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**THE CONSTITUTIONAL DUTY TO GIVE REASONS FOR  
JUDICIAL DECISIONS**

LUKE BECK\*

**I INTRODUCTION**

The obligation of judicial officers to provide reasons for their decisions has been described by Sir Anthony Mason, a former Chief Justice of the High Court, as an element of the broader 'culture of justification' that exists in modern democracies.<sup>1</sup> While there is an increasing international scholarly literature examining the duty to give reasons for judicial decisions,<sup>2</sup> the Australian scholarly literature is far less developed.<sup>3</sup> This article contributes to that developing literature by arguing that in Australia there is an absolute constitutional duty to provide reasons for judicial decisions and by examining whether the general practice of the New South Wales Court of Appeal and the High Court complies with that duty when deciding applications for leave or special leave to appeal.

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\* Senior Lecturer, School of Law, Western Sydney University.

1 Sir Anthony Mason, 'Reply to David Dyzenhaus' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 52, 54.

2 See, eg, B V Harris, 'The Continuing Struggle with the Nuanced Obligation on Judges to Provide Reasons for Their Decisions' (2016) 132 *Law Quarterly Review* 216; Mathilde Cohen, 'When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach' (2015) 72 *Washington and Lee Law Review* 483; Hamish Stewart, 'The Trial Judge's Duty to Give Reasons for Judgment in Criminal Cases' (2009) 14 *Canadian Criminal Law Review* 19; Mary Liston, "'Alert, Alive and Sensitive": *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law' in David Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing, 2004) 113; David McGowan, 'Judicial Writing and the Ethics of the Judicial Office' (2000) 14 *The Georgetown Journal of Legal Ethics* 509; H L Ho, 'The Judicial Duty to Give Reasons' (2000) 20 *Legal Studies* 42; Frederick Schauer, 'Giving Reasons' (1995) 47 *Stanford Law Review* 633; Michael Taggart, 'Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases?' (1983) 33 *University of Toronto Law Journal* 1; Michael Akehurst, 'Statements of Reasons for Judicial and Administrative Decisions' (1970) 33 *The Modern Law Review* 154.

3 A notable and important exception is Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38 *Melbourne University Law Review* 482.

There is clear authority in Australia that reasons for judicial decisions should ordinarily, although not always, be provided<sup>4</sup> and that a failure to provide reasons, where they are required, is an error of law.<sup>5</sup> This article makes two central doctrinal arguments. The first doctrinal argument is that it is a defining characteristic of courts and of the exercise of judicial power that reasons for judicial decisions are *always* given. The second doctrinal argument is that a failure to provide reasons is not just an error of law but is a jurisdictional error. This article also provides important statistical data on the practice of giving reasons for applications for leave and special leave to appeal by the New South Wales Court of Appeal and the High Court. That analysis shows that the New South Wales Court of Appeal always complies with the constitutional duty to provide reasons for judicial decisions in respect of leave to appeal applications but that the High Court only sometimes complies with that constitutional duty in respect of special leave to appeal applications.

The article is structured as follows. Part II examines the existing authorities concerning the duty to give reasons for judicial decisions. Relying on the underlying principles of the authorities considered in Part II, Part III develops the argument that it is a defining characteristic of courts and of the exercise of judicial power that reasons for judicial decisions are always given. Part IV furthers the analysis in Part III by explaining what amounts to adequate reasons in order to comply with the constitutional duty to provide reasons for judicial decisions.

In Part V, the article examines the consequences of a failure to comply with the constitutional duty to provide reasons for judicial decision. Part V argues that a failure to comply with the duty is not simply an error of law, as existing authorities hold, but is in fact a jurisdictional error. The jurisdictional error arises because a failure to comply with the duty impairs the institutional integrity of the court and, possibly also, because a failure to comply amounts to a denial of procedural fairness. Part VI examines the content of the duty to give reasons in respect of applications for leave or special leave to appeal. Part VI explains the scope of the constitutional duty in the context of leave and special leave to appeal applications and undertakes an empirical analysis of decisions of the High Court and the New South Wales Court of Appeal to see whether practice is consistent with principle. Part VI also discusses the implications of the High Court's regular failure to comply with the constitutional duty. Part VII offers some concluding comments.

## II THE DUTY TO GIVE REASONS FOR JUDICIAL DECISIONS

An important explanation of the purposes served by the giving of reasons for judicial decisions was given by McHugh JA (as he then was) in *Soulemezis v Dudley (Holdings) Pty Ltd.*<sup>6</sup> McHugh JA explained three key purposes served by

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4 *Wainohu v New South Wales* (2011) 243 CLR 181, 228–9 [104]–[109] (Gummow, Hayne, Crennan and Bell JJ) ('*Wainohu*').

5 *Fleming v The Queen* (1998) 197 CLR 250, 260 [22] (The Court).

6 (1987) 10 NSWLR 247, 279 ('*Soulemezis*').

the giving of reasons for judicial decisions. The first purpose identified by McHugh JA was that reasons enable ‘the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge’s decision’.<sup>7</sup> The second purpose concerns judicial accountability. The giving of reasons enables decisions to be scrutinised, whether by appellate courts or the public. The third purpose identified by McHugh JA concerns the common law method. Reasons allow people ‘to ascertain the basis upon which like cases will probably be decided in the future’.<sup>8</sup> This section of the article examines the source of the duty to give reasons for judicial decisions.

Writing extra-judicially in 1995, Justice Michael Kirby, then of the High Court, wrote that the ‘duty of judicial officers to provide reasons must be taken to state the general rule now applicable, by the common law, throughout Australia’.<sup>9</sup> As Justice Kirby explained, an early rationale for the duty was to facilitate appeals since an absence of reasons for decision would frustrate the availability of an appeal.<sup>10</sup> Later, the duty came to be accepted as a general incident of the judicial process whether or not an appeal was available.<sup>11</sup> This section of the article demonstrates that the requirement that reasons be given for an exercise of judicial power is not simply a rule of the common law of Australia, which would imply that the rule could be abrogated by statute. The High Court has authoritatively ruled on the matter. The duty to give reasons is a constitutional demand and cannot be abrogated by statute.

The key case is *Wainohu*.<sup>12</sup> In that case, the High Court held that the *Crimes (Criminal Organisations Control) Act 2009* (NSW) was invalid because it impaired the institutional integrity of the Supreme Court of New South Wales contrary to the *Kable* doctrine. The Act conferred an administrative function on judges of the Supreme Court, acting *persona designata*, to declare an organisation to be a criminal organisation.<sup>13</sup> The making of such a declaration then enlivened a power in the Supreme Court, acting as a court, to issue a control order against members of a declared organisation on application by the Commissioner of Police.<sup>14</sup>

The legislation impaired the institutional integrity of the Supreme Court by providing that no reasons need be given by a judge acting *persona designata* for making a declaration in respect of an organisation. The High Court held that a non-judicial function cannot be conferred on a state judge *persona designata* if that function is incompatible with the performance of the judge’s judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution

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7 Ibid.

8 Ibid.

9 Michael Kirby, ‘Ex Tempore Judgments – Reasons on the Run’ (1995) 25 *University of Western Australia Law Review* 213, 221.

10 Ibid 219–20, quoting *Pettitt v Dunkley* [1971] 1 NSWLR 376, 382 (Asprey JA).

11 Ibid 220, citing *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386 (Mahoney JA) and *Soulezis* (1987) 10 NSWLR 247, 278 (McHugh JA).

12 (2011) 243 CLR 181.

13 *Crimes (Criminal Organisations Control) Act 2009* (NSW) pt 2.

14 *Crimes (Criminal Organisations Control) Act 2009* (NSW) pt 3.

exercising judicial power.<sup>15</sup> In *Wainohu*, the administrative function of the judge acting *persona designata* under the *Crimes (Criminal Organisations Control) Act* was ‘integral’ to the later exercise by the Supreme Court of a judicial function.<sup>16</sup> Because no reasons were required for a declaration, a ‘critical element of the Court’s power to make an interim control order or a control order would necessarily be unexplained and unable to be explained by the Court’.<sup>17</sup> It followed that the administrative function conferred on the judge *persona designata* breached the ‘incompatibility condition’ that the *Kable* doctrine dictates applies to limit the nature of non-judicial functions conferred on state judges.

Relevant for the purposes of this article is the High Court’s analysis of the constitutional dimension of reasons for judicial decisions. In their judgment in *Wainohu*, French CJ and Kiefel J explained that, when applied to a court, the term ‘institutional integrity’ refers to the ‘possession of the defining or essential characteristics of a court’.<sup>18</sup> One of those characteristics is that a court ‘generally gives reasons for its decisions’.<sup>19</sup> Their Honours explained that a ‘public explanation of reasons for final decisions and important interlocutory rulings’ is central to the judicial function.<sup>20</sup>

In support of this proposition, French CJ and Kiefel J referred to comments in earlier cases. First, French CJ and Kiefel J referred to comments by Gummow J in *Grollo v Palmer* describing the nature of judicial power as including that decisions are ‘delivered in public after a public hearing, and, where a judge is the tribunal of fact as well as law, are preceded by grounds for decision which are animated by reasoning’.<sup>21</sup> Secondly, French CJ and Kiefel J referred to Heydon J’s judgment in *AK v Western Australia*, which adopted an extra-curial explanation of the objectives of reasons for judicial decision given by Gleeson CJ.<sup>22</sup> Their Honours quoted Gleeson CJ’s explanation:

First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Secondly, the general acceptability of judicial decisions is promoted by the obligation to explain them. Thirdly, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions.<sup>23</sup>

French CJ and Kiefel J explained that

[t]he connection between the duty to give reasons and the nature of the judicial power enunciated in *Grollo*, and the objectives which that duty serves, explained in

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15 *Wainohu* (2011) 243 CLR 181, 206 [39], 208 [43] (French CJ and Kiefel J).

16 *Ibid* 219 [68] (French CJ and Kiefel J).

17 *Ibid* 219–20 [69] (French CJ and Kiefel J).

18 *Ibid* 208 [44].

19 *Ibid* 209 [44].

20 *Ibid* 213 [54].

21 *Ibid* 214 [56], quoting *Grollo v Palmer* (1995) 184 CLR 348, 394 (Gummow J).

22 *Ibid* 214 [56], citing *AK v Western Australia* (2008) 232 CLR 438, 470 [89] (Heydon J).

23 *Ibid* 214–15 [56], quoting Chief Justice Murray Gleeson, ‘Judicial Accountability’ (1995) 2 *The Judicial Review* 117, 122.

*AK*, marks the duty as an incident of the judicial function whether or not the court making the relevant decision is subject to appeal.<sup>24</sup>

French CJ and Kiefel J gave an additional reason for holding that the giving of reasons is a defining characteristic both of ‘courts’ and of the exercise of ‘judicial power’. That reason is that the giving of reasons is ‘an expression of the open court principle, which is an essential incident of the judicial function’.<sup>25</sup>

French CJ and Kiefel J’s analysis leads to three related conclusions concerning the giving of reasons for judicial decisions. The giving of reasons is a defining characteristic of ‘courts’. The giving of reasons is a defining characteristic of the exercise of ‘judicial power’. In addition, a judge acting *persona designata* may not be given administrative decision-making functions immunised from an obligation to give reasons without that function being incompatible with judicial office and therefore invalid as breaching the *Boilermakers* doctrine in the case of federal judges and the *Kable* doctrine in the case of state judges.

Justices Gummow, Hayne, Crennan and Bell came to the same conclusion in their joint judgment concerning the obligation to give reasons for judicial decisions. Their Honours described the quelling of controversies ‘by the giving of reasons’ as ‘a hallmark distinguishing substantive judicial decisions from arbitrary decisions’.<sup>26</sup>

The decision in *Wainohu* must be taken as an authoritative declaration that there is a constitutional duty to provide reasons for judicial decisions, at least ordinarily.

### III THE SCOPE OF THE DUTY TO GIVE REASONS

In *Assistant Commissioner Condon v Pompano Pty Ltd*, French CJ wrote that the defining characteristics of courts include ‘the provision of reasons for the courts’ decisions’.<sup>27</sup> Taken at face value, this statement could be read to mean that the duty to provide reasons is absolute. However, the duty to give reasons identified in *Wainohu* was explained in that case as being not absolute. As Morrison JA pointed out in *R v Kay; Ex parte Attorney-General (Qld)*, *Wainohu* holds that ‘not every judicial decision requires an expression of reasons’.<sup>28</sup>

In their judgment in *Wainohu*, French CJ and Kiefel J wrote that the ‘centrality, to the judicial function, of a public explanation of reasons for *final decisions and important interlocutory rulings* has long been recognised’.<sup>29</sup> They also wrote that it is a defining characteristic of a court that it ‘*generally* gives reasons for its decisions’.<sup>30</sup> French CJ and Kiefel J explained:

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24 Ibid 215 [57].

25 Ibid 215 [58].

26 Ibid 225 [92].

27 (2013) 252 CLR 38, 71 [67].

28 [2016] QCA 269, [27].

29 (2011) 243 CLR 181, 213 [54] (emphasis added).

30 Ibid 209 [44] (emphasis added).

The duty does not apply to every interlocutory decision, however minor. Its content – that is, the content and detail of the reasons to be provided – will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision.<sup>31</sup>

Two separate questions arise in any particular case where compliance with the constitutional duty to give reasons is in issue. First, were reasons for decision required at all? Secondly, if reasons were required, were the reasons provided adequate or sufficient to fulfil the constitutional duty? This section of the article argues that, contrary to French CJ and Kiefel J's suggestion, reasons for judicial decisions will always be required and that the essential element of adequate reasons is disclosure of the path of reasoning leading to the decision.

Despite what was said in *Wainohu*, there are compelling reasons to doubt the suggestion in *Wainohu* that the constitutional duty to give reasons is not absolute. There is no persuasive rationale for that idea and the idea contradicts fundamental principles underlying the decision in *Wainohu*.

In developing the argument that reasons for judicial decision are always required, it is necessary to begin by acknowledging that the not absolute statement of the rule has a pedigree. In *Public Service Board of New South Wales v Osmond*,<sup>32</sup> the High Court held that administrative decision-makers are not subject to a common law duty to provide reasons for decision, but that judicial decision-makers are. In that case, Gibbs CJ described the duty to give reasons as an 'incident of the judicial process',<sup>33</sup> a proposition later constitutionalised by *Wainohu*. Gibbs CJ added that his statement of principle was 'subject to the qualification that it is a normal but not a universal incident'.<sup>34</sup> This qualification is implicit in the statement in *Wainohu* that a court 'generally gives reasons for its decisions'.<sup>35</sup>

The default position at common law is that reasons for judicial decisions are required. Before *Wainohu* constitutionalised reasons for judicial decisions, the approach of the High Court at common law was that there must be good reasons to depart from the default position that reasons must be given. In 2001 in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of the State of Victoria*,<sup>36</sup> the question for the High Court was whether an error of law had occurred in the failure of a judge of the Supreme Court of Victoria to give reasons for refusing leave to 'appeal' on a question of law to that Court from a decision of the Victorian Civil and Administrative Tribunal. In holding that reasons for decision were required, Gaudron, Gummow, Hayne and Callinan JJ wrote: 'The practice of giving no reasons for refusing leave under s 148(1) of the VCAT Act is unwarranted. There is no basis for departing in such cases from the ordinary rule that reasons should be given.'<sup>37</sup>

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31 Ibid 215 [56].

32 (1986) 159 CLR 656.

33 Ibid 667, quoting *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386 (Mahoney JA).

34 Ibid 667.

35 (2011) 243 CLR 181, 209 [44] (French CJ and Kiefel J) (emphasis added).

36 (2001) 207 CLR 72 ('*Roy Morgan*').

37 Ibid 83–4 [26].

Referring to both *Roy Morgan* and *Wainohu*, the Federal Court in *Koutalis v Pollett* adopted the proposition that the ordinary rule is that reasons for judicial decisions must be given.<sup>38</sup> The case concerned a small claims matter in the Chief Industrial Magistrate's Court of New South Wales conducted in accordance with s 548 of the *Fair Work Act 2009* (Cth). Rares J held that 'there is nothing in s 548 that excuses a court conducting a hearing with the small claims procedure from giving the parties adequate reasons for its decision'.<sup>39</sup>

The references in *Wainohu* by French CJ and Kiefel J to 'final decisions and important interlocutory rulings'<sup>40</sup> as requiring reasons but 'minor' interlocutory decisions not requiring reasons are not inconsistent with the approach applied in *Roy Morgan* and *Koutalis v Pollett*. French CJ and Kiefel J's comment is not a suggestion there are certain identifiable categories of 'important' or 'minor' decisions and that the task is one of categorising a decision. Those comments simply reflect the idea that there may be some 'minor' interlocutory rulings for which reasons may exist to depart from the default position.

That it is not a question of categories of decisions not requiring reasons and that it is a question of the particular decision in issue has long been accepted at common law. In *Soulemezis*, McHugh JA referred to 'some examples of cases which might not require reasons'.<sup>41</sup> McHugh JA also said:

For example, many questions concerning the admissibility of evidence may require nothing more than a ruling: in New South Wales common law judges have long held that they are not obliged to hear argument on the admissibility of every question of evidence let alone give reasons. *It all depends on the importance of the point involved and its likely effect on the outcome of the case.*<sup>42</sup>

The idea that whether reasons are required all depends on the particular circumstances was also the approach of Gummow and Hayne JJ in *Evans v The Queen*.<sup>43</sup> In that case, Gummow and Hayne JJ said that '[i]t is not possible to formulate a single criterion of universal application that distinguishes between issues whose resolution' requires that reasons be given and those where reasons need not be given.<sup>44</sup> They suggested that cases involving the exercise of a discretion or where resolution of an issue 'depends upon some intermediate conclusion of fact or law' are likely to require the giving of reasons.<sup>45</sup> A problem is apparent with this reasoning. The fact that it is inherently uncertain when the exception to the ordinary rule requiring reasons operates suggests that the exception lacks a principled rationale.

More significantly, it seems there may never be good reasons for departing from the default position that reasons are required. In *Soulemezis*, McHugh JA also said that 'when the decision constitutes what is in fact or in substance a final order,

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38 (2015) 235 FCR 370, 377–8 [36]–[37], 278 [39] (Rares J).

39 Ibid 378 [39].

40 (2011) 243 CLR 181, 213 [54].

41 (1987) 10 NSWLR 247, 279, citing *Brittingham v Williams* [1932] VLR 237.

42 Ibid (emphasis added).

43 (2007) 235 CLR 521.

44 Ibid 531–2 [34].

45 Ibid 532 [34].

the case must be exceptional for a judge not to have a duty to state reasons'.<sup>46</sup> This comment was quoted with approval by French CJ in *Hogan v Hinch*.<sup>47</sup> *Hogan v Hinch* concerned the validity of s 42 of the *Serious Sex Offenders Monitoring Act 2005* (Vic) which allowed a court to issue a suppression order prohibiting the publication of material connected with a proceeding conducted under the Act and making it an offence to contravene such an order.

*Hogan v Hinch* did not concern the duty to give reasons for decision. However, French CJ offered some obiter remarks concerning an instance not engaging the duty to give reasons. French CJ said: 'In the ordinary course a judge making such an order, other than a short-term "holding" order, should give reasons for so doing'.<sup>48</sup> French CJ did not explain why making a short-term holding order would not require reasons for decision. Presumably, such short-term orders will be made to preserve the status quo pending full argument. In the same passage in *Soulemezis* from which French CJ quoted in *Hogan v Hinch*, McHugh JA quoted with approval comments of Cussen ACJ in *Brittingham v Williams*:<sup>49</sup>

A case may turn entirely upon a finding in relation to a single and simple question of fact, or be so conducted that the reason or reasons for the decision is or are obvious to any intelligent person; or a claim or defence may be presented in so muddled a manner that it would be a waste of public time to give reasons; and there may be other cases where reasons are not necessary or even desirable.<sup>50</sup>

McHugh JA explained that '[t]he limited nature of judicial resources and the cost to litigants and the general public in requiring reasons' is a relevant factor justifying the principle underlying Cussen ACJ's comments.<sup>51</sup>

*Brittingham v Williams* is the classic defence of the idea that not all judicial decisions require reasons. Yet, the reasoning in that case is not persuasive. *Brittingham v Williams* demonstrates the error of suggesting that there are categories of case (eg, reasons obvious, claim presented in a muddled manner) that do not require reasons for decision rather than that in particular cases good reasons might exist that would justify not giving reasons. This error, along with other errors, is also demonstrated by other, more modern, judicial suggestions. Take, for example, the decision in *Soulemezis* that decisions on procedural applications involving discretionary considerations – in that case, a decision refusing an application to expedite the hearing of a child custody dispute – do not require reasons.<sup>52</sup> That decision commits the error of holding there are categories of case that do not require reasons. That decision is also contrary to Gummow and Hayne JJ's suggestion in *Evans v The Queen* that decisions involving the exercise of a discretion are likely to require reasons. It is also contrary to the comment by Gummow, Hayne, Crennan and Bell JJ in *Wainohu* that reasons for decision are 'a

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46 (1987) 10 NSWLR 247, 279.

47 (2011) 243 CLR 506, 540 [42].

48 Ibid.

49 *Soulemezis* (1987) 10 NSWLR 247, 279–80.

50 *Brittingham v Williams* [1932] VLR 237, 239.

51 *Soulemezis* (1987) 10 NSWLR 247, 279.

52 Ibid 270, 279.



hallmark distinguishing substantive judicial decisions from arbitrary decisions'.<sup>53</sup> A discretionary decision for which no reasons are given looks arbitrary.

Moreover, the *Brittingham v Williams* and *Soulemezis* suggestions run contrary to the rationale given in *Wainohu* for the constitutional duty to give reasons. As Edelman J said in *Francis v Todd*, citing *Wainohu* and Gleeson CJ's explanation of the purposes of reasons for decision, the giving of sufficient reasons 'exposes decisions to scrutiny, it promotes general acceptability of judicial decisions, and it is consistent with democratic institutional responsibility to the public'.<sup>54</sup> Those purposes are not promoted by a failure to give reasons. Indeed, failing to give reasons frustrates those purposes.

Bosland and Gill have offered what is perhaps the most compelling counterargument to the ideas underlying the comments of Cussen ACJ, McHugh JA and French CJ that not all judicial decisions require reasons. Bosland and Gill write: 'if a decision is so obvious, simple or trivial, the reason for the decision should be relatively quick and simple to explain'.<sup>55</sup> An *ex tempore* statement of those reasons incurs no cost to the litigants or the administration of the courts. Building on Bosland and Gill's point, a further point is this: if a judge cannot provide a short *ex tempore* explanation of his or her reasons for a decision, then that fact of itself suggests that the reasoning underlying the decision is sufficiently complex as not only to require reasons but to require written reasons.

Not only did French CJ not give any explanation in *Hogan v Hinch* as to why a short-term holding order would not require reasons, his joint judgment with Kiefel J in *Wainohu* offered no reasoning in support of the idea that there may be some situations in which good reasons exist to depart from the constitutional duty to give reasons. The fact that French CJ and Kiefel J could offer no reasons for that proposition provides some basis for doubting its persuasiveness. Indeed, the core holding in *Wainohu* – that part of what it is that makes a court a 'court' and part of what it is that makes an exercise of judicial power an exercise of 'judicial power' is the giving of reasons for decisions – is inconsistent with there being any exception to the constitutional duty to give reasons. A characteristic can hardly be a 'defining' or 'essential' characteristic of something if there are times when that characteristic is not possessed by that thing. If it is true that reasons for judicial decisions are not always required, then reasons for decision are *not* a defining characteristic of 'courts' and the exercise of 'judicial power' and *Wainohu* was wrongly decided.

It follows that there is good reason to believe that the constitutional duty to provide reasons for decision extends to *all* judicial decisions. The real issue then is the extent of reasons that will be adequate to satisfy the duty.

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53 (2011) 243 CLR 181, 225 [92].

54 [2011] WASC 185, [14], citing *Wainohu* (2011) 243 CLR 181, 214–15 [55]–[56] (French CJ and Kiefel J) and Gleeson, above n 23, 122.

55 Bosland and Gill, above n 3, 505.

#### IV THE ADEQUACY OF REASONS

In *Wainohu*, French CJ and Kiefel J said that ‘the content and detail of the reasons to be provided ... will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision’.<sup>56</sup> In *Francis v Todd*, Edelman J said ‘an assessment of whether the minimum content, or sufficiency, for reasons has been met requires consideration of the reasons as a whole, including findings which can be inferred from reasons’.<sup>57</sup>

The general principles concerning what is necessary to satisfy the duty to provide reasons were summarised by Nettle JA in *Hunter v Transport Accident Commission*, where his Honour wrote:

while the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion. ... Above all the judge should bear steadily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion expressed. Failure to expose the path of reasoning is an error of law.<sup>58</sup>

The Full Court of the Federal Court, consisting of Lander, Gilmore and Gordon JJ, quoted this passage with approval in *Police Federation of Australia v Nixon*.<sup>59</sup> Citing Nettle JA’s comments in *Hunter v Transport Accident Commission*, Redlich and Kaye JJA in *Pham v Legal Services Commissioner* said that the principles concerning the giving of reasons for judicial decision are ‘well established’.<sup>60</sup>

Also referring to Nettle JA’s comments in *Hunter v Transport Accident Commission*, Ashley JA, with whom Warren CJ and Nettle JA agreed, in *Franklin v Ubaldi Foods Pty Ltd* said:

But one thing is clear. Reasons must be such as reveal – although in a particular case it may be by necessary inference – the path of reasoning which leads to the ultimate conclusion. If reasons fail in that respect, they will not enable the losing party to know why the case was lost, they will tend to frustrate a right of appeal, and their inadequacy will in such circumstances constitute an error of law.<sup>61</sup>

In the Federal Court, Kiefel J described the need to reveal the path of reasoning leading to a judicial decision as key to the adequacy of reasons for decision. In *Singh v Minister for Immigration and Multicultural Affairs*, Kiefel J explained:

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56 (2011) 243 CLR 181, 215 [56].

57 [2011] WASC 185, [18], citing *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430, 443 (Meagher JA) and *Bennett v Carruthers* [2010] WASC 131, [27] (Mazza J).

58 (2005) 43 MVR 130, 136–7 [21].

59 (2011) 198 FCR 267, 284 [67].

60 [2016] VSCA 256, [88].

61 [2005] VSCA 317, [38], quoted with approval in *Assad v Eliana Construction & Developing Group Pty Ltd* [2015] VSCA 53, [31] (Redlich, Kyrou and McLeish JJA).

The rationale underlying the giving of reasons is to inform the parties, and the public, of the process by which the outcome was arrived at and to enable the parties to thereby discern whether a legal error has been committed.<sup>62</sup>

There are other formulations of the ‘path of reasoning’ concept. In *Transport Accident Commission v Kamel*, the Victorian Court of Appeal stated that ‘[i]t has been said that the reasons must disclose “the route that led to the answer”, “how or why the conclusion was reached”, “the process of reasoning” or “the path of reasoning”’.<sup>63</sup> The Full Court of the South Australian Supreme Court has explained that there will not be a failure to give adequate reasons where ‘[a] fair reading of the Judge’s reasons exposes his [or her] reasoning process in a way that the losing party can understand’.<sup>64</sup> As Gummow and Hayne JJ put it in *AK v Western Australia*, ‘[t]he reasoning which led to [the] conclusion’ must be provided.<sup>65</sup>

There has been judicial consideration of what will not amount to adequately revealing the path of reasoning. In *Transport Accident Commission v Kamel*, the Victorian Court of Appeal said that ‘the mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings’ does not disclose the path of reasoning and will not amount to adequate reasons.<sup>66</sup> Nettle J said the same thing in *Hunter v Transport Accident Commission*.<sup>67</sup> Kiefel J made a similar point in *Singh*.<sup>68</sup> This is consistent with what Gaudron, Gummow, Hayne and Callinan JJ said in *Roy Morgan* about the need to reveal ‘why the judge reached the decision’<sup>69</sup> and what Gummow and Hayne JJ said in *AK v Western Australia* about the need for judgments to ‘articulate how the link was made between the legal principle [applicable to an issue] ... and the findings of fact [relevant to that issue]’.<sup>70</sup>

The requirement that reasons for judicial decisions must disclose the path of reasoning applies to cases where factual issues are in dispute.<sup>71</sup> For example in *Lu v Heinrich*,<sup>72</sup> the New South Wales Court of Appeal found that the District Court had not given adequate reasons in a negligence case for a finding that a motor vehicle accident had not caused the plaintiff psychiatric harm. The Court of Appeal explained that the judge, in preferring the evidence of one expert witness to that of others, ‘did not explain why he apparently rejected the other psychiatric experts’

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62 [1999] FCA 1322, [9] (‘Singh’), citing *Rich Rivers Radio Pty Ltd v Australian Broadcasting Tribunal* (1989) 22 FCR 437, 444 (The Court), *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500, 507 (Woodward J), and *Commonwealth v Pharmacy Guild of Australia* (1989) 91 ALR 65, 88 (Sheppard J), as referred to in *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402, 414–15 (Sackville J).

63 [2011] VSCA 110, [70] (Kyrou AJA), [1] (Warren CJ agreeing), [2] (Ashley JA agreeing).

64 *Resi Corporation v Munzer* [2016] SASCFC 15, [91] (Lovell J), [1] (Sulan J agreeing), [2] (Stanley J agreeing).

65 (2008) 232 CLR 438, 451 [36].

66 [2011] VSCA 110, [73] (Kyrou AJA).

67 [2005] 43 MVR 130, 140 [28].

68 [1999] FCA 1322, [9].

69 *Roy Morgan* (2001) 207 CLR 72, 84 [26] (emphasis added).

70 *AK v Western Australia* (2008) 232 CLR 438, 453 [45].

71 A recent example is *Harris v DJD Earthmoving Pty Ltd* [2016] VSCA 188.

72 (2014) 68 MVR 277.

opinions on the causation issue. His Honour's bald conclusion did not disclose adequate reasons in this respect'.<sup>73</sup>

The requirement to disclose the path of reasoning also applies to cases where legal principles are in dispute. For example, in *Cantwell v Beitzel*, the New South Wales Supreme Court found that a magistrate did not 'sufficiently disclose the reasoning process he applied' in determining that a particular statutory provision had no application in the matter.<sup>74</sup> The magistrate had rejected a submission advanced by one of the parties as to the proper construction of that statutory provision. However, the Supreme Court found that '[o]ther than stating that he rejected the argument, the magistrate said nothing further. He gave no reasons for such rejection'.<sup>75</sup> This failed to comply with the duty to give reasons.

The reasons required for a judicial decision must be given subsequent to argument, whether delivered in writing at a subsequent date or *ex tempore* following argument. In assessing whether a judicial officer has complied with the duty to give adequate reasons, judicial comments during argument are not considered. In *AK v Western Australia*, Gleeson CJ and Kiefel J explained that judicial comments during argument 'do not form part of a statement of the reasons for decision'.<sup>76</sup> In his judgment in that case, which French CJ and Kiefel J relied upon in *Wainohu*, Heydon J explained that 'there is a fundamental difference between the significance of what judges say in argument and the significance of what they say in actually deciding cases'.<sup>77</sup> Heydon J explained that the 'process of testing propositions and floating ideas in argument is a radically different process' from giving reasons for decision and that the former 'process does not form part of the judgment'.<sup>78</sup>

## V THE CONSEQUENCES OF FAILING TO FULFIL THE DUTY TO GIVE REASONS

The 1971 decision of the New South Wales Court of Appeal in *Pettitt v Dunkley* is sometimes cited as establishing that a failure to comply with the duty to give adequate reasons is an error of law.<sup>79</sup> In *Public Service Board of New South Wales v Osmond*, Gibbs CJ described that decision as having 'broken new ground'.<sup>80</sup> In *Fleming v The Queen*, Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ doubted that *Pettitt v Dunkley* broke new ground suggesting that it was settled law that a failure to give adequate reasons for judicial decisions was an error of law by the time *Pettitt v Dunkley* was decided.<sup>81</sup> Regardless of the origins of the

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73 *Lu v Heinrich* (2014) 68 MVR 277, 293 [87] (McColl JA) (citations omitted), citing *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186, 191–2 [28] (Ipp JA).

74 (2014) 87 NSWLR 103, 111 [31] (Bellew J).

75 *Ibid* 112 [32] (Bellew J).

76 (2008) 232 CLR 438, 446 [16].

77 *Ibid* 483 [111].

78 *Ibid*.

79 [1971] 1 NSWLR 376.

80 (1986) 159 CLR 656, 666.

81 (1998) 197 CLR 250, 260 [22].

proposition, it is now settled law that a failure to comply with the duty to give reasons is an error of law.<sup>82</sup>

This Part of the article argues that a failure to comply with the duty to give reasons for judicial decisions is not simply an error of law but amounts to jurisdictional error. There are two routes to this conclusion. First, that a failure to give reasons impairs the institutional integrity of the court and is thus unconstitutional. The second route picks up a recent suggestion by the Federal Court concerning procedural fairness.

### A Failing to Give Reasons Impairs the Institutional Integrity of the Court

A close analysis of the case law dealing with whether a failure to provide adequate reasons for administrative decisions amounts to jurisdictional error leads to the conclusion that a failure to provide adequate reasons for judicial decisions does amount to jurisdictional error because the failure impairs the institutional integrity of the court. The starting point in that analysis is the High Court's decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*.<sup>83</sup>

Although administrative decision-makers are not under any general common law duty to provide reasons, many statutes impose a duty to provide reasons. *Ex parte Palme* concerned the legal consequences of a failure to comply with such a statutory duty to provide reasons. The relevant provision of the *Migration Act 1958* (Cth) provided that if the Minister makes a decision to revoke a visa, the Minister must provide a written notice to the visa-holder that, among other things, sets out the reasons for the decision.<sup>84</sup> The High Court accepted that the fact that the giving of reasons is an event subsequent to the making of a decision does not prevent such a failure amounting to jurisdictional error. Gleeson CJ, Gummow and Heydon JJ said:

Here, the question is whether the step under s 501G which logically and temporally succeeds the making of a decision in exercise of a power is a condition precedent to that exercise. The possibility that this is so may be conceded. But, as *Project Blue Sky* emphasised,<sup>85</sup> the answer depends upon the construction of the Act to determine whether it was a purpose of the Act that an act done or not done, in breach of the provision, should be invalid.<sup>86</sup>

Similarly, McHugh J said:

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

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82 *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 399 [130] (Basten JA): 'There is extensive authority for the proposition that a failure, on the part of a tribunal exercising judicial functions, to give reasons for its decision will constitute an error of law which will permit the decision to be set aside on appeal'.

83 (2003) 216 CLR 212 ('*Ex parte Palme*').

84 *Migration Act 1958* (Cth) s 501G(1)(e).

85 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390–1 [93] (McHugh, Gummow, Kirby and Hayne JJ).

86 *Ex parte Palme* (2003) 216 CLR 212, 225 [44].

condition precedent to the validity of a decision. If it has, a decision that does not give reasons will be made without authority.<sup>87</sup>

In *Ex parte Palme*, the plaintiff was unable to demonstrate that the *Migration Act 1958* (Cth) had such a purpose. The section requiring that reasons be provided stipulated that a failure to comply with the section ‘does not affect the validity of the decision’.<sup>88</sup>

The Queensland Supreme Court followed *Ex parte Palme* recently in *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd*.<sup>89</sup> The case concerned a decision of an adjudicator under the *Building and Construction Industry Payments Act 2004* (Qld). The Act provided that an adjudicator’s decision ‘must’ include ‘the reasons for the decision’.<sup>90</sup> Jackson J found that the adjudicator failed to discharge that duty and that that failure amounted to jurisdictional error. On the proper construction of the provision, the requirement for reasons was ‘an essential element’ of an adjudication decision.<sup>91</sup> It followed that failing to provide reasons amounted to jurisdictional error.

The reasoning in *Sierra Property* speaks directly to the reasoning in *Wainohu* about the constitutional duty to give reasons for judicial decisions. *Wainohu* holds that one of the ‘defining or essential characteristics’ or ‘hallmark[s]’ of a ‘court’ and of ‘judicial power’ is the giving of reasons.<sup>92</sup> In other words, the giving of reasons is an essential element of the making of a judicial decision. A purported decision affected by jurisdictional error is in law no decision at all.<sup>93</sup> A purported decision that lacks an essential element of what it is that makes a decision a decision is necessarily affected by jurisdictional error. It follows that a failure to provide reasons for a judicial decision amounts to jurisdictional error. The statute in *Wainohu* provided that reasons need not be given. That was held to be unconstitutional as impairing the institutional integrity, in the sense of the ‘possession of the defining or essential characteristics of a court’,<sup>94</sup> of the New South Wales Supreme Court. By parity of reasoning, a judge simply choosing not to provide reasons for a judicial decision must necessarily also impair the institutional integrity of the court purporting to make that decision. Neither parliament nor an individual judge has power to impair the institutional integrity of a court.

## B Failing to Give Reasons Denies Procedural Fairness

In *CAL15 v Minister for Immigration and Border Protection*,<sup>95</sup> the Federal Court suggested another basis on which a failure to give reasons for judicial

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87 Ibid 227 [55].

88 *Migration Act 1958* (Cth) s 501G(4).

89 [2016] QSC 108 (*‘Sierra Property’*).

90 *Building and Construction Industry Payments Act 2004* (Qld) s 26(3)(b).

91 *Sierra Property* [2016] QSC 108, [67].

92 (2011) 243 CLR 181, 208 [44], 215 [57], 225 [92] (French CJ and Kiefel J).

93 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

94 *Wainohu* (2011) 243 CLR 181, 208 [44].

95 [2016] FCA 1344 (*‘CAL15’*).

decisions might amount to jurisdictional error.<sup>96</sup> That basis was that failing to provide reasons denies a party procedural fairness in respect of a party's right to appeal or seek review of the decision for which reasons were not given.<sup>97</sup> It is settled law that a denial of procedural fairness amounts to jurisdictional error.<sup>98</sup>

*CAL15* concerned an application for leave to appeal to the Federal Court against a decision of the Federal Circuit Court. The applicant had sought judicial review in the Federal Circuit Court of a decision of the Administrative Appeals Tribunal upholding a ministerial decision to deny the applicant a protection visa. The applicant failed to attend a directions hearing in the Federal Circuit Court and a Registrar dismissed the judicial review application with costs. The Federal Circuit Court dismissed an application to set aside the Registrar's order.

One of the grounds raised in the Federal Court application was that by failing to provide written reasons for decision, the Federal Circuit Court had denied the applicant procedural fairness. The Federal Court dismissed that ground on the basis that the giving of reasons is a step subsequent to making a decision and so cannot have amounted to procedural unfairness in the making of the decision.<sup>99</sup> Without any elaboration, Mortimer J added: 'Whether or not a failure to give reasons is a denial of procedural fairness in terms of the exercise of any appeal or review rights (whether by leave or otherwise) is not a matter raised by this application.'<sup>100</sup>

There may well be substance in this suggestion. The common law version of the duty to provide reasons for judicial decisions was linked to appeal rights. In *Carlson v King*, Jordan CJ said:

It has long been established that it is the duty of a Court of first instance, from which an appeal lies to a higher Court, to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision. The duty is incumbent, not only upon magistrates ... and District Courts, but also upon this Court, from which an appeal lies to the High Court ...<sup>101</sup>

In *Waterways Authority v Fitzgibbon*, Hayne J quoted from *Carlson v King* and added: 'To fail to make or cause to be made such a note may invoke principles of procedural fairness and constitute a failure to exercise the relevant jurisdiction'.<sup>102</sup> In *Police Federation of Australia v Nixon*, Lander, Gilmour and Gordon JJ also quoted from *Carlson v King* and commented that '[t]o fail to do so

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96 For an argument that procedural fairness requires that reasons be given for administrative decisions, see Justice Chris Maxwell, 'Is the Giving of Reasons for Administrative Decisions a Question of Natural Justice?' (2013) 20 *Australian Journal of Administrative Law* 76.

97 See J W Bridge, 'The Duty to Give Reasons for Decisions as an Aspect of Natural Justice' in D Lasok et al (eds), *Fundamental Duties* (Pergamon Press, 1980) 81.

98 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 569 [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 89 [5] (Gleeson CJ), 91–101 [17]–[42] (Gaudron and Gummow JJ), 143 [170] (Hayne J).

99 *CAL15* [2016] FCA 1344, [31] (Mortimer J), citing *Ex parte Palme* (2003) 216 CLR 212, 225–6 [44]–[48] (Gleeson CJ, Gummow and Heydon JJ), 227 [55] (McHugh J).

100 *CAL15* [2016] FCA 1344, [31].

101 (1947) 64 WN (NSW) 65, 66 (citations omitted).

102 *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816, 1835 [129].

may invoke principles of procedural fairness and is an error of law'.<sup>103</sup> In neither case was the point developed further.

Both Hayne J and Lander, Gilmour and Gordon JJ's judgments cite the same passage from Asprey JA's judgment in *Pettitt v Dunkley*.<sup>104</sup> In that passage, Asprey JA explains that reasons for decision enable an appellate court to understand the basis on which a decision was reached and that an absence of reasons will mean that parties confront difficulties in exercising their appellate rights. Lander, Gilmour and Gordon JJA also cite a passage from Moffatt JA's judgment in the same case explaining a judge's decision 'does not exhaust the rights which parties may have', given the availability of avenues of appeal and review.<sup>105</sup>

The logic underlying the idea that a failure to give reasons may amount to a denial of procedural fairness seems to have two related strands. The first strand concerns the procedural fairness hearing rule. The decision for which reasons have not been given does not finally dispose of the issue in respect of which the decision was made or finally determine the parties' rights. With the exception of final decisions of the High Court, there will be avenues for review and/or appeal. As *Kioa v West* explains, it is an essential aspect of procedural fairness that a party knows the case against them and has the opportunity to respond to it.<sup>106</sup> Further, as Steytler P said in *Riley v Western Australia*, citing *Carlson v King* and *Pettitt v Dunkley*, if reasons for decision are not provided then 'the losing party cannot know whether there has been a mistake of law or of fact'.<sup>107</sup> In the absence of reasons, a losing party will not know the case against them in any exercise of their right to seek review or to appeal and, beyond the orders made, will have 'no idea of exactly ... what it [is] that they [are] appealing against'<sup>108</sup> in order to be able to respond to it in any review or appeal proceedings.

The second strand of the logic underlying the procedural fairness argument concerns the bias rule. *Kioa v West* quoted from the speech of Lord Denning in *Kanda v Government of Malaya*, including this passage:

the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.<sup>109</sup>

Where reasons for decision are not provided, a fair-minded observer might think that the judge has taken in account matters not known to the losing party. As the High Court emphasised in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, it is 'unjust' for a case to be decided on the basis of matters in respect of which the parties have had no notice or opportunity to address.<sup>110</sup> In *International Finance*

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103 *Police Federation of Australia v Nixon* (2011) 198 FCR 267, 284 [67].

104 [1971] 1 NSWLR 376, 382.

105 *Ibid* 388.

106 (1985) 159 CLR 550, 582 (Mason J).

107 (2005) 30 WAR 525, 534 [32].

108 *Koutalis v Pollett* (2015) 235 FCR 370, 377 [33] (Rares J).

109 *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ), quoting *Kanda v Government of Malaya* (1962) AC 322, 337 (Lord Denning for their Lordships).

110 (2007) 230 CLR 89, 149–50 [132]–[133] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).



*Trust Co Ltd v New South Wales Crime Commission*, the High Court further emphasised that a ‘court may not decide a case on a point not raised by one of the parties or by the court for the consideration of the parties’.<sup>111</sup> This relates directly to the underlying rationale French CJ and Kiefel J gave in *Wainohu* for the proposition that the giving of reasons is a ‘defining characteristic’ of a ‘court’ and of the exercise of ‘judicial power’.<sup>112</sup> That rationale adopted Gleeson CJ’s explanation that reasons for decision expose decisions to scrutiny, promote the general acceptability of judicial decisions and is consistent with democratic institutional responsibility to the public. The necessary logic of Gleeson CJ’s explanation is that the absence of reasons for judicial decision is likely to foster public suspicion about the integrity of the judicial decision making process.<sup>113</sup>

In the absence of reasons for a judicial decision, the fair-minded observer of the apprehended bias test – who is presumably a member of Gleeson CJ’s public whose confidence in the judiciary is partly dependent on the giving of reasons for judicial decisions – might wonder whether the judge made that decision on a basis unknown to the losing party.<sup>114</sup> Lord Denning once explained that in order for a trial to be fair, the decision reached ‘should be seen to be based on reason; and that can only be seen, if the judge himself states his reasons’.<sup>115</sup> To this can be added the observation of Sir Frank Kitto who, after his retirement from the High Court, explained that ‘[t]he process of reasoning which has decided the case must itself be exposed to the light of day’ in order to provide ‘a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing’.<sup>116</sup> Academic analysis has also explained that providing reasons for judicial decisions functions ‘to help protect the court’s moral power by giving some assurance that private views are not masquerading behind public views’.<sup>117</sup>

Given the analysis above concluding that failing to give reasons for a judicial decision amounts to jurisdictional error because the failure impairs the institutional integrity of the court, it may never be necessary to ultimately decide whether such a failure also amounts to a denial of procedural fairness.

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111 (2009) 240 CLR 319, 381 [146] (Heydon J), citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Friend v Brooker* (2009) 239 CLR 129.

112 See above n 92 and accompanying text.

113 See Gleeson, above n 23, 123. See also Harris, above n 2, 222–3; *Soulemezis* (1987) 10 NSWLR 247, 278–9 (McHugh JA).

114 Comment, ‘Duty of a Lower Court to Give Reasons for Its Decisions’ (1982) 56 *Australian Law Journal* 323, 326: ‘To the layman, also, it might seem that, as a matter of natural justice, a defeated party is entitled to a statement of reasons for the decision unfavourable to him’. Cf the bare assertion that ‘[a]n absence of reasons does not amount to a denial of natural justice’: Michael O’Loughlen, ‘Whether Courts Must Give Reasons for Decision’ (1999) 73 *Australian Law Journal* 623, 633.

115 Sir Alfred Denning, *The Road to Justice* (Stevens, 1955) 29.

116 Sir Frank Kitto, ‘Why Write Judgments?’ (1992) 66 *Australian Law Journal* 787, 790.

117 Edward H Levi, ‘The Nature of Judicial Reasoning’ in Sidney Hook (ed), *Law and Philosophy: A Symposium* (New York University Press, 1964) 263, 281. See also Ho, above n 2, 50.

## VI THE DUTY TO GIVE REASONS AND LEAVE TO APPEAL DECISIONS

The requirement to obtain leave or special leave to appeal to an appellate court is a common feature of the Australian judicial system.<sup>118</sup> In *Coulter v The Queen* in 1988, Deane and Gaudron JJ explained that the purpose of the requirement for leave is to '[promote] the availability, the speed and the efficiency of justice'.<sup>119</sup> They also identified four 'special features' of an application for leave or special leave to appeal 'which set it apart from at least some other judicial proceedings'.<sup>120</sup> First, decisions on applications for leave to appeal involve an 'extremely wide' judicial discretion.<sup>121</sup> Second, 'notwithstanding that refusal of the application ordinarily involves the final determination of the particular litigation, that wide discretion can commonly be exercised without the provision of detailed or, sometimes, any reasons'.<sup>122</sup> Third, where the court which is to hear the appeal makes the decision on the leave application, 'there is a risk that the ordinary appearance of judicial disinterest in the outcome of proceedings may be, albeit wrongly, seen as qualified' by considerations of judicial workload rather than the merit of the application.<sup>123</sup> Fourth, there is a risk that a refusal of leave to appeal will be seen 'by an unsuccessful applicant as a decision to close the doors of the court in his face' instead of a decision on the merits.<sup>124</sup> Deane and Gaudron JJ explained that these features of applications for leave or special leave to appeal emphasise the importance of the observance of the 'ordinary safeguards of the administration of justice'.<sup>125</sup>

The idea that applications for leave or special leave to appeal might be determined without the provision of any reasons can no longer be accepted in light of subsequent developments in the law. As noted in Part III, in 2001 in *Roy Morgan*,<sup>126</sup> the High Court held that the Victorian Supreme Court made an error of law in failing to give reasons for refusing leave to appeal on a question of law to that Court from a decision of the Victorian Civil and Administrative Tribunal. In holding that reasons for decision were required, Gaudron, Gummow, Hayne and Callinan JJ explained that even in respect of applications for leave to appeal, '[t]here is no basis for departing in such cases from the ordinary rule that reasons should be given'.<sup>127</sup> They also referred directly to Deane and Gaudron JJ's

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118 See M J Beazley, P T Vout and S E Fitzgerald, *Appeals and Appellate Courts in Australia and New Zealand* (LexisNexis Butterworths, 2014) ch 6; Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (Federation Press, 2015) chs 7, 12.

119 (1988) 164 CLR 350, 359.

120 Ibid.

121 Ibid.

122 Ibid 359–60. See also *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 218 (The Court): 'Ordinarily, [an application for special leave to appeal] results in a decision which is not accompanied by reasons'.

123 *Coulter v The Queen* (1988) 164 CLR 350, 360.

124 Ibid.

125 Ibid.

126 (2001) 207 CLR 72.

127 Ibid 83–4 [26].

comments in *Coulter v The Queen* and emphasised that '[n]ot giving reasons is exceptional'.<sup>128</sup> In *Wainohu*, Gummow, Hayne, Crennan and Bell JJ cited these passages from *Roy Morgan* with approval.<sup>129</sup> Further, as earlier parts of this article have argued, it appears that there can never be good reasons for departing from the duty to give reasons for judicial decisions.<sup>130</sup>

In *La La Land Byron Bay Pty Ltd v Independent Liquor and Gaming Authority*,<sup>131</sup> the New South Wales Court of Appeal, citing *Roy Morgan*, explained the extent of reasons necessary in applications for leave to appeal from a decision of a lower court in order to satisfy the obligation to provide reasons. In their joint judgment, Beazley P, Gleeson JA and Sackville AJA explained:

The court is not required to give reasons such as are appropriate for a full appellate determination. Rather, the reasons required on the refusal of leave are directed to why leave is refused, having regard to the principles governing the court's discretion in determining whether to grant or refuse leave ...<sup>132</sup>

The reasons stated by the NSW Court of Appeal in refusing leave are thus conventionally short, usually being no more than a few pages, directed to why, having regard to the principles governing leave, the case is not an appropriate matter for the grant of leave. Short reasons are appropriate, sufficient and necessary for the proper administration of justice.<sup>133</sup>

This part of the article considers whether the practice of the New South Wales Court of Appeal in deciding applications for leave to appeal and the practice of the High Court in deciding applications for special leave to appeal comply with the constitutional duty to give reasons.

### A New South Wales Court of Appeal Practice

In 2014, which is the most recent year for which data is available, the New South Wales Court of Appeal decided 186 applications for leave to appeal.<sup>134</sup> That workload was undertaken by a court consisting of 13 judges of appeal (including the Chief Justice and the President) and three acting judges of appeal.<sup>135</sup> Judges of the Supreme Court also sat as additional judges of appeal from time to time.<sup>136</sup>

Table 1 sets out an analysis of 20 leave to appeal decisions determined by the New South Wales Court of Appeal in 2016. The cases included in the sample are those from March to November 2016 where 'leave to appeal' appears in the judgment catchwords (in the Judgment and Decisions Enhanced online database

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128 Ibid 83 [25].

129 (2011) 243 CLR 181, 225 [92] n 198.

130 It is settled that applications for special leave to appeal involve the exercise of judicial power: *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 218 ('The Court').

131 [2015] NSWCA 254.

132 Ibid [8].

133 Ibid [9]–[10].

134 Supreme Court of New South Wales, '2014 Annual Review' (Report, 2015) 46  
<[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Annual%20Reviews%20+%20Stats/Supreme\\_Court\\_Ann\\_Rev\\_2014\\_2.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Annual%20Reviews%20+%20Stats/Supreme_Court_Ann_Rev_2014_2.pdf)>.

135 Ibid 13–14.

136 Ibid 13.

(‘JADE’)<sup>137</sup> and where leave to appeal was refused in an *ex tempore* judgment. *Ex tempore* decisions to refuse leave were chosen for the purpose of enabling comparison with the practice of the High Court.

Table 1: NSW Court of Appeal *Ex Tempore* Leave to Appeal Decisions

	Justices	Area/s of law application relates to discernible	Proposed grounds of appeal discernible	Ground/s on which application refused stated	Path of reasoning for ground/s discernible	Word count
<i>Young v King</i> [2016] NSWCA 282	Basten, Gleeson JJA, Emmett AJA	Yes	Yes	Yes	Yes	12 124
<i>Denning Real Estate Pty Ltd v XR Property Developments Pty Ltd</i> [2016] NSWCA 286	Leeming JA, Sackville AJA	Yes	Yes	Yes	Yes	2966
<i>Ciavarella v Hargraves Secured Investments Ltd</i> [2016] NSWCA 304	Meagher, Leeming, Payne JJA	Yes	Yes	Yes	Yes	6791
<i>711 Hogben Pty Ltd v Tadros</i> [2016] NSWCA 244	Meagher, Leeming JJA	Yes	Yes	Yes	Yes	1636
<i>Mendonca v Chan &amp; Naylor (Parramatta) Pty Ltd</i> [2016] NSWCA 246	Meagher, Leeming JJA	Yes	Yes	Yes	Yes	1746
<i>Rahman v A-G (NSW)</i> [2016] NSWCA 261	Meagher, Payne JJA	Yes	Yes	Yes	Yes	2200
<i>Berry v Nicholls</i> [2016] NSWCA 272	Beazley P, McColl, Ward JJA	Yes	Yes	Yes	Yes	1094
<i>Gorzynski v Bendigo and Adelaide Bank Ltd</i> [2016] NSWCA 170	Basten JA, Sackville AJA	Yes	Yes	Yes	Yes	3742
<i>Joo v Yoo</i> [2016] NSWCA 172	Ward, Payne JJA, Sackville AJA	Yes	Yes	Yes	Yes	3451
<i>Barnett v Harrison</i> [2016] NSWCA 184	Basten, Leeming JJA, McDougall J	Yes	Yes	Yes	Yes	3168
<i>Gibson v Drumm</i> [2016] NSWCA 206	Beazley P, Simpson JA	Yes	Yes	Yes	Yes	3221
<i>Ex parte PFC</i> [2016] NSWCA 102	Beazley P, Sackville AJA	Yes	Yes	Yes	Yes	3025

137 BarNetwork Pty Ltd, *Home, Jade* <<https://jade.io>>.

	Justices	Area/s of law application relates to discernible	Proposed grounds of appeal discernible	Ground/s on which application refused stated	Path of reasoning for ground/s discernible	Word count
<i>Donnelly v Australia and New Zealand Banking Group Ltd</i> [2016] NSWCA 167	Basten JA, Sackville AJA	Yes	Yes	Yes	Yes	741
<i>Stankovic v New South Wales</i> [2016] NSWCA 168	Basten JA, Sackville AJA	Yes	Yes	Yes	Yes	1444
<i>Souleles v Todd</i> [2016] NSWCA 91	Beazley P, McColl JA	Yes	Yes	Yes	Yes	3259
<i>CBX2 Pty Ltd v National Australia Bank Ltd</i> [2016] NSWCA 79	Ward JA, Sackville AJA	Yes	Yes	Yes	Yes	3062
<i>Hassoun v Wesfarmers General Insurance Ltd</i> [2016] NSWCA 76	Ward JA, Sackville, Barrett AJJA	Yes	Yes	Yes	Yes	2935
<i>DB v Secretary, Department of Family and Community Services</i> [2016] NSWCA 63	McColl, Meagher JJA	Yes	Yes	Yes	Yes	5244
<i>Rinehart v Rinehart</i> [2016] NSWCA 58	Beazley P, Leeming, Simpson JJA	Yes	Yes	Yes	Yes	4377
<i>Zepinic v Chateau Constructions (Aust) Ltd</i> [2016] NSWCA 50	McColl, Leeming JJA	Yes	Yes	Yes	Yes	2047

The average word count for decisions in the sample is 3414 words and the median word count is 3044 words. The longest decision consists of 12 124 words and the shortest of 741 words. In every case in the sample, the area or areas of law the application relates to is discernible from the reasons for decision as are the proposed grounds of appeal in each application. In every case in the sample, the ground or grounds on which the application for leave to appeal was refused is stated and the path of reasoning leading to that ground or those grounds is discernible. The general practice of the New South Wales Court of Appeal in deciding applications for leave to appeal complies with the constitutional duty to give adequate reasons for judicial decisions.

## B High Court Practice

The High Court's special leave workload is significantly more burdensome than the leave to appeal workload of the New South Wales Court of Appeal. The High Court's most recent Annual Report indicates that in the 2015–16 financial year, the High Court decided 455 applications for special leave to appeal.<sup>138</sup> That workload was undertaken by a court consisting of seven members. In May 2016, the High Court registry announced new procedures so that the vast majority of applications for special leave to appeal would be determined on the papers rather than following a short oral hearing.<sup>139</sup>

The High Court's reasons for decision on applications for special leave to appeal are notoriously vague. Justice Mark Weinberg of the Victorian Court of Appeal has described them as being 'extremely brief' and 'often uninformative'.<sup>140</sup> Academics have given similar descriptions with Jeremy Gans, for example, describing the High Court's reasons for decision in special leave applications as 'very uninformative'.<sup>141</sup>

Table 2 sets out an analysis of 20 special leave decisions determined on the papers in 2016. The cases included in the sample are the first five decisions published on the Australian Legal Information Institute ('AustLii') High Court of Australia Special Leave Dispositions ('HCASL') database in the months of August, September, October (excluding the first published decision, which was actually an application for removal) and December 2016. Choosing the sample by this method allowed for the cases included in the table to include those decided by a larger mix of judges. Each case in the sample turns out to be a case in which special leave to appeal was refused.

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138 High Court of Australia, 'Annual Report' (2016) 13 <[http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA\\_Annual\\_Report\\_2015-16.pdf](http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2015-16.pdf)>.

139 Andrew Phelan, Chief Executive and Principal Registrar of the High Court, 'Changes to High Court Procedures for Considering Applications for Special Leave' (Media Release, 16 March 2016) <[http://www.hcourt.gov.au/assets/corporate/policies/Special\\_Leave\\_Changes.pdf](http://www.hcourt.gov.au/assets/corporate/policies/Special_Leave_Changes.pdf)>.

140 Mark Weinberg, 'Adequate, Sufficient and Excessive Reasons' (Speech delivered at the Judicial College of Victoria, Melbourne, 4 March 2014) 30 [118] <<http://www.austlii.edu.au/au/journals/VicJSchol/2014/5.html>>.

141 Jeremy Gans, 'News: Another NSW–Vic Schism amongst Special Leave Grants' on *Opinions on High: High Court Blog* (17 October 2016) <<http://blogs.unimelb.edu.au/opinionsonhigh/2016/10/17/news-another-nsw-vic-schism-amongst-special-leave-grants/>>.

Table 2: Special Leave Decisions Determined on the Papers

	Justices	Areas of law application relates to discernible	Proposed grounds of appeal discernible	Grounds on which application refused stated	Path of reasoning for grounds discernible	Word count
<i>Walter Elliott Holdings Pty Ltd v Fraser Coast Regional Council</i> [2016] HCASL 173	Bell and Keane JJ	Yes	Yes	Yes	Yes	103
<i>Lynx Engineering Consultants Pty Ltd v Pilbara Infrastructure Pty Ltd</i> [2016] HCASL 174	Bell and Keane JJ	No	No	Yes	No	66
<i>Waters v Federal Court of Australia and the Judges Thereof</i> [2016] HCASL 175	Bell and Keane JJ	Yes	No	Yes	No	67
<i>Vargas v Clarke</i> [2016] HCASL 176	Nettle and Gordon JJ	No	No	Yes	No	124
<i>Rose v Queensland Police Service</i> [2016] HCASL 177	Nettle and Gordon JJ	No	No	Yes	No	124
<i>Sandhu v Minister for Immigration and Border Protection</i> [2016] HCASL 198	Kiefel and Keane JJ	No	No	Yes	No	69
<i>RF v Director-General, Community Services Directorate</i> [2016] HCASL 199	Kiefel and Keane JJ	No	No	Yes	No	43
<i>MZAGS v Minister for Immigration and Border Protection</i> [2016] HCASL 200	Kiefel and Keane JJ	No	No	Yes	No	46
<i>Laurent v Fates</i> [2016] HCASL 201	Kiefel and Keane JJ	No	No	Yes	No	53
<i>Oxenham v Western Australia</i> [2016] HCASL 202	Kiefel and Keane JJ	No	No	Yes	No	73

	Justices	Area/s of law application relates to discernible	Proposed grounds of appeal discernible	Ground/s on which application refused stated	Path of reasoning for ground/s discernible	Word count
<i>Singh v Minister for Immigration and Border Protection</i> [2016] HCASL 217	Nettle and Gordon JJ	Yes	Yes	Yes	Yes	150
<i>Sanderson v Bank of Queensland</i> [2016] HCASL 218	Nettle and Gordon JJ	Yes	No	Yes	No	149
<i>MZADZ v Minister for Immigration and Border Protection</i> [2016] HCASL 219	Nettle and Gordon JJ	Yes	No	Yes	No	159
<i>Dean v Legal Practice Board</i> [2016] HCASL 220	Nettle and Gordon JJ	No	No	Yes	No	145
<i>Santos v Western Australia</i> [2016] HCASL 221	Nettle and Gordon JJ	Yes	No	Yes	No	123
<i>Patsuris v Gippsland and Southern Water Corporation</i> [2016] HCASL 261	Gageler and Keane JJ	Yes	No	Yes	Yes	66
<i>MZAGE v Minister for Immigration and Border Protection</i> [2016] HCASL 262	Gageler and Keane JJ	No	No	Yes	No	69
<i>Ulster v Viney</i> [2016] HCASL 263	Gageler and Keane JJ	No	No	Yes	No	49
<i>Mammoth Investments Pty Ltd v Granite Hill Pty Ltd</i> [2016] HCASL 264	Gageler and Keane JJ	No	No	Yes	No	60
<i>Esperance Cattle Company Pty Ltd v Granite Hill Pty Ltd</i> [2016] HCASL 265	Gageler and Keane JJ	No	No	Yes	No	60

The average word count of a special leave disposition determined on the papers is 89.9 words and the median word count is 69 words. The longest disposition consists of 159 words and the shortest of 43 words. In every case, the ground or grounds on which the court refused the application is stated in the reasons for decision. In only less than half of cases (seven out of 20) is it possible to work out



what area or areas of law the application relates to by reading the reasons for decision. In almost no case (two out of 20) is it possible to work out by reading the reasons for decision what the proposed grounds of appeal might be. The path of reasoning leading to the ground or grounds on which the application is refused is very rarely discernible (three out of 20).

The situation with special leave applications determined following an oral hearing is very similar. Table 3 sets out an analysis of 20 special leave decisions determined following an oral hearing in 2016. Cases included in the table are those in which special leave was refused commencing in October (which is when compilation of the table occurred) and working backwards through the High Court of Australia Transcripts database on Austlii until 20 such decisions were located. Cases in which special leave was granted were not included in the sample since the implications of inadequate reasons in those cases are less serious given the matter is to proceed to a full hearing. For the purposes of the analysis, judicial comments made in the course of argument were excluded from the analysis. Only the *ex tempore* reasons for decision given at the end of the hearing were analysed.

Table 3: Special Leave Decisions Determined after Oral Hearing

	Justices	Areas of law application relates to discernible	Proposed grounds of appeal discernible	Ground/s on which application refused stated	Path of reasoning for ground/s discernible	Word count
<i>Commissioner of Taxation v Financial Synergy Holdings Pty Ltd</i> [2016] HCATrans 232	French CJ and Kiefel J	No	No	Yes	Yes	47
<i>CGU Insurance Ltd v Barrie Toepfer Earthmoving and Land Management Pty Ltd</i> [2016] HCATrans 244	Gageler and Keane JJ	No	No	Yes	No	38
<i>Jones v Treasury Wine Estates Ltd</i> [2016] HCATrans 242	Gageler and Gordon JJ	No	No	Yes	Yes	53
<i>Graham on Behalf of the Ngadju People v St Ives Gold Mining Co Pty Ltd</i> [2016] HCATrans 241	Gageler and Gordon JJ	No	No	Yes	No	52
<i>Multigate Medical Devices Pty Ltd v B Braun Melsungen AG</i> [2016] HCATrans 195	Kiefel, Keane and Nettle JJ	Yes	Yes	Yes	No	77

	Justices	Area/s of law application relates to discernible	Proposed grounds of appeal discernible	Ground/s on which application refused stated	Path of reasoning for ground/s discernible	Word count
<i>The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd</i> [2016] HCATrans 198	Keane and Nettle JJ	No	No	Yes	No	31
<i>Stretton v Minister for Immigration and Border Protection</i> [2016] HCATrans 200	Gageler and Gordon JJ	No	No	Yes	No	40
<i>JR Consulting &amp; Drafting Pty Ltd v Cummings</i> [2016] HCATrans 202	Gageler and Gordon JJ	Yes	Yes	Yes	No	52
<i>Baiada Poultry Pty Ltd v Glenister</i> [2016] HCATrans 171	Kiefel and Gordon JJ	No	No	Yes	No	25
<i>Western Australia v Banjima People</i> [2016] HCATrans 172	Kiefel and Gordon JJ	No	No	Yes	No	25
<i>Perilya Broken Hill Ltd v Valuer-General (NSW)</i> [2016] HCATrans 174	Keane and Nettle JJ	No	No	Yes	No	27
<i>Saleh v The Queen</i> [2016] HCATrans 175	Keane and Nettle JJ	No	No	Yes	No	25
<i>R v Theodoropoulos</i> [2016] HCATrans 147	Bell and Nettle JJ	No	No	Yes	Yes	52
<i>Box Hill Institute of TAFE v Johnson</i> [2016] HCATrans 145	Bell and Nettle JJ	No	No	Yes	No	30
<i>Azam v Iadmeneo (No 123) Pty Ltd</i> [2016] HCATrans 143	French CJ and Gageler J	No	No	Yes	Yes	37
<i>McCormack v Schultz</i> [2016] HCATrans 119	Kiefel and Bell JJ	Yes	No	Yes	Yes	40
<i>Grills v Leighton Contractors Pty Ltd</i> [2016] HCATrans 118	Kiefel and Bell JJ	No	No	Yes	Yes	32
<i>Kubovic v HMS Management Pty Ltd</i> [2016] HCATrans 117	Kiefel and Bell JJ	No	No	Yes	Yes	25

	Justices	Area/s of law application relates to discernible	Proposed grounds of appeal discernible	Ground/s on which application refused stated	Path of reasoning for ground/s discernible	Word count
<i>Independent Public Business Corporation of Papua New Guinea v International Petroleum Investment Co</i> [2016] HCATrans 114	French CJ and Keane J	No	Yes	Yes	No	42
<i>Fernandez v Minister for Immigration and Border Protection</i> [2016] HCATrans 113	French CJ and Keane J	No	No	Yes	No	28

The average word count of a special leave application determined following an oral hearing is 38.9 words and the median word count is 37.5. The longest decision consists of 77 words and the shortest of 25 words. In every case, the ground or grounds on which the court refused the application is stated in the reasons for decision. In very few cases (three out of 20) is it possible to work out what area or areas of law the application relates to by reading the reasons for decision. In almost no case (three out of 20) is it possible to work out by reading the reasons for decision what the proposed grounds of appeal might be. The path of reasoning leading to the ground or grounds for refusing the application is discernible in less than half of cases (seven out of 20).

Based on this analysis a number of conclusions may be offered. The High Court is more likely to give briefer reasons for dismissing an application for special leave to appeal after an oral hearing than for dismissing an application decided on the papers. The High Court is also more likely to articulate the path of reasoning leading it to form the view that one or more grounds on which the application may be refused exists in respect of applications decided following an oral hearing than in respect of applications decided on the papers.

### C Implications of Practice

The general practice of the High Court in deciding applications for special leave to appeal is to assert the existence of one or more of the grounds on which special leave may be refused without articulating, even very briefly, the path of reasoning leading the Court to believe that ground or those grounds exist.<sup>142</sup> If the

<sup>142</sup> The High Court's short comments in its special leave decisions cannot be taken to be adopting by shorthand the reasons of the court below. An application for special leave argues that the reasons of the court below are wrong and seeks a grant of special leave to appeal. The reasons of the court below are not directed to whether special leave should be granted and are not directed to answering the applicant's claim that those reasons are flawed.

analysis in this article is correct, then it follows that the High Court regularly fails to comply with the constitutional duty to provide adequate reasons for decision in applications for special leave to appeal.

Constitutional law is not like international law. In international law, custom or practice can be used ‘as evidence of a general practice accepted as law’.<sup>143</sup> The fact that the general practice of the High Court is not to disclose the path of reasoning leading to its decisions to refuse special leave to appeal is not evidence that the practice of the High Court complies with the law. In the *Communist Party Case*, Fullagar J said it was ‘an elementary rule of constitutional law’ that ‘a stream cannot rise higher than its source’.<sup>144</sup> Like Parliament, the High Court must comply with the demands of the Constitution. The practice of the High Court is not evidence that disclosing the path of reasoning is not the minimum content of the constitutional duty to provide adequate reasons for judicial decisions.

The significantly burdensome volume of applications for special leave to appeal undoubtedly explains the High Court’s general practice of failing to provide adequate reasons for decision in respect of applications for special leave to appeal. The position of the High Court, the seven members of which had to determine 455 applications for special leave to appeal in a single year, can be contrasted with the position of the Supreme Courts of New Zealand and the United Kingdom. The Supreme Court of New Zealand consists of six members who had to decide only 169 applications for leave to appeal in 2015.<sup>145</sup> Between 1 April 2015 and 31 March 2016, the Supreme Court of the United Kingdom, consisting of 11 justices, decided 210 permission to appeal applications.<sup>146</sup> The size of the High Court has not increased since shortly after the end of the Second World War almost three-quarters of a century ago. It may well be time to expand the size of the High Court so that it is able to cope with its workload in a manner that allows the Court to comply with its constitutional duty to provide reasons for decision.

An alternative approach is for Parliament to act under s 73 of the *Constitution*. Section 73 of the Constitution makes the appellate jurisdiction of the High Court subject to ‘such exceptions and subject to such regulations as the Parliament prescribes’. The requirement to obtain special leave to appeal is such an exception.<sup>147</sup> Parliament may wish to consider introducing an additional hurdle or filtering mechanism directed at reducing the number of applications for special leave that are filed in the High Court. One option is to adopt a version of the procedure required for ‘leap frog’ appeals in the United Kingdom. A ‘leap frog’ appeal is brought directly to the Supreme Court of the United Kingdom from a

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143 *Statute of the International Court of Justice* art 38(1). See *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, 559 (Brennan J).

144 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (‘*Communist Party Case*’).

145 *Supreme Court Case Volumes – For the 12 Months Ending 31 December 2015*, Courts of New Zealand <<https://www.courtsofnz.govt.nz/publications/annual-statistics/latest-december-2015/supreme-court/supreme-court-case-volumes-for-the-12-months-ending-31-december-2015>>.

146 Supreme Court of the United Kingdom, ‘The Supreme Court Annual Report and Accounts 2015–2016’ (Report, 4 July 2016) 20 <<https://www.supremecourt.uk/docs/annual-report-2015-16.pdf>>.

147 *Judiciary Act 1903* (Cth) ss 35, 35AA; *Federal Court of Australia Act 1976* (Cth) s 33(3); *Family Law Act 1975* (Cth) s 95. See *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194 upholding the constitutional validity of such provisions.

decision of the High Court of England and Wales bypassing the Court of Appeal. In such cases, an application for permission to appeal may be filed in the Supreme Court only if the High Court grants a certificate. A certificate is granted where the High Court is satisfied that a 'sufficient case for an appeal to the Supreme Court [on one or more of the grounds on which permission to appeal to the Supreme Court may be granted] ... has been made out to justify an application for leave to bring such an appeal'.<sup>148</sup> Requiring the court below to certify that the applicant has an arguable case for a grant of special leave to appeal to the High Court as a condition precedent to making an application for special leave is likely to reduce the number of hopeless applications filed.

## VII CONCLUSION

This article has argued that there is an absolute constitutional duty to provide reasons for judicial decisions. It is a defining characteristic of courts and of the exercise of judicial power that reasons for judicial decisions are always given. A failure to provide reasons for a judicial decision is not just an error of law but is a jurisdictional error on the basis that the failure impairs the institutional integrity of the court and possibly because the failure amounts to a denial of procedural fairness.

This article has also examined whether the general practice of the New South Wales Court of Appeal and the High Court complies with the constitutional duty to provide reasons for judicial decisions when deciding applications for leave or special leave to appeal. That statistical analysis shows that the New South Wales Court of Appeal always complies with the constitutional duty in respect of leave to appeal applications. That statistical analysis also shows that the High Court only sometimes complies with that constitutional duty in respect of special leave to appeal applications.

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148 *Administration of Justice Act 1969* (UK) c 58, s 12(1)(b).