Queensland Law Society Inc and Bar Association of Queensland
SYMPOSIUM 2001
Gold Coast – Friday 2 March 2001

ADMINISTRATIVE LAW

THE OBLIGATION TO GIVE REASONS

Justice Margaret Wilson

[1] In keeping with the Symposium's traditional emphasis on practical skills, I propose concentrating on content and technique in the performance of *The Obligation to Give Reasons* in administrative decision making. I do so mindful that my exposure to administrative decision making has been as a lawyer, not an administrator. My perspective is necessarily that of someone who has had the advantage of detachment and hindsight in reviewing what others have done.

[2] It is as well to recap briefly on the source of the obligation to give reasons. You will recall the High Court's decision in *Public Service Board of NSW v Osmond* (1985-86) 159 CLR 656 that there is no general rule of the common law or natural justice requiring reasons to be given for an administrative decision. Osmond was an officer of the NSW Public Service, who was unsuccessful in an application for promotion. He appealed to the Public Service Board, but lost. The Board declined to give him reasons for its decision. Its refusal to do so was upheld by the High Court.

Gibbs CJ seemed to doubt that an obligation to give reasons for an administrative decision could be founded on the rules of natural justice. He said (at page 670) –

> "It remains to consider whether, notwithstanding that there is no general obligation to give reasons for an administrative decision, the circumstances make this a special case in which natural justice required reasons to be given. The rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done after the decision has been made. However, assuming that in special circumstances natural justice may require reasons to be given, the present is not such a case."

Fifteen years later there is a more ready acceptance of an obligation to give reasons for administrative decisions. This is due in no small part to the increasing number of statutory prescriptions that reasons be given and the culture that has generated; it is also due to a greater willingness by courts to recognise cases as special ones in which natural justice requires reasons to be given. For example, in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 the House of Lords held that the Home Secretary was obliged to give reasons in fixing non-parole periods for various prisoners sentenced to life imprisonment. The refusal to do so was unfair and contrary to the requirements of natural justice. According to their Lordships the classes of case where there is a duty to give reasons include:

(i) where the subject-matter is an interest so highly regarded by the law (eg personal liberty) that fairness requires that reasons, at least for particular decisions, be given as of right;

(ii) where the decision appears aberrant, fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real or apparent.

Closer to home, in *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462 Fitzgerald P said (at pages 475-476)-

> "...the law has moved on in the decade since *Osmond*…
>
> even *Public Service Board v Osmond* does not hold that fairness does not ordinarily require that reasons be given for decisions which affect rights and liabilities; its conclusion was rather that at that time, those who made administrative decisions were not required to provide reasons because that was established by a long line of authority. It is not really surprising that, in a complex society in which there is a proliferation of tribunals with power to affect citizens' rights and liabilities, the courts have come to insist that it is an incident of a duty to act fairly that decisions be adequately explained."

[3] A tribunal with a statutory obligation to state its "findings in relation to the facts of the case" may also have a wider obligation under the general law to give reasons for

its decision – eg. the Solicitors Complaints Tribunal (*AG v. Kehoe* [2000] QCA 222, 6 June 2000) and the Statutory Committee of the Queensland Law Society (*Adamson v Queensland Law Society Inc.* [1990] 1 Qd R 498). In *Kehoe*, where there was no conflict in the evidence in relation to a charge of unprofessional conduct, the Court of Appeal said that the Tribunal ought nevertheless to have done more than simply announce that the charge was proved, that it imposed a fine of so much on the practitioner, and that it made the normal order as to costs. It should have stated briefly which facts it considered material, the inferences it drew from them and the basis upon which it considered a particular penalty to be appropriate.

[4] The failure to give reasons, or to give adequate reasons, for an administrative decision where reasons are required may be an error of law: *Muralidharan v Minister for Immigration* (1996) 62 FCR 402; *Dornan v Riordan* (1990) 24 FCR 564*; McIntyre v Tully* [2000] QCA 115, 11 April 2000; *Absolon v NSW Technical and Further Education Commission* [1999] NSWCA 311, 30 August 1999.

[5] The adequacy of reasons, in the sense of their sufficiency in content and form, has to be looked at in the context of the nature of the question to be decided and other factors such as the functions, talents and attributes of the decision maker (*Cypressvale* at 485 per McPherson and Davies JJA). In the case of tribunals exercising quasi-judicial powers, the level of sophistication required may approach that required of the judiciary, but there is a vast array of administrative decisions for which that would be unnecessary and inappropriate. Most administrative decisions do not require the resolution of an inter partes conflict - in other words, the administrative decision making process will usually be quite different from the judicial decision making process. That difference will often be reflected in the content and form of statements of reasons for administrative decisions.

[6] There may be a statutory requirement to give reasons, and some statutory prescription of the content and form of the statement of reasons. Otherwise, what is required to fulfil the duty to give reasons will, like other aspects of natural justice, depend on all the circumstances, including the nature of the decision. In *Baker v Canada* [1999] 2 SCR 817, a deportation order was made against a woman with Canadian born dependent children. She then made a written application for

exemption from the requirement that an application for permanent residence be made abroad. The application was dismissed by a senior immigration officer without a hearing and without giving formal reasons. Her counsel requested and was provided with the notes made by the investigating immigration officer and used by the senior officer making his decision. The Supreme Court of Canada held that natural justice required the giving of reasons for the decision, and that in the circumstances the obligation had been fulfilled by supplying the investigating officer's notes.

[7] The statement of reasons should reveal the steps in the reasoning process by which the ultimate decision was reached. While it is generally unnecessary to give reasons for the conclusion reached on every intermediate issue, reasons should be given for the conclusions on the "principal important controversial issues" *(Bolton Metropolitan DC v Secretary of State for Environment* (1995) 71 P & CR 309 at 313-14 per Lord Lloyd of Berwick). Recently the Court of Appeal determined an appeal from the Solicitors Complaints Tribunal in *Queensland Law Society Inc v Carberry* [2000] QCA 450, 3 November 2000. The Court was critical of the Tribunal's failure to give reasons for its conclusions, which included the conclusion that, in circumstances of potential conflict of interest, the practitioner had inadvertently or accidentally advanced the interests of others over those of his client. Pincus JA said (at para [6]):

> "It is my respectful opinion, that, at least in major matters, the Tribunal's practice of stating unreasoned conclusions, when dealing with such a serious question as possible removal of a practitioner, is entirely unsatisfactory. A result of the practice can be that conclusions are reached as a matter of impression, rather than by careful analysis of the details of the evidence."

[8] What is required is a statement of the actual reasons for the decision in question. See *Minister for Immigration v Singh* (2000) 98 FCR 469; *Minister for Immigration v Taveli* (1990) 23 FCR 162 per French J. What findings of fact were made? What material was considered in arriving at those facts? If it was necessary to choose between rival contentions, what were the competing arguments, and why was one preferred over the other? What were the reasons for the ultimate decision? It is beside the point that there may be some other ground (perhaps a better one) which

would have justified the same decision. Where the statement of reasons is drafted by someone other than the ultimate decision maker, there may be an unconscious temptation to stray from the actual reasons into some ex post facto rationalisation. The temptation has to be resisted!

[9] Writing style is very individualistic. Can I nevertheless make some suggestions and observations which you may find helpful in preparing or analysing statements of reasons? Whatever its length, a statement of reasons needs to be logically structured. The decision and the decision maker need to be clearly identified. So, too, should the source of the power or obligation to make the decision: this will often be a specific statutory provision.

[10] Where an administrative decision maker is called upon to make decisions of a particular type, it is likely that a decision will be stored on a word processor and used, to some degree at least, as a pro forma for later decisions. There is nothing inherently wrong with this. Indeed, such a practice can not only afford a ready check list of relevant factors; it can even promote consistency of decision making. However, always remember that each case has to be considered on its individual merits. In *Minister for Immigration v Wu Shan Liang* (1996) 185 CLR 259 (at page 266) the High Court cautioned against the use of a verbal formula **"**to cloak..[a].. decision with the appearance of conformity with the law when .. [it] .. is infected by one of the grounds of invalidity prescribed by the [relevant] Act. " Not only would "the incantation of the formula" not save the decision from invalidity; its use may even be evidence of an actionable abuse of power by the decision maker. Recently a judge of the Supreme Court (Williams J, as he then was) was called upon to review the reasons of the Chief Executive of the Department of Corrective Services for renewing a "maximum security order" in relation to a prisoner. He commented on the similarity in wording used in providing reasons in the case before him with that used in another case recently before the Court, and emphasised that to be proper the reasons must be directed at each separate individual and address the issues relevant to each individual. *(Abbott v Chief Executive, Department of Corrective Services*, 21 December 2000).

[11] If you are writing a statement of reasons, try not to be verbose: it is worth taking the time and effort to be succinct, if that is possible. Use simple language. Try to avoid long, convoluted sentences: they can be mistaken for convoluted reasoning processes! When you think you have said all that needs to be said, go back over the statement of reasons: does it contain everything it needs to contain; is there surplusage which can be cut out; does it have a logical flow, or could it be improved by cutting and pasting?

[12] There is a widely held view that consciousness of the obligation to give reasons for administrative decisions improves the quality of the decision making itself. The formulation of a statement of reasons is a great mental discipline. But it is important to maintain perspective and balance. Some argue that it can impose an undue burden on a decision maker; that it can increase costs and delay; and that in some instances it can lead to a lack of candour. These negative factors must never be allowed to outweigh the positive benefits to the decision making process and to those affected by administrative decisions that are to be gained from the giving of reasons. If decision makers approach the giving of reasons responsibly and with common sense, the appropriate balance can, I am sure, be attained.