THE WRITING OF A LABOUR DETERMINATION; COSTS; ENFORCIBILITY

by Mr Peter R Marsh,
Employee Relations & Mediation Services Consultant

Text of address delivered at the Institute's Labour Arbitration/Mediation Course, North Ryde, New South Wales
31st July 1993

In dealing with the writing of a labour determination, I could confine my comments to what is appropriate or required for a member of an industrial tribunal appointed under a statute. It seems to me, however, that this would not be the best approach for members of the Institute, in that they will invariably be acting as private arbitrators, and not governed by all the various industrial relations statutes both Federal and State. There is no doubt that judicial standards apply to all areas of industrial arbitration, but the legal context in which the arbitration takes place differs between what we understand as a private arbitration, and an arbitration by a member of an industrial tribunal. In this sense, a private labour arbitration is more in line with arbitration in the U.S., and where appropriate I have in this address given some idea of the attitudes of arbitrators in the U.S. Nevertheless, the writing of a labour determination arising from an industrial matter that has been before an arbitrator, whether in a private capacity or otherwise, must, subject to the exceptions I will outline, follow the standards required of a judgement made by the courts. For this reason, I believe the views of some of our most senior members of the legal profession are of assistance in dealing with the issue of writing a labour determination.

At the conclusion of a hearing regarding any industrial matter, it is usual for the arbitrator to reserve his or her decision and subsequently produce a written decision (which may include the terms of the award or determination) and reasons for decision. Circumstances may dictate, on occasion, that an extemporary decision be given, with written reasons for decision handed down at a later date. Similarly, the arbitrator may decide to hand down an extemporary decision and reasons for decision at the conclusion of the hearing. The Rt Hon Sir Harry Gibbs, has made the following observation regarding this latter procedure.[1]

> "There is often need to revise reasons which were given ex tempore to make them express what the judge had meant to say and although this is permissible, litigants do not always understand why the judgement that they read differs, perhaps widely, from that which the judge pronounced in court. The Judicial Commission of New South Wales in its latest report has pointed out that a number of complaints made to it resulted from the fact that litigants erroneously regarded as improper the fact

> that the published version of a judgement differed from what the litigant heard said in court."

In industrial relations, the arbitrator may be confronted with circumstances which require him or her to act expeditiously in making an award or determination. However, arbitration generally results in the imposition of new rights and obligations on parties. If the arbitrator says something in an extemporary decision, the parties are obliged to act on that. If the arbitrator subsequently changes the decision which alters the award or determination, then this will result in industrial uncertainty and the arbitration will not be successful. It is always best in my opinion, irrespective of the circumstances of the matter before the arbitrator, to reduce his or her decision to writing, even if this means on occasion asking the parties to wait while this is done.

I am firmly of the view that reasons should be given wherever possible that are comprehensive and well thought out. This position was summarised by a Full Bench of the Australian Industrial Relations Commission in a decision dated 6 May 1991 as follows:

> "It is well established that adequate reasons for decision should be given and a failure to give adequate or any reasons can amount to an error which will be corrected on appeal. Until recently this principle was considered to be substantially derived from the need to ensure that a party having a right of appeal would not be deprived of the right by a failure of the court or tribunal at first instance to provide reasons. More recently, it has been recognised that the requirement to provide reasons should be seen as a normal incident of the judicial process. This was the view expressed in the High Court by Gibbs C.J., with whom Wilson, Brennan and Dawson JJ. agreed, in *Public Service Board of N.S.W. v Osmond.* In the same case, Gibbs C.J. quoted with approval the following statement by Professor Wade, the author of "Administrative Law".
>
> 'The giving of reasons is required by the ordinary man's sense of justice and is also a healthy discipline for all who exercise power over others.'
>
> The evolution of principle on this subject has taken place in the courts and has been of direct concern to the judges but members of the Commission are obliged to perform their duties in a judicial manner and we consider that the requirement to provide reasons is equally relevant to the functions of the Commission. There may be occasions where reasons may not be required, but these will be rare; where an arbitration of competing claims has proceeded to conclusion, it will be exceptional for the arbitrator not to be under a duty to provide adequate reasons."[2]

It is therefore generally accepted that as a result of arbitration, reasons for decision will be required, in that parties experience a real grievance where they know the outcome of a decision affecting them but they do not know the basis, the reasons why. The handing down of reasons for decision enables those affected by the decision to see what was taken into account and whether an error has been made so that they may determine whether to challenge the decision and what means to adopt in doing so.

Well reasoned reasons for decision can contribute greatly to the acceptance of an award or determination by the parties by persuading them that the arbitrator understands the case and that his or her award or

determination is basically sound. Any award or determination should be stated separately from the reasons for decision, and the decision must make it clear where the reasons for decision end and the award or determination begins. The written award or determination must be signed by the arbitrator.

Where the arbitrator gives reasons for decision, those reasons must deal with all the grounds of argument and set out the factual and legal basis of the decision. The Administrative Appeals Tribunal Act Cth and the Administrative Decisions (Judicial Review) Act 1977 Cth require a statement in writing setting out:

- a reference to the evidence or other material on which findings on material questions of fact are based
- the reasons for the decision.

It has been noted by JW Shaw Q.C.,[3] that English Common Law, as developed by the courts in Australia, has evolved a series of often complicated principles that govern the admission of evidence – oral and documentary. For the purposes of litigation, in proceedings before the Australian Industrial Relations Commission, the Commission is not bound to act in a formal manner and is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks just. State industrial statutes generally contain like provisions. Shaw notes however:

> "The ordinary test of relevance contained in the rules of evidence is applicable to industrial arbitration, although perhaps not in its full rigour. Evidence will be relevant if it is logically probative of one of the issues of the case. If it has nothing to do with the issues between the parties then it is time-wasting and distracting... similarly, certain forms of blatant secondhand evidence or 'hearsay' may properly be excluded by the industrial tribunal if that evidence is untestable and unfair. So it was that Justice Evatt said of the approach to evidence before a non-judicial tribunal in *R v Ware Pensions Entitlement Appeal Tribunal; ex parte Bott.*
>
> Some stress has been laid by the present respondents upon the provision that the Tribunal is not... "bound by any rules of evidence" Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can without grave danger of injustice set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer substantial justice"[4]

Evidence tendered to an arbitrator may be documentary, oral or consist of inspections. At the end of the day the arbitrator has to sort through all the evidential material before him or her and decide what is relevant, and what weight to give the evidence. My experience is that labour arbitrators tend to adopt a lenient attitude toward admitting evidence but this means that the decision must reflect the view of the arbitrator as to relevance and weight given to aspects of the evidence.

Findings on all material questions of fact must be stated. As the Rt Hon. Sir Harry Gibbs has stated:

> "It is of critical importance for a judge of first instance to make a clear finding on any disputed issue of fact and to state the relevant facts in his or her judgement clearly and accurately. The parties may not know the law, but they generally know the facts and will have a sense of grievance if the judge appears to overlook or mistake a fact that they consider to have an important bearing on the decision".[5]

In industrial relations there is always an over abundance of opinion and assertions placed before the arbitrator, and it must always be borne in mind that facts, not opinions and assertions should determine the outcome. There will always be plenty of witnesses who will give an opinion that a wage increase is justified, but the case must be based on substantive facts, rather than opinions.

The evidence or other material upon which the findings on material questions of fact are based, must be referred to. The requirement is that they be referred to and not that they be set out in the decision (*Ansett Transport Industries (Operation) P/L v Taylor (1987)* 73 ALR 193). A purported list of all the documents that were before the arbitrator will not be sufficient to satisfy the requirement (*A.P.M. Construction P/L v Deputy Commission of Taxation (1986)* 65 ALR 343). The evidence may be identified by stating its source or nature, whichever is the more intelligible and informative.

If a finding of fact depends on an issue of credibility, which often occurs in dismissal cases, the arbitrator should give reasons for preferring one witness to another. It is not always sufficient to state that having observed the demeanour of witnesses, then the arbitrator forms a view. It is preferable to deal with facts established by the evidence and other material. It is also important, particularly in dismissal cases, to refrain from using harsh criticisms of witnesses, unless this is absolutely necessary. The dismissal of an employee is generally an emotionally charged act, and words are spoken and actions are often carried out in the heat of the moment, and it is best to avoid attacking or condemning witnesses.

The legislative framework which forms the basis of the decision should be stated but the detail given may differ according to the knowledge and experience of the parties.

In the U.S. there appears to be a debate among arbitrators which indicates the range of arbitral thinking as to the extent to which arbitrators should consider law in resolving disputes. In their book "How Arbitration Works" Frank and Edna Elkouri quote Arbitrator Bernard D Meltyers' views on how arbitration should be approached.[6] Meltyers argues that arbitrators should respect "*the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes higher law. Otherwise, arbitrators would be deciding issues that go beyond not only the submission agreement but also arbitral competence*". An alternative view is that of Arbitrator Richard Mittenthal who is quoted as saying "*although the arbitrators award may permit conduct forbidden by law but sanctioned by contract, it should not require conduct forbidden*

by law even though sanctioned by contract." A third view is that of Robert G Howlett, who has insisted that "*Arbitrators, as well as judges are subject to and bound by law, whether it be the fourteenth amendment to the constitution of the United States or a city ordinance. All contracts are subject to statute and common law; and each contract includes all applicable law."*

Whilst there can be no direct comparison of the work of arbitrators in the U.S. to, say, private arbitration in Australia, it may be that the private arbitrator will be confronted with a dispute where consideration will need to be given to Federal and State Statutes, e.g. Equal Opportunity Legislation, Occupational Health and Safety Legislation. Furthermore, the arbitrator may also have to give consideration to the public policy position that exists in relation to wage fixation. This aspect was referred to by Justice Munroe, a senior Deputy President of the Australian Industrial Relations Commission, in a speech this month. He stated that private, non-official, and supplementary-official arbitration or dispute settlement in parallel to, and at times in competition with, the official system have been a relatively common feature of the Australian scene. He stated "*the most recent instance that comes to mind in the federal jurisdiction was the private arbitration of site allowances in the building industry. The maintenance of the public system's declared objectives is made awkward, if other options co-exist. Control over outcomes or over the industrial parties behaviour is likely to be proportionately reduced*".[7] It is clear that the obligation on a private arbitrator is much narrower than that of a member of the Australian Industrial Relations Commission.

A member of the Australian Industrial Relations Commission must apply the test of public interest to any decision made, i.e. the current principles of wage fixation. Even with the changes made to the Federal Industrial Relations Act, the test of public interest remains. Failure to comply with the wage fixation principles is a ground for appeal. This ground of appeal is unlikely to impact in a legal sense on any decision made by a private arbitrator. The ground for seeking a review of any decision by a private arbitrator would be confined to that which is based on the arbitrator being wrong at law. In private arbitration, however, there still may be implications for the wage system as a whole flowing from a private arbitration. How the individual private arbitrator will deal with these implications will depend on how the arbitrator approaches the arbitration.

I now turn to the reasons for the decision. I would firstly agree with the Rt Hon Sir Harry Gibbs when he states:

> "The essential quality of a judgement is clarity, the second desirable quality is brevity, or as much brevity as the subject will permit".[8]

It is sometimes tempting for an arbitrator to raise matters in a decision which he or she regards as important, but are not the matters before them. In my experience, it is of little assistance to anyone to go to matters which are outside the terms of the dispute before the arbitrator. Invariably comments and pronouncements of this nature are of no interest to the

parties to the dispute. As a general rule, the arbitrator of an industrial dispute should only deal with the matters that are before him or her. As well, it appears that many arbitrators are tempted to set out in their decisions large slabs of transcript when instead advocates' views can be summarised. It may be unfair in quoting transcript in a decision in that the advocate may respond to questioning from the arbitrator in a manner that appears on transcript at least as ill-informed or unprofessional, whereas the general thrust of the case is the opposite. It must be borne in mind that advocates in industrial disputes may lack experience or legal training. In these circumstances it is preferable to summarise the positions put rather than directly quoting what has been put to the arbitrator.

Another practice to avoid is go to a whole range of precedents when one authoritative decision or case is all that is required.

All the steps of reasoning linking the facts to the ultimate decision, which are necessary for a party affected to understand how the decision was reached, should be stated in the reasons for decision. The relevant criteria, the weight given to each criterion and the conclusion reached should be stated.

The reasoning should identify any official guidelines, principles or practice which forms part of the justification for the decision made. When the decision is based on a report or investigation made by someone else, the report, the facts and a reference to the evidence on which they are based and the reasons thereto should be incorporated into the decision.

Finally decisions should be handed down within a reasonable time frame. Not all industrial matters brought before an arbitrator are urgent, but in the majority of cases the parties seek a decision which imposes new rights and responsibilities upon the parties, and they wish to know their positions as quickly as possible. I note that the rules of the Institute provide for the publishing of reasons within 30 days or an otherwise agreed time frame. In the U.S. the position regarding the handing down of a decision after an agreed time frame may or may not affect the validity of an award. The award might be held invalid if it is not made within a time frame agreed to by the parties or by an applicable law and the parties have not agreed to an extension. Alternatively failure to meet a time limit specified may not result in the award being invalidated if no objection has been made to the delay prior to the handing down of the award or there is no showing of prejudice from the delay.

One matter should be referred to and that is after reserving a decision, the arbitrator finds that he or she is not absolutely clear on an aspect of a submission or other material before them. Alternatively, the arbitrator becomes aware that circumstances have changed in the period since the matter was before the arbitrator. It may also be that if new evidence becomes available to a party, an application is made for a re-opening of a case. It is accepted practice that an arbitrator on his or her own motion, or upon request of a party, may re-open the hearing at any time before

handing down a decision. In industrial relations, it is of little assistance to anyone if the arbitrator makes a decision which is a bad decision simply because the arbitrator did not understand some of the information before the arbitrator, or more information was required, or the decision no longer was relevant because circumstances have changed. Parties may be concerned at the re-opening of a case by an arbitrator because it generally means a further time delay, but in the long run it is generally in the best interests of all that it is done.

When it comes to handing down the decision, it is my view that it is preferable to advise the parties of the time and date that the decision will be issued and requesting the attendance of the parties. This practice ensures that there is no confusion regarding dates if a party wishes to take the decision on appeal or have the decision reviewed by the courts. The listing of a time and date for the handing down of a decision is a practice generally adopted by industrial tribunals for the reasons just mentioned.

COSTS AND ENFORCEMENT

Proceedings before industrial tribunals in Australia are cost free. This has no doubt contributed to the support for the Australian compulsory arbitration system. Parties are able to have access to an arbitrator at no cost, and costs are not awarded against parties. For private arbitration, different practices are adopted, generally at the discretion of the arbitrator. Certain arbitrators request that their costs be borne equally by the parties, whilst others accept that their costs may be borne by one or other of the parties.

The Federal system of industrial relations operates essentially on the basis that it is in the interests of the parties to operate within the system than to challenge the authority of the Commission. A.M. North Q.C.[9] has appointed out however there nevertheless exists in the Industrial Relations Act a comprehensive compliance mechanism namely:

a. The Commission itself has power to insert a bans clause in an award;
b. The Commission has power to authorise proceedings in the Federal Court for breach of a bans clause;
c. The Commission has power to cancel awards;
d. The Federal Court has power to impose a penalty on a union official who incites others to act in breach of an award;
e. The Federal Court has power to impose a penalty for a breach of an award, including a bans clause;
f. The Federal Court has power to impose a penalty on an organisation or person which or who wilfully contravenes an award or order of the Commission;
g. The Federal Court has power to deregister an organisation, in particular, on the ground that it has engaged in industrial action which has interfered with trade and commerce.

So the compliance mechanisms depend upon deregistration and the

imposition of monetary penalties.

According to A.M. North Q.C. "*The Act proceeds on the basis that compliance does not depend on jailing people for the sake of industrial action. The failure to pay a penalty cannot now lead to the jailing of the defaulter, as happened to Clarrie O'Shea... the system treats industrial action as a symptom of an underlying problem, addresses the problem, and thereby removes the cause of the industrial action. This system no longer outlaws industrial action – it accepts the reality that there will be some, but it deals with it in the context of the industrial issues which provoke the action*".[10]

North notes however that the common Law and the Trade Practices Act impact upon the legality of taking industrial action.

He states:

> "The next thing to be noted is that in its application to industrial action the common law has been greatly expanded by decision of the courts in the United Kingdom which operate in an environment in which there is no equivalent of the Commission having a statutory duty to prevent and settle industrial disputes. There is therefore a real question whether the scope of the common law decisions is appropriate in the Australian context."[11]

The sanctions available under common law and s.45D of the Trade Practices Act which are not available under the Industrial Relations Act system are compensation by way of damages and injunction leading to fines and/or jail for contempt of court arising out of breach of the injunction.

North states however "*Again the notion of awarding compensatory damages over action taken in the course of industrial relations does not fit into the nature of the industrial relations process. That process is concerned with resolving conflict and avoiding loss. The award of damages is appropriate in regulating relations between traders, but not on balancing the interests of employers and employees.*"[12]

This view may be contrasted with the attitude that prevails in the U.S. regarding the role of arbitrators in that country. It is expected that arbitrators recognise fundamental principles of contract law, such as those concerning the need for consideration to produce a binding contract, those concerning offer and acceptance, those concerning anticipatory breach and those concerning the obligation to perform contractual commitments in spite of hardship. It is generally accepted that in empowering the arbitrator to resolve their dispute, the parties are considered to have clothed him or her with the authority to grant adequate monetary relief where he or she finds that the grievance has merit.

It is also accepted in the U.S. that arbitrators have authority to award money damages for contract violations even though the contract does not specifically provide such remedy. It is agreed that to restrict arbitrators to remedies specifically set forth in the contract would negate arbitration as a method of dispute settlement and would result in cluttering contracts with numerous damages provisions which would invite more trouble than they prevent.

According to one U.S. arbitrator:

> "The ordinary rule at common law and the developing law of labor relations is that an award of damages should be limited to the amount necessary to make the injured "whole". Unless the agreement provides that some other rule should be followed, this rule must apply."[13]

The view that the private arbitrator in Australia has power to make an award for damages was dealt with by Heerey J in a recent Federal Court judgement. In that case the judge stated:

> "The arbitrator in a private arbitration derives jurisdiction and power from the agreement of the parties. In appearance and practical effect, the process is very like that of litigation. The arbitrator hears evidence and argument, finds facts and applies the law to those facts. In the course of so doing, the arbitrator will rule on disputed questions of law. The result is an award which conclusively establishes the rights of the parties as to the arbitrated dispute, unless and until set aside by a court. Thus an arbitrator may find that A breached his contract with B, and that by reason of breach B suffered damages in the sum of $X, with the consequential award that B recovers $X against A. That award can be enforced through the courts."[14]

From this it can be concluded that any award made by a private arbitrator is subject to review by the courts, and is also subject to enforcement by the courts. In this regard the work of a private arbitrator is not distinguishable from a member of an industrial tribunal. However this leaves the issue of the power of the private arbitrator to award damages, which opens up the issue of common law and industrial relations, which is a topic that has produced much debate of recent times and goes beyond what I have been requested to talk about at this course. Except to say this, it is my view that the real skill of the arbitrator is not to rely on enforcement provisions to carry the day with any decision made. The real skill is to produce a decision which is voluntarily complied with by both parties on the basis that the decision is fair and well reasoned. In the end, it matters little if the style of the decision is polished, if the law has been properly considered, and the evidence lucidly set out, if the decision is not capable of resolving the matter before the arbitrator to the satisfaction or acceptance of the parties.

FOOTNOTES

1. "Judgement Writing". The Rt. Hon. Sir Harry Gibbs GCMG, AC, KBE Australian Law Journal Volume 67 July 1993 p.494.
2. Full Bench decision of Australian Industrial Relations Commission C053 Dec 384/91 M Print J7634.
3. J.W. Shaw Q.C. "Evidence and Industrial Advocacy". The Journal of Industrial Relations June 1986 Vol 28 No. 2 p.274.
4. p.275. Journal of Industrial Relations June 1986.
5. p.497 Australian Law Journal Vol. 67, July 1993.
6. "How Arbitration Works" by Frank Elkouri and Edna Asper Elkouri. The Bureau of National Affairs Inc. Washington D.C.

7. Justice P.R. Munroe "Arbitration under Enterprise Bargaining. Has the Commission a future?" ACIRRT Conference 9 July 1993.
8. p.498. Australian Law Journal July 1993.
9. A.M. North Q.C. "Industrial Action – The need for change in the law". Law Institute Journal p.608, July 1991.
10. p.608. Law Institute Journal, July 1991.
11. Ibid, p.609. Law Institute Journal, July 1991.
12. Ibid, p.609. Law Institute Journal, July 1991.
13. How Arbitration Works F & EA Elkouri, p.352.
14. National Union of Workers & Ors vs Pacific Dunlop Tyres and Goodyear Tyres. Federal Court of Aust No. V125 or 1992. Judgement No. 609/92.

THE USE OF COMPUTERS IN COMMERCIAL ARBITRATION

At the May 1993 Conference of the Institute at Sanctuary Cove in Queensland Graham Ellis former Judge of the Supreme Court of Papua New Guinea presented a comprehensive paper on the use of computers in arbitration proceedings. The paper was complimented by a practical demonstration of some of the latest technology available on the market.

The paper and presentation had two major objectives, first to provide convenient easy to understand reference material and secondly to disclose the author's own experiences in the hope that these would assist others about to pursue the use of computers and those already using the technology an opportunity to share their experiences.

The paper is divided into sections such as Terminology, Hardware including computers, disks, printers, scanners, overhead projectors and modems, software, data transfer as well as a very useful section entitled Practical Tips.

Because the text of the paper is too lengthy to publish in "The Arbitrator" it has been decided that copies would be made available to members on request.

Copies may be obtained by contacting your Chapter Secretariat. Please refer inside back cover for postal, telephone or facsimile details.