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Statements of Reasons: Why, When, What, How

In this paper, I will concentrate my remarks on administrative and tribunal decision makers in Australia. There are similar issues for judges, but this paper (and the theme of the seminar) concerns administrative decisions, not the exercise of judicial power.

In writing reasons for decisions, one is best guided by becoming aware of and applying the more general rules that apply to other State and Federal Tribunals and quasi-judicial decision-makers in Australia.

I will address you as if you are a tribunal member or an administrative decision-maker.

Why should you make reasons for your decisions?

In *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 it was observed that a duty to give proper reasons is a legal incident of the judicial process, but is not normally a legal incident of administrative decision making (at 667). Mr Osmond was an officer employed under the *Public Service Act 1979* (NSW), who had unsuccessfully applied for promotion to a senior position. He was denied reasons. The High Court held that the employer was not so required, there being no general law obligation requiring reasons to be given for administrative decisions. But there are exceptions.

The areas in which administrative decision-makers are required to give reasons for the exercise of statutory power are growing steadily, sometimes by way of specific legislation and sometimes by way of more general provision, such as (for federal decision-makers) pursuant to s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In relation to Commonwealth legislation, there is an express provision in the *Acts Interpretation Act 1901*

(Cth) identifying the content of an obligation to give written reasons (section 25D). Challenges to federal administrative decisions are usually heard in the Federal Court of Australia – eg. *Dornan v Riordan* (1990) 24 FCR 564; 21 ALD 255.

In *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 377 [31] (Handley JA), 377 [33] (McColl JA, agreeing with Basten and Handley JJA), 399 [130] (Basten JA) the NSW Court of Appeal held that *Osmond* did not apply and that the workers compensation Appeal Panel was subject to an implied statutory obligation to give reasons arising from the statutory context and the nature of the functions imposed on it.

The Court held that the consequences of a failure to provide reasons is invalidity of the decision (Basten JA at [130]).

As for executive decision-makers many statutes set out the requirement for a decision maker to provide reasons for decisions.

In NSW, the legislation very often provides for reasons to be provided.

As for the NSW tribunal and the appeal panel, the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) provides that the tribunal must give notice of any decision made on the proceedings (s 62(1)). If no reasons are provided any party may, within 28 days of being given notice of a decision, request the tribunal to provide a written statement of reasons for its decision. The statement must be provided within 28 days after the request is made (s 62(2)).

The bottom line is that in order to be considered lawful (and to communicate your decision properly to the intended recipient) the extent of written reasons to be given by a tribunal or executive decision maker should be so much as is necessary to properly and fully record the <u>real</u> or <u>actual</u> reasons for the decision and it should identify:

(a) the statutory power(s) being exercised;
(b) the documents, material, policy or matters taken into account;
(c) the findings on material questions of fact; and

(d) the reasoning process leading to the conclusions made.

Guidance in making lawful reasons can be found in many sources.

In the High Court decision in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, the Court said (in a Victorian workers compensation statutory regime concerning a Medical Panel of assessors) (at [55]), in relation to the duty to give reasons:

> *"The statement of reasons must explain the actual path of reasoning by which the medical panel in fact arrived at the opinion the medical panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. If a statement of reasons meeting that standard discloses an error of law in the way the medical panel formed its opinion, the legal effect of the opinion can be removed by an order in the nature of certiorari for that error of law on the face of the record of the opinion. If a statement of reasons fails to meet that standard, the failure is itself an error of law on the face of the record of the opinion, on the basis of which an order in the nature of certiorari can be made removing the legal effect of the opinion."*

This passage is now Holy Writ in Australia, having been widely adopted in the States.

The NSW Court of Appeal in *Zahed v IAG Limited t/as NRMA Insurance* (2016) 75 MVR 1; [2016] NSWCA 55 held that *Wingfoot* applied to reasons given by the State Insurance Regulatory Authority (SIRA) claims assessor (now PIC) (assessing motor accident damages) in the subject legislative scheme in NSW (per Emmett JA at [34], Meagher and Leeming JJA agreeing).

In *Sadsad v NRMA Insurance Ltd* (2014) 67 MVR 601, the Supreme Court of NSW considered the adequacy of reasons of a SIRA medical assessor (now PIC), rather than a claims assessor. However, the underlying principles are substantially the same. After applying *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, Hamill J stated (at [47]–[48]):

> "It is one thing to give a "beneficial construction" to the reasons of an administrative decision-maker. It is another to fill in the gaps in the path of reasoning by reference to an assumption that the decision was made according to the relevant law (in this case cl 2.5). This accords with the approach taken by Stone J in *SZCBT v Minister for Immigration and Multicultural Affairs*

[2007] FCA 9 at [26]:

> [26] The minister urged a "beneficial" construction of the Tribunal's reasons and referred to comments made in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. The phrase "beneficial construction", as used in *Wu Shan Liang* has a specific meaning, and was certainly not intended to mean that any ambiguity in the Tribunal's reasons be resolved in the Tribunal's favour. Rather, the construction of the Tribunal's reasons should be beneficial in the sense that the Tribunal's reasons would not be over-zealously scrutinised, with an eye attuned to error. In this sense a "beneficial" approach to the Tribunal's reasons does not require this court to assume that a vital issue was addressed when there is no evidence of this and, indeed, the general thrust of the Tribunal's comments suggest that the issue was overlooked.
>
> Further, while to "fulfil a minimum legal standard, the reasons need not be extensive", "where more than one conclusion is open, it will be necessary for the [decision-maker] to give some explanation of its preference for one conclusion over another": *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at [121]–[122] per Basten JA."

In addition to guidance from the courts, rules and practices concerning writing reasons for decisions of any executive or administrative decision-maker are useful and relevant. In NSW, For NCAT, as per section 62(2) NCAT Act, written reasons that are provided must include the following:

1. the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
2. the tribunal's understanding of the applicable law,
3. the reasoning processes that lead the tribunal to the conclusions it made.

The NCAT also has the power to correct obvious errors on the face of decisions (section 63, NCAT Act).

This section may be compared with the Commonwealth provisions on which it was clearly modelled (section 25D of the *Acts Interpretation Act 1901* (Cth)). The NSW provision was arrived at after taking into account long-established federal case law on the subject.

Section 62 of the NCAT Act should be adopted by all tribunal and administrative decision makers as the goal to be achieved so as to set out defensible and lawful reasoning

In favour of the decision maker, there are other interpretive rules that should be kept in mind.

Reasons on Findings only - In *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302 it was held (at [60]) that that an administrative decision maker "was not required to give reasons for findings he did not make, [and] he was not required to give reasons for issues he did not determine". See also: - *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 and, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 and *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 (at [56]).

Every Piece of Evidence - In *Reece v Webber* (2011) 192 FCR 254 at [65] (Jacobson, Flick and Reeves JJ) the Full Federal Court said:

> "[A] failure to expressly mention particular material is not conclusive that it has not been taken into account. A decision-maker is not normally required in its reasons for decision to refer to "every item of evidence that was before it" and an "omission to refer to a piece of evidence does not necessarily require a conclusion that it has been overlooked": cf. *SZEHN v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1389 at [58] per Lindgren J. See also: *SZHPI v Minister for Immigration and Citizenship* [2008] FCA 306 at [15] per Branson J; *Australian Postal Corporation v Sellick* [2008] FCA 236 at [64], 101 ALD 245 at 259 per Bennett J."

See also, *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443 at [22] and *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [46]-[470; and *Rodger v De Gelder* (2015) 71 MVR 514 per Gleeson JA at [89]-[90] and *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24].

No Good Reasons - For instance, in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, Gibbs CJ said (at 663-4):

> "[T]he fact that no reasons are given for a decision does not mean that it cannot be questioned; indeed, if the decision-maker does not give any reasons for his decision, the court may be able to infer that he had no good reasons."

In *R v Secretary for Trade and Industry ex parte Lonrho plc* [1989] 1 WLR 525, 540, Lord Keith said:

> "… if all the other known facts and circumstances appear to point overwhelmingly in

> favour of a different decision the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision."

Finding as to Facts - Findings of fact are not ordinarily justiciable in judicial review proceedings, they are entirely a matter for the tribunal – *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355.5 to 357.3 per Mason CJ, Brennan and Deane JJ agreeing; *Bruce v Cole* (1998) 45 NSWLR 163 at 187F to190E per Spigelman CJ, Mason P, Sheller and Powell JJA agreeing).

No Looking Over Your Shoulder - In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 (at [48]), the joint judgment approved a statement by Lord Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369 that:

> "... the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision."

The High Court further observed (at [48]) that procedural fairness did not require the then Refugee Review Tribunal, a decision of which was under challenge:

> "… to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment".

Helpful guidelines were published by the Commonwealth's Administrative Review Council (ARC) styled "*Practical Guidelines for Preparing Statements of Reasons*" in June 2000. A useful commentary on the said guidelines was also published at the same time. The guidelines (last revised on 26 May 2003) and the commentary are posted on the internet. The Guidelines, for example, state in clear and practical terms (at page 12):

> "State the real reasons for your decision. Do not rewrite history when preparing a statement of reasons. Every decision should be capable of a logical explanation. Your statement must contain all steps of reasoning, linking the facts to your decision, so that the person reading the statement can understand how your decision was reached.

> Your statement must go further than state your conclusions - you must give real reasons for those conclusions. You should also indicate any relevant policy statements or guidelines or other agency practices you took into account. In essence, you need to include any detailed background to the making of your decision, so that the person who receives the reasons will understand them (and not have to guess at any gaps)."

My suggested checklist for the ensuring that the Tribunal sets outs proper reasoning is set out below.

Preliminary Matters

1 You have already made your decision. If so, you should have already undertaken most or all of the following steps:

(a) identified the decision to be made;
(b) identified your statutory powers;
(a) examined/considered/understood your statutory powers in their proper context;
(b) ensured that your copy of the statutory powers is complete, consolidated and up-to-date;
(c) noted/considered/identified any relevant government policy/manual/practice (you will later "engage" with this material);
(d) sought further information if required;
(e) undertaken any other investigation if required;
(k) decided whether any matter is appropriate to be attached to your decision, such as the imposition of conditions or qualifications and whether such matters are appropriate and lawful.

The Reasons for Decision

2 Follow, an established procedural form if one is available. If one is not, attempt to create a generic one and use it (but not slavishly).

3 As to your decision itself, there are 2 principal parts to this process. There are the easy parts and the hard parts. The easy parts are marked with an asterisk as follows:

* the decision to be made, by reference to the matters referred;

* the statutory powers/policy/guidelines/practice;

* the evidence both in support and against the making of the decision;

- the findings on material questions of fact, referring to the evidence or other material on which those findings were based; and

- your own reasoning process or processes that led you to the conclusion or conclusions you made (your real path of reasoning – your actual path of reasoning recorded in sufficient detail so as to enable a court to see whether your opinion does or does not involve any error of law – *Wingfoot* at [55]);

* your conclusion/decision/determination.

Writing Up the Hard Parts

4 This involves:

(a) findings of fact, referring to the evidence; and

(b) your reasoning processes

- the hardest part of all;

- read and consider everything first and bullet point the major factors which have turned your mind. Then set down those factors. This should ultimately comprise the ***core*** of your reasoning process;

- be <u>brief</u>, <u>simple</u> and <u>clear</u> (Justice Kirby's "blessed trinity")

- If you can (and if you need to) present a cogent explanation or argument in your reasoning;

- be relevant, select only the principal and essential issues necessary for the decision;

- no clutter or minor details should be included;

- resist the temptation to stray into other (possibly more interesting) areas and ideas;

- follow the language of the statutory power that you are applying. Always do this. Never attempt to paraphrase or rewrite the statute or the delegated instruments in the making of your decision;

- include only the real reasons for your decision, not all possible reasons or other reasons which come to mind if those reasons have not being the reasons which turned your mind;

- include only your reasons and not the reasons of any other person or entity. Failure to do this will probably render the decision void;

- use appropriate language that is plain and clear;

- remember your audience at all times:

  (i) the applicant;

  (ii) the Minister or the Department;

  (v) the Federal Circuit Court; the Federal Court or the Supreme Court of a State; and

  (vi) all those who have access to the relevant Registers where the decisions and reasons are published.

- inform them all, expose them all to your reasoning process in full;

- be honest and courageous in setting out your reasoning process;

- refer to the evidence you accept and say why you accept it;

- refer to the evidence you reject and say why you reject it (not always necessary, but it does not hurt);

- if you can't explain it, you probably have not understood it;

- identify any aspect of policy or guidelines that you are relying on and in what respects. Do this with some precision;

- if in doubt – or just do it anyway, put down your draft written reasons for a while and review them later; and,

- review your draft written statement of reasons at least once before handing down your decision. The object of your review, or rewriting should be to:

  * expunge superfluous details and repetition;

* remove unnecessary emphasis;

* eliminate the words not necessary to express the idea, clichés, verbiage, redundancies and grammatical errors;

* tighten the text;

* delete any sexist or racist or stereotyped and otherwise prejudiced expressions; and

* verify punctuation and spelling.

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