LEGAL SERVICES COMMISSIONER CONFERENCE OF REGULATORY OFFICERS

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Justice Alan Wilson
Supreme Court of Queensland
President, Queensland Civil and Administrative Tribunal

Crafting clear reasons: Better Reasons by Decision Makers

STATUTORY OBLIGATION TO PROVIDE REASONS

The *Queensland Civil and Administrative Tribunal Act* 2009 ('QCAT Act') contains provisions which formalise obligations that had previously been found, in the case law which developed around administrative law after the 1970s, to properly apply to decision makers and the reasons for their decisions.[1]

Those provisions begin with the overarching objects of the QCAT Act, found in ss 3 (d) and (e): to enhance the quality and consistency of decisions made by decision-makers; and, the openness and accountability of public administration.

Then, s 21(1) places a specific obligation upon decision-makers, in review proceedings, to use their best endeavours to help the tribunal towards its decision. In this sense the QCAT Act urges tribunal members, and decision-makers, into an alliance. It is also clear that merits review, in QCAT, is to be undertaken in a manner that is some considerable distance away from traditional adversarial litigation.

The QCAT Act also contains a code, governing a decision-maker's obligations to persons affected by the decision. Under s 157 the decision maker for a reviewable decision must give a written notice which includes the decision and the reasons for it to each person who could apply to QCAT for review. If reasons are not initially provided, the putative applicant may request them (s 158), or can be ordered to do so (159). If the reasons lack particularity, or the subject is entitled to more detail, the tribunal can remedy that too: s 160.

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[1] Provisions which had their genesis in s 28 of the *Administrative Appeals Tribunal Act* 1975 (Cth).

When an application for review is brought within QCAT's orbit, new obligations fall on decision-makers who, on receipt of an application, must give the tribunal a written statement of reasons, and all relevant documents: s 21(2). Again, if the reasons are inadequate, the decision maker can as it were be marked down, and made to do it again or supplement what has been supplied.

You will be familiar with another important statutory provision about the form and content of reasons: s 27B of the *Acts Interpretation Act* 1954, which insists upon the specified, minimum standards for reasons: that they set out findings on material questions of fact, and that they refer to the evidence or other material on which those findings were based.

QCAT is not, because of the way its Act says it will approach the review jurisdiction, obsessed about the calibre of the reasons it sees: its role is merits review, which involves producing the correct and preferable decision following a fresh hearing, on the merits.

That said, the tribunal sees applications from time to time in which review is sought, it may be suspected, because the applicant does not fully understand the reasons, or those reasons have failed to make it clear that they are, in truth, correct and unassailable. Often that occurs because the style, form and content of the reasons are confusing, or unclear.

WELL-WRITTEN REASONS ARE PERSUASIVE

It may seem unusual to speak of reasons as 'persuasive' but crafting them with the intent that they should both explain, and persuade, the subject and any other reader that they are correct is not improper.

Well-crafted reasons will be persuasive not least because of their clarity, their ready and lucid explanation of the process of reasoning which underpins them, and their ability to be easily understood.

The key is to write reasons that *can* be understood: reasons which expose, in language that is as simple and straightforward as the matter allows, how and why the decision-maker came to the decision; and, by that simplicity and clarity, allow the reader to see and understand what has happened – and, at best, why it is right.

Reasons written in this way fulfil another vital element of procedural fairness: they are *accessible.*

Crafting good reasons has close parallels to the business of judgment writing, and what has been learned in that discipline can be used by you. The primary feature of a decision-maker's reasons, and what makes them 'reasons', is that they record and explain *why* the decision was made[2]. The obligations underpinning the 'why' are not materially different from those confronting judges when they come to explain their judgments.

The judges must:

- Identify the question(s) to be decided
- Make findings of fact
- Identify the relevant law
- Apply that law to the facts, as found
- Do so in a way that exposes their process of reasoning

Many judges now accept that good clear writing is an integral part of that exercise. Professor Jim Raymond, the judgment writing guru who has lectured, over the past decade, to almost every judicial officer in Australia, makes a simple point: that the structure of a good set of reasons is identical to the structure of a good argument. The audiences may differ, but the purpose is the same: to persuade the losing party that their failure to achieve the outcome they desired is, while disappointing, undoubtedly right – in other words, to persuade them (and an appeal court, or review tribunal) that the decision should be accepted.

It is not impossible that a moral niggle arises here: is it right for me, as a decision-maker in an administrative capacity, to exercise my skills as a writer by attempting to 'sell' my decision to the disappointed subject?

I doubt there are many occasions when you are required to write reasons explaining a decision that you believe is, in truth, wrong. Even if that rare occasion arises, however, there is still much to be said for expressing yourself in a way that can be clearly understood. In the vast majority of matters where you are, yourself,

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[2] *Rashid v Minister for Immigration* [2007] FCAFC 25 at [18] per Heerey, Stone and Edmonds JJ.

convinced that your decision is right, it is not an illegitimate exercise to express yourself in terms that help others to reach the same conclusion.

CLEAR, CONCISE REASONS

Use accessible language

New languages have arisen among us. One might be called 'judge-speak'. Australian High Court decisions are now over five times, on average, longer than they were 80 years ago. Following that guidance from on high, and despite Professor Raymond's efforts, the decisions of many Australian judges are densely reasoned, extremely long (and growing inexorably longer) and riddled with quotations from other cases and judges, and footnotes.

Their form actively discourages reading (except by the parties or those who must, for professional reasons, come to grips with them).

Another is the language of administrative decision-makers. It is often neutral to the point of blandness, repetitive, too long, and mimics all the worst elements of judge-speak: in particular, it also discourages reading.

It is not your primary task to produce writing of publishable standard in your decisions. But it is a task that can become repetitive, and formulaic. It is often easier to follow a precedent, no matter how dull, or to simply fall into the prevailing style for fear that all others are somehow *verboten*. It is this course that allows bad habits, and undesirable styles, to develop and take over.

A first proposition rests on this question: is the decision written in a clear, readable and, so far as possible, non-technical and jargon-free style?

The question is vital because it springs from fundamental issues of fairness, and justice – will the recipient understand what I have decided, and why? Will any other reader?

Here are some examples:

This is a determination under s 75 of the Domestic Animal (Dogs, Cats and Poultry) Act 1995. Subject owns residential property at Smith St, Greenville, whereon have been kept, at diverse times and dates, up to 11 dogs. Various neighbours have lodged adverse reports concerning behaviour of said dogs. Council has a substantive log of complaints about said dogs causing injury to other ratepayers and creating undue noise and is thereby obligated to have said dogs destroyed.

Ms Brown owns a residential property as Smith Street, Greenville. Council has received reports and complaints about her dogs, which it has investigated. The law has limits on the number of dogs a householder can keep, and also places responsibility upon an owner to ensure they do not cause harm or disturbance. This decision concerns Ms Brown's dogs, Council's investigations into complaints about them, and the conclusions it has reached about what should be done.

Applicant Jones seeks issue of positive Notice under Protection of Young People Act 1998. Applicant has several relevant convictions involving physical assaults. Section 175 of said Act requires that certain matters be addressed in an application of this type; such matters are addressed as follows…

Mr Jones seeks what is called a Blue Card which would, under the Protection of Young People Act 1998, allows him to pursue his interest in training children in gymnastics. He has, however, some previous convictions for assault and the law requires that I must consider them in deciding his application. The way this is done is, firstly, to decide whether any of the convictions is what the law calls 'serious'. If that is the case, the law makes it quite difficult for Mr Jones to obtain a Blue Card. Even if it that is not the position, however, I must still consider the nature of each offence and decide whether the case is what the law calls an 'exceptional' one – meaning that, although the offending is not 'serious', it is still so important and relevant that I should refuse to issue a Blue Card.

Explain the Statute

In most cases you will be working within a statute or regulation, and it will be the legal rock upon which your decision rests. Statutes and rules are not always written in language that is easily understood – was it not so, lawyers would be redundant.

The legislation about Blue Cards in Queensland[3] is an example: it contains qualifying clauses, and a negative, that can be a little confusing, particularly when an applicant has been convicted of an offence: first, it requires the decision-maker to decide if the conviction is for a *serious* offence; then, if it is not, the Commissioner *must issue a positive notice unless satisfied it is an exceptional case in which it would not be in the best interests of children to issue a positive notice.*

Our language is rich, and complex. You are often supplied, in statutes and regulations, with tools that are not as sharp-edged as they might be.

(There is a hidden danger here: sometimes a decision-maker will, even unconsciously, use the complexity of the statutory language as a kind of smoke-screen, or a form of cover – in the hope the claimant will, in the confusion they suffer trying to understand the decision, be discouraged from challenging it.)

An important task of a decision-maker is to make the legislation accessible to the claimant, and any reader. Often, this means attempting to summarise it in simpler language, relevant to the particular case.

Summarising the law, and putting it into accessible language, serves two useful purposes: it helps you in the work of shaping and explaining your decision, because you will be forced to focus on its meaning and intent during the work of 're-framing' it into your own words; and, it helps the recipient of the decision – usually, not a lawyer, and generally inexperienced in the jurisdiction – understand the law that affects them.

This is not always an easy task: remember that the *Acts Interpretation Act* requires[4] that legislation be construed in ways that best achieve the purpose of the Act. Your summary will reflect, in condensed form, the purposes of the legislation, the way it seeks to achieve those purposes, and how a particular provision fits into its overall scheme.

But making this summary is valuable work, and rewarding. It will improve your own understanding; it brings satisfaction; and, it may be able to be re-used.

Known pitfalls

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3 *Commission for Children and Young People and Child Guardian Act* 2000

4 S 14A(1).

The most common, recurring errors involve mistakes about evidence, and a failure to 'expose' the process of reasoning – that is, leaving a gap in the step between recitations of the relevant facts and law, and the actual decision.

Is the evidence relevant, and sufficient?

There are many pressures upon government officers, at all levels, when they deal with complaints and reports about matters that may lead to the need for an administrative decision. Resources are strained, and staff are not always trained in the business of collecting evidence that can lawfully be relied upon.

Plainly, educating staff is important. I know that, in Queensland, Crown Law has devoted time and effort to valuable training programs. But, ultimately, part of your work as a decision-maker is to decide whether the evidence meets the necessary standard – usually, of course, the civil standard on the balance of probabilities but with fluctuations depending on the seriousness of the issues involved.

The most common mistake is to simply set out a series of reported complaints or allegations or events, but make no effort to establish if they meet the necessary standard of proof, or to show that they do.

Another frequent error – and one which increases the possibility of an application for review – is to ignore or not refer to evidence presented by the applicant or subject. It is unsurprising that an applicant will feel that justice has not been done if their evidence is not addressed.

Is the process of reasoning exposed? The 'why' of a decision

The second type of mistake goes to the core of a decision-maker's work: the decision must, in the time-honoured phrase, *expose the process of reasoning.*

A failure to do so often involves a variant of these phrases:

- *In these circumstances, my decision is…*
- *Taking into account the facts set out above and applying the said provision, I find that…*

- *I am therefore satisfied that…*

What the writer has failed to do, at the last hurdle as it were, is to put the work of the decision together into a coherent, logical exposition of the intellectual exercise of reasoning which leads to the conclusion.

The failure often rests on the false assumption that the law, and the facts, speak for themselves and dictate only one outcome. That is often the case, but that does not excuse the decision-maker from this last piece of critical work. It still remains, at the end, necessary to explain why that is so.

The reader must be able to see and understand the *why* of your decision – an exercise which requires the decision-maker to explain, in a way that can be understood, that *the application of this law to these findings of fact = this conclusion.*

Using structure to improve quality

The work of writing a decision benefits from a simple structure, generally following this sequence of questions:

- *What is to be decided?*
- *What are the relevant facts?*
- *What is the law to be applied?*
- *What happens when that law is applied to those facts?*
- *What decision flows logically from that exercise?*

Decisions will be easier if the question to be answered is, right at the start, clearly articulated. This will involve a brief summary of the nature of the application, the underlying facts, and the applicable law. Writing this to the best of your ability is useful work - it eases the reader into the more detailed writing that follows and what it will be about; it may even, in some cases, enable you to 'flag' the conclusion.

This is a fictional example of the kind of introduction which can make the work of explaining the final decision easier:

Mr Smith is a fisherman, with a licence to catch mullet south of Moreton Island. The licence requires him to catch at least 500kg each year, and if he does not the

Department may withdraw it. Mr Smith only caught 170kg last year. The Department wants to withdraw his licence and can do so unless, under the Fisheries Regulation 1999, he can show a good reason that should not happen.

One reason recognised in the Regulation is that to do so would cause him hardship. The burden of proving hardship rests on him. He says he was too ill to fish for much of the year but, despite being asked several times over some months to produce a doctor's report or other evidence of his illness, he has not done so. That is the only reason he has put forward. I have to decide if his mullet licence should be withdrawn.

The business of summarising the law, and the facts, need not always be done separately. In some small cases you can talk about them simultaneously, or in reverse order. There is no science in the order of them. In some cases the facts are not in issue, or the law is very straightforward, and the order of discussion will be a matter of emphasis.

For reasons already discussed the form of a decision climbs to a crescendo, reached at the point where you explain your decision. That work will be easier if the identification of the issues, analysis of the facts, and summary of the law, in your own words, have been carefully and logically performed. This is particularly true of the summary of the statute: your précis of the law, in your own words, can be done with particular reference to the facts in the case and that work should have gone a long way towards showing why you have reached a particular decision.

Credit issues, disputes of fact

Administrative decision-makers are sometimes called upon to make decisions involving disputes about factual matters where the evidence is sparse, contradictory, or confused.

Their findings will only be overturned if they are perverse, contrary to the overwhelming weight of the evidence, ignore the probative force of some evidence, or are plainly unreasonable[5].

In the face of conflicting evidence the first sensible question must always be *is it necessary to make a finding?* Unnecessary findings of fact are likely to excite the interest of a reviewing court or tribunal, because they suggest a fundamental lack of understanding of the primary issues.

There are other 'in-between' cases, as it were. It is the not uncommon to come across an administrative case where there is no strict burden of proof, but the claimant advances allegations of fact in an effort to persuade the decision maker that *x* is the case. It may be legitimate, and acceptable, for the decision maker to simply find that the evidence is insufficient for them to be satisfactorily persuaded to the claimant's position.

The second question is *what is the standard of proof?* The third is *can a finding be made on the available evidence?*

The third question sometimes arises where decision-makers are, by the nature of their enquiry, denied the fullest opportunity to test evidence before them, either by adversarial or inquisitorial techniques; or, in cases where the claimant must persuade the decision-maker that certain facts occurred, or will occur. The nature and extent of the decision-maker's obligation to explore and expand evidence rests on principles of procedural fairness.

If the primary issue cannot, however, be resolved except by a determination of the weight of conflicting evidence or questions of credit, the principles in *Azzopardi* remain as a reliable guide. It poses these questions:

- *Which evidence has probative force?*

- *Where is the weight of the evidence?*

[5] This is the classic test first set out by Glass J in *Azzopardi v Tasman UEB Holdings* (1985) 4 NSWLR 139 at 155-6.

- *Is a finding of* x *reasonable in light of the answers to the first two questions?*

The answers to these questions are not matters of rocket science. Intensive legal training is not a necessary pre-requisite to reaching the correct conclusions. While the first question has legal elements, it is not difficult for a non-lawyer to grasp that some evidence – eg, what someone who did not see an event says about it – may not have great probative value. While the second question involves value judgments, only a small proportion of cases involve factual disputes where the evidence is finely balanced. The third question will usually only be asked if something seems amiss after the first two have been asked.

Credibility assessments can sometimes be at the heart of tribunal decisions[6]. Decision-makers called upon to make findings must strive to do so in a way which explains, in a logical manner, why one version has been preferred. The High Court has repeatedly said that findings must be rational, and logical[7].

Recent cases show that credit findings must, if possible, rely upon something tangible than things like demeanour alone which should now, if possible, be avoided. Corroboration in some form is now, as it were, queen.

If one party's or witnesses' version is to be preferred, you must say why[8]. It is not sufficient just to set out one party's version and evidence, and then the other party's and then simply assert that having seen or heard or considered them, the decision is in favour of one or the other[9].

Adequate reasons require, again, that the unsuccessful or disbelieved party can see *why* you have not accepted their factual contentions. Appeal courts and tribunals can and will interfere if the basis of factual findings is not apparent[10].

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6 *Applicant NAFF of 2002 v Minister for Immigration* (2004) 221 CLR 1, at 26.

7 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 207 ALR 12; (2004) 78 ALJR 992.

8 *Judgment Writing*: Sir Harry Gibbs, (1993) 67 ALJ 494 at 497.

9 *Goodrich Aerospace v Arsic* (2006) 66 NSWLR 186, per Ipp J at [28].

10 *Fox v Percy* (2003) 214 CLR 118; *CSR Limited v Della Maddalena* (2006) 80 ALJR 458 at 465.

I acknowledge, again, that in the kinds of matters falling to be determined by administrative decision-makers there is sometimes limited scope, or sparse material, upon which to make these decisions. The cases, especially the decisions of the High Court in the past two decades, probably add to your burdens: in particular, if you are confronted with a decision in which credit or factual findings are critical and you do not have sufficient material to make them, an obligation may arise to alert the parties to the problem and invite them to make further submissions, or present further evidence.