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# Administrative Decision Making in the Public Sector

## Managing Legal Risk

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# Administrative Decision Making in the Public Sector

## Managing Legal Risk

In this presentation I shall give a general overview of the nature of administrative decisions and the role of lawyers in assisting decision makers. Jo Kummrow shall explore what is involved in according natural justice to a person affected by a decision, a common area of legal risk for decision makers. Domenic shall then navigate us through the sometimes daunting task of preparing reasons for decision.

## General Overview

### What are administrative decisions in the public sector?

In the public sector 'administrative decisions' are decisions by a public official, typically acting pursuant to a grant of power under an Act of Parliament. The decisions affect the rights and privileges of persons to participate in the occupational, social and recreational opportunities of our society.

Some common examples of 'administrative decisions' are decisions by public officials to:

- grant or not grant occupational licences (eg. a licence to conduct a real estate business), driver's licences and recreational licences (eg. hunting licence)
- compulsorily acquire the land of a person
- grant tax exemptions to persons
- commit a person to stand trial for a criminal offence
- grant or not grant water allocation rights to irrigators
- provide health services and educational services

### Examples of decisions that are not administrative decisions in the public sector

The decision by the executive branch of government to go to war is not an administrative decision. It is an Act of State, an exercise of

sovereign power and is immune from the scrutiny of Courts.

The decisions by an office holder in a private organisation may affect the rights and privileges of its members. However, the rules that govern these rights and privileges arise from a private arrangement or agreement. However, should a person in the organisation be aggrieved by a decision of an office holder, the legal regime that governs judicial scrutiny of that office holder's decision is similar to the judicial scrutiny of a public official's decisions.

The decision to follow a religion is a private decision. However, if for example, an official in the Education Department decided to add Intelligent Design to the curriculum as a science subject, the decision may be challenged as contrary to Section 2.2.10(1) of the Education Act 2006 as being outside the power of the official. That provision provides that public schools must be secular.

The decision to marry, the decision to buy a house, the decision to join a football club are all private decisions which once made, are consummated through the legal regime that governs these transactions or decisions.

### Who are the decision makers?

The decision makers are to be found in the executive arm of government and comprise the Ministers, Departmental Heads, Administrative Office Heads and Public Officials. Such officials include a myriad of junior and senior public servants.

### What guides their decision making?

The legislation relevant to a given decision generally only provides the framework in which decisions may be made and by whom, but does not generally map or detail the operational environment in which the legislation applies to the circumstances of an individual case.

That environment is often mapped in the Policies Practices and Procedures (PPP's) drafted and utilised by the officials of government

departments and public authorities. This is particularly the case in high volume areas such as planning and licensing.

The aim of PPP's is to attempt to consistently find the best fit between the interests of the persons affected by a decision and the interests of the State. Good PPP's achieve the objectives of the legislation and thus make for good decisions. An example of the relationship between the legislation and PPP's in decision making is that of an applicant who wishes to have a gun licence for hunting purposes.

An aim of the Firearms Act 1996 is to protect the community from firearms falling into the wrong hands. Another aim is to provide licences for certain sporting purposes. The decision maker has to balance these two aims when considering the application. The legislation requires, in section 104, that the applicant be 'a fit and proper person' to hold a licence. The PPP's will assist the decision maker in carrying out the balancing exercise by providing guidance on how the standard of 'fit and proper person' is met.

### **A good decision maker**

A good decision maker is expected to leave his or her prejudices and subjective views at home, not abuse his or her power, adhere to the requirements of the legislation and be guided by the principles of logic and rationality with sound judgment.

The following requirements for good decision making can be distilled from the common law:

- That the decision maker has the legal authority to make the decision.
- That certain legislative notice provisions and time requirements are complied with.
- That where the decision maker is required to give a person the opportunity to comment on material that may be unfavourable to them or otherwise be heard, that they be given that opportunity before a decision is made. (Natural justice or procedural fairness)
- That the documentation before the decision maker is the complete record of

the facts and information relevant to the case.

- That all relevant considerations, facts, arguments, submissions are taken into account, not just those that justify the preferred decision; an irrelevant consideration includes fear of creating an undesirable precedent.
- That the decision be 'reasonable' in all the circumstances.
- That the merits of the particular case are considered rather than the rigid application of policy to a given class of cases.
- That any conflict of interest is avoided and that any apprehended bias is avoided.
- That there be consistency between like cases which are treated in like ways.
- That decisions are made in a timely manner and communicated clearly rationally and respectfully.
- That where there is a duty to give reasons the decision maker is required to be abundantly clear as to what issues were considered and the reason relevant material was accepted or rejected, so as to fully explain the basis for the decision.

### **Challenging administrative decisions**

#### ***Judicial Review***

Generally the common law did not consider judicial review as a mechanism for the judiciary to make an administrative decision that the parliament had entrusted to a public official. Instead, judicial review was limited to an enquiry into the process by which the decision was arrived at. Judicial review was concerned to enquire into those requirements outlined above under the title 'good decision maker'. If the decision making process was found to be flawed, the judge refers the matter back to the decision maker to be made again according to law.

The 'Wednesbury unreasonableness test' may be considered a form of merits review by the judiciary. The test arose out of the English case

of Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 233. The test is that the Courts could interfere with a decision notwithstanding that the process by which it was arrived at was appropriate in circumstances where the decision was so unreasonable that no reasonable decision maker could have come to it.

### **Victorian Civil and Administrative Tribunal**

Some administrative decisions can be reviewed on their merits where the decision maker stands in the shoes of the original decision maker and makes the decision anew.

A particular Act of Parliament may confer a power on VCAT to substitute *on the merits* a new decision instead of the decision appealed from.

### **The role of administrative lawyers in the public sector**

Administrative Lawyers may provide two types of legal service, a reactive service or a proactive service. The reactive service is where lawyers wait for the decisions of their clients to be challenged and provide them with strategic legal advice to meet the challenge. Administrative lawyers are essentially litigators in this role.

The proactive service is where lawyers work with their clients in the early identification of legal risk in their decision making. This may involve working through existing PPP's and assisting them model new PPP's, particularly with respect to changes in legislation. This would also involve lawyers working closely with their clients in the making of those complex administrative decisions that carry high legal and reputational risk for their clients. Administrative lawyers are essentially preventative lawyers in this role.

It seems to follow that proactive legal services with reactive capacity minimise the exposure of clients to legal risk and optimise the management of legal risk when decisions are challenged.

Most government departments and agencies have in-house lawyers working in teams throughout their business units. Some legal disciplines outside the speciality of the teams are briefed out to external legal service providers. The challenge for in-house lawyers is to effectively target their services to the areas of need in the organisation. This can be difficult where some business units do not recognise the potential for legal risk just because they are not skilled in identifying legal risk. An approach to a lawyer by such a unit is only made when problems arise and the lawyer can only play a reactive role.

This challenge may be met if there is a commitment by the organisation as a whole to effectively utilise legal services. Whether in-house or external legal providers are utilised, a dynamic business plan with clear performance measures can effectively target areas of legal risk. This is achieved through a continual process of auditing and reviewing the types of legal services required in a given business unit. This is the process known as 'continuous improvement'.

### **The Victorian Government Solicitor's Office**

Sometimes the solutions are clear and all that is required is an independent and objective view of the legal risk landscape. VGSO offers an independent insight into the legal needs of its clients and, in servicing government clients exclusively, it brings a whole of government approach to finding solutions.

# Procedural Fairness - Important role of decision makers in government departments and agencies

The role of the decision maker in a government agency is often a difficult one. It poses daily complex questions for the decision maker and requires them to apply the relevant legislation to the facts of an application. In many cases, the facts will raise different issues not previously considered or judicially determined. You simply can't refer to a text book for a standard answer.

So while decision making is one of the most challenging aspects of the role, it is also one of the most interesting. Administrative decisions often involve complex or new legislation, uncertain facts with the ultimate result that their decisions may have a major economic or social impact on the applicant, whether they be an individual, organisation or the broader community.

I speak with the experience of having worked in an Australian consulate in Asia for two years assessing applications for migration to Australia. Many of the applications I determined related to spouse migration (now known as partner migration) which involved difficult decisions about the 'bona fides' nature of an application. In many respects the facts and ultimate decisions were not always clear cut.

You are no doubt aware of the impact of immigration law on the development of administrative law in Australia. Log onto the legal website, Austlii and conduct a search for 'administrative law and visa' and you will be met with a seemingly infinite list of immigration law cases.

Why? Possibly due to the large case load of permanent migration applications, coupled with the fact that such applications requires government representatives to make decisions that directly impact on the lives of the applicants and their sponsors. Also, decision making in the immigration jurisdiction often involves an assessment of uncertain facts pertaining to an application and balancing those facts against the legal requirements for the grant of a visa. The decision maker also faces a complex legislative

regime, which underpins the immigration area, and which is also overlaid with the policy of the government of the day.

As a decision maker, the primary concern for myself and my colleagues was to make a 'lawful decision'. Yet, none of us were legally trained.

A government decision maker is charged with the responsibility for ensuring that all legal requirements are satisfied, any relevant policy issues are considered, as well as taking into account relevant facts and seeking further information or material, if required. Ultimately, decision making is about making a fair decision in all of the circumstances.

Of course, there is always the option of an unsuccessful applicant seeking review of a primary decision. But our seminar today is about managing legal risk and so my task is to take you, the decision makers and those government lawyers advising decision makers, along what I like to call 'the path of good decision making'. Specifically, I will be discussing the importance of procedural fairness in the decision making process:

1. What is procedural fairness?
2. Why is it important?
3. General principles of procedural fairness
4. Some golden rules of procedural fairness
5. Checklist for good decision making

## What is procedural fairness?

The terms 'procedural fairness' and 'natural justice' are generally one in the same and people tend to use these terms interchangeably. For the purposes of my presentation, I will use the term 'procedural fairness' as it is the term more commonly used by the courts these days.

Procedural fairness arises through the common law and legislative requirements.

Sometimes legislation sets out procedural requirements that must be followed, such as the need to make a decision within a statutory timeframe (eg. 45 day decision period in freedom of information applications<sup>1</sup>). Another example is where a show cause notice is sent to a person and the relevant legislative provision prescribes the time period in which the applicant must provide a response (eg. 28 days). However, legislation is often silent on what must be done to satisfy procedural fairness requirements.

Procedural fairness has primarily developed through the common law and the consideration by courts of legal cases seeking to challenge the administrative decisions of government.

What is required to satisfy procedural fairness requirements will depend on the circumstances of the case. For example, the nature of the inquiry, the subject matter and statutory rules under which decision maker is operating.

Generally, procedural fairness requires fairness and a common sense approach.

For example, procedural fairness requires that a person, whose interests or rights will be affected by a decision (presumably negatively) must be:

- informed about the basis upon which the decision to refuse the application is to be made (eg. the decision maker has received adverse information from a third party); and
- provided with a reasonable opportunity to receive a fair hearing and respond to any concerns before a final decision is made.

The relative seriousness of the consequences for a person arising from the exercise of a decision making power can also affect the content of procedural fairness.<sup>2</sup>

### Why is it important?

Whether you are making a decision about a visa or a certificate of registration, a professional conduct issue or providing access to documents, a decision may be held by a tribunal or court to be invalid if it is not made in accordance with procedural fairness requirements – both statutory and under the common law.

Procedural fairness principles have evolved from the view that government decision making should be fair and reasonable.

Case law that considers procedural fairness issues focuses on the importance of how the decision is made and the process involved in decision making rather than the actual decision.<sup>3</sup>

Importantly, procedural fairness allows a person whose interests or rights may be affected by a decision the opportunity to:

- raise arguments in their favour;
- show cause why proposed action should not be taken;
- deny or explain any allegations and provide evidence to rebut those allegations or claims; and
- raise any mitigating circumstances.

### General principles of procedural fairness

The general principles underpinning procedural fairness require decision makers to:

- inform an applicant of the case against them or their interests and give them an opportunity to be heard – known as the ‘hearing rule’;
- not have a personal interest in the outcome of a decision – known as the ‘no bias rule’; and
- act fairly and on the weight of the evidence – known as the ‘no evidence rule’.

The High Court case of *Kioa v West*<sup>4</sup> sets out a number of these general principles. Numerous cases have since followed which apply these general principles to different fact situations.

The facts of *Kioa* involved a decision to refuse a visa to an applicant. A subordinate officer in the Immigration Department provided a submission to the decision maker in which the subordinate officer commented on the possible non-genuine reasons for the applicant wishing to remain in Australia. In making the decision, the decision maker did not refer to comments. A majority of

the High Court held that the decision maker had an obligation to put those claims to the applicant so that he could be given the opportunity to deal with relevant matters adverse to his interests. As this was not done, the High Court found the decision was invalid.

It is also important to note that procedural fairness is not a concept that applies only to individuals who are subject to the decisions of government. Large corporate organisations also require that legislative and common law procedural fairness requirements are complied with.

On 5 April 2007, the Federal Court handed down a decision in the matter of *Telstra Corporation Limited v Australian Competition and Consumer Commission (No 2)*.<sup>5</sup> While dealing with federal telecommunications and competition issues, the case provides a recent restatement of the principles of procedural fairness. The court held that Telstra was denied procedural fairness when it was not given an opportunity to be heard in respect of issues or material; which were adverse to Telstra that were not apparent from a Consultation Notice issued to the company by the Australian Competition and Consumer Commission. The Court also held that while a provision in the relevant legislation set out a procedure to be followed in relation to the content and issuing of notices, the obligation to accord procedural fairness at common law was not displaced by that statutory provision.

Due to the time available for my presentation today, I propose to focus on dealing with adverse information. The key aspects of the other two principles mentioned above are referred to in this paper.

### Some golden rules of procedural fairness

***Inform an applicant of the case against them or their interests and give them an opportunity to be heard – known as the ‘hearing rule’***

The hearing rule requires that a person be provided with any ‘credible, relevant and significant’<sup>6</sup> information in the decision maker’s possession that is adverse to that person and relevant to the decision to be made. Procedural fairness requires that the applicant be afforded a

‘reasonable opportunity’ to put their case, or to show cause, whether in writing, at a hearing or otherwise, why contemplated action should not be taken or whether a particular decision should be made (for eg. a negative decision).

What will amount to a ‘reasonable opportunity’ will vary according to the circumstances, but will generally invoke the ‘hearing rule’, which is referred to below, and involves:

- providing the applicant with a copy or summary of the adverse information where a third party has provided such information in confidence to the decision maker; or
- putting the adverse information to the applicant at an interview, particularly where time and delay is a factor.

Communication with an applicant should be in writing and include the adverse information or sufficient details of that information so that the applicant can provide a meaningful and informed response.

Procedural fairness also involves giving adequate notice of an ‘invitation to comment’ and providing access to the adverse material. In the case of *Robb Dale v Chief Commissioner of Police*<sup>7</sup>, the Victorian Supreme Court held that the applicant was ‘significantly disadvantaged’ by not being given access to documents relevant to the allegations made against him and before the decision maker.

Following a written submission or an interview, circumstances may require that the applicant be given a further opportunity to provide a further submission.

However, adverse information need not be provided to an applicant where it relates primarily to a person other than the applicant<sup>8</sup>, unless it has a damaging potential.<sup>9</sup>

In relation to the time accorded to an applicant in which to provide their comments or respond to adverse information, what will amount to a ‘reasonable opportunity’ will vary according to the circumstances and will be judged by an objective standard being what a reasonable

person would believe was a reasonable opportunity given the circumstances.

In the absence of any breach of procedural fairness, a decision maker will generally not need to consult with an applicant if the decision maker has merely evaluated the evidence before him/her, as provided by the applicant, and determined that it does not support the applicant's application. Although, in some circumstances, for example, where the decision maker disputes a historical fact, it may be necessary to provide the applicant with an opportunity to furnish further evidentiary evidence.<sup>10</sup> Also, if the relevant issue is so critical that the applicant should have dealt with it in their application, and has not done so, the decision maker may be obliged to seek the views of the applicant on that issue prior to making a decision.

Upon receipt of a response by, or an interview with the applicant, it is imperative that the decision maker consider any response provided by the applicant and take it into consideration when making their final decision.

It may also be the case, as in *Kioa*, that the decision maker does not rely on the adverse information in making their final decision. However, the courts have held that it is enough that there is a risk of prejudice to the applicant<sup>11</sup> regardless of whether the decision maker makes reference to this fact or omits any reference to the adverse information.<sup>12</sup>

The principles of procedural fairness do not require a decision maker to make a case for or provide advice to an applicant about their application<sup>13</sup> unless required by the relevant legislation.<sup>14</sup> However, it is commonly accepted that a part of good government administration involves providing assistance to applicants when it appears to be needed so that they are able to lodge valid applications for determination.

Further, if the decision maker has made a representation that he or she will do something (eg. further consult with the applicant) the concern of the law is to avoid practical injustice. In such circumstances, a decision maker may be required to further consult with the applicant.<sup>15</sup>

The issue of delay can constitute a breach of procedural fairness and potentially invalidate a decision. Therefore, it is important to avoid delay especially if there are issues of demeanor or credibility involved in an application and if delay is attributed to the actions (or inaction) of the agency.

The issue of delay was considered in the Federal Court case of *Applicant S296 of 2003 v Minister for Immigration and Multicultural Affairs*.<sup>16</sup> The facts of this case involve an applicant with a psychiatric illness. Eighteen months prior to being given a first hearing date the applicant lodged with the Refugee Review Tribunal, an application for review of a decision to refuse him a visa. Due to his illness, the applicant was unable to attend the first hearing and a second hearing was scheduled. However, the applicant sought to have the second hearing adjourned in order that he could undertake a psychiatric assessment. The Tribunal declined his request and made a decision on the material before it. The Federal Court held that the Tribunal member did not give consideration to the fact that the application for review had been on foot for a significant period of time (some two years). It held that this fact, when taken together with the acceptance by the Tribunal member that the applicant suffered from a mental illness, required that there be at least another opportunity given to the applicant to put forward, or to seek to put forward, material from him in person.

If delay is a factor in a decision, it should be referred to and explained in the reasons for decision.<sup>17</sup>

### ***Acting fairly and on the weight of the evidence***

The requirement that a decision maker act only on the basis of logically probative evidence is known as the 'no evidence rule'. This principle of procedural fairness requires decision makers to make reasonable inquiries or investigations and ensure that their decisions are based upon findings of fact which are based upon sound reasoning and relevant evidence.

### ***Not having a personal interest in the outcome of a decision***

This procedural fairness requirement is commonly known as the ‘no bias rule’. It requires decision makers to act fairly and without bias in making decisions, including ensuring that no person decides a case in which they or someone they know has an actual or perceived pecuniary interest or conflict of interest in relation to the outcome of the decision. The ‘no bias’ rule also requires that decision makers, when exercising their powers, must put aside any personal prejudices or dislikes in relation to an applicant.

### **Decision making checklist**

The VGSO has prepared a checklist for decision makers to assist in good decision making. A copy is attached to this paper. We emphasise that it is not an exhaustive list.

### **Importance of training new decision makers and ongoing training**

Government departments should ensure that training is provided to new decision makers and that all decision makers are provided with ongoing training. For example, government lawyers should keep abreast of developments in case law with respect to procedural fairness requirements and general administrative law principles. Such information can be summarised and disseminated to decision makers and inform ongoing training sessions.

It is also important that decision makers are encouraged to discuss issues (subject to confidentiality) that arise from their decision making duties and to share knowledge among their colleagues for consistency and mutual learning.

### **More information**

Most commonly advice will be sought on statutory decision-making powers and the application of legal requirements to a particular fact situation. While it may not always be necessary, it may be prudent to run a query past a lawyer, whether they be an inhouse or external lawyer, to discuss what may be required to

satisfy procedural fairness requirements in the circumstances.

When seeking such advice, ensure that you provide the lawyer with all relevant facts and any previous decisions made by your agency that may be relevant to that case.

The Administrative Review Council is currently working on a practical publication on procedural fairness for government decision makers.<sup>18</sup>

For copies of all cases referred to in this presentation, see [www.austlii.edu.au](http://www.austlii.edu.au).

### **Checklist for decision makers**

- Ensure you have the appropriate legal authority or jurisdiction to make the decision (eg delegation)
- Understand the relevant legislative provisions (eg what considerations, if any, are relevant to making a decision)
- Understand your agency’s policy guidelines (if any) and how they apply – as a general rule, policy needs to be flexibly applied
- Ensure that a written record (eg a file note) of all meetings, telephone calls, emails and other correspondence is placed on the application file
- Ensure that contact with an applicant is meaningful and well communicated
- Review all information and material provided with the application
- Identify and consider all relevant information
- Identify any issues of concern or where further information/consultation is required
- Consult with the applicant and other parties (if necessary) to obtain any required information or material
- Ensure that any procedural requirements, set out in the relative legislative provisions or under the common law are observed,

particularly where a person may be adversely affected by a decision

- Give the applicant a reasonable opportunity to comment on information or material that may be unfavourable to them prior to making a decision
- Consider all further information or material provided by the applicant that is relevant to the application
- Consider any previous decisions made by your agency that may be relevant to this case
- If delegated to make a decision, ensure that you exercise your powers in your personal capacity – your decision must be independent and free from interference (eg by a manager or Minister)
- Avoid any conflicts of interest and bias in your decision making
- Act fairly on the weight of the evidence
- Observe any privacy issues when disclosing information or material relevant to an application
- Ensure that decisions are made in a timely manner and observe any statutory time periods
- Be consistent in your decision making

## Preparing Reasons for Decisions – some survival tips

### Introduction

For most decision-makers, providing reasons for a decision can be a daunting task. This apprehension is quite understandable given that these reasons will probably form the starting point of any criticism of a decision.

In the audience today will be people who are responsible for making administrative decisions. There will also be many others of you who might be engaged by decision-makers to provide assistance in the drafting of reasons, or advice about issues relating to reasons, including whether they have to be given.

My talk today is intended to provide some suggestions on how to go about giving reasons.

### The Public Policy in favour of giving reasons for decision

Before getting started with an analysis of what you should do, it is worthwhile to remind ourselves why giving reasons is important.

In relation to the decision maker and person who is affected by the decision, reasons:

- provide fairness by enabling decisions to be properly explained;

- assist in making a decision whether to exercise rights of review or appeal; and
- assist in defending a decision - otherwise a Court/Tribunal might infer reasons itself, which might not be favourable to the decision maker.

However there are also other more general benefits in providing reasons:

- Improve the quality of decision-making.
- Promote public confidence in the administrative process.
- Assist tribunals and courts to better perform administrative or judicial review.

In *Commonwealth of Australia v Pharmacy Guild of Australia*,<sup>19</sup> Sheppard J noted that the provision of reasons engenders confidence in the community that the decision maker has gone about their task appropriately and fairly.

Public policy considerations have also been cited against a general right to reasons, for example the costs and delay that potentially occur as a result of this requirement; and the resultant timidity of decision-makers who might not want to have their decisions challenged.<sup>20</sup> However the reforms of the past

30 years in Victoria have clearly shown a strong preference in favour of providing reasons.

### Seven questions you should ask yourself when preparing a statement of reasons

In June 2000, the Administrative Review Council published the booklet 'Practical Guidelines for preparing statement of reasons'.

Whilst these guidelines are specifically focussed on the requirements under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act), they provide a useful reference point for decision-makers and those engaged to assist in drafting reasons.

The Guidelines recommend that seven matters are addressed when preparing a statement of reasons:

1. Do I have an obligation to give reasons for decision?
2. Can I refuse to provide a statement of reasons?
3. What must be in my statement of reasons?
4. How and when should my statement of reasons be prepared?
5. How should I treat recommendations, reports or submissions in my statement of reasons?
6. How should I treat confidential information in my statement of reasons?
7. What happens if my statement is not adequate?

For the purposes of this talk, I propose to explore how questions 1 and 3 apply to Victoria's circumstances.

I propose to also look at how you might follow these guidelines in a real life situation.

### Question 1: Do I have an obligation to give reasons?

#### Common Law

*Public Service Board of NSW v Osmond*<sup>21</sup> is regularly cited as authority for rejecting any

common law right to reasons for administrative decisions.

In that case, the High Court unanimously rejected the proposition that natural justice/procedural fairness comprised a third element, namely the requirement that reasons be given for an administrative decision.

It should be noted however that Gibbs CJ, with whom the rest of the Court agreed, did leave open the possibility that there might be special cases where the requirements of procedural fairness did require that reasons for a decision be given.<sup>22</sup> There has been an attempt to rely on this exception, in conjunction with the changing meaning of procedural fairness, to return to the position put forward by Kirby P in his Court of Appeal judgment in *Osmond*<sup>23</sup> which was that there is a common law obligation to provide reasons unless the nature of the decision make this inappropriate.

However the common law position is mostly irrelevant in Victoria, given that Parliament has introduced legislation imposing an obligation to provide reasons for most administrative decisions.

#### Legislative obligations

In Victoria, there are numerous examples of where Parliament has imposed an obligation on decision-makers to give reasons. These examples can be divided into three categories:

- Legislation that imposes a requirement for reasons in respect of a specific statutory function (eg s 27 of the FOI Act).
- An obligation to provide written reasons upon request for decisions that can be appealed to VCAT (ss 45 and 46 of the VCAT Act 1998).
- A general obligation to provide written reasons under s 8 of the *Administrative Law Act 1978* (the AL Act).

For the purpose of this talk, I will restrict myself to examining s 8 of the AL Act.

### **The obligation to give reasons under s 8 of the AL Act 1978**

Section 8(1) of the AL Act states:

A **tribunal** shall, if requested to do so by any person affected by a **decision** made or to be made by it, furnish him with a statement of its reasons for the decision.

Tribunal is defined by the AL Act to mean:

**A person or body** of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law **required**, whether by express direction or not, **to act in a judicial manner to the extent of observing one or more of the rules of natural justice**. [my emphasis]

This can be contrasted to the situation under the ADJR Act which enables any aggrieved person to seek reasons for a decision (s 13 of the ADJR Act).

The Administrative Review Council has criticised this aspect of the AL Act as creating uncertainty.<sup>24</sup> In my opinion, this criticism has substance.

One example which I have encountered a number of times relates to the question whether the Governor in Council is a 'tribunal' for the purposes of the AL Act. This is an important issue given the large number of statutes which require decisions to be made by the Governor in Council.

#### **Decisions of the Governor in Council**

In *FAI Insurances Ltd v Winneke*,<sup>25</sup> the High Court found that the Governor in Council was subject to the requirements of natural justice/procedural fairness. However the High Court did not provide any majority view as to whether the Governor in Council could be considered to be a 'tribunal' or whether the Governor in Council was making a 'decision' for the purposes of the AL Act.

One year after the FAI decision was handed down, Fullagar J in *Orientimix Australasia Pty Ltd v City of Melbourne & Ors*<sup>26</sup> took the view that FAI did not provide any authority in relation to whether the Governor in Council was a 'tribunal' for the purpose of the AL Act and proceeded to

find that, for the purposes of s 41(3) of the *Planning Appeals Board Act 1980*, the Governor in Council was **not** a 'tribunal'. The rationale for Fullagar J's decision was that the requirement of natural justice/procedural fairness had to be met prior to the matter reaching the Governor in Council, and not by the Governor in Council, therefore the Governor in Council was not a 'tribunal'.

Interestingly, Fullagar J also took the view that the Governor in Council did not make any 'decisions' for the purposes of the AL Act given that it merely gave 'formal effect to the decision of others'.<sup>27</sup>

This is interesting because it leaves open whether the person making the 'decision'<sup>28</sup> might also be subject to the rules of natural justice/procedural fairness and therefore be considered to be made by a 'tribunal' for the purposes of the AL Act. The effect of such a conclusion would be to subject that person to the operation of the AL Act, including the obligation to give reasons.

In contrast to *Orientimix*, Gobbo J in *Jones v Committee of Classifiers, Technical Schools*,<sup>29</sup> took the view that the Governor in Council was a 'tribunal' for the purposes of the AL Act. However this view was merely obiter dicta and did not relate to the primary question of whether the Committee of Classifiers, Technical Schools was a 'tribunal' (which Gobbo J concluded that such a Committee was *not* a 'tribunal').

Accordingly, it is likely that *Orientimix* still represents the common law view that the Governor in Council is not a 'tribunal' for the purposes of the AL Act and therefore there is no obligation to give reasons.

Nevertheless, the *Orientimix* decision represents a view of a single Supreme Court judge, and would appear to be at odds with the progress made in administrative law over the past 25 years (eg Mason CJ in *Kioa v West*<sup>30</sup>). It is conceivable that the correctness of this authority might be challenged one day.

Such a challenge might conceivably argue that there is an obligation to give reasons, although this obligation might in practice rest on the relevant Minister. Whether this obligation can be assigned to the Minister on the basis that she or he is a delegate to the Governor in Council<sup>31</sup> or is the de facto decision maker<sup>32</sup> remains to be seen.

Accordingly, it is my opinion, that if reasons are sought in relation to a decision of the Governor in Council, there might be instances where the Minister might decide in the interests of good administration to provide reasons, albeit on the basis that the Governor in Council (or more appropriately, the relevant Minister) is not doing this under any obligation. Whether the Minister does this or not will be a policy consideration that needs to be made by him or her.

One example of this in which I was involved took place in 1998, when an order of the Governor in Council to 'call-in' a town planning appeal in relation to a proposed development of the old Niddrie Quarry was challenged in the Supreme Court by the Moonee Valley City Council.

In that instance, the Minister for Planning provided reasons (on behalf of the Governor in Council), although he maintained that there was no obligation on him to do so.

The Supreme Court in the Niddrie Quarry case considered the reasons of the Minister and found in favour of the Minister for Planning.<sup>33</sup>

I note in passing that, despite this decision of the Supreme Court affirming the validity the environmental approvals in the Niddrie Quarry case, subdivided lots from that site only began being sold at the site this year.

### **Question 3: What must be in a statement of reasons?**

Section 8 of the AL Act does not specify what the reasons should disclose (cf s 13 of the ADJR Act).

What will amount to adequate reasons will depend on the circumstances. However as a bare minimum, a statement of reasons needs to be in writing<sup>34</sup> and contain sufficient detail so as to enable a court to determine whether or not the decision contains an error of law.<sup>35</sup>

In my opinion, this requires that all material questions of fact are stated in the reasons. In other words, if there is a finding of fact which was relevant and which was taken into account in the chain of reasoning leading to the decision, it should be stated.

The reasons must express clearly why contentious issues were decided the way they were. In other words, if there is strong evidence in support of a particular conclusion and the tribunal reaches a different conclusion, then some explanation is required as to why this other conclusion was reached.<sup>36</sup>

It is not necessary to overwhelm yourself with the provision of elaborate reasons and it may be sufficient to be one or two pages long, provided any Court or Tribunal on review can see that you have addressed your mind to relevant matters and have not acted unreasonably.<sup>37</sup>

### **An example**

Whilst there can be no blueprint or universal pro-forma approach to reasons that can deal with every situation, it might be useful to apply the above analysis to a hypothetical example.

Section 151 of the *Aboriginal Heritage Act 2006* empowers the Aboriginal Heritage Council (AHC) to register certain Aboriginal corporations as Registered Aboriginal Parties (RAPs).

Corporations which obtain the status of RAP play an important role in the granting of cultural heritage permits and other approvals. These approvals can in some cases be critical for a development of land to proceed.

Whether or not an Aboriginal corporation is registered as a RAP for a particular area has a significant impact on the ability of that corporation to play a meaningful role in protecting cultural heritage.

At this stage, this Act is scheduled to commence on 28 May 2007, so it is possible to use this legislation for the purposes of a hypothetical example.

Applying the seven questions set out above:

1. *Does the AHC have an obligation to give reasons for decision?*

- There is no express obligation in the AH Act to provide reasons;
- Does it fall under s 8 of the AL Act? (need to consider whether it is a tribunal, and whether the decision made is within the definition of decision under the AL Act)
  - *Tribunal*: the AH Act expressly empowers the AHC to seek information from third parties for the purpose of determining these applications. In the absence of any contrary provision, the rules of procedural fairness would require any adverse material obtained from third parties to be put to the Applicant and an opportunity to respond is provided. Accordingly, I would consider that in this instance the AHC is a tribunal for the purposes of s 8 of the AL Act;
  - *Decision*: this decision is 'a decision operating in law to determine a question affecting the rights of the applicant'.
  - Consequently, in my opinion, the AHC would be required in this instance to provide reasons if requested.

2. *Can the AHC refuse to provide a statement of reasons?*

- Requests for reasons need to be made within 30 days of the notification of the decision.<sup>38</sup> If no request for reasons are made within this time, no reasons need to be provided.

3. *What must be in the statement of reasons?*

- The Council would be well advised to keep its statement of reasons as clear and succinct as possible.

- The Council needs to set out all material findings of fact. As part of this process:

- The AH Act requires that certain factors must be taken into account. If any of these specific matters are relevant, the reasons should make reference to these matters and how these matters affected the decision;
- The AH Act also permits the AHC to take into account any other matter it considers relevant, and allows the AHC to seek further information from third parties if this is necessary. If the Council has considered any such additional material, it should make reference to this in its reasons.

4. *How and when should the statement of reasons be prepared?*

- There is no obligation to prepare a statement until the AHC has been requested to do so.
- However a note of the decision should be made at the time the decision is taken. The contents of the note should be structured so as to assist in any future need to draft a statement of reasons. In *Singh v Minister for Immigration, Local government and Ethnic Affairs*,<sup>39</sup> Keely J said of the practice of another officer preparing reasons by simply working on the file without any instructions from the delegate as to what the reasons were at the time the matter was decided:

whatever may be said in favour of that practice when the reasons are drafted almost immediately after the decision, in my opinion it

is obviously undesirable where the reasons relate to a decision given some six months earlier.<sup>40</sup>

- The reasons should be expressed in terms intelligible to a layperson (ie reasons should be clear and simple).

5. *How should the AHC treat recommendations, reports or submissions in my statement of reasons?*

- Where a third party may have made a submission on a material issue of fact, the statement must deal with the submission and indicate the weight which the AHC has given to it.<sup>41</sup>
- Failure to refer to particular submissions may leave the Council open to the suggestion that the submission was not taken into account. As Pincus J noted in *Hoskins v Repatriation Commission*:<sup>42</sup>

If a submission worthy of serious consideration and seriously advanced is not dealt with, one ought to infer that it has been overlooked, giving rise to an error of law.

6. *How should I treat confidential information in my statement of reasons?*

- If confidential material is provided by a third party, the AHC should ensure that it is permitted to disclose this material pursuant to the *Information Privacy Act 2000*.
- The reliance on confidential material also raises issues of procedural fairness, which would have required that the applicant was given an opportunity to respond to the substance of this material if it contains information that it adverse to their claim.

In practice, decisions can often be written in a way which does not disclose confidential material, but indicates all relevant factors that have been taken into account, and given appropriate weight.

- Finally, matters of cultural sensitivity need to be taken into account when drafting reasons.

7. *What happens if the statement is not adequate?*

- The Supreme Court might require a further statement of reasons to be provided if it does not consider the reasons to be adequate.<sup>43</sup>

### Conclusion: getting the balance right

The aim of my talk is to provide a useful reference point for decision-makers and their advisers when preparing reasons for decisions.

In case my comments have raised the anxiety levels of some decision makers, some reassurance might be offered by the High Court which has taken the view that:

reasons of an administrative decision maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.<sup>44</sup>

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These notes are published with the permission of the presenters,

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The notes are not be regarded as legal advice.

<sup>1</sup> Section 21, *Freedom of Information Act* 1982 (Vic).

<sup>2</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>3</sup> *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72.

<sup>4</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>5</sup> *Telstra Corporation Limited v Australian Competition and Consumer Commission (No 2)* [2007] FCA 493.

<sup>6</sup> *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J)

<sup>7</sup> *Robb Dale v Chief Commissioner of Police* [2005] VSC 310.

<sup>8</sup> *Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77, 78).

<sup>9</sup> *Colpitts v Australian Telecommunications Commission* (1986) 9 FCR 52, 71.

<sup>10</sup> *Broussard v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 98 ALR 180, 189-190.

<sup>11</sup> *Kioa v West* (1985) 159 CLR 550, 602-603 (Wilson J) and 630 (Brennan J).

<sup>12</sup> *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72.

<sup>13</sup> *Luu v Renevier* (1989) 91 ALR 39, 45.

<sup>14</sup> Section 17(3), *Freedom of Information Act* 1982 (Vic).

<sup>15</sup> *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502.

<sup>16</sup> *Applicant S296 of 2003 v Minister for Immigration and Multicultural Affairs* [2006] FCA 1166 (28 August 2006).

<sup>17</sup> *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77.

<sup>18</sup> 'Current projects', Administrative Review Council, [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Latest\\_News](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Latest_News) (last accessed 19 April 2007).

<sup>19</sup> (1989) 91 ALR 65.

<sup>20</sup> eg R W Cole 'The Public Sector: The Conflict between Accountability and Efficiency' (1988) 47 Australian Journal of Public Administration 223.

<sup>21</sup> (1986) 159 CLR 656.

<sup>22</sup> *Ibid* 670.

<sup>23</sup> *Cypessvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462, 475-6 (Fitzgerald P).

<sup>24</sup> Administrative Review Council, *Review of the ADJR Act: Statement of Reasons for Decisions*, Report No. 33 1991.

<sup>25</sup> (1982) 151 CLR 342.

<sup>26</sup> (1983) 62 LGRA 152, 157.

<sup>27</sup> *Ibid* 157

<sup>28</sup> I am assuming that there is someone along the way who can be characterised as making a decision, an assumption I think is quite reasonable to make.

<sup>29</sup> Unreported Vic Supreme Court, 13 September 1983.

<sup>30</sup> (1985) 159 CLR 550.

<sup>31</sup> *FAI v Winneke* (1982) 151 CLR 342, 400 (Wilson J)

<sup>32</sup> *Ibid* 416 (Brennan J).

<sup>33</sup> *Moonee Valley City Council v Quadry Industries Minister for Planning and Or* (1999) 102 LGERA 367.

<sup>34</sup> s 8(3) of the ALA.

<sup>35</sup> s 8(4) of the AL Act.

<sup>36</sup> eg *Sun Alliance Insurance v Massoud* [1989] VR 8; approved in *Shepparton Petroleum Carriers Pty Ltd v Johnston* (Unreported Vic Supreme Court, Marks J 27 October 1989).

<sup>37</sup> *Masters v McCubbery* [1996] 1 VR 635 at 651 (Winneke P).

<sup>38</sup> s 8(2) of the AL Act.

<sup>39</sup> (1989) 18 ALD 638.

<sup>40</sup> *Ibid* at 640.

<sup>41</sup> *Dennis Willcox Pty Ltd v Commissioner of Taxation* (1988) 78 ALR 267.

<sup>42</sup> (1991) 32 FCR 443 at 448.

<sup>43</sup> s 8(4) of the AL Act.

<sup>44</sup> *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh & Gummow JJ).

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