Reasons, Reasonableness and Intelligible Justification in Judicial Review

Leighton McDonald*

Abstract

Australian courts have not recognised a general obligation to give reasons for administrative decisions. This article considers two contexts in which the inadequacy of reasons may nonetheless give rise to legal consequences: first, where there is a breach of a statutory obligation to give reasons and, second, where deficiencies in justification are relevant to the application of the unreasonableness ground of review. The aim is to contribute to a clearer understanding of the ways in which the inadequacy of reasons may reveal or constitute reviewable errors. More broadly, the article considers how review of the adequacy of reasons fits within the conceptual framework of judicial review in Australia given the propensity for a procedural obligation to give reasons to invite analysis of the substance of reasons. A possible strategy to limit any slide from the review of 'procedural' reason-giving obligations into 'substantive' review is to distinguish 'intelligible' reasons and 'persuasive' reasons. The overall argument is that although the concept of intelligibility is being explored in the cases, even minimal intelligibility requirements will have substantive elements and, further, there is as yet little judicial guidance as to how any inquiry into the intelligibility of reasons can be quarantined from broader substantive questions about the persuasiveness of justifications.

I Introduction

The giving of reasons is an attempt to justify or explain a conclusion reached, decision made, or action undertaken; reasons, that is, purport to justify outcomes. Giving reasons for a decision is not the same as having good or persuasive reasons for making that decision.[1] Nor does giving reasons ensure that the decision-maker will reason correctly or reach the preferable decision.

There is now a large body of literature exploring the question of whether administrators should be obliged to give reasons for their decisions.[2] A summary of the reasons for requiring reason-giving was provided by Kirby J in *Palme*:

* Associate Professor, ANU College of Law, Australian National University, Canberra, Australia. An earlier version of this article was presented at the Public Law Conference: Process and Substance in Public Law, Cambridge University, England, 15–17 September 2014. Thanks are due to Peter Cane, Christos Mantziaris, Daniel Stewart and the referees for helpful comments.

1 Frederick Schauer, 'Giving Reasons' (1995) 47(4) *Stanford Law Review* 633, 636.

2 For a recent contribution, see Bruce Chen, 'A Right to Reasons: *Osmond* in Light of Contemporary Developments in Administrative Law' (2014) 21(4) *Australian Journal of Administrative Law* 208.

> The rationale of the obligation to provide reasons for administrative decisions is that they amount to a 'salutary discipline for those who have to decide anything that adversely affects others'. They encourage 'a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making'. They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so. They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions. Where the decision effects the redefinition of the status of a person by the agencies of the State, they guard against the arbitrariness that would be involved in such a redefinition without proper reasons. By giving reasons, the repository of public power increases 'public confidence in, and the legitimacy of, the administrative process'.[3]

Despite these familiar arguments, 'as a device of institutional design, reason-giving' remains 'contingent rather than necessary, a style of decision-making with disadvantages … that might at times outweigh its advantages'.[4] As is well known, the general case for reason-giving has not induced Australian courts to recognise a common law obligation to give reasons for administrative decisions[5] or to significantly erode this position through the creation of exceptions.[6]

Nevertheless, the legal consequences of inadequate reasons for administrative decisions have become an important question in Australian judicial review. First, the common law's omission has been substantially filled by the legislature. Most Australian parliaments have enacted a right to reasons in relation to decisions that may be reviewed by generalist merit review tribunals[7] and such rights are also central components of the judicial review statutes of those jurisdictions that have enacted them.[8] In state jurisdictions that lack a judicial review statute, reasons are available under the applicable rules of civil procedure.[9]

---

3 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 242 [105] (citations omitted) ('*Palme*').

4 Schauer, above n 1, 657. Or as Endicott frames it, reasons (like other procedures), can have process costs and process dangers: Timothy Endicott, *Administrative Law* (Oxford University Press, 2nd ed, 2011) 189.

5 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

6 See below, Part III. The Australian experience is helpfully contrasted with that of the United Kingdom and Canada in Matthew Groves, 'Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*' (2013) 35(3) *Sydney Law Review* 627, 634–44.

7 *Administrative Appeals Tribunal Act 1975* (Cth) s 28; *ACT Civil and Administrative Tribunal Act 2008* (ACT) ss 22B–22F; *Administrative Decisions Review Act 1997* (NSW) ss 49–54; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 45–7; *State Administrative Tribunal Act 2004* (WA) ss 21–3; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 158; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 35.

8 *Administrative Law Act 1978* (Vic) s 8; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13; *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 13; *Judicial Review Act 1991* (Qld) ss 31–40; *Judicial Review Act 2000* (Tas) ss 3, 31.

9 *Uniform Civil Procedure Rules 2005* (NSW) r 59.9; *Rules of the Supreme Court 1971* (WA) O 56, r 5(2). The legislative provisions in this and the above two citations are collated in Groves, above n 6, 644–5. Possible limits on the Supreme Court's power to direct that reasons be provided under r 59.9 of the *Uniform Civil Procedure Rules 2005* (NSW) were considered in *Minister for Resources and Energy v Gold and Copper Resources Pty Ltd* (2015) 208 LGERA 228.

In part through these means, the practice of giving of reasons has been stitched into the fabric of contemporary Australian administrative law.[10]

Inadequate reasons may constitute an error of law per se (if there is a legal obligation to provide reasons), but they may also provide evidence that an independently reviewable error has been made (for example, that mandatory relevant considerations have not been considered or that policy has been inflexibly applied).[11] However, in the context of judicial review of the reasonableness of the substantive outcome of a decision (that is, the unreasonableness ground of review) the following question can arise: if reasons for a decision have been given, what is the relationship between the inadequacy of the reasons for a decision and a conclusion that the substance of the decision is unreasonable? In particular, will inadequate reasons merely be evidence of an unreasonable decision or might inadequacies in reasons (which are given or apparent) for a decision themselves establish that the decision is unreasonable?[12] The link between review of reasons for a decision and conclusions about the reasonableness of outcomes thus provides a second context in which the question of the legal consequences of inadequate justifications may arise. The nature of the relationship between reasons and reasonableness is raised explicitly by the High Court's recent holding in *Minister for Immigration and Citizenship v Li* that lack of an 'evident and intelligible justification' for a decision may be a basis for holding a decision itself to be unreasonable and invalid on that account.[13]

We have, then, at least two contexts in which the inadequacy of reasons may give rise to legal consequences: first, where there is a breach of an identified legal obligation to give reasons; and second, where deficiencies in reasons given or apparent are relevant to the application of the unreasonableness ground of review. The legal consequences of inadequacy of reasons where there is a legal (typically, statutory) obligation to give reasons cannot, it turns out, be reduced to generally applicable doctrinal propositions. The explanation for this (which is developed in Part IIIA of the article) will come as no surprise to Australian administrative lawyers: the determination of the standard of reasons required and the consequences of breach is closely tethered to the particulars of statutory context.[14] And although it was suggested in *Li* that unreasonableness may be a conclusion attached to a decision which lacks a sufficient justification, the nature and detail of this connection remain opaque. The aim of this article is not, however, to

---

10 Of course, the lack of a common law right to reasons in no way prevents reasons being given in the discretion of decision-makers. As the Commonwealth Ombudsman observed in 2004, '[m]any public-sector bodies have made an agency commitment to [provide reasons] … whatever legal obligations may apply': Commonwealth Ombudsman, *Annual Report 2003–2004* (2004) 78. Complaints for inadequate reasons may be (and often are) made to an Ombudsman with appropriate jurisdiction. The Commonwealth Ombudsman has expressed the view that it is a 'fundamental principle of good public administration that reasons for an administrative decision should be provided to anyone aggrieved by the decision': ibid 77.

11 This distinction is elaborated in Part II.

12 It is possible that the justification for a decision may be deficient (in a variety of ways), even though the outcome cannot be said to be unreasonable (according to a specified standard of reasonableness) as alternative reasons may be supplied.

13 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] ('*Li*').

14 See, generally, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; this point is explained more fully in Part IIIA below.

comprehensively chart the doctrine, but to better understand the different general ways in which the inadequacy of reasons may reveal or constitute reviewable errors. More broadly, the aim is to consider how review of the adequacy of reasons for decisions fits within the conceptual framework of judicial review in Australia given the propensity for what appears to be a procedural obligation (the giving of reasons) to invite analysis of the substance of available reasons.

Reason-giving requirements are typically understood as imposing procedural obligations. Reasons attempt to justify, but we all know they may fail to persuade. As such, the obligation to give reasons can be seen as a step to support the making of a decision or to facilitate its appeal or review which is not directly focused on establishing the reasonableness of the decision. At first glance, then, review of the adequacy of the reasons given for a decision appears of a piece with judicial review orthodoxy in Australia. The constitutional separation of judicial power has generated the proposition that Commonwealth courts must not exercise non-judicial power.[15] This, in turn, is taken to mean that courts are limited to questions of legality which are distinct from questions about the merits of a decision.[16] Although the procedure/substance distinction does not fully capture the nuances of judicial review in Australia,[17] the least controversial grounds of review (and applications of those grounds) remain those which focus on the procedures or reasoning processes of decision-makers. This is why the unreasonableness ground of review (which is a species of 'substantive review') has, in Australia, been understood as a tightly controlled exception.

On the other hand, any requirement to give reasons is likely to include an obligation that those reasons are, in some sense, 'adequate'. Yet if the obligation to provide reasons enables the courts to review the adequacy of those reasons, reason-giving requirements may, despite initial procedural appearances, encourage substantive review by inviting courts to consider whether reasons are persuasive. And the prohibition on courts reviewing administrative decisions on the merits presumably rules out review of the *adequacy* of reasons insofar as that licenses a judicial assessment of whether the reasons are sufficiently *persuasive*.

A possible strategy to limit any slide from a 'procedural' reason-giving obligation into a more substantive form of review is to draw a distinction between 'intelligible' reasons and 'persuasive' reasons, and insist that in reviewing reasons courts should require only the former. Arguably, a standard that there be 'intelligible' reasons would ensure that a reviewing court can understand why a decision has been made, but might nonetheless stop short of an invitation to assess the persuasiveness of the reasons. Part III of the article develops the argument that something like the concept of intelligibility has informed the courts' approach to articulating the standard of reasons typically required by statutory obligations to give them. In interpreting these obligations, the courts emphasise that the judicial

---

15 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

16 For an illuminating discussion, see Cheryl Saunders, 'Constitution as Catalyst: Different Paths within Australasian Administrative Law' (2012) 10(2) *New Zealand Journal of Public and International Law* 143, 157.

17 Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2nd ed, 2012) 40.

role remains limited and does not extend to requiring that good or persuasive reasons be given. Nevertheless, it will also be argued that even minimal adequacy requirements raise questions that go to the substance of the reasons, not just their form. For this reason, the line between intelligibility and persuasiveness of reasons is difficult to draw clearly.

Part IV of the article considers the connection between inadequate reasons and unreasonableness review and, in particular, the different interpretations of the link drawn by the High Court of Australia between a lack of an intelligible justification and conclusions of unreasonableness. The concept of intelligibility may prove attractive in judicial efforts to articulate the scope of obligations to adequately justify administrative decisions — in the context of statutory obligations to give reasons and, also, unreasonableness review. However, it is argued that there is little guidance in the nascent Australian doctrine as to how the concept of intelligibility can effectively be quarantined from broader substantive questions concerning the persuasiveness of justifications.

II The Justification of Administrative Decisions: Senses of Inadequacy

As any student of administrative law can attest, official decisions must be authorised by law. Indeed, the notion that 'all claims of governmental power must be justified in law' is a basic element of the rule of law.[18] However, establishing legal authority (that is, the 'jurisdiction') to make an administrative decision is, at best, a necessary condition for justified or legitimate administrative action. The laws that authorise the making of particular administrative decisions typically confer discretionary choices on administrators or require them to apply contestable criteria.[19] Although it may be a good idea for the legislature to confer jurisdiction on particular administrators to make these choices, the justifications for the enactment of power-conferring rules do not, of themselves, justify particular exercises of power. For this reason, attempts to justify or legitimate administrative decisions by invoking 'legislative will' invariably ring hollow.[20] In some circumstances, the legislative judgment to confer powers on particular administrators may be justified by reference to their institutional competence or expertise. However, in Australia at least, the expertise of the bureaucracy has never been assumed to presumptively fill the justificatory gap between legal authority and particular exercises of discretionary powers.[21]

---

[18] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001) 100.

[19] For example, if X is satisfied of A, they must/may do B. In such situations, A is often a highly contestable factual or legal question or a complicated mix of factual and legal issues.

[20] As Mashaw has observed, although we speak unselfconsciously of legislative will in the context of legislation, such claims to authority are not plausibly made in relation to bureaucratic decision-making: Jerry L Mashaw, 'Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State' (2001) 70(1) *Fordham Law Review* 17, 20.

[21] As Cane has noted, 'in the Australian context, expertise is a special characteristic of some administrative decision-makers rather than an assumed characteristic of public administration generally': Peter Cane, 'Judicial Control of Administrative Interpretation in Australia and the United States' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 215, 222.

In this context, the provision of reasons can be understood as an attempt to bolster the legitimacy of administrative decision-making, even though the giving of reasons will not necessarily establish that particular decisions are justified. Reason-giving, that is, attempts to build a bridge between legal authority and the making of legitimate administrative decisions.[22] This helps to explain why reason-giving obligations (as opposed to an obligation to have good reasons) can be described as a procedural step: 'a requirement of reasons does not tell the public authority how to decide, but only requires it to be candid about its own reasons'.[23] In this sense, the practice of reason-giving can contribute to the legitimacy of administrative decision-making without also claiming that it will ensure the reasons demonstrate that decisions are well justified.

Endicott has noted that

> [a]lthough it is possible for a decision to be unlawful because of the reasoning process by which it was reached, it is actually a fundamental principle of administrative law … that the law does not require public authorities to engage in the correct reasoning process.[24]

In Australia, this principle is part of what it is meant by the distinction between merit and legality review. If reasons and reasoning processes were unlawful merely on account of being bad or because they are unpersuasive, this distinction could not be maintained. Thus, although reasons can be inadequate in a plethora of ways, not all inadequacies evident in a statement of reasons can be grounds for concluding an administrative decision is unlawful or invalid.

To better understand the senses in which inadequacies of justification or reasons can give rise to legal consequences, it is helpful to explain a distinction that can be drawn between the use of inadequacy of reasons as evidence of reviewable error and the use of inadequacy to establish a reviewable error per se.[25]

A *Inadequate Reasons as Evidence of a Reviewable Error*

Where a statement of reasons is given (whether or not under an obligation to do so), it may be used with or without other evidence to establish a breach of an administrative law norm (that is, that a 'ground of review' is available). Put more simply, a statement of reasons may contribute to proving that the decision-maker has made a reviewable error. Inadequate reasons are inadequate in this sense because they reveal an independently reviewable error. Such errors could, in principle, be established without a statement of reasons. Once such an error has been revealed it could not be remedied by the post hoc production of a further statement of the reasons for the decision — the error was merely evidenced by the reasons. Inadequate reasons in this sense may reveal errors that fall into any of the

---

22 Mashaw, above n 20, 22. There are other procedures, such as participation and deliberation, which may also serve this purpose.

23 Endicott, above n 4, 187 (emphasis altered).

24 Ibid 209 (emphasis altered); see also Cane and McDonald, above n 17, 138.

25 In *Palme*, a 'critical distinction' was noted 'between failure to comply' with a statutory obligation to give reasons and 'using that failure to conclude that' the decision 'is flawed by jurisdictional error': (2003) 216 CLR 212, 226 [48].

broad categories of errors making up the so-called 'grounds of review'. Reasons may show errors of a procedural nature. For example, reasons may indicate that adverse material, which was credible and significant, was not disclosed.[26] Reasons may also indicate a variety of what can be called 'reasoning process' errors;[27] that is, errors that recognise a number of limited ways in which failures in reasoning processes may be grounds for unlawfulness or invalidity. For example, reasons may provide evidence that irrelevant considerations were considered, that a decision-maker failed to consider mandatory relevant considerations, or that lawful policy has been rigidly applied, or that statutory powers and obligations have been misunderstood. One recurrent issue concerns the factual inferences that may be drawn from a statement of reasons which contains an inadequate treatment of a particular matter. Failure to mention a matter in a statement of reasons may assist an argument that a mandatory relevant consideration was not considered[28] or that the essential elements of a claim were not addressed.[29] The appropriateness of inferences can depend upon whether the decision-maker was under an obligation to provide reasons and set out material findings of fact.[30] It may also be the case that reasons assist in demonstrating that the lack of evidence or other material to support the decision suggests that the decision-maker has misconceived the nature of their powers and thereby made a jurisdictional error.[31]

Beyond noting that difficult issues have arisen concerning the inferences that may legitimately be drawn from a statement of reasons, little further can be said about the circumstances in which inadequate reasons may show that a decision-maker has breached an administrative law norm. To study these circumstances would be to consider the variety of ways in which grounds for issuing judicial review's remedies may arise. In all of these instances, some inadequacy in the reasons may be used to identify an underlying, independently reviewable error. It is not the case that the inadequate justification itself amounts to a reviewable error — though, as explained below, the case of review for unreasonableness complicates this general claim.

---

26 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.

27 The distinction between procedural errors and reasoning process errors is drawn in Cane and McDonald, above n 17, 116–7.

28 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

29 *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 389. In some circumstances, a failure to consider a critical piece of evidence may also amount to a jurisdictional error, though it has proved difficult to articulate general principles to determine when this ground of review will be available: see, eg, *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99.

30 Where there is a duty to provide reasons and material findings of fact, the court may infer a matter not mentioned in the reasons was not a material consideration: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 338 [34], 346 [68].

31 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 119–20. It has been said that such inferences only arise in 'extreme cases': *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* (2009) 166 LGERA 379, 423 [203].

B *Inadequate Reasons as a Reviewable Error Per Se*

Reasons may also be considered to be inadequate regardless of whether they demonstrate an independent ground of review. Given there is 'in Australia no free-standing common law duty to give reasons for making a statutory decision',[32] the ability to obtain a remedy for the inadequacy of reasons in and of itself depends upon a legal duty to give reasons being established. Where no obligation to give reasons can be established, failure to provide reasons or the inadequacy of any reasons provided cannot constitute an error of law per se.[33] Australian courts have largely resisted calls to carve out exceptions to the common law rule that there is no general obligation to give reasons for administrative decisions. Although the possibility that the rules of procedural fairness may, in individual circumstances, require reasons has not been foreclosed,[34] instances where a right to reasons has been implied on procedural fairness grounds have been rare.[35] Statute thus remains by far the most important source of obligations to provide reasons in Australian law.

My initial focus (in Part III) will be on inadequacies in reasons or justifications that amount to errors per se. This involves further analysis of the legal consequences of breaches of statutory obligations to give reasons. As noted above, the ways in which inadequacies in a statement of reasons may be evidence of an underlying reviewable error are well understood — justifications provided by a decision-maker (even in formal statements of reasons) are facts about decisions and merely provide evidence that may be utilised to establish a decision was based on a reviewable error. However, in Part IV I consider the possibility that inadequate reasons may, in the context of unreasonableness review, be considered as amounting to a reviewable error per se. The existence of this possibility indicates that the distinction between inadequate reasons amounting to errors per se as opposed to constituting evidence of an independently reviewable error is less clear cut in the case of substantive review.

III Failure to Comply with Statutory Obligations to Give Reasons

Before examining how Australian courts have approached the standards of adequacy that apply to statutory reason-giving obligations and the legal consequences of breaching them, it is helpful to distinguish between different categories of obligations. Statutory obligations to give reasons can be divided into two broad categories: general and specific obligations to give reasons. A further distinction can be drawn between specific obligations provided for by express

---

[32] *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 497–8 [43] ('*Wingfoot*'); *Osmond* (1986) 159 CLR 656.

[33] Though, as explained above in Part IIA, 'where reasons have been voluntarily provided a court may look at the reasons which have been provided for the purpose of determining whether any grounds of review are available': *Soliman v University of Technology, Sydney* (2012) 207 FCR 277, 290 [44].

[34] *Osmond* (1986) 159 CLR 656, 670 (Gibbs CJ).

[35] For discussion, see Chen, above n 2, 218. Chen argues that the rules of procedural fairness are capable of being developed to support a broader right to reasons.

statutory language and those which may be implied through principles of statutory interpretation in the absence of express words.

i. General express obligations: The obligations in this category are contained in legislation that applies to a defined class of decisions or to a number of specified decisions made pursuant to powers contained in other enactments. The reach or scope of such provisions may be more or less extensive. In Australia, s 13 of the *Administrative Decisions (Judicial Review) Act) 1977* (Cth) and s 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) are the paradigm examples of this category of statutory obligations to give reasons.

ii. Specific express obligations: This category relates to obligations to give reasons that are expressly created by the legislation under which a decision is made. Such obligations may be expressed to apply to one or more decisions made under the legislation. There are a great many examples of such provisions in Australian legislation.[36]

iii. Specific implied obligations: In the absence of an express obligation to give reasons, a duty to provide reasons may, as a matter of statutory construction, be implied in limited circumstances. One basis for such obligations is as part of a broader set of procedural fairness requirements that are implied by the statute.[37] In Australia, the courts have (as noted above) rarely relied upon this strategy of argument, though the courts in United Kingdom and Canada have been more receptive to it.[38] One explanation for this reticence may be that this road to implied reason-giving obligations would require the conclusion that *any* inadequacy in reasons would automatically amount to a jurisdictional error.[39]A more common approach has been to imply reason-giving requirements into specific statutory schemes. Here, the strategy of argument is that a number of factors[40] combine to enable an inference that Parliament intended that the decision-maker be obliged to give reasons,[41] though the judicial willingness to take this step has been variable.[42] An advantage of this approach is

---

[36] For example, s 43(2) of the *Administrative Appeals Tribunal Act 1975* (Cth), which requires the Administrative Appeals Tribunal to give reasons for its decisions on review. See also the statutory requirement to give reasons considered in *Wingfoot*, which is discussed below.

[37] After a long-running debate, the High Court of Australia appears now to favour the view that the legal foundation of procedural fairness obligations is (at least, in relation to statutory powers) implied statutory obligation, rather than the common law: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97].

[38] See Groves, above n 6.

[39] Denial of procedural fairness is presumptively a jurisdictional error: see, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

[40] Relevant factors include the existence of a right to appeal (which would typically be of little use without a statement of reasons) and a consideration of whether or not the decision-maker undertakes functions that are similar to those undertaken by judges: see *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372; *Soliman v University of Technology, Sydney* (2012) 207 FCR 277.

[41] A recent example is *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v Secretary of the Treasury* (2014) 242 IR 318, 330 [44]–[45].

[42] Contrast *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 and *Sherlock v Lloyd* (2010) 27 VR 434. For an argument counselling a cautious approach to the implication of reason-giving

that the question of whether breach of the obligation is a jurisdictional error and the consequent invalidity of the decision is left open, to be determined through a consideration of the purposes of the statute and general principles of interpretation.

A *Ascertaining Standards of Adequacy and the Consequences of Breach*

As the basis of reason-giving obligations is statute (whether general or specific, or express or implied), the question of what a particular statutory obligation requires (in terms of the content of a statement of reasons) presents as a question of statutory interpretation. The remedial consequences of breach of an express or implied statutory requirement (in particular, whether breach of a requirement will lead to invalidity, unlawfulness or have no legal consequences) is also a question of statutory interpretation.[43]

Some statutes provide a level of express guidance about the standard required of a written statement of reasons. For example, a statement required under s 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) must set out 'the findings on material questions of fact' and refer 'to the evidence or other material on which those findings were based' and give 'reasons for the decision'. However, in the 'absence of express statutory prescription', the standard used to evaluate the adequacy of reasons 'can be determined only by a process of implication'.[44] For this reason, the High Court has cautioned against over-reliance on '[g]eneral observations, drawn from cases decided in other statutory contexts and from academic writing, about functions served by the provision of reasons for making administrative decisions'.[45] This caution can be read as part of the broader emphasis in Australian judicial review law on statutory interpretation. Furthermore, it is not merely the statutory context that must be considered. The factual circumstances in which decisions are made may influence the interpretation of the standard of reasons required by the statute in particular cases.[46]

A formulaic approach to the precise adequacy requirements associated with particular obligations to give reasons is thus not possible. Nevertheless, a consideration of the cases can assist in better understanding the general nature of even minimal standards of adequacy associated with reason-giving requirements (see below, Part IIIB). Before considering that issue, however, a number of observations about the legal consequences of breaching reason-giving obligations can be made by reference to the categories of obligations identified above. These

---

requirements, in part because Australian legislatures have been active in enacting express obligations to give reasons, see Groves, above n 6, 649.

43 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. For an explanation of these distinctions, see Cane and McDonald, above n 17, 90–93; 135–7.

44 *Wingfoot* (2013) 252 CLR 480, 498 [44].

45 Ibid 498 [45].

46 *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* (2014) 242 IR 318, 330–1 [46]; in this respect the approach is similar to the determination of the content of some other categories of statutory procedural obligations: see, eg, *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 62.

observations must be read in light of the High Court's insistence that each reason-giving requirement must be interpreted in its own statutory habitat.

First, where a statement of reasons does not meet the standard required pursuant to a specific express obligation or a specific implied obligation to give reasons, it has often been concluded that the decision-maker has failed to comply with the legal duty imposed upon them and, thereby, has made an error of law.[47] Further, where reasons are taken to form part of the 'record',[48] inadequate reasons will 'inevitably be an error of law on the face of the record' (which along with jurisdictional error is a basis for the issue of a writ certiorari).[49] Such a failure would also likely be regarded as a procedural error for the purposes of s 5(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (and its state equivalents).

Second, although the possibility that a breach of an express or implied specific statutory requirement to give reasons may also constitute a jurisdictional error (with the result that the decision is invalid) has been acknowledged,[50] it has not been embraced. In some instances, the conclusion that inadequate reasons do not result in jurisdictional error has been at least partially based on express statutory guidance.[51] In other cases, it has been asserted that 'it is not easy to accept the notion that a decision is made without authority [jurisdiction] because subsequently the decisionmaker fails to give adequate reasons for the decision'.[52] More generally, obligations to give reasons can and have been conceptualised as having a 'derivative nature' with the consequence that 'the legal requirements attending the production of reasons need have no necessary connexion with the legal requirements attending the decision'.[53] This derivative nature has been used to suggest that the appropriate remedial response to inadequate reasons may be a mandatory order that adequate reasons be provided, rather than the invalidation of the substantive decision.[54] In the case of implied obligations to give reasons, it has

---

47 *Wingfoot* (2013) 252 CLR 480, 493 [28]; *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 399 [130]. *Dornan v Riordan* (1990) 24 FCR 564 (error of law for the purposes of an *Administrative Decisions (Judicial Review) Act 1977* (Cth) application, though the correctness of this position has been the subject of debate in the Federal Court: see *Comcare Australia v Lees* (1997) 151 ALR 647, 658–9; *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 253 ALR 263, 270–2 [30]–[34]; *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 179 FCR 554, 562–3 [46]–[50]).

48 The common law position is that reasons are not part of the record (*Craig v South Australia* (1995) 184 CLR 163, 182) though statutory modification has been undertaken in some state jurisdictions: see the *Administrative Law Act 1978* (Vic) s 10 and the *Supreme Court Act 1970* (NSW) s 69(4).

49 *Wingfoot* (2013) 252 CLR 480, 493 [28].

50 The possibility is acknowledged in *Wingfoot*, ibid 493-4 [29]. Given the analysis is framed as a question of statutory interpretation, the possibility that reason-giving may be a jurisdictional requirement is not one that can be foreclosed.

51 *Palme* (2003) 216 CLR 212, 225 [45].

52 *Seiffert v Prisoners Review Board* [2011] WASCA 148 (8 July 2011) [177].

53 *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 253 ALR 263, 271 [33].

54 *Repatriation Commission v O'Brien* (1985) 155 CLR 422, 445–446 (Brennan J). The appropriate relief for inadequate reasons given by the Administrative Appeals Tribunal (ie for non-compliance with the obligations in ss 43(2) and 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) will depend upon the facts and circumstances of each case in exercise of the Federal Court's discretion to make such orders as appropriate on the determination of an appeal: *Civil Aviation*

been suggested that the legislature's silence as to both the existence of the obligation and the consequences of a failure to provide reasons make it less likely that the Parliament 'implicitly assumed or accepted that invalidity would follow' from inadequate reasons.[55]

Third, it is commonly assumed that *general* express reason-giving obligations do not go to validity. This assumption is based on a number of factors. As the obligation does not arise under the statute pursuant to which the impugned decision was made, the requirement is not considered to be 'a step in the giving of the decision'.[56] Relatedly, the fact that general express reason-giving obligations typically contain a statutory mechanism to enable affected persons to obtain better reasons if the reasons given are inadequate is considered to imply that breach of general express reason-giving obligations should not result in the invalidity of the decision itself. Rather, the remedy should be to seek a better statement of the reasons for the decision.[57]

B *The Nature of Standards of Adequacy*

Given that the content of any obligation to give reasons is a matter of statutory construction, what, if anything, can be said about the general nature of such requirements? In a variety of contexts, the courts have emphasised that the judicial role is 'limited to determining whether a minimum standard has been satisfied, as opposed to fixing some ideal or even desirable level of reasoning'.[58] Any standard of adequacy can be more or less exacting. However, the theme that perfection or persuasiveness in reasons is not required is consistent with the principle that courts should not be 'over-zealous' in scrutinising a statement of reasons for evidence of reviewable errors.[59] More generally, this theme is also consistent with the fundamental principle that inadequate reasoning or incorrectness is not itself a ground of review, even though certain errors in the reasoning process may, as noted earlier (Part IIA), establish an accepted ground for judicial review. Courts have thus been alive to the concern that a standard for the adequacy of reasons should not be allowed to collapse the distinction between a requirement to give reasons and a requirement to give persuasive reasons. To do so would presuppose that the courts have legitimate authority to directly evaluate the merits of administrative decisions.

Does this cautious approach to interpreting the standards of adequacy associated with reason-giving requirements suggest that the obligations typically

---

Safety Authority v Central Aviation Pty Ltd (2009) 179 FCR 554, 564 [55]; see also *Repatriation Commission v Holden* (2014) 142 ALD 267, 285–6 [84]–[93].

55 *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v Secretary of the Treasury* (2014) 242 IR 318, 333 [57]. See also *Soliman v University of Technology, Sydney* (2012) 207 FCR 277, 294 [51].

56 *Sherlock v Lloyd* (2010) 27 VR 434, 444 [43].

57 See Groves, above n 6, 648.

58 *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v Secretary of the Treasury* (2014) 242 IR 318, 331 [47]; *Comcare Australia v Lees* (1997) 151 ALR 647, 656 ('no standard of perfection is required').

59 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272.

associated with such requirements are unrelated to the substance of the reasons offered? Can reason-giving obligations be thought of as imposing merely procedural constraints on decision-makers? In *Wingfoot*,[60] the High Court of Australia considered a bare statutory requirement on a Medical Panel to give reasons for an 'opinion' in answer to a medical question referred to it.[61] In articulating (by statutory implication) the standard of adequacy required of a statement of reasons, the Court emphasised: (a) that the Panel's function was to give its *own* opinion, and it would thus be misleading to think of it as exercising an arbitral or adjudicative function; and (b) the purpose of the reason-giving requirement to be discerned from the legislative context and history was to facilitate judicial review; that is, to enable a court to see whether the opinion involved any error of law. It was held that to be adequate, the reasons must explain the Panel's 'actual path of reasoning' in 'sufficient detail to enable a court to see whether the opinion does or does not involve any error of law'.[62] This standard of adequacy was lower than that preferred by the Court of Appeal of the Supreme Court of Victoria, which had held that the Panel was obliged to give a 'comprehensible explanation' for rejecting other expert opinions that had been provided to it.[63]

It might be thought that a requirement to merely give the 'actual reasons' for a decision sets the standard of adequacy in a manner that is divorced from any analysis of the substance of the reasons. An obligation to give the actual reasons for a decision requires only that the decision-maker record the authentic[64] reasons they had for the decision and to provide these to affected persons. It is a step related to the making of the decision, but does not impose any substantive adequacy constraints; that is, constraints that depend on the quality of the content of the reasons.

Even in relation to the spare statutory obligation considered in *Wingfoot*, however, this conceptualisation of the adequacy requirements for a statement of reasons is misleadingly narrow. In framing the obligation in terms of the actual path of reasoning, the High Court also emphasised that that path of reasoning must be explained in sufficient detail to enable a court to consider whether any legal errors had been made. To the extent that a statement of reasons must be an exercise in explanation, further 'adequacy constraints' must surely follow. Although any adequacy constraints must be derived from a particular statutory obligation, a reason-giving requirement would cease to be a reason-giving requirement if it did

---

60 (2013) 252 CLR 480.

61 The legislation required that the 'opinion must be adopted and applied for the purposes of determining the question or matter, arising under or for the purposes of the [*Accident Compensation Act 1985* (Vic)], in which the medical question arose and in respect of which the medical question was referred to the Medical Panel': ibid 505 [64].

62 Ibid 501 [55].

63 *Kocak v Wingfoot Australia Partners Pty Ltd* (2012) 35 VR 324, 343 [55]. The High Court considered that any errors made in rejecting expert opinion would not reveal errors of law as the key complaint about the reasons for the Medical Panel's opinion related to a finding of fact about the nature of the injury sustained by the worker.

64 The courts are aware of the problems associated with post-hoc rationalisations that do not reflect the 'true reasons for the decision in question': see, for example, *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162, 179.

not demand that a statement of reasons have some level of explanatory value. This is recognised through the imposition, in other contexts, of requirements to state the 'essential ground' for a conclusion[65] or to provide sufficient detail to enable a person to understand why a decision went against them.[66] The general point to emphasise is that the idea of reasons (as an attempted justification or explanation) has an internal structure that will necessarily (or, at the very least, ordinarily) imply minimal requirements beyond the requirement that the reasons given be the actual or authentic reasons for the decision.

Consider, for instance, adequacy requirements suggested in relation to a variety of reason-giving obligations that are related to whether reasons are comprehensible (for example, norms of clarity or non-contradiction).[67] Although 'no standard of perfection is required,' 'reasons should be expressed in clear language so that they are capable of being understood'.[68] Similarly, it has been held that reasons should not be expressed in 'vague generalities'.[69] Where legal rules or principles must be applied, a decision-maker is required to 'set out his [or her] understanding of the relevant law' and the reasoning process that justified conclusions as to how the law has been applied to the facts as found.[70] An explanation that lacks these features may not be capable of being comprehended. The level of explanatory detail required in justification of a decision may be context-dependent and variable (for example, whether the rejection of other expert opinion or particular pieces of evidence must be explained), but some minimal requirements of intelligibility arguably attend any obligation to *explain* or *justify* an administrative decision. Norms of clarity are clearly relevant, but there may be further requirements that can plausibly be connected to the question of whether reasons are comprehensible or intelligible — though such further requirements are admittedly underdeveloped in the cases.

Stated shortly, my argument is that even minimal requirements associated with the intelligibility of reasons[71] cannot be understood in purely procedural terms. It is helpful to first ask whether the requirement to give reasons can be understood as 'a purely formal one', such that 'so long as the administrator gave some reason, no matter how bad or how wrong, he or she was home free'.[72] Form, like procedure, is often contrasted with substance. A requirement may be understood as formal to the extent compliance with it is content-independent. It is true that an obligation that reasons be stated with sufficient clarity to render them understandable, is not directly concerned with whether the reasons are good or bad (that is, persuasive). However, even if that requirement does not invite a direct

---

65 *Palme* (2003) 216 CLR 212, 224 [40]. As Groves suggests the 'implicit point of the majority in *Palme* is that a defining feature of reasons is an explanation of a decision': above n 6, 630.

66 *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465, 484.

67 In *Wingfoot*, questions about the intelligibility of the reasons (focused on requirements rendering reasons capable of being comprehended) did not arise on the facts.

68 *Comcare Australia v Lees* (1997) 151 ALR 647, 656.

69 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500, 507.

70 Ibid.

71 The language of intelligibility was used by the Victorian Court of Appeal in *Kocak v Wingfoot Australia Partners Pty Ltd* (2012) 35 VR 324, 335 [40].

72 Martin Shapiro, 'The Giving Reasons Requirement' [1992] *University of Chicago Legal Forum* 179, 182.

consideration of whether or not the reasons are persuasive, the fulfilment of such an obligation depends upon the content, not the form, of the reasons given. Just as a more determinate or clear rule 'has content different from that of a less determinate counterpart,'[73] a vague or indecipherable reason has a content different to a clear and intelligible one. Thus, the question as to whether or not an unintelligible reason or 'vague generalities' satisfy even the barest of obligations to give reasons appears to relate to a matter of substance, not form.[74] It is also arguably the case that reasons may be unclear not only due to vagueness of expression or problems of syntax, but because reasons that have a clear meaning lack salience in the factual circumstances of a case. It follows that although even minimal requirements of adequacy are attached to a (procedural) step associated with the making of a decision (the giving of a statement of reasons), they will also have substantive elements. It is difficult, therefore, to conceptualise a requirement to give reasons in purely procedural terms.

An obligation to give adequate reasons (which I have argued will include at least minimal requirements of intelligibility that are related to the substantive content of the reasons) need not, however, collapse the obligation to give reasons into a requirement to give good or persuasive reasons. Although the intelligibility of reasons is related to whether those reasons are persuasive, perfectly intelligible reasons can fail to persuade. If that is accepted, intelligibility requirements address only a limited aspect of the substance of the reasons given and do not directly enable judicial consideration of whether the reasons are persuasive (except to the extent they are considered unintelligible). The concept of intelligible reasons, that is, arguably occupies a space between the bare statement of actual reasons and persuasive reasons.

Yet even if intelligibility is understood in this way, it remains the case that one way in which reasons may fail to persuade is because they are unintelligible. This suggests that the line between unintelligible reasons and unpersuasive reasons will not be easy to draw — particularly if the lack of intelligibility relates to a lack of correspondence or relation between the reasons given and the factual circumstances and legislative context relevant to the making of a decision. The Australian cases on statutory obligations to give reasons suggest that the adequacy of reasons will be approached by reference to intelligibility requirements in this limited sense, as opposed to a more direct review of the persuasive power of the reasons. The cases, however, provide little guidance on the question of how intelligibility requirements can be quarantined from broader substantive questions going more directly to the merits of decisions, beyond the emphasis that reasons need not show reasoning processes to be perfect.

---

[73] John Gardner, *Law as a Leap of Faith* (Oxford University Press, 2012) 200.

[74] Similarly, a requirement that the reasons stated reflect 'the real findings and the real reasons' (see *Minister for Immigration and Ethnic Affairs v Taveli (*1990) 23 FCR 162, 179) relates to the substance of the reasons, not the form of the reasons or the way or mode (ie procedural steps) associated with recording or disclosing them.

IV Inadequate Reasons and Unreasonableness Review

There are two ways in which inadequate reasons may be relevant to the application of the principles associated with the unreasonableness ground of review. Inadequate reasons may provide evidence that points towards a decision being unreasonable or the inadequacy of the reasons expressed for an outcome may itself be sufficient to generate a conclusion that a decision was unreasonable (even if it is possible that other reasons could be found to justify the outcome). Posing these alternatives suggests that the distinction drawn earlier between inadequacy of reasons as evidence of error and inadequacy of reasons as an error of law per se may be less sharply defined in the context of unreasonableness review. A conclusion of unreasonableness based on inadequacies of reasons can be understood as equivalent to a conclusion that it is the faulty reasons themselves that constitute error. This Part considers the relationship between the inadequacy of reasons (in particular, the lack of intelligible reasons) and unreasonableness review raised by the plurality in *Li*. It is useful to begin with a brief explanation of how the unreasonableness ground of review was positioned within judicial review doctrine prior to its reformulation in *Li's* case.[75]

The orthodox approach to unreasonableness review can be described by reference to two features. The first is that judgments of unreasonableness are outcome-focused. Unreasonableness as conceived in the classic *Wednesbury* formulation is a characteristic of the impugned decision — it is the decision itself that must be adjudged so unreasonable that no reasonable decision-maker could have made it.[76] Unlike most other grounds of judicial review, the focus of unreasonableness review (as a discrete ground of review) is on the decision made not the procedure or reasoning processes by which it was reached. Thus, although an analysis of reasons may assist a court in reaching a conclusion about the substantive unreasonableness of an outcome, a decision may be unreasonable even where no reasons are given.[77] And as Craig has argued, unreasonableness review in this outcome-focused sense would not exist if it did not allow judges to consider

---

[75] For detailed discussions of the impact of *Li* on the orthodox approach to unreasonableness review, see Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *Public Law Review* 117 and Matthew Groves and Greg Weeks, 'Substantive (Procedural) Review in Australia' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 133.

[76] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 ('*Wednesbury*').

[77] Where no reasons are given for the exercise of a power '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': *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280, 289 [45]. As noted by the High Court in *Li*, decisions that are affected by an underlying legal error associated with the decision-making process (such as a considerations error) can be described as being unreasonable in the legal sense. However, *Li* clearly acknowledges that a decision may be subject to unreasonableness review on account of the substance of the decision (the outcome), even if there is no underlying legal error associated with a decision-maker's reasoning process or the procedures adopted: for elaboration, see McDonald, above n 75, 121–2.

the merits of that substantive decision, including the appropriate weight to be given to relevant matters.[78]

The substantive, outcome-focused nature of unreasonableness review explains the second feature of the orthodox approach that deserves emphasis. The standard of review has consistently been framed in terms of the austere formulation associated with the *Wednesbury* case. Unreasonableness is only established if the decision-maker has made a decision that is so unreasonable that no reasonable decision-maker could have so exercised the power. Unreasonableness review does enable courts to consider the reasonableness of outcomes (based, for example, on judgments about the relative weight decision-makers have given to relevant matters),[79] but the standard is stringent. Moreover, the application of that standard in recent decades has been 'extremely minimalist'.[80] One way to understand the nature of this ground of review in Australian law is as a (very narrow) exception that proves, rather than undermines, the general rule that judicial review must not trespass on the substantive merits of administrative decisions.[81] In the Australian constitutional context — where the distinction between the legalities and merits is derived from the separation of judicial power — criticisms heard elsewhere that the *Wednesbury* standard of review is insufficiently exacting have not resonated. The more commonly expressed worry is that unless the ground of review is 'extremely confined',[82] the legitimate boundaries of judicial review will be jeopardised.

The plurality's reasons in *Li* destabilised the orthodox understanding of the applicable standard of review in applying the unreasonableness ground. The plurality held that the *Wednesbury* standard of review — whereby review is available only for 'an irrational, if not bizarre decision' — should not be understood as a default standard.[83] Rather, the 'legal standard of reasonableness' to be applied 'must be the standard indicated by the true construction of the statute'.[84] An obvious query about this way of understanding the standard of unreasonableness is this: how can a variable, context-dependent standard be accommodated within a conceptual framework of review supposedly set up by the separation of judicial power from the executive function of administration? Without 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. Whether the decentring of *Wednesbury* in *Li* will invigorate the practical application of unreasonableness review remains to be seen.[85]

---

78 Paul Craig, 'The Nature of Reasonableness Review' (2013) 66(1) *Current Legal Problems* 131, 135–8.

79 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 42.

80 Groves and Weeks, above n 75, 142.

81 This way of understanding the application of unreasonableness review in Australian law is defended in McDonald, above n 75, 125–8.

82 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36.

83 *Li* (2013) 249 CLR 332, 364 [68]. Cf Gageler J's approach at 370–1 [88]–[92], which appears to accept *Wednesbury* as a default standard of review.

84 Ibid 364 [67]. For discussion of this aspect of the decision, see McDonald, above n 75, 128–31.

85 See below n 104.

We can now return to the link drawn in *Li* between unreasonableness and the inadequacy of justification. In *Li*, the plurality of the Court accepted the basic outcome-focused orientation of unreasonableness review, and that a decision may be unreasonable because the decision-maker had given excessive or inadequate weight to relevant considerations.[86] Yet in its analysis of the standard of legal reasonableness to which decision-makers must adhere, the plurality also indicated that unreasonableness may be a conclusion 'applied to a decision which lacks an evident and intelligible justification'.[87] This suggestion appears to indicate that one reason why a decision is itself adjudged unreasonable is because of errors revealed in the justifications or reasons (given or available) for that decision, regardless of whether the outcome itself is unreasonable (according to a specified standard of reasonableness). Focusing on the intelligibility of justifications in this context provides an argumentative strategy that may, to an extent, avoid a direct consideration of the persuasiveness of the reasons through a focus on questions about the intelligibility of reasons. This focus — on whether the decision-maker's reasons can be comprehended — may be thought to cleave more closely to questions of legality than a direct evaluation of the reasonableness or persuasiveness of the decision itself. But whether this focus is less outcome-oriented depends upon whether a meaningful distinction can be drawn between the persuasiveness of reasons and what the plurality in *Li* meant by the concept intelligibility.

Although the sorts of bare intelligibility constraints considered in Part IIIB do (as I have argued) relate to the substance of the reasons given, they are not directly concerned with the question of whether the substantive outcome is based on reasons that, all things considered, are sufficiently persuasive to fall within a range of reasonable outcomes. Here, however, much will depend upon: (i) whether 'intelligibility' in the context or unreasonableness review is primarily directed to the sorts of minimal requirements that have been identified in the context of statutory obligations to give reasons; and (ii) whether an intelligible justification must be found in the decision-maker's reasons for the decision, if reasons have been given, or whether the court can consider alternative justifications for the decision.

In elaborating the notion of 'intelligible justification' the plurality in *Li* comment that '[e]ven where some reasons have been provided,' it may 'not be possible for a court to comprehend how the decision was arrived at'.[88] These brief remarks could be read as suggesting that intelligibility in this context is limited to minimal requirements that enable the court to understand the reasons actually given. On the other hand, it may be that reasons cannot, in the relevant sense, be comprehended or understood unless they also have a base level of persuasiveness to render them plausible in the circumstances of the case. Reasons may be clear, but if those reasons are clearly implausible, they may, without violence to language, also be said to lack an intelligible justification. To the extent that questions of plausibility seep into the analysis, the persuasiveness of the reasons becomes more difficult to disentangle from the question of their intelligibility.

---

86 *Li* (2013) 249 CLR 332, 366 [74].

87 Ibid 367 [76]. *Li's* case is not the first to draw a link between the adequacy of justification and conclusions of unreasonableness: see *Parramatta City Council v Pestell* (1972) 128 CLR 305, 323 and *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768, 821.

88 *Li* (2013) 249 CLR 332, 367 [76].

The facts of the *Li* case demonstrate the difficulty of distinguishing between an unintelligible justification and an unpersuasive justification. In *Li*, the Migration Review Tribunal was hearing an appeal from a decision to refuse an application for a skilled occupation visa. The High Court held that a decision not to adjourn the hearing was unreasonable. The applicant's migration agent had requested the adjournment on the basis that the body charged with assessing the applicant's skills (Trades Recognition Australia) had made identifiable errors and that the outcome of an internal review of that assessment would soon be available. The requested adjournment was refused on the basis that the applicant had 'been provided with enough opportunities to present her case' and because the Tribunal was 'not prepared to delay any further'.[89]

Chief Justice French emphasised a number of inadequacies with these reasons. The reasons failed to consider any issues other than the asserted 'sufficiency of the opportunities provided' for Ms Li to put her case; they did not indicate why arguments put in support of the appropriateness of an adjournment were rejected; they did not suggest that the applicant was at fault for requesting a deferment; and it was not suggested that the decision, which was fatal to Ms Li's application, was based on a considered view as to how to comply with the legislative instruction to the Tribunal to carry out its review function in a 'fair, just, economical, informal and quick' manner.[90] Although French CJ did not put the point quite this way, these inadequacies in the reasons might be considered to support a conclusion that the decision lacked what the plurality referred to as an evident and intelligible justification. So considered, review for unreasonableness can proceed by reference to inadequacies reflected in the reasons, rather than requiring the court directly to second-guess the weight attached to relevant considerations and consider unreasonableness in an objective sense. On this interpretation of French CJ's analysis, it appears that the underlying problem with the reasons was their brevity. In the factual circumstances, the reasons did not address obvious objections, nor explain why the matters referred to were considered to have persuasive value.[91] The reasons lacked any explanatory force.

The plurality's reasons emphasised similar problems with the Tribunal's reasons, but also revealed an alternative way of characterising the error, namely, that the error of the Tribunal was that it gave 'too much weight to the fact that Ms Li had had some opportunity to present evidence and argument and insufficient weight to her need to present further evidence' in light of the purposes of statutory discretion to adjourn the hearing.[92] Arguably there was nothing unintelligible about the Tribunal's reasons; at least in the sense of the reasons lacking sufficient clarity or elaboration to be comprehensible. The reasons were brief, but the Tribunal's view that a fair opportunity to be heard had been provided and that it was time to

---

89 Ibid 339 [3].

90 Ibid 352 [31].

91 Although this analysis provides a possible way of reading French CJ's judgment, there are also indications that a fuller statement of the reasons would not have saved the decision — that is, the refusal to adjourn the proceedings could not be justified on reasonable grounds given the factual circumstances of the case and the nature of the statutory power: see McDonald, above n 75, 121. See further below n 95.

92 *Li* (2013) 249 CLR 332, 369 [85]; see also 379–80 [122] (Gageler J).

make a decision (in the context of a process that was entering its fourth year) are easy enough to comprehend. One of the reasons the plurality gives for its conclusion was that '[i]n the circumstances of this case, it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute'.[93] This reasoning at least suggests that the refusal to grant an adjournment was considered unreasonable because the refusal to wait for the outcome of the internal review was simply not within the realms of plausibility in the circumstances of the case. It is possible, though not certain, that if the brief reasons had been elaborated and that emphasis was given to the background context of a 'busy tribunal, operating under considerable pressure of time and resources',[94] the Court would have altered its conclusion.[95] But, for present purposes, it is sufficient to observe that the conclusion of unreasonableness in *Li* could be framed either by reference to the unintelligibility of the justification offered (in terms of their brevity) *or* on the basis that, in the context of the factual circumstances, the reasons available to refuse the adjournment simply lacked sufficient persuasive power to get the decision over the line.

The question of whether the necessary intelligible justification must be found in the reasons for the decision, if reasons have been given, or whether the Court can supplement those reasons was considered by the Full Court of the Federal Court in *Minister for Immigration and Border Protection v Singh*.[96] The Court concluded that where reasons are offered, 'it is to those reasons to which a supervising court should look in order to understand why the power was exercised as it was'.[97] Judges should not look for alternative justifications to those actually given on the basis that the Parliament has given the task of deciding how the power should be exercised to the administrative decision-maker, not the court. On this approach, the key question is whether the decision-maker's subjective reasons are intelligible, not whether intelligible reasons could (in the court's view) be offered for the decision.

A possible objection to this approach to intelligibility is that it may provide an incentive to withhold reasons unless the decision-maker is under a statutory obligation to give them. *Li* indicates that, once given, reasons will be closely reviewed. On the other hand, it was also emphasised in *Li* that unreasonableness may be an inference drawn from the 'facts and from the matters falling for consideration in the exercise of the statutory power', even if no reasons are

---

93 Ibid 369 [85]. Similarly, Gageler J found it 'difficult to disagree' with the conclusion of the Federal Court that the decision was unreasonable in the *Wednesbury* sense: ibid 379 [122].

94 Groves and Weeks, above n 75, 149.

95 Groves and Weeks take the view that if a fuller statement of reasons had been given 'the High Court would not have been able to infer that the MRT had acted unreasonably': ibid 148. Gageler J commented that the Tribunal had failed to point to a 'consideration weighing in favour of an immediate decision': *Li* (2013) 249 CLR 332, 380 [122]. Considered in context, this comment is open to the interpretation that any acceptable reason for the decision, in the circumstances of Ms Li's situation, would have needed to respond to the specifics of the case presented in favour of an adjournment (as opposed to giving emphasis to general constraints bearing upon the Tribunal's efficient operation).

96 (2014) 308 ALR 280.

97 Ibid 290 [47].

offered.[98] In fact, this possibility has long been recognised,[99] albeit rarely applied.[100] *Li* clarifies that the principle that 'where no good reason has been given by a decision-maker, a judicial review court may conclude that one did not exists' extends beyond situations where no reasons are provided to situations where the reasons given are insufficiently intelligible.[101] But where reasons are non-existent or lack clarity or intelligibility, questions arise about the how a court should approach its review role. It was suggested in *Singh* that where reasons have been given, it would 'be a rare case where the reasons demonstrate a justification, but the ultimate exercise of the power would be seen to be legally unreasonable'.[102] This may suggest a pronounced judicial reluctance to conclude a decision is unreasonable if the decision is supported by reasons (so long as the reasons cross the ill-defined threshold of intelligibility). Perhaps the price of a *Wednesbury*-style standard of review in Australia will become the giving of (intelligible) reasons. Admittedly, a difficulty with this interpretation is that it is not clear why giving reasons, a factually contingent matter, should alter the standard of unreasonableness review which, according to the plurality in *Li*, is to be determined by the true construction of that statute.

As there is no general obligation in Australian law to give reasons for administrative decisions, there is no reviewable error merely because reasons given voluntarily are inadequate. However, *Li* indicates that unintelligible reasons, if given, may found a conclusion of unreasonableness. What remains to be clarified is the relationship between unreasonableness review that 'concentrates on the outcome of the exercise of power' and unreasonableness review that 'concentrates on an examination of the reasoning process'.[103]

It seems likely that decision-makers will have a greater incentive to clearly and comprehensively explain their decisions to the extent that the question of whether a decision lacks an intelligible justification depends on whether such a justification can be found in any reasons that have been given, as opposed to justifications that could have been given. If a supervising court is able to comprehend the justification and thereby conclude there is an intelligible justification for a decision the risk of invalidation on the basis of the unreasonableness ground of review may at least be reduced. By focusing on whether any reasons given provide an intelligible justification for the decision, the analysis may be said to be directed to inadequacies in the actual justification presented, not the merits of the decision itself. In this way, a focus on the unintelligibility of reasons in the context of unreasonableness may enable the courts to partially deflect the criticism that the reformulation of unreasonableness review in *Li* raises a threat to the constitutionally circumscribed boundaries of review. That is, a focus on the intelligibility of justification may enable the courts to continue to sell the story that unreasonableness review in the outcome-focused

---

98 *Li* (2013) 249 CLR 332, 367 [76].

99 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 359–360.

100 For a recent example, see the dissenting judgment of Debelle J in *Acquista Investments Pty Ltd v Urban Renewal Authority* [2015] SASCFC 91 [348].

101 Groves and Weeks, above n 75, 147.

102 *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280, 290 [47].

103 Ibid.

sense is an exception that proves, rather than undermines, the notion that a meaningful distinction can be drawn between legality and merit review. This conclusion is speculative. Yet, if correct, the lower courts may be more inclined to embrace unintelligibility as a basis for conclusions of unreasonableness than to explore the implications of ill-defined move away from the *Wednesbury* standard of review signalled in *Li*.[104] What is clear post-*Li* is that brief and uninformative reasons are apt to encourage conclusions of unreasonableness. By providing an incentive to decision-makers who give reasons to give better reasons, *Li* makes an important contribution to the already robust practice of reason-giving in Australian administrative law — a practice that has developed despite the lack of a common law obligation.

V Conclusion

The adequacy of the justifications offered by decision-makers is an increasingly important aspect of Australian judicial review. Obligations to give adequate reasons have an undeniable procedural element as a step associated with the making of a decision. However, even minimal requirements associated with such obligations will also have substantive dimensions.

As inadequacies in statements of reasons given pursuant to statutory obligations may not provide grounds for the invalidation of decisions (even if breach is an error of law), increasing attention is likely to be given to the question of whether the quality of justification is so lacking that a decision should be held legally unreasonable. Given that *Li* indicated that unreasonableness review should not be thought to be limited to the orthodox *Wednesbury* standard of review, a focus on the intelligibility or justification may be a way to attempt to align the practice of unreasonableness review (which *Li* may invigorate) with the theory that judges cannot legitimately encroach on the 'executive function of administration', nor be swayed by considerations of substantive fairness or principles of good administration.[105] For this reason, the concept of intelligible justification — as distinct from persuasive justification — will likely attract further judicial attention.

---

[104] These implications are examined in McDonald, above n 75, 128–31. Little by way of clear patterns can yet be discerned in the cases which have considered the High Court's reformulation of unreasonableness review in *Li*, though unreasonableness on the basis of a lack of an evident and intelligible justification appears to have been embraced as a distinct basis for unreasonableness review. Some judges have continued to emphasise that successful review for unreasonableness will remain a 'rare bird': see, eg, *Pangilinan v Queensland Parole Board* [2014] QSC 133 (18 June 2014) [70] and *Acquista Investments Pty Ltd v Urban Renewal Authority* [2015] SASCFC 91 [75], [344].

[105] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 25 [76]. It is also possible that the move in *Li* away from *Wednesbury* as a default standard for substantive review will place pressure on the continuing acceptance of these assumptions.