DECISION WRITING: BEYOND ADEQUACY

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Presentation given to Council of Australasian Tribunals, 9 June 2023

Introduction

1 My aim today is not to set out at great length the legal principles which bear upon what constitutes adequate reasons by a tribunal or administrative decision-maker. That ground has already been well tilled. I will refer at the end of this paper to a number of helpful written papers on that subject.

2 Rather, my aim is to adopt a practical and pragmatic approach. I hope that I will be able to offer some helpful tips to assist you in what is probably the most challenging and stressful part of your function as a tribunal member, namely explaining why you have resolved a dispute in a particular way.

3 I hope it will be of benefit if I use some case studies to illustrate why particular statements of reasons fell short of relevant legal requirements.

4 I appreciate that there is more than one administrative tribunal or regulatory body represented here today, including some welcome guests from New Zealand. Many of you operate under different statutory regimes. I suspect that most, if not all, of those regimes contain an express provision which obliges you as a decision-maker, either voluntarily or upon request, to provide a statement of reasons (either oral or written) for your decisions. Those statutory provisions, while they may be differently worded, are likely to reflect the well-known formula which requires the decision-maker to provide a statement which:

- sets out the findings on material questions of fact;
- refers to the evidence or other material on which those findings are based; and
- gives the reasons for the decision.

5 There are permutations on this formula, such as that under s 62(3) of the *Civil and Administrative Tribunal Act 2013* (NSW), which requires a written statement of reasons to set out:

(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; and

(3) the reasoning processes that led the Tribunal to the conclusions it made.

6 The purposes for requiring an administrative decision-maker to give reasons for his or her decisions can be expressed in different ways. Sometimes it is expressed as explaining to the losing party why they have lost. In doing so, the reasons should place the loser in a position of being able to determine whether those reasons disclose an appealable or reviewable error (such as whether relevant legislation has been misconstrued or misapplied, whether there has been a failure to take into account a mandatory relevant consideration or whether an irrelevant consideration has been taken into account).

7 Another purpose is to expose the decision-maker's reasoning on matters of fact and law so that an appeal or review court can scrutinise the legal correctness of the judgment. The provision of reasons can also expose a defect in the law or in its administration, which is particularly important in public law cases.

8 The requirement to give reasons also serves to promote and maintain high standards of administrative decision-making, including by encouraging consistency in high volume jurisdictions and by explaining inconsistencies when they occur. This exposes administrative review processes to public consideration and assessment and helps promote public confidence in the independence and integrity of administrative review institutions. This is a most significant considerations in circumstances where you, as an administrative decisionmaker, have vested in you the power of the State to resolve particular disputes.

9 That brings me to the next point. Although there may be some common elements in the legal principles relating to what constitutes adequate reasons by a judicial officer, as opposed to an administrative decision-maker, the expected standard fluctuates. That is well demonstrated by the Court of Appeal's decision in *New South Wales Land and Housing Corporation v* ***Orr*** [2019] NSWCA 231; 373 ALR 294 where the majority (Bell P and Ward JA) said at [65]:

> One may begin with the observation that the quality of a court or tribunal's reasons can vary immensely, of course, depending upon a range of considerations including the experience and skill of a judicial officer or tribunal member, the complexity of the subject matter, the quality of the submissions made before the court or tribunal, the availability of transcript, the urgency of the matter and the time the judicial officer or tribunal member has to compose his or her reasons. Further, good judgment writing is an art not a science …

10 Their Honours went on to state in *Orr* that the adequacy of reasons varies both with the nature of the decision-maker (i.e. the difference between a Court and a Tribunal) and (even within the framework of tribunals), the type of tribunal and nature of the question being decided are also relevant. This makes good sense. Pragmatism is required when assessing the adequacy of reasons given by a tribunal which may, for example, hear four or five different cases a day, lack the advantage of a written transcript, receive little assistance from participants and lack the assistance of an associate.

11 Some cases have highlighted that a statutorily required statement of reasons must explain the actual path of reasoning by which the relevant decision was arrived at. For example, in *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480 at [55], the Court described the standard of reasons required of a medical panel under the *Accident Compensation Act 1985* (Vic) as follows:

> The standard required of a written statement of reasons given by a Medical Panel under s 68(2) of the Act can therefore be stated as follows. 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, that 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.

12 Focussing further by way of introduction on general principles which inform what are adequate reasons, the following principles are well settled:

(1) Reasons ought not to be read zealously and with an eye attuned to the detection of error (*Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang*** [1996] HCA 6; 185 CLR 259).

(2) Reasons should be read fairly and as a whole, noting that individual passages from a statement of reasons should not be read in isolation from other passages to which they may be related (*Wu Shan Liang*).

(3) There should be a degree of tolerance for loose language or verbal slips (*Wu Shan Liang*).

(4) It needs to be recognised that administrative decision-makers commonly express their reasons sequentially, but that does not mean that they decide each factual issue in isolation from the others. The normal practice is to review the whole of the evidence, consider all issues of fact, and then reduce the analysis to writing. The expression of conclusions in a certain sequence does not necessarily indicate a failure to consider the evidence as a whole (*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 77 ALJR 1165 at [14] per Gleeson CJ).

(5) There may be some tension between the obligation to explain or reveal the path of reasoning and the desirability (or in some statutory instances, the obligation) to be concise (*Zahed v IAG Limited t/as NRMA Insurance* [2016] NSWCA 55 at [4] per Leeming JA).

(6) In some matters, the nature of the decision-maker's task may mean that certain aspects do not require detailed articulation of reasons. An example is the view expressed in *Allianz Australia Insurance Ltd v Kerr* [2012] NSWCA 13; 83 NSWLR 302 at [57]-[59] per Basten JA that the obligation of a claims assessor under the *Motor Accidents Compensation Act 1999* (NSW) did not require the assessor to explain why, in awarding a buffer for future economic loss, the assessor decided to adopt a particular amount in an appropriate range or why one amount was chosen over another.

(7) Generally speaking, the provision of inadequate reasons is likely to give rise to a question of law or jurisdictional error for the purposes of appellate and/or judicial review (see *Ming v Director of Public Prosecutions* [2022] NSWCA 209 at [25] per Kirk JA).

Some practical tips

13 Giving reasons for an administrative decision is not a case of one glove fits all. As noted the relevant statutory context can vary widely. Also an administrative decision-maker generally makes decisions on a wide range of issues, some of which are interlocutory in nature, while others have more enduring legal consequences. Interlocutory decisions include rulings on requests for adjournment, objections to evidence and other procedural matters. I do not deny that some interlocutory decisions have far reaching consequences for the parties, as is the case, for example, with a decision on an application for summary dismissal.

14 At the risk of over-simplification, however, the reasons expected for an interlocutory decision will generally be less demanding than those that apply to a final substantive decision. Reasons for many interlocutory and some final decisions may sometimes even be given *ex tempore*, particularly where the issues are not complex and where the tribunal hopefully has the benefit of written outlines of submissions which provide a framework for its reasons.

15 Indeed, absent a statutory obligation to the contrary, it may well be that there is no legal obligation on some tribunals to provide written reasons for a ruling on an interlocutory matter. In any event, subject to an overriding statutory obligation to provide reasons, it is sensible to ask the parties whether they require reasons for an interlocutory decision or ruling. In my experience as a Judge, the parties frequently do not require reasons even where an interlocutory ruling is made in the course of judicial and not administrative decision-making.

16 Let me now give you a few more tips for producing written statements of reasons where they are required to be provided.

(a) Get an early start

17 Try to get a start on writing your reasons as soon as you possibly can. Even in a high volume jurisdiction it should be possible to make an early start, even before a hearing (or interview) commences. I do not mean to suggest that this involves writing a draft set of reasons in advance of the hearing. Rather, I commend to you the desirability of preparing a skeleton of your reasons, even if that simply involves an identification of the primary issues which fall for determination and a series of headings which you will fill in after the hearing. Depending upon whether you have the benefit of outlines of submissions in advance of the hearing, this might also involve setting out a brief summary of the opposing contentions and setting out or summarising in the draft reasons any relevant legislative provisions, as well as any authorities which guide the determination of the legal issues.

18 Getting started on producing a statement of reasons can often be a challenge. All the more so if the case is a difficult one and may have occupied more than a day's hearing time. It is so easy to put those type of cases in the drawer and focus attention on less challenging matters. Generally, this most unwise. Complex cases normally get harder the longer you leave them. At the very least, try to get down in writing your primary thoughts on how a complex case

should be resolved. Don't fall into the temptation of believing that there will be a divine inspiration if you park the case and come back to it a few months later.

19 One thing I do if I am confronted with a daunting judgment is to adopt a modular approach. Try to divide the case into several discrete segments which might involve areas such as the identification of the key issues, a summary of the legislation and any applicable case law or legal principles, a brief summary of the parties' submissions, an outline of the key evidence and a statement of your findings of fact and finally your analysis and determination. The task seems easier if you tackle one module at a time rather than embark upon the task of writing the decision in its entirety from scratch.

20 If you experience writer's cramp in producing a statement of reasons (and most of us do) and feel as though you have hit a brick wall, I find it helpful to change the physical setting in which you are working. This may simply involve moving from one desk where you are trying to write your reasons to another area. Perhaps a table or standing desk if financial resources permit!. A change in physical setting can often help break the mental block.

(b) How to structure your reasons

21 The diversity of cases and jurisdictions mean that it is unlikely that a rigid structure will work in every case. However, Dr James Raymond has suggested the following seven step process which you might find helpful:

(1) Identify the issues i.e. what is it that you have to decide?

(2) Prepare a losing party's position analysis and the reasons why it fails on the issues requiring determination.

(3) Arrange the analysis of issues like rooms in a "shotgun house" (a US expression for a standard house configuration where each room follows the next in a straight line leading from the front to the back from a central corridor).

(4) Prepare an outline with specific headings suitable for the particular case.

(5) Write a beginning.

(6) Write an ending.

(7) Review your draft with a checklist and a trusted confidant.

(See James C Raymond, "The Architecture of Argument", (2004) 7(1) *Judicial Review 39* at 42).

22 I also commend to you the desirability of structuring your reasons, particularly those of any length, with appropriate headings and sub-headings (and perhaps an index). The helps break the reasons up and provides helpful signposts to the reader. It is desirable to use plain English and avoid unnecessary technical jargon and Latin expressions. I also find shorter sentences to be more effective than long rambling sentences which tend to confuse the reader because of the need to absorb so much information without a pause.

(c) The importance of clarity and brevity

23 Many judgments and decisions, including some of my own, are too long. Brevity is an important objective but that is only likely to be achieved if you spend time honing your early drafts. The reality is that circumstances sometimes deny you that opportunity. It is important, however, at the very least to ensure that your draft reasons are proofed so as to remove any obvious typographical errors. There is nothing more embarrassing for you and off putting for anyone who is called upon to review your reasons if they are littered with typographical errors. Even more humiliating is the case where the decision-maker addresses legislation which is not in force at the relevant time, perhaps having been led into that misguided state by the parties. There was a case in the High Court not so long ago where it was only discovered during the course of the hearing in that Court that every Court below had addressed the wrong iteration of the relevant legislation.

24 It is especially important that you pay careful attention to the wording of the final orders which you make in the matter and ensure that the wording is correct. Your reasons should explain why you are making those orders. An appeal body or review court will pay particular attention to the formulation of the formal orders so it is important that they not contain typographical errors or involve ambiguity.

25 If at all possible, it is highly desirable if early in your statement of reasons you identify the key issues which arise for determination. One Justice of the High Court says that the greatest challenge they face when writing reasons for judgment is how to express the first sentence.

26 It won't always be possible, but sometimes a case can lend itself to a pithy and memorable identification of the key issue. That was the case, for example, in a joint judgment of which I was a member. The case involved the question whether there must be love and affection for there to be a genuine spousal or de facto relationship for the purposes of relevant provisions of migration legislation concerning partner visas (see *Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5). The joint judgment commenced with the following extracts from Frank Sinatra's famous song:

> Love and marriage, love and marriage, go together like a horse and carriage, this I tell you brother, you can't have one without the other.

27 The joint judgment said that these memorable lines substantially encapsulated the issue which was at the heart of the appeal.

28 You should tread carefully, however, in using humour in your reasons. It can backfire. You run the risk that the parties may consider that you have not given the issues in dispute proper and respectful consideration. Having said that, however, I agree with what Justice Keith Mason said in 2005 when, in a law graduation address on the topic of judicial humour, he also emphasised the need for restraint in the use of humour, but then added that this should not banish smiles from the hearing room. He said:

> Humour must always be moderate, measured and appropriate to the occasion. Beyond this, humour needs no further justification. It is a legitimate expression of humanity and individuality. These are judicial virtues in the eyes of all except those who want Courts to be staffed by robots preferably made in their own image.

The same may be said concerning the use of humour in reasons for decision.

(d) The dangers with templates or standard paragraphs

29 I mentioned above how outlines of written submissions can help provide a framework for your reasons, as well as assist in identifying the primary issues requiring determination and the parties' contentions in relation to them. I recognise that many of you will be asked to make decisions affecting a litigant in person whose submissions, either written or oral may be of limited assistance. Generally, however, submissions are a useful aid in helping you get your mind around the issues which require determination. If there is no practice note or similar document which requires the parties to provide submissions in advance of the hearing, you should exercise any power that you have to require that to occur.

30 I should emphasise, however that this does not mean that you should become a captive of any submissions you receive. You should avoid any temptation which might arise from the pressure of your work and the number of cases allocated to you to plagiarise or parrot such submissions. The danger is well illustrated by a decision of the Full Court of the Federal Court where the Administrative Appeals Tribunal adopted and repeated, without attribution, whole slabs of one party's written submissions and passed them off as though they were its own work. The Full Court held that the nature and extent of the plagiarism was such as to demonstrate that the Tribunal had not engaged in an active intellectual process and had constructively failed to exercise its jurisdiction (see *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 and see also *Li v Attorney-General for New South Wales* (2019) 99 NSWLR 630; [2019] NSWCA 95 and *Ultimate Vision Inventions Pty Ltd v Innovation and Science Australia* [2022] FCA 606). The Full Court noted at [90] that, at a level of general legal principle, there is no legal error in a tribunal using "standard paragraphs". It added however:

> … As a matter of the quality of decision-making, some courts have indicated it is preferable or desirable not to use such paragraphs. Where the paragraphs in question relate to the individual circumstances of an applicant, particularly a person's credibility, then closer scrutiny of a decision which contains standard paragraphs is appropriate and necessary to determine whether the tribunal has discharged its statutory function and exercised its jurisdiction to review the decision before it. It is permissible to use standard paragraphs as a guide but not so as to seek to cloak the decision with the appearance of legality.

31 The Full Court then helpfully identified at [92] various questions which can arise if a tribunal uses template or standard paragraphs:

> In relation to template or standard paragraphs, relevant to the question, to be answered objectively, whether or not the decision-maker has performed its allocated task will be the following:
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> (i) the function of the decision-maker and the source of that function;
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> (ii) the source of the copied material;
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> (iii) the subject-matter of the copied material;
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> (iv) whether the copied material was controversial;
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> (v) the similarity of the claim to the claim from which the material was copied;
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> (vi) the extent of the copying;
>
> (vii) whether the copied material was up to date;
>
> (viii) whether the material was used in addressing the individual circumstances of an applicant, including credibility, particularly in evaluating the claim or application; and
>
> (ix) whether the fact of copying and the source of the copied material was acknowledged.

(e) Attending to the fundamentals

32 As a decision-maker at either first instance or as a tribunal of review, it is important to recognise and give effect to your important role as a fact finder. It is critical that you set out clearly your findings of fact on relevant matters, with reference to the evidence or material upon which they are based.

33 Although it is well settled that there is no obligation to address all the evidence, you are on dangerous ground if you ignore a strong body of evidence without any explanation.

34 Similarly, if you make adverse credibility findings, it is important that you provide some explanation for those findings. Your assessment of a witness's demeanour in the witness box may sometimes be relevant, but it is rarely determinative in its own right. Generally, far more reliable benchmarks of credibility or reliability are consistency with contemporaneous documents or the application of ordinary common sense, logic and human experience to everyday matters. Two other gentle warnings regarding adverse findings on credit. First, ensure that any relevant procedural fairness requirements have been met because this is a fertile area for challenge. Indeed, procedural fairness requirements should always be at the forefront of your mind as you write your reasons. Secondly, and importantly, if it is not necessary for the determination of a matter to make an adverse credibility finding, don't make it. Never lose sight of the significance of the power you wield and the potential to do considerable harm to peoples' reputation and circumstances.

35 As will be highlighted by one of the case studies, it is not sufficient for you simply to describe the competing evidence or submissions on a particular point and assert that you prefer one rather than the other. You must explain why you prefer that account.

(f) Some other tips

36 I find it very helpful to take comprehensive notes during a hearing, even when there is a reliable transcript. I find that it helps my concentration. Moreover, the notes help distil the essence of a submission or evidence more effectively than having to trawl through an entire transcript. Of course the transcript (where available) may need to be used to verify critical points.

37 For those of you who are more technology literate than me, you will be aware that there are all sorts of devices available in terms of highlighting etc to make the task even easier.

38 Having referred now to technology, it is appropriate to say a few things about how best to tackle the physical task of preparing reasons. I invariably dictate my reasons. That probably reflects my time as a barrister because I always

dictated my opinions and submissions. That experience also assists in giving *ex tempore* reasons.

39 Many others shun the use of dictation. Some of my colleagues still handwrite their judgments. More frequently these days, decision-makers type their own judgments. I envy them.

40 I also appreciate that many of you do not have the benefit of an associate to assist you in producing or proofreading written reasons.

(g) Prioritising delivery of decisions

41 It is difficult to be prescriptive about this matter. Much will depend upon the nature of your workload, jurisdiction and personal work habits. Obviously, the urgent nature of some proceedings will be patent and require prioritisation even if you have other matters reserved.

42 All things being equal, however, the general rule is that you should strive to publish reasons in much the same order as they are heard. It is tempting (and perhaps unavoidable in some cases) to defer writing the more difficult and complex decisions. The price that you pay, however, is that those decisions tend to grow even more complex and formidable as time passes.

43 Bear in mind also that an excessively long passage of time between the hearing and the decision may itself give rise to appeal points relating in particular to any adverse findings on credibility. Ironically, the longer you leave it the more you may have to say in your reasons to explain adverse findings on credibility in order to meet any claim that delay has affected such findings. In other words, your decision will become longer, not shorter, with the passage of time.

44 Every judge or tribunal member has their own idiosyncrasies and ways of dealing with the order in which they write their reasons. Some decision-makers have more than one statement of reasons happening at once. That is my own practice but I appreciate that not everyone agrees with it. Like many other aspects of decision writing, while there are some general guiding suggestions,

each of you needs to experiment and see what operates best for you in being efficient and productive in producing reasons.

45 It is critically important that you have a reliable list of all your reserved decisions. I have a white board in my Chambers on which is kept a list of all my reserved judgments. I can't describe the pleasure (and relief) at being able to rub them off as and when the reasons are published.

(h) Appeal proofing?

46 Some decision-makers ask how best to appeal-proof their decisions. I feel uncomfortable speaking on that topic because I sincerely believe that it should not be a matter of concern. We are all human. We strive to do our best but sometimes we will be told we got it wrong. Generally, we don't like having our decisions overturned. When Sir Anthony Mason was appointed to the High Court after several years on the NSW Court of Appeal he described the experience of being overturned in the High Court (which happened to even as great a Judge as he) as a "purifying" one.

47 The reality is that you won't always produce a decision which survives the appeal process. That can be for any number of reasons but it may have little to do with your personal competence. Believe me, many appeals bear little resemblance to the way in which the case has been run below.

48 It also has to be recognised that you work under considerable pressure and in high volume jurisdictions and it is not surprising that errors can and do occur. But don't add to your problems by becoming unduly concerned about appeals or, indeed, seeking consciously to appeal-proof your decisions. More often than not that focus will back-fire and be productive of error, rather than avoid it.

Conclusion

49 I trust that these few ideas will assist you in the difficult task of explaining your decisions. If it gives you any comfort, I think that the task becomes easier with experience. That is not to deny the desirability of even experienced decision-

makers periodically reflecting on how he or she can most efficiently and effectively produce reasons.

Some suggested reading

50 The following are some helpful writings on judgment or decision writing:

- Justice Anthony Payne, "Making good decisions", NCAT Member Conference, 4 November 2022.
- Justice AS Bell, "Delivering Reasons in the Tribunal Context", NCAT Members Training Day, 24 October 2019.
- Chief Justice Bathurst, "Efficient, Informal and Fair: Tribunals Delivering Under Pressure Writing Better Judgments", COAT Annual Conference, 7 September 2018.
- Sir Harry Gibbs, "Judgment Writing" (1993) 67 *Australian Law Journal 494.*
- Sir Frank Kitto, "Why Write Judgments?", (1992) 66 *Australian Law Journal 787*.
- Justice Julie Ward, "Words, Words, Word…", NCAT Conference, 8 October 2014.
- NCAT Decision Writing Guide 2, "A Guide to Reasons for Decision in the Tribunal", March 2017.
- Acting Judge Jennifer Boland, "Writing reasons for decision-principles and practical tips", COAT Course, 3 August 2018.
- Justice Mark Weinberg, "Adequate, Sufficient and Excessive Reasons" Judicial College of Victoria, 4 March 2014.
- Justice Roslyn Atkinson, "Judgment Writing", QCAT Conference, 6 February 2010.
- Justice Stephen Gageler, "Why Write Judgments?" (2014) 36 *Sydney Law Review 189*.
- James C Raymond, "The Architectures of Argument" (2004) 7(1) *Judicial Review 39*.
- James C Raymond, "Five Ways to Improve Your Judgment Writing", *Judicial Commission of NSW*.
- Justice Michael Kirby, "*Ex Tempore* Judgments – Reasons on the Run", (1995) *Western Australian Law Review* 213.