Rights to Reasons - What is Adequate?

A Paper presented by Mark Robinson, Barrister,
to the "Open Government" Conference on
10 February 1999, Sydney, organised by the
Public Interest Advocacy Centre

Introduction

This paper briefly sets out the new rights to applicants to be provided with written reasons for executive decision-making in New South Wales upon request arising from the *Administrative Decisions Tribunal Act* 1997 ("**ADT Act**"). The ADT commenced operations on 6 October 1998. The paper contains a discussion of:

- What new rights are created for applicants and how to enforce them;
- What should be the minimum standard of the content of written reasons for decisions under the Act;
- The nature of the duty of NSW executive decision-makers to create both meaningful and lawful reasons for decisions.

Right to Reasons - The First Round

The right for interested persons to be given written reasons for adverse decisions of administrators is one of the "key elements" of the ADT Act (Shaw, page 2). It is a right which, in a many cases, did not exist in New South Wales before the commencement of the ADT Act.

It will signal a sea change in the manner, form, conduct and quality of future decision-making of New South Wales government administrators.

Commonwealth administrators experienced a similar sea change in this regard on 1 July 1976 when the *Administrative Appeals Tribunal Act* 1975(Cth) ("**AAT Act**") commenced and on 1 October 1980 when the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("**ADJR Act**") commenced. However, the new provisions in New South Wales do not go far enough towards the more satisfying position of the Commonwealth where rights to reasons exist not just in relation to reviewable decisions of administrators which are able to the reviewed on the merits in the Commonwealth Administrative Appeals Tribunal (section 28 of the AAT Act), they exist in respect of most Commonwealth administrative decisions which are capable of being the subject of judicial review in the Federal Court (section 13 of the ADJR Act).

Therefore, at present, the Commonwealth rights to reasons can almost be described as a blanket right to obtain written reasons whether or not there is provided tribunal merits review rights, whereas, the NSW rights at this stage only relate to decisions reviewable in the NSW ADT.

How to Obtain Written Reasons for Reviewable Decisions

There are three possible ways to obtain written reasons for decisions under the ADT Act:

1 Apply to the administrator who made the decision under section 49 of the Act and/or;

2 Apply for an internal review of the adverse decision under section 53 of the Act whereupon written reasons should be provided; and/or,

3 Apply to the Tribunal for review of a reviewable decision in the circumstances permitted by section 55 of the Act whereupon the administrator who made the decision must, within 28 days after receiving notice of the application, lodge with the Tribunal documents and written reasons.

In the first instance, a written application for reasons should be made to the administrator who made the decision. Division 2 of the ADT Act, sections 49 to 52, provide for:

(a) a statement of reasons to be provided to interested persons by the "administrator" on written request;

(b) the contents of such reasons; and,

(c) application rights to the Tribunal if the provision of reasons is refused or the reasons provided are inadequate.

Reasons must be requested within 28 days after the person was provided with the written reviewable decision - s 50(1)(b).

Reasons must be requested within a reasonable time after the decision was made if there was no written notification of the decision provided to the applicant - s 50(1)(c).

The administrator must provide written reasons "as soon as practicable (and in any event within 28 days) after receiving such a request" - s49(2).

Section 49(3) provides the statement of reasons "***is to***" set out the following:

"(a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,

(b) the administrator's understanding of the applicable law,

(c) the reasoning processes that led the administrator to the conclusions the administrator made."

This section may be compared with the Commonwealth provisions on which it was clearly modelled.

Section 28(1) of the AAT Act and section 13(1) of the ADJR Act each provide that the

administrator must:

> *"... furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision."*

Section 25D - Acts Interpretation Act 1901 (Cth) provides:

> ***"Content of statements of reasons for decisions***
>
> *25D. Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression "reasons", "grounds" or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based."*

The Commonwealth formula was so popular that it was adopted in terms in NSW in 1987 in various health legislation by the *Health Legislation (Reasons for Decisions) Amendment Act 1987* and recommended for adoption in England by the All Souls Review in 1988 (See ARC - 1991, page 21).

How To Enforce These Rights

There are a number of ways to enforce these rights in relation to the provision of written statements of reasons. Most of them are set out in the ADT Act.

At first instance, an administrator can refuse outright to provide a statement of reasons if:

1. The administrator does not believe the applicant is entitled to be given the statement (presumably because either the applicant is not an "interested person" within the meaning of the definition in section 4 (1) or the decision in relation to which reasons have been requested is not a "reviewable decision" within the meaning of section 9 of the Act);

2. The request for reasons was made 28 days after the written decision was provided to the person; or

3. In any other case (including cases where there was no written decision or where the written decision was not delivered to the person), the request was not made within a reasonable time after the decision was made (section 50 (1)).

If the there was a written decision delivered to the person and the request for reasons was made later than 28 days, nothing can be done by the Tribunal or anybody to compel the provision of reasons in the absence of the agreement of the administrator to extend the time (this power is on an internal review application - section 53(2)(d)). The only option here is to commence an appeal to the ADT under section 55 to seek to challenge the reviewable decision (not the decision to refuse reasons). Because the applicant is outside the 28 days in which to request reasons, the applicant is probably also out of time to commence ADT

proceedings and would have to satisfy the Tribunal that the late application should be considered (section 55(2) and (3) and section 57). Once the Tribunal has permitted the application to be made, written reasons will be then provided within 28 days (section 58(1)).

Generally speaking, a person can enforce that person's rights under the Act to be provided with reasons by applying to the Tribunal in three ways:

1. Where there is a refusal to provide reasons (for the reasons 1 & 3 above) - under section 50(1), by making application to the Tribunal under section 51;

2. Where there is a failure to provide reasons at all within 28 days of the request - section 49(2) by making application to the Tribunal under section 52(1);

3. Where the statement of reasons provided is "inadequate" within the meaning of section 53(3) and 49(3) of the Act, by application to the Tribunal under section 52(2)

"Adequate Reasons" - For What Purpose?

Now that the new rights to reasons are briefly described, it begs the question set out in the title of this paper - What is an adequate statement of reasons? That question begs further questions, including:

- What is adequate for whom?
- What is adequate for what purposes? and
- Is there a minimum legal standard of adequacy, and, if so, what is it?

As to the question what is adequate for whom - the answer depends upon whether one is talking about the provision of adequate reasons to:

- the satisfaction of the administrator decision-maker?
- the satisfaction of the interested person?
- the satisfaction of the Tribunal - s 52
- the satisfaction of the Supreme Court on judicial review - ss 119 - 123?

All of these bodies or persons will have different standards, purposes and/or different agendas as to the adequacy of the content of the statement of reasons. Even those standards, purposes and agendas will be subject to change from time to time depending on such factors as: policy, resources, skill, experience, significance and complexity of the decision, and legal or practical constraints.

Fortunately, much of the potential agony in this regard has been removed by the ADT Act itself. As we have seen section 52 provides for an interested person to apply to the Tribunal if the statement of reasons is "inadequate".

The Tribunal is granted the power to order an adequate statement of reasons be provided.

What is "adequate" is set out in section 52(3). A statement of reasons is considered an adequate statement of reasons "***only*** if it sets out the matters referred to in section 49(3)" (my

emphasis).

So, the ADT Act itself sets out the minimum legal standard for the content of statements of reasons.

What is Adequate - s 49(3)

Section 49(3) is an attempt at a broad codification of much of the case law relating to sections 13 of the ADJR Act, section 28 of the AAT Act and section 25D of the Acts Interpretation Act 1901 (Cth). The cases relating to those sections are clearly relevant in considering the minimum legal content of a statement of reasons (Shaw, page3).

The power of the Tribunal to, in effect, supervise NSW administrators in relation to the content of reasons for decision under the ADT Act is a significant power which is similar to the supervisory power of the Commonwealth AAT in section 28(5) of the AAT Act and the power of the Federal Court of Australia in the section 13 (7) of the ADJR Act. For example, section 13(7) of the ADJR Act provides:

> "If the Court, upon application for an order under this subsection made to it by a person to whom a statement has been furnished in pursuance of a request under subsection (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an ***adequate reference*** to the evidence or other material on which those findings were based or ***adequate particulars*** of the reasons for the decision, the Court may order the person who furnished the statement to furnish to the person who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons." (my emphasis)

Answer to the question of what is an adequate statement of reasons depends on the legislative purpose of requiring that a statement of reasons be provided at all.

In most cases of executive decision-making, prior to the commencement of the ADT Act there might well have been no common law obligation to provide reasons for decisions in respect of many reviewable decisions the subject of the ADT Act (see: *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656; cf Kirby's paper below).

The duty is a statutory duty. The nature of the duty must be ascertained by reference to the statute.

As to the general issue, the courts, tribunals and advisory bodies and persons have been attempting to set out an appropriate answer to the question since about 1976. One of the earliest discussions of the issue is that of the Administrative Appeals Tribunal in *Palmer & Minister for the ACT, Re* (1978) 23 ALR 196; (1978) 1 ALD 183 (Fisher J, Senior Member Hall and Member Woodley). *Palmer's case* was expanded upon significantly by the Administrative Review Council ("**ARC**") in a document titled *Statement of Reasons: An Explanatory Memorandum*, November 1978 and again by the Council in 1991 in its *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*;

Report No 33.

The ARC's work in this regard and the cases referred to therein remains good and required reading for administrators on the subject of written reasons even in a NSW context.

These documents and papers set out the most significant practical advice to administrators to assist them to write lawful and meaningful decisions.

The Purpose of Providing Reasons

In general terms, the purpose of Parliament providing for written statements of reasons is to:

1 Improve decision-making (consistency, predictability, quality and to ensure clarity of reasoning and rational decision-making);
2 Inform the applicant and overcome any grievance that may be felt;
3 Enable the applicant or the parties to see the extent to which their arguments have been understood and accepted or rejected;
4 Enable any errors (of law or fact or both) to be identified and considered;
5 Enable the applicant to consider avenues of appeal, including self help options.
6 To inform any internal reviewer, Tribunal or Court of the *real* reasons for the decision made *as at* the time of the decision on the evidence then available to the administrator and thus facilitate merits or judicial review;
7 To create public sector consistency, discipline, openness, invite scrutiny and create accountability; and
8 To ensure administrative justice by disclosing the reasoning process in the making of administrative decisions.

On the second reading speech of the ADT Bill in the NSW Parliament on 29 May 1997, the Minister said:

> *"An essential element of good administration is the need to ensure that reasons are given for administrative decisions. The supply of reasons with decisions will give people dealing with government departments and agencies an assurance that decisions are made rationally, taking into account only the relevant considerations. This will ensure that decisions can be seen to have been lawfully made and also reduce the likelihood of appeals on the merits of the decision.*
>
> *The obligation to provide reasons for decisions reached in the exercise of public powers is essential to ensuring accountability. It is likely to cause a decision maker to consider carefully the grounds upon which a decision is made and ensure that proper process and policies are applied. However, the most important result of requiring reasons to be given for decisions is that it allows an individual affected by a decision to understand the reasons for that decision and therefore arms the individual with the information necessary to seek review and remedies to ensure administrative justice."*

The adequacy of the content of statements of reasons must be determined by reference to the

above concepts. While there will be a steep learning curve for NSW administrators over the next few years in respect of writing reasons, they also have the considerable benefit of 20 years of Commonwealth commentary and case law upon which to draw to assist them in part (see the list of good articles and papers set out at the end of this paper).

It is hoped that each NSW agency and department goes on to develop internal guidelines to assist decision-makers in this regard (as the ARC recommended at the federal level - ARC 1991, page 18, para 69).

It should be noted that while the wording of section 49(3) reflects the federal case law position, the NSW Attorney-General has recently identified 2 Federal Court cases which were particularly influential in the area (Shaw, pages 3 and 4).

In *Ansett Transport Industries (Operations) Pty Ltd v Wraith*, (1983) 48 ALR 500, Woodward J cites with approval the decision in *Re Palmer* and states (in relation to section 13(1) of the ADJR Act that it:

> *"... requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."*
>
> *This requires that the decision maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation."*

In *Soldatow v Australia Council,* (1991) 28 FCR 1, Davies J held section 13(1) of the ADJR Act required (at page 2):

> *"... proper and adequate reasons which are intelligible, which deal with the substantial issues raised for determination and which expose the reasoning process adopted. The reasons need not be lengthy unless the subject matter requires but they should be sufficient to enable it to be determined whether the decision was made for proper purpose, whether the decision involved an error of law, whether the decision-maker acted only on relevant considerations and whether the decision makers left any such consideration out of account (and see the cases cited there)."*

The Federal Court sounded a significant warning in 1997 when in *Yung v Adams* (1997) 80 FCR 453 at 482 Davies J stated:

> *"[W]here there is a failure to state sufficient reasons, it can often be inferred from that failure that the tribunal wrongly approached the issues before it and accordingly that the decision should be set aside and the matter remitted...."*

Internal Reviews and Right to Reasons - The Second Round

A new and interesting feature of the Act in sections 53 to 54 is the right of internal review of the decision.

Upon application by the interested person within 28 days after the applicant received the decision or the reasons for the decision, the administrator must appoint another appropriate person to internally review the decision.

The internal review procedure should be completed within 14 days and may occur once only. It is a new concept (outside FOI legislation) which will potentially place a significant but ultimately useful and constructive resource burden on NSW administrators while increasing the review options for an applicant.

Section 53(6) & (7) of the ADT Act provide:

> *(6)* ***Notice of result of review and appeal rights***
>
> *As soon as practicable (or in any event within 14 days) after the completion of an internal review of a decision, the administrator must notify the applicant in writing of:*
>
> > *(a) the outcome of the internal review, and*
> > *(b) the reasons for the decision in the internal review, and*
> > *(c) the right of the person to have the decision reviewed by the Tribunal.*
>
> *(7)* ***Statement of reasons***
>
> *For the purposes of subsection (6), an applicant is notified of the reasons for a decision in an internal review only if the applicant is given a statement of reasons setting out the following:*
>
> > *(a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,*
> > *(b) the understanding of the administrator of the applicable law,*
> > *(c) the reasoning processes that led the administrator to the conclusions the administrator made.*

This process is where the same administrator, or another delegate of the same decision-maker causes a review to be undertaken and then remakes the decision.

Just how these sections will work in practice is unclear until the regulations referred to in section 53(11) and the guidelines provided for in section 54 emerge. One also needs to consider the position of the "administrator" within the definition of that term contained in sections 9 and 38(4) and (5) of the Act. Only then will a clear picture emerge as to the proper operation of the internal reviews and, relevantly here, the "second round" of the

provision of reasons for decisions.

It is significant to point out that on an internal review, the new decision is “deemed” to be the original decision (section 53(8)) and the administrator (including any new delegate of the administrator who “is taken to be” the administrator) must hand down a written statement of reasons without the need for the applicant to make any further requests.

In short, the duty to make the new decision on internal review here is tied up with the contemporaneous duty to provide written reasons.

Inadequate Reasons as an Error of Law (and a Ground of Judicial Review)

It is well settled in federal case law that a substantial failure to produce a proper statement of reasons itself constitutes an error of law where the statement of reasons is a requirement of the exercise under the statute of the decision-making power - *Dornan v Riordan* (1990) 24 FCR 564 [see also generally, Smith 1992, Kirby 1994, Katzen 1993 and Bayne 1992].

The result of this ground of judicial review is that the decision itself may be set aside. It is also open to the Court to make orders in the nature of mandamus to order the provision or adequate or proper written reasons.

This ground of judicial review was popular in the Federal Court in the early 1990s (Smith 1992, page 265), slumped somewhat in the mid 90s and has made a recent comeback in a spate of recent migration cases. The finding of the ground of review usually permits the Federal Court to quash the decision under review for procedural ultra vires or denial of substantial justice or fairness (see, for example: In the Migration area, *Anjum v Minister for Immigration and Ethnic Affairs*, unreported, 17 December 1998, Sackville J; *Gui v Minister for Immigration and Ethnic Affairs*, unreported, 11 December 1998, Hely J; *Kandiah v Minister for Immigration and Ethnic Affairs*, unreported, 3 September 1998, Finn J; *Kermanioun v Minister for Immigration and Ethnic Affairs*, unreported, 20 November 1998, Finn J; *Cho v Minister for Immigration and Ethnic Affairs*, unreported, 22 December 1998, Madgwick J; and *Azarcon v Minister for Immigration & Multicultural Affairs* [1999] FCA 145, unreported, 26 February 1999, (Wilcox, Hill & Whitlam JJ): In other areas, see *Fry v McGufficke,* unreported, 26 November 1998 (Black CJ, Foster, Madgwick, Finkelstein and Dowsett JJ).

On the face of it, the power on internal review in section 53(6) of the ADT Act to produce a decision and reasons at the same time indicate that the provision of an inadequate statement of reasons might well expose the primary decision to judicial review (and thus setting aside) under the federal law principle.

I see no reason why the federal principle would not be applied by New South Wales courts (see: *New South Wales Insurance Ministerial Corporation (formerly GIO of NSW)* v Mesiti, unreported, 01/12/1994, NSWCA (Mahoney JA, Handley JA, Sheller JA); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (Kirby P, Mahoney and McHugh JJA) and *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 (Fullagar, Gray and Tadgell JJ); Kirby 1994 and Bayne 1992).

It is arguable that the ADTs power to give reasons for its decisions (either in writing or orally) is also closely tied up with the Tribunal's decision-making power so as to expose the Tribunal's decisions to judicial review on the ground of inadequate reasons as an error of law (see sections 89 and 80 of the ADT Act).

The Nature of the Duty

The nature of the duty on administrators to give reasons is an onerous one, as it is onerous on Tribunal members and judges at all levels.

To expose one's real reasoning processes as at the time of making a decision is a not an easy task.

The applicant, those who administer the State's laws, the ADT and the Courts will all want the real reasons for administrative decisions set out fully and clearly.

Writing the real reasons for decisions might involve courage and honesty in some cases. Somebody may well disapprove of the decision (Robertson, page 54).

However, writing the real reasons in clear and concise terms, properly reflecting the nature of the decision, the complexity of the evidence and the law involved and written in a style appropriate to the intended audience, is the challenge that Parliament has laid down for NSW administrators.

Thank you.

Sources & Notes

Cases

Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500 FedCt(Vic), Woodward J

Azarcon v Minister for Immigration & Multicultural Affairs [1999] FCA 145, unreported, 26 February 1999, (Wilcox, Hill & Whitlam JJ) [in relation to the duty of the Immigration Review Tribunal to give proper and full reasons for decision - failure to give lawful reasons constitutes procedural ultra vires]

Ciciwill Pty Ltd v Consumer Claims Tribunal (1997) 41 NSWLR 737 (Hulme J) [relating to the adequacy of written reasons of the NSW Consumer Claims Tribunal]

Dornan v Riordan (1990) 24 FCR 564 (Sweeney, Davies & Burchett JJ) [Failure to provide proper reasons constitutes an error of law]

Fry v McGufficke, unreported, 26 November 1998 (Black CJ, Foster, Madgwick, Finkelstein and Dowsett JJ)

Palmer & Minister for the ACT, Re (1978) 23 ALR 196; (1978) 1 ALD 183 (Fisher J, Senior Member Hall and Member Woodley, Commonwealth AAT)

Public Service Board (NSW) v Osmond (1986) 159 CLR 656 [As qualified by:

1. *Yung v Adams* (1997) 80 FCR 453 at 481 - 482 (Davies J) Reversed in part, but not on the right to reasons in *Adams v Yung*, unreported, 15 May 1998 (Beaumont, Burchett and Hill JJ) NB: Burchett J at page 63 and Hill J at page 22; and by
2. *Attorney-General of NSW v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729 (Priestley, Handley and Powell JJA) [relating to the common law duty on NSW costs assessors to give reasons for cost assessment decisions]

Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 (Kirby P, Mahoney and McHugh JJA)

Sun Alliance Insurance Ltd v Massoud [1989] VR 8 (Fullagar, Gray and Tadgell JJ)

Transport Accident Commission (Vic) v Bausch (1998) 13 VAR 61; (1998) 27 MVR 24 Victorian Court of Appeal (Tadgell, Batt & Buchanan JJA) [in relation to the adequacy, lawfulness and appropriateness of written reasons which omitted relevant material]

Articles/Monographs

ARC - 1978 *Statement of Reasons: An Explanatory Memorandum*, November 1978,

Administrative Review Council - once published in Pearce, *The Australian Administrative Law Service*, loosleaf, Vol 1, page 5003, (now replaced) and the Administrative Review Council's *Third Annual Report*, 1979, Appendix 2.

ARC- 1991 *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*; Report No 33, 1991, Administrative Review Council

Bayne Peter Bayne, "Administrative Law - Inadequacy of reasons as an error of law" (1992) 66 *ALJ* 302

Katzen Hayley Katzen, "Inadequacy of Reasons as a Ground of Appeal" (1993) 1 *AJ Admin L* 33

Kirby Michael Kirby, *"Reasons for Judgment: 'Always Permissible, Usually Desirable'"* (1994-95) 12 *Aust Bar Rev* 121

Shaw Jeff Shaw, "The Administrative Decisions Tribunal - A Lengthy Gestation" (1998) 18 *AIAL Forum* 1

Robertson Alan Robertson "Writing Reasons for a Decision" (1996) 47 *Admin Review* 53

Smith Matthew Smith, "The Obligation of the Administrative Appeals Tribunal to Give Adequate Reasons" (1992) 3 *PLR* 258

Tongue Sue Tongue, "Writing Reasons for Decision" Paper, delivered at the Australian Institute of Administrative Law National Administrative Law Forum, Melbourne, June 1998.

Thawley Tom Thawley, "An Adequate Statement of Reasons for an Administrative Decision" (1996) 3 *AJ Admin L* 189