, 284.

[31] Geoff Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24 *Melbourne University Law Review* 543, 553.

[32] (2010) 240 CLR 611 ('*SZMDS*').

[33] Ibid [36]; Chen, above n 1, 223.

In response to the suggestion that reasons ought to be required in order to determine whether a decision is unreasonable or involves irrationality, it may be argued that this cannot be the case in light of the reality that Australian courts are willing to determine questions of legal unreasonableness solely based on the outcome of decisions and in circumstances where no reasons have been furnished. This continues to be the case even after the seemingly forceful obiter remarks of Gummow ACJ and Kiefel J in *SZMDS*.[34] As noted above, while focusing on the outcome of a decision is associated with the outdated *Wednesbury* approach that has since been reformulated in *Li*, a majority of the High Court in *Li* maintained that unreasonableness may be determined from the reasons for a decision (where reasons have been provided) but may *also* be an inference drawn from the 'facts and from the matters falling for consideration in the exercise of the statutory power'.[35]

Despite this, in order to determine whether a decision has an intelligible justification, the High Court in *Li* and the Full Court of the Federal Court in *Singh* have indicated a preference for examining the reasons of a decision rather than its outcome in cases where reasons have been provided.[36] As noted above, this was said by the Full Court in *Singh* to be due to the fact that Parliament has conferred decision-making authority on the decision-maker and thus, it is the explanation given by that decision-maker that should inform review by a supervising court.[37] This preference for analysing the reasons of a decision rather than its outcome (where both options are available) may indicate a judicial reluctance to utilise the orthodox outcome-focused approach to determine questions of legal unreasonableness, where it can be avoided, so as to preserve the distinction between the legality and the merits of a decision, derived from the separation of judicial power under the Constitution.[38] As judicial review is concerned with the legality rather than the merits of administrative decisions,[39] a focus on whether a decision-maker's reasons are intelligible cleaves more closely to questions of legality than a direct assessment of the reasonableness (or persuasiveness) of the decision itself.[40]

It may therefore appear from the reasoning in *Li* and *Singh* that the courts have recognised the problematic nature of an outcome-based approach to legal unreasonableness, its inability to fit neatly into the Australian judicial review framework and have indicated a preference or movement towards analysing the reasons of decision-makers when discerning a decision's intelligibility. However, a closer inspection of one particular aspect of the High Court's reformulation of the unreasonableness ground of review enunciated in *Li* stands squarely against that proposition. As has been noted above, the Court in *Li* departed from the stringent and confined standard enunciated in *Wednesbury* that a decision must be 'so unreasonable that no reasonable decision-maker could have so exercised the power'[41] in favour of a contextual legal standard 'indicated by the true construction of the statute.'[42] McDonald rightly queries whether 'a variable, context-dependent standard [can] be accommodated within a conceptual framework of review supposedly set up by the separation of judicial power from the executive function of administration'[43] and notes that '[w]ithout something like *Wednesbury* as a default standard of review, it becomes more difficult to maintain that the substantive nature of unreasonableness review is a strictly limited exception that does not call into question the integrity of the legality-merits distinction.'[44]

If the Court in *Li* was in fact indicating a preference for, or a movement towards, analysing the reasons rather than the outcomes of decisions in order to discern legal unreasonableness in a manner which is consistent with the constitutional framework for judicial review in Australia, reformulating the outcome-focused test for legal

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[34] *Minister for Immigration v SZMDS* (2010) 240 CLR 611, [36].
[35] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [76] (Hayne, Kiefel and Bell JJ); McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review', above n 12, 486–487. See also *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28, [64] (Allsop CJ, Griffiths and Wigney JJ); *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [44] (Allsop CJ, Robertson and Mortimer JJ).
[36] This was the approach taken in *Li*. See also *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [47] (Allsop CJ, Robertson and Mortimer JJ); McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' above n 12, 486–487.
[37] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [47] (Allsop CJ, Robertson and Mortimer JJ).
[38] McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' above n 12, 483.
[39] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–36 (Brennan J). See also *Craig v South Australia* (1995) 184 CLR 163, 175 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).
[40] McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' above n 12,484.
[41] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, 234 (Lord Greene MR).
[42] McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' above n 12, 483.
[43] Ibid.
[44] Ibid.

unreasonableness in this manner would be a strange measure to take. Not only did the Court in *Li* reinforce that it is permissible for courts to consider the outcome of administrative decisions in cases where reasons are not provided, but the Court expanded this approach in a manner that is likely to cause more hostility to the merits-legality distinction than the more stringent former standard. On this revised approach, in circumstances where no reasons are present, it seems that the boundary between a legitimate form of judicial intervention through legal unreasonableness and a more direct substitution of opinion by members of the judiciary will become even more blurred.[45]

In light of this reality, any argument that legal unreasonableness is concerned primarily with the reasons for a decision rather than its outcome or persuasiveness, due to its neater fit with the merits-legality distinction of judicial review in Australia, becomes difficult to maintain. It is even more difficult to maintain that this judicial concern with reasons may give rise to a duty in administrative decision-makers to provide reasons for their decisions. However, one must query whether the current outcome-based approach to legal unreasonableness will be sustainable in the long term in light of its problematic position within the Australian judicial review framework. This may provide an incentive for the High Court to base the legal unreasonableness ground of review purely on the intelligibility of a decision-maker's reasons rather than the outcome or persuasiveness of a particular decision. If the ground of legal unreasonableness is reconfigured in this respect, the provision of reasons may be rendered a common law requirement in administrative decision-making. However, as evolved, the principles of legal unreasonableness do not require reasons to be provided as a corollary of the requirement that administrative decisions must have intelligible justifications.

III NATURAL JUSTICE

Natural justice is concerned with ensuring fairness in the decision-making process.[46] The core requirements of natural justice can be separated into two distinct rules of the common law,[47] namely the hearing rule and the bias rule, which respectively require 'the according of an appropriate opportunity of being heard'[48] and 'the absence of the actuality or the appearance of disqualifying bias'.[49] For the purposes of this paper, only the content of the hearing rule will be examined.

> In *TCL*,[50] the Full Court of the Federal Court of Australia held that '[t]he essence of natural justice is fairness – it is its root as a legal conception and it lies at the heart of its operation.' As natural justice concerns 'what a decision-maker must do *in the course of* deciding how the particular power given to the decision-maker is to be exercised',[51] a reviewing court seeking to preserve the principles of natural justice will be interested in the fairness of the procedure adopted by a decision-maker rather than the fairness of the decision or outcome created by that procedure.[52]

It is difficult to detail the content of the rules of natural justice with any degree of precision as the requirements of fairness cannot be determined by reference to a 'fixed body of rules'[53] but rather must be

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[45] Ibid.

[46] *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387 ('*TCL*'), 414 (Allsop CJ, Middleton and Foster JJ).

[47] In *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, the High Court confirmed that the requirement to adhere to the principles of natural justice was anchored in the common law, although the operation of the principles of natural justice can only be understood by reference to the statutory context in which they arise. See Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 285.

[48] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 367 (Deane J).

[49] Ibid.

[50] Ibid 414 (Allsop CJ, Middleton and Foster JJ).

[51] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 ('*Applicant VEAL of 2002*'), 96 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

[52] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160 (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ); *Applicant VEAL of 2002*, 96 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J).

[53] *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 ('*Mobil Oil*'), 504 (Kitto J).

determined by the particular statutory framework and factual circumstances of each case.[54] In *Lloyd v McMahon*,[55] Lord Bridge observed:

> … the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body … has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. … [T]he courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.

While the principles of natural justice are concerned with the preservation of fairness, it must be borne in mind that these principles are solely interested in preserving fairness in a practical sense, rather than in an abstract or theoretical sense. In *TCL*,[56] the Full Court held that unless there is 'true practical injustice, there can be no breach of any rule of natural justice.' Similarly, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam ('Lam')*,[57] Gleeson CJ explained that '[f]airness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.' It has therefore been made clear that the principles of natural justice will only be attracted if an aggrieved party can demonstrate injustice in a practical sense.

Although it will not be possible to lay down a universal test by which one can ascertain whether the requirements of fairness have been met,[58] in relation to the specific content of the hearing rule, in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*,[59] the Full Court of the Federal Court held that there will generally be three minimum requirements where the rules of natural justice apply:

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

These principles will be enlivened in 'the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.'[60] The willingness of the High Court to take a broad approach to the interpretation of 'interests' in particular indicates that a wide range of privileges and benefits controlled or generated by public officials will attract the requirements of natural justice.[61]

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[54] Aronson and Groves, above n 1, 500; *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ).
[55] [1987] AC 625, 702–703.
[56] *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, 414 (Allsop CJ, Middleton and Foster JJ).
[57] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 (Gleeson CJ).
[58] *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504 (Kitto J).
[59] (1994) 49 FCR 576, 591–592 (Northrop, Miles and French JJ).
[60] *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).
[61] *S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 (Gummow, Hayne, Crennan and Bell JJ); *Kioa v West* (1985) 159 CLR 550, 616 (Brennan J). For an examination of the scope of the threshold requirements, see Aronson and Groves, above n 1, 412–428.

A *Could the principles of natural justice require the giving of reasons?*

In *Osmond*,[62] Gibbs CJ (and a majority of the High Court) doubted whether natural justice could require the giving of reasons in administrative decision-making. His Honour held that '[t]he 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.'[63] In *Canwest Global Communications Corporation v Treasurer*,[64] Hill J similarly queried 'how … can it be said that the failure to give reasons affects the logically anterior decision-making process?' Notwithstanding arguments of this kind, there remains a strong case to be made that the giving of reasons is required by the principles of natural justice.[65]

B *The giving of reasons as part of the decision-making process*

Rather than acceding to the view that the provision of reasons for a decision follows, and is distinct from, the making of a decision, it has been suggested that 'the provision of reasons is better viewed as a part of the decision-making process itself.'[66] For instance, Cremean claims that:

> … surely, the giving of reasons is *part of* the decision itself – and does not logically occur afterwards. It would be irregular in our system if decisions were made and reasons were then found for them. In other words, giving reasons is part of the decision-making process.[67]

However, such arguments conflate two conceptually and practically distinct notions, namely the *formulation* of reasons and the *provision* or *publication* of reasons. In attempting to rebut the idea that the fairness of a process cannot be 'impugned or satisfied by providing reasons after that process ended',[68] arguments of the kind made by Cremean overlook the fact that the difficulties expressed by Gibbs CJ in *Osmond* doubt how the provision or publication of reasons can impact the decision-making process after the reasoning process is concluded and a decision is made.

In lengthy or complex modern decision-making, it may be difficult to ascertain the distinction between notice of relevant matters to a potentially aggrieved party, the formulation of reasons for a decision and the provision or publication of those reasons.[69] This may especially be the case where a decision-making process involves the provision of notice to potentially aggrieved parties with relevant facts, evidence and/or proposed decisions.[70] However, the fundamental distinction between these concepts remains apparent as the *provision* of reasons 'logically and temporally succeeds the making of a decision'.[71] If this is accepted, it is difficult to maintain that the giving of reasons is part of the decision-making process itself.

C *The provision of reasons as a means of ensuring practical fairness*

While the giving of reasons logically and temporally follows the decision-making process, the fairness of a decision-making process may nevertheless be effected by the provision of reasons after a decision has been made if an aggrieved party is unable to determine, in the absence of reasons, whether the principles of natural justice

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[62] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 670.
[63] Ibid.
[64] (1997) 147 ALR 509, 536 (Hill J).
[65] HWR Wade and CF Forsyth, *Administrative Law* (11th ed, Oxford University Press, 2014) 440.
[66] Chen, above n 1, 220; Maxwell, above n 1, 84.
[67] Damien Cremean, 'Obligation to Give Reasons' (2012) 19 *Australian Journal of Administrative Law* 57, 57; Chen, above n 1, 220.
[68] Matthew Groves, 'Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*' (2013) 35 *Sydney Law Review* 627, 635.
[69] Aronson and Groves, above n 1, 604; Maxwell, above n 1, 84–85.
[70] Groves, above n 68, 628–629.
[71] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 [44] (Gleeson CJ, Gummow and Heydon JJ); Groves, above n 68, 628–629.

have been adhered to in the making of the decision.[72] After all, it is only through the provision of reasons that one is able to ascertain whether, in the making of the decision, the arguments advanced in the course of the opportunity to be heard were taken into account or not.[73] TRS Allan states:

> A principal purpose of the rules of natural justice, more generally, is to enable a person to *identify* with the decision-making process: by observing them we make it easier for him to accept the result, and "make it manifest to anyone disappointed at the outcome that we were solicitous of his interests and did not reach an adverse decision lightly or wantonly, but only for good reason and with evident reluctance".[74]

In the absence of a statement of reasons being provided, a decision-maker cannot enable a person to identify with the decision-making process and cannot make it manifest that they were solicitous of an aggrieved party's interests.

In a natural justice context, the courts often refer to practical considerations, especially in determining whether an opportunity was lost to influence a decision being made.[75] However, more broadly construed, if *practical* fairness and the avoidance of *practical* injustice are truly at the core of natural justice as a legal conception and lie at the heart of its operation,[76] it is anomalous to suggest that a potentially aggrieved party has a right to hear the case against them and make submissions in response to that case, but then not to allow that party to know, by way of a statement of reasons, whether their submissions were taken into account when the decision is made. If the principles of natural justice cease to operate on the decision-maker once a decision has been finally arrived at, the practical impact of the principles of natural justice will be cut short. In *R v Civil Service Appeal Board; Ex Parte Cunningham*,[77] McCowan LJ of the England and Wales Court of Appeal expressed this concern as follows:

> [t]o accord with natural justice a tribunal must permit a party to state his case. But how will that avail him if he has no idea whether any attention has been paid by the tribunal to what he said? … [I]t cries out for some explanation from the board. As I would put it, not only is justice not seen to have been done but there is no way, in the absence of reasons from the board, in which it can be judged whether in fact it has been done.

If natural justice is really a matter of practical justice and practical fairness, then the principles of natural justice may allow one impacted by a decision to determine whether their submissions were taken into account in practice. The only way that this can be ensured is through requiring decision-makers to provide reasons for their decisions that indicate to an aggrieved party why a decision was decided in a particular manner and how contentious matters of law or fact were resolved.[78] Of course, a duty to provide reasons based on the principles of natural justice would only apply where the principles of natural justice operate and would be contextual in nature so as to require from a statement of reasons only so much as is necessary in the circumstances to ensure the attainment of justice and fairness in a practical sense. To maintain otherwise may relegate the principles of natural justice to a level of abstraction that is anomalous to its pragmatic nature and its very essence as a legal conception.

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[72] A similar point is made by Chen, above n 1, 220. See also *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462, 476 (Fitzgerald P).

[73] Cremean, above n 67, 57.

[74] TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies* 497, 500, citing John Lucas, *On Justice* (Clarendon Press 1980) 97; Mark Elliott, *Beatson, Matthews, and Elliott's Administrative Law* (4th ed, Oxford University Press, 2011), 393–394.

[75] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 [33]-[38] (Gleeson CJ); *Minister for Immigration and Border Protection v SZSSJ; Minister for Immigration and Border Protection v SZTZI* [2016] HCA 29 (27 July 2016), [82].

[76] *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, 414 (Allsop CJ, Middleton and Foster JJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [37]-[38] (Gleeson CJ).

[77] [1991] 4 All ER 310, 322; Chen, above n 1, 220; Maxwell, above n 1, 87.

[78] Although not specifically in a natural justice context, see the decision of the Court of Appeal in *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447, 467 (Kirby P); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; *South Bucks District Council v Porter (No 2)* [2004] UKHL 33; *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153; *Re Poyser and Mills' Arbitration* [1964] 2 QB 467.

IV CONCLUSION

In the event that the matter comes before the High Court for reconsideration in the near future, significant developments made in Australian administrative law since *Osmond* was decided are likely to cause major difficulties to a rule that has remarkably survived the past thirty years largely unscathed. While it is doubtful that *Li* unreasonableness, as currently evolved, would give rise to a common law duty requiring administrative decision-makers to provide reasons for their decisions, the principles of natural justice and their concern with practical conceptions of fairness provide fertile ground upon which at least a partial duty to provides reasons may flourish.