Tribunals Conference – Writing Reasons for a Decision

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I do not want to dwell on the bare legal requirements of the obligation to give reasons. The provisions of section 43(2B) of the *Administrative Appeals Tribunal Act 1975* and equivalent provisions for other tribunals[1] are well known. Such a tribunal is obliged in giving its reasons to set out the findings on material questions of fact and the evidence or other material on which those findings were based. The requirements are not substantially different from those imposed on first level decision-makers by section 13 of the *Administrative Decisions (Judicial Review) Act 1977.*

You will also recall that section 25D of the *Acts Interpretation Act 1901* imposes a similar obligation where an Act[2] 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: see *Dalton v Deputy Commissioner of Taxation* (1986) 160 CLR 246.

It is also now well established, after some early uncertainty, that a failure to comply with an obligation to give reasons is itself an error of law.[3] However, tribunal members may breathe a little more easily after the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 70 ALJR 568. There the High Court confirmed the line of authority in the Federal Court that an administrator's reasons are not to be construed minutely and finely with an eye keenly attuned to the perception of error and to that extent are to be given a beneficial construction: see 70 ALJR at 575. (Of course it is to be remembered that the unsuccessful side will often be doing exactly that: construing your reasons minutely and finely with an eye keenly attuned to the perception of error.)

Justice Hill explained the requirement to give reasons in a little more detail in *Copperart Pty Ltd v Federal Commissioner of Taxation* (1993) 93 ATC 4779 at 4781. His Honour said that the obligation to give reasons was not satisfied by a statement of the Administrative Appeals Tribunal's conclusion of fact. The parties are entitled to know what evidence the Tribunal accepted and what evidence it took into account and what it rejected.

So much for the bare requirements. Can any further principles be formulated to guide those on whom there is imposed the often difficult task of writing reasons for a decision?

The first principle seems to me to require an identification of your audience and the keeping of that audience clearly in mind. Your primary audience is the parties (especially the losing side): they need you to explain why they won or lost or, to put it the other way, why your decision is the correct and preferable one.[4] At the same time I would not endorse the sentiment in a letter written by Doe CJ of New Hampshire on 27 March 1886:

> "To write a legal opinion which the dullest lawyer can easily understand at the first reading, and which no-one will complain of as being too much adapted to infants, is no easy task."[5]

I do not think you should aim so low.

Your secondary audience is a *'notional'* Federal Court judge. And there is also the public to have in mind. Justice Finn in a recent decision (*Comcare v Parker*, unreported, 2 August 1996) adopted a dictum of Justice Gray, speaking for the Full Court of the Supreme Court of Victoria in the following terms:

> "The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will be inadequate if (a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or (b) justice is not seen to have been done."[6]

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This latter aspect seems to me to relate to the importance, from a public interest point of view, of the process of reasoning which has decided the case being itself exposed to the light of day.[7] Justice Finn in the decision to which I have referred said (at page 12) that he was not dealing with some ambiguity or some parsimony in the reasons but concluded that the reasons for decision which he had before him were "*unduly uninformative*".

There is of course a difference in role between the different levels of the judicial and administrative hierarchy. There are two sides to this. I cannot see the point, and I can well see the danger and distraction, of a tribunal writing reasons as if the author were a Judge of Appeal. Most tribunals are and should be concerned with facts first and with statutory interpretation second. This is frequently difficult enough whether or not one agrees with Justice Pincus who described the task of a court too often as being "*simply to see if particular sets of facts fit within obscure verbal formulae devised by the legislature*".[8] But the other side of the coin is that it is very doubtful, given the preponderance of facts and the fresh facts which are before a tribunal, that a tribunal could get away with a six line judgment such as this classic from the Supreme Court of California:

> "The Court below erred in giving the third, fourth and fifth instructions.
>
> If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence.
>
> A drunken man is as much entitled to a safe street as a sober one, and much more in need of it.
>
> The judgment is reversed and the cause remanded".[9]

Equally it is doubtful that tribunals will be able to take advantage of the developing trend in intermediate courts of appeal of dismissing appeals for the short reason that the appeal court agrees fully with the conclusions and reasons of the trial judge.

As the statutory requirements indicate, you must state the findings of fact, the evidentiary basis and the reasoning process. What the parties, the courts and the public want are the real reasons. This is not easy, as anyone will know who has tried to analyse their own reasons for a decision taken in pursuance of a broad discretionary power. Stating the real reasons may well involve both honesty and courage. This is because a conscientious judge or tribunal will be vulnerable because he or she has given his or her (real) reasons.[10] It will require courage because somebody will disapprove of any decision which is given. But reasons should not be written for the primary purpose of making the decision unappealable. That should be a consequence which should follow from a true analysis of the evidence and the statute.

Two points to note in this regard are first, that tribunals should avoid the use of the word '*irrelevant*' in relation to evidence when what is really meant is that, in the tribunal's view, that evidence is of only minor importance. The second point is that even though synonyms can be useful to look at in understanding a statutory provision it is essential always to come back to the actual words of the statute in their context. A mere paraphrase will most frequently catch the disapproving eye of an appeal judge.

Reasons should of course be brief but, to repeat something I have said already, they should not be so brief that at the very least you do not explain to the unsuccessful party why they have lost. Again, as I have referred to above, very short reasons may well be a growing trend in appeal courts but federal tribunals cannot be so peremptory. If there is a conflict of evidence and you accept one version you must say so and you should say why. But again relative brevity is a principle to be pursued.

I do not mean that in writing reasons for a decision a tribunal should follow the course referred to, disapprovingly, by Sir Frank Kitto:

> "Perhaps the most common case of an insufficiently disciplined judgment is one which recites the facts – in a degree of pedestrian detail that scorns to discriminate between those that really bear on the problem, those that may interest a story-lover but not one possessing the lawyer's love of relevance, and those that are not even interesting but just happen to be there – which identifies the question to be decided, and then, without carefully worked out steps of reasoning but with a 'blinding flash of light' (as has been said), produces the answer with all the assurance of a divine revelation."[11]

Another way of putting this, so it seems to me, is that you should not start writing before you know what your final attitude is to be. Of course in the process of writing you may change your mind, and revise the whole, because that after all is one of the benefits of the discipline of writing reasons. But what I am referring to is this case:

> "And there is still another writer, common in law, who starts writing before he knows what his final attitude to his subject is to be. He takes his reader through each step of the mental process by which he himself arrives, or hopes to arrive, at a conclusion; the facts of a series of cases are stated, and the judges' reasons summarized, but until the last page the reader never quite knows why. Before he starts writing, and continually as he goes along, the writer must pause to ask himself what a reader coming to the subject for the first time, and unlikely ever to return to it, will want to know. The significance of what is being said must be spelled out continually."[12]

It seems to me that the clearest reasons will follow from clear thinking before the writing process starts and clear writing will often involve spelling out continually the significance of what is being said.[13]

I should mention briefly the appropriate style or level. Chief Judge Cardozo described six styles the lowest of which was the "*tonsorial or agglutinative, so called from the shears and the paste pot which are its implements and emblem*".[14] I have very rarely seen tonsorial or agglutinative reasons for a federal tribunal's decision. But there is a real question as to the formality with which the reasons should be expressed. In my view it is probably inappropriate to adopt the '*magisterial or imperative*' type identified by Chief Judge Cardozo and the '*conversational*' may be much more appropriate at least in those cases involving applicants in person and where the decision will, in all probability, affect only that person and the decision-maker. It is I think however true to say that traditionally the Administrative Appeals Tribunal has tended to write in a style which emulates that of a Federal Court judge. The correct tone should follow from the accurate identification of the audience.

Lastly, as Lord Macmillan wrote:

> "Clear thinking always means clear writing and clear writing is always good writing".[15]

The obverse of this, as Tom Reid[16] says, is that:

> "If you can't explain it, you have not understood it".

Notes

1 See section 1281 of the *Social Security Act 1991* for the Social Security Appeals Tribunal, section 368 of the *Migration Act 1958* for the Immigration Review Tribunal, section 430 of the *Migration Act 1958* for the Refugee Review Tribunal and section 140(1) of the *Veterans' Entitlements Act 1986* for the Veterans' Review Board.

2 Or regulation.

3 See *Dornan v Riordan* (1990) 24 FCR 564, a case dealing with section 98BD of the *National Health Act 1953*.

[4] There is a discussion of the meaning of 'correct and preferable' and the task of tribunals that review the merits of administrative decisions in the 1995 report of the Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, at page 10, footnote 31.

[5] This letter is reproduced in an article by Professor John Reid "*Doe did not sit – The creation of Opinions by an Artist*" (1963) 63 Columbia Law Review 58 at 68.

[6] *Sun Alliance Insurance v Massoud* [1989] VR 8 at 18.

[7] See *Scott v Scott* [1913] AC 417 at 477 and "*Why Write Judgments?*" by the Right Honourable Sir Frank Kitto KBE reprinted in (1992) 66 ALJ 787 at 790.

[8] "*Supping with the Devil*": Commentary by the Honourable Justice William Pincus in *Courts in a Representative Democracy* (1995) AIJA at p209.

[9] *Robinson v Pioche* (1855) 5 Cal 460 at 461 referred to by Mr Justice Marshall F McComb in "*The Writing and Preparation of Opinions*" 10 *Federal Rules Decisions* 1 at 1-2.

[10] See *Broome v Cassell* [1972] AC 1027 at 1122, referred to by Sir Frank Kitto (see footnote 7) at 788.

[11] Sir Frank Kitto (see footnote 7) at 792.

[12] GVV Nicholls "*Of Writing by Lawyers*" (1949) 27 *Canadian Bar Review* 1209 at 1220. The author is indebted to AJ Leslie QC for this reference and those in footnotes 5 and 9.

[13] See also "*The Writing of Judgments*" by Lord Macmillan (1948) 26 *Canadian Bar Review* 491 at 492.

[14] Cardozo, B "*Law and Literature*", Harcourt, Brace and Company, 1931, p10. The other five styles identified by Chief Judge Cardozo were: magisterial or imperative; laconic or sententious; conversational or homely; refined or artificial; and demonstrative or persuasive.

[15] Lord MacMillan "*Law and Other Things*", Cambridge University Press, 1937, page 146.

[16] Tom Reid is Second Parliamentary Counsel and was co-leader, with the author, of the workshop at which this talk was given.