11. Judicial Review Remedies; Obtaining Reasons for Decisions

Jurisdictional Error Recap

Three categories of mistakes a decision-maker can make:

1. JE where DM lacks jurisdiction (both MR and JR are available) (category 1)
2. JE where DM's jurisdiction is not exercised properly (both MR and JR are available, but for JR, must establish materiality) (category 2)
3. NJE, where JR remedies are typically not available (but may correct the face of the record with certiorari – therefore, really only MR is available)

Category 1 JR Grounds: No need to establish materiality

Most pure — Remedy: There is no decision at all

Sub-category	Statute	Case law
No authority at all to make a decision	*ADJR Act* ss 5(1)(c); 6(1)(c)	*MIMIA v B* (2004) 219 CLR 365 (concerned the jurisdiction of the Family Court)
Procedural *ultra vires*	*ADJR Act* ss 5(1)(b), 6(1)(b)	*Project Blue Sky*
Failure to satisfy the jurisdictional fact	*ADJR Act* ss 5(1)(h) and 5(3)(a) and (b); ss 6(1)(h) and 6(3)(a) and (b);	*Project Blue Sky; Timbarra; Plaintiff M70; Applicant S20*

Category 2 JR Grounds: Need to establish materiality

Where the decision-maker has authority but didn't exercise it properly, you must establish:

1. That the decision-maker failed to exercise their jurisdiction properly
2. AND that the error was material to the decision or to the conduct for the purposes of making a decision

   To then get a remedy

Sub-category	Statute	Case law
Breach of natural justice	*ADJR Act* ss 5(1)(a), 6(1)(a)	*Lam; Plaintiff S157; Miah; Kioa; Quin; Jia*
Fettering discretion by policy	*ADJR Act* ss 5(2)(f), 6(2)(f)	*Green v Daniels; Prygodicz* ('RoboDebt case); *MILGEA v Gray; British Oxygen*
Dictation	*ADJR Act* ss 5(2)(e), 6(2)(e)	*Rendell; Plaintiff M64; Loielo*
Delegation	*ADJR Act* ss 5(1)(c); 6(1)(c). See also the *Acts Interpretation Act*	*Re Reference; O'Reilly*
Unauthorised purpose	*ADJR Act* ss 5(2)(c), 6(2)(d)	*R v Toohey; Cunneen; Smethurst*
Relevant/Irrelevant Considerations	*ADJR Act* ss 5(2)(a) + (b); 6(2)(a) + (b)	*Trebilco; Murpheyores; Plaintiff M70/2011; Peko-Wallsend; Yusuf*
Wednesbury unreasonableness	*ADJR Act* ss 5(2)(g), 6(2)(g)	*Li; Singh; Wednesbury; SZMDS; Applicant S20*

Sub-category	Statute	Case law
No evidence	Common law – there has to be a lack or absence of evidence to satisfy an essential statutory element of the decision-making process to constitute an error of law. Merely inadequate evidence is not enough	*Melbourne Stevedoring; Viane*

Judicial Review Remedies

- Normally, the orders/writs the Court can make are unaffected by whether you have sought judicial review in the common law or through a statutory scheme, e.g. *ADJR Act, Constitution,* etc.
- But the specific remedy that a court might choose to issue will **usually be affected by the nature of the alleged error.** So it's going to turn on:
  - whether the **complaint relates** to a decision, or
  - a procedure used in the process of making a decision (**conduct** leading up to a decision), or
  - whether the decision-maker **failed to perform** a statutory duty because they **failed to make a decision**
- Remedies at the state and Cth level are the same

Origins and development

- 3 types of remedies considered
  1. **Prerogative writs —** certiorari, prohibition, mandamus and habeas corpus
  2. **Equitable remedies** — declaration and injunction
  3. **Statutory remedies** available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*').

> 💡 **Note:** The 'standing' rules that relate to the availability of remedies at common law and the time limits that apply to each will differ
> Go back to topic 6 notes to find these standing requirements

- Remedies also operate on the assumption that the government, including ministers, agencies, and public officials, are very likely to obey
- Contemporary examples of **habeas corpu**s being sought – *MIMA v Vadarlis* (2001) 110 FCR (release 400 asylum seekers from the MV Tampa vessel), *Hicks v Ruddock* (2007) 96 ALD 321 (to release David Hicks from Guantanamo Bay)
- Procedure for issuing prerogative writs has become increasingly complex → Procedural reform introduced with the *ADJR Act* and in every Australian jurisdiction (except for the HC and WA)
- See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82
  - HC indicated that different legal principles may govern the issue of **'constitutional writs'** as opposed to 'prerogative writs' → this is to distinguish that the writs referred to are the ones expressly specified in the *Constitution* (s 75(v))
  - See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651
- **A declaration (equitable remedy) is the most common remedy** in administrative law because of the flexibility and preparedness of government agencies, generally, to abide by a declaration of a court

- There are advantages, but sometimes it is necessary/desirable to apply for a prerogative writ rather than an equitable remedy
- Can seek both equitable and prerogative remedies at the same time in the same court
- Equitable remedies are unique because they can **apply to both public and private law** without differentiation
- See *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135

Common Law Remedies

Certiorari

'To be informed of' / 'to be certified of'

- Enables the superior court to quash a decision on the ground of jurisdictional error, breach of natural justice, fraud, or error of law on the face of the record (the grounds overlap), e.g. license has been cancelled, so you want the decision to be quashed
- Classic statement by Atkin LJ in *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* [1924] 1 KB 171, 205:

> 'Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act **in excess** of their legal authority they are subject to the controlling jurisdiction of the King's Bench division exercised in these writs'.

  - **Principle 1:** Certiorari issues to a body having **'the duty to act judicially'**
    - Directing the inferior court or tribunal to certify the official record *to* the superior court so that it **could be scrutinised for legal error**
      see *R v Northumberland Compensation Appeal Tribunal*; *Ex parte Shaw* [1952] 1 KB 338; *Re McBain*
  - **Principle 2:** Certiorari is directed to a body that can **'determine questions affecting the rights of subjects'**
    - Certiorari granted only where there is a decision that has **'a discernible or apparent *legal* effect upon rights',** i.e. there must be something that can be quashed
      see *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 303 ALR 64 [see next dot point]
- Certiorari to quash report or preliminary step may be refused if there is no legal effect to the decision *or* if there is a more convenient and satisfactory alternative remedy/process:
  - Remedy was refused because the report that had been prepared, even if contrary to natural justice, actually had **no legal consequence** attached to it
    Ainsworth v Criminal Justice Commission (1992) 175 CLR 564
  - But, certiorari can be issued if the action to be quashed is '**a precondition to a course of action** *or* as a step in **a process capable of altering rights, interests or liabilities'**
    see *City of Port Adelaide Enfield v Bingham* (2014) 119 SASR 1; *Rodger v De Gelder* (2011) 80 NSWLR 549
- Meaning and scope of 'the record'?
  - If it's a non-jurisdictional error: The remedy cannot be issued to quash a decision, but it can be issued to correct the error on the record; but if it's a jurisdictional error, the court can look at evidence beyond the record to ascertain the error: see *Shaw; Craig* and *Kirk*.

- Limits on the scope of judicial review of proceedings of inferior courts to both jurisdictional and non-jurisdictional errors are **narrowly construed**, i.e. the record should not necessarily include everything, if you want more then you need to look for a statutory appeal mechanism: see *Craig*
- **NSW prefers a broader view**, where judicial review should be used to correct legal error generally, and that the record should include the reasons for the ultimate determination: see *Supreme Court Act 1970* (NSW) **s 69(4)**
  - In NSW, we have legislation that states reasons for the decision are part of the record → which reasons are considered as part of the ultimate determination are **construed strictly**
  - **Note:** Even with a broader view, remember this remedy is not the same as a general appeal for an error of law, because it's determined based on different material: see *Easwaralingam v Director of Public Prosecutions* [2010] VSCA 353, [25].

- And it's doubtful that certiorari issues against a non-government body, even if it is exercising public sector power (UK decision of *Datafin* highlights a different approach taken compared to Australia. More likely, Australian courts would issue an equitable remedy)
- Certiorari is *not* a remedy listed in the *Constitution* s 75(v)
  - It wasn't included in the drafting of the *Constitution* as a way to ensure that the granting of original jurisdiction was confined to jurisdictional error only: see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476
  - Nevertheless, the court will grant certiorari as an **ancillary remedy** *with* the constitutional writs of prohibition and mandamus
  - But practice is that it will issue as an ancillary remedy to those listed in s 75(v); see *Aala*. Four certiorari issues emerge:
    1. **will not issue on its own** under s 75(v) unless entitlement to another constitutional remedy established;
    2. will **only issue** under s 75(v) **to quash jurisdictional error**, so as to mirror the grounds on which mandamus and prohibition issue;
    3. can issue under s 75(iii) or under s 76(i) (where it may issue for non-jurisdictional error of law on the face of the record) *(Plaintiff S157);*
    4. since it's not mentioned as a remedy in the *Constitution*, it **can be ousted by a privative clause.** However, since *Plaintiff S157,* the use of privative clauses in federal statutes has become largely theoretical.

> 💡 **Note**: Cases that have *started* in the Federal Court's original jurisdiction can issue the certiorari as a standalone remedy (per s 39B *Judiciary Act*) (*not* cases that have been remitted from the HC)
>
> - Whereas, the HC can only issue this remedy if you're entitled to prohibition or mandamus → so really think about where you want to start your matter by considering *what* you want to achieve

Prohibition

'We forbid'

- Granted by the superior court to **restrain a body** from exceeding its powers or usurping a jurisdiction that it does not have

- Grounds on which the writ commonly issues (see *Aala*): Want or excess of jurisdiction, breach of natural justice, and fraud
- Most frequently used in the Federal jurisdiction, and had developed in tandem with the law on certiorari (usually sought against the same bodies for the same reasons, but at different stages in the matter)
- Essence of the writ – classic statement in *R v Wright*:

> Writs of prohibition lie only in respect of acts to be done judicially [not about courts only, but rather it's about the nature of the acts being done, also by administrators]. Acts which are ministerial in their nature or administrative only or amount to the exercise of a subordinate legislative power, are not subject to the writ, even though what is done involves an excess of authority … prohibition is a proper remedy to **restrain a body or functionary that acts or is about to act beyond power.** But where there is no determination affecting existing rights, no question of fact or law submitted for decision, no exercise of a discretionary authority to the prejudice of person or property, nothing sought or proposed but the promulgation of a set of provisions regulating the future conduct of persons when they engage in define activities, in such a case there is no element or consideration present giving colour to the notion that the function is performed judicially so that an excess of authority may be restrained by a writ of prohibition.

  - A high threshold to satisfy before the court will grant this writ
- Differences from certiorari; prohibition:
  1. It is *not* for non-jurisdictional error of law on the face of the record: It only restrains a want or excess of jurisdiction ('record' is not a central element)
  2. It doesn't have the same requirement that a decision has to have an apparent/discernible effect upon rights
  3. **The central issue is whether there is a jurisdictional error** (so in *Ainsworth,* where certiorari could not issue, prohibition could)
- Temporal divide: Certiorari quashes a decision; prohibition prohibits further action being taken prior to a decision being implemented (sometimes overlaps)
  - Or continuing the operation of the decision (e.g. ongoing liability like fees) can provide a reason for the prohibition to be issued

Mandamus

'We command' (opposite to prohibition)

- Granted by a superior court to **command fulfilment of a duty of a public nature** that remains unperformed and for which no other specific legal remedy is available: see *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228.
- It can be sought by itself, or it can be combined with other writs
  - So it can be sought with certiorari → So it can quash a flawed decision that hasn't been made in accordance with the duty, and then mandamus can compel a fresh decision to be made, this time, in compliance with the duty
- **The central legal issue is whether there is a "public duty" that remains unperformed** → there must be a 'duty', not 'discretion', for the remedy to be available
- Five ways that issues can arise:
  1. Legislation will impose a non-discretionary duty that is to be performed once certain facts are established → To compel the decision-maker: *Randall*; *Bott*

2. A different role where a decision involving **a discretionary element has been erroneously made** → the court will grant mandamus to compel a fresh decision/exercise of power (but not in a particular way): *Randall*; *Bott*
    - Usually used where a breach is of one or more of the **criteria of legality,** e.g. breach of natural justice, consideration of irrelevant matter, wrong construction of legislation
    - e.g. there may be discretionary elements within the performance of that duty, and a jurisdictional error that occurs in connection with the discretionary element
3. Will **not** issue where the decision-maker, who acted erroneously in exercising a statutory power, is **under *no duty* to exercise that power,** e.g. in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319
    - So if mandamus is not available, certiorari is not available (in the HC)
4. To compel another court to **exercise jurisdiction that court has declined to exercise**, or to compel a court to **exercise jurisdiction differently,** e.g. to observe natural justice, or to construe a legislative provision differently: see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389
    - It doesn't normally issue to a superior court, but it will where the HC is able to direct mandamus to a superior court that is constituted by an officer of the Cth (so the Federal Court, rather than a state Supreme Court)
5. Where the **very existence of a public duty is the issue in dispute**:
    - *Yarmirr v Australian Telecommunications Corporation* (1990) 20 ALD 562 — no enforceable statutory duty to connect telephone services
    - *Mudginberri Station Pty Ltd v Langhorne* (1985) 7 FCR 482 — there was an enforceable statutory duty to provide meat inspectors
    - Public duty will exist (general rule) only when a statute imposes such a duty
    - International law does not impose duties enforceable in domestic law by mandamus, nor will it enforce a duty of a private nature (e.g. contractual obligations in private law)

Habeas Corpus

'We command you that you must have the body'

- Directed to the person responsible for the detention of another, requiring them to physically bring the body of the detainee to the Court, and do whatever the Court directs them to do
- They must be there in person, because if the Court determines that the detention is unlawful, they must be immediately released, and it is the only way to ensure their release
- Also used to question the **legality of detention** – immigration detention, mental health institutions, military conscription, employment bonding & child custody disputes
- 3 requirements must be met before habeas corpus will issue (see *Vadarlis* (*Tampa case*) and *Hicks*):
    1. detention **attributable** to the alleged detainor → *who is responsible* for the custody of the detainee (the respondent)
    2. detention must be **unlawful** → this is key (there are instances where restraints on liberty are lawful, e.g. wearing a seatbelt)
    3. detainee must have a **legal right to be released**
- *Vadarlis* — detention of a person need not involve complete or total restraint, e.g. in criminal cases, house arrest, periodic detention and bail are treated as forms of detention that can attract this writ

- *Hicks* — writ of habeas corpus can be sought to question the detention of a person detained *outside* the jurisdiction (although there can be the practical constraint and effectiveness of a court order regarding someone held in a foreign jurisdiction)

Injunction (Equity)

'Enjoin a course of action' (in the equitable jurisdiction, but referred to as common law jurisdiction)

- An order or decree made by a court **requiring** a party either to do a particular thing ('mandatory injunction') or to **refrain** from doing a particular thing ('prohibitory injunction')
- Injunction as a public law remedy:

  Cooney: An injunction can be sought by a **government instrumentality** (frequently the AG or a local council) **to enforce compliance** with a statutory requirement that, **if broken, would be a criminal offence**

  - Prohibitory injunction granted to a private company to restrain a statutory body from engaging in unauthorised activity: *see Bateman's Bay*
  - Mandatory injunction granted to a private company to compel a statutory body to fulfil its legal obligation to repair telecommunications equipment: see *John Fairfax & Sons Ltd v ATC* [1977] 2 NSWLR 400
- Attractive remedy:
  - It can be granted in interlocutory (interim) or perpetual form → It can be sought: Urgently, ex parte, and/or in Chambers
    - But interlocutory injunctions are often refused, e.g. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199
  - It is coercive: A person in breach can be committed for contempt of court
    - But only if there is no other alternate remedy (the Court will try and issue a different remedy if it can)
  - It developed as a public law remedy because it does not have the same restrictions or inadequacies as prerogative writs: *Bateman's Bay*
    - Unlike other writs, it can be quite flexible to suit the needs of the particular case
  - Issuance at the suit of the Attorney-General/local council to prevent a threatened interference with public rights: *Cooney* and *Bateman's Bay*

Declaration (Equity)

'To make clear'

- A conclusive statement by the Court of the pre-existing rights of the parties
- A declaratory order is *not* coercive
  - It cannot compel someone to do something, because it's just a statement about their rights
  - **But** if someone proceeds to act in a contrary way, then the action they take is considered to be devoid of legal effect
  - With it, the matter becomes *res judicata* (it cannot be relitigated), but it can give rise to new proceedings that are not being brought for a different remedy → **it creates legal rights as much as it declares legal rights**
- It can now be sought for alone without other writs
- Like injunctions, they're **adaptable**, e.g.

- Taxpayer sought a declaration that it was unlawful for a government agency to impose an obligation on him and millions of other taxpayers: see *Dyson v Attorney-General* [1911] 1 KB 410
- Declaration sought on legal issue currently before another tribunal, prior to tribunal ruling on the issue: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421

- **Constraints** on the court's power to grant a declaration are **discretionary** (it would not be granted if it wouldn't be effective)
  - The person applying must have standing to seek equitable relief
  - There must be a *real* legal controversy, and not a hypothetical issue to be resolved: *Forster*; *Enfield*
  - Court must heed the legality/merits distinction in framing, and not usurp authority of the Executive decision-maker: *Guo*

Statutory Remedies

Attempts to simplify what remedies are available for judicial review under **s 16 *ADJR Act***

Reflection of the common law

- Central purpose of Cth *ADJR Act* – to reform remedies for judicial review

- **Section 16:** general power to provide appropriate relief. FCA or Federal Circuit and Family Court of Australia (FCFCA) may make an order under s 16(1):
  a. an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;
  b. an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit;
  c. an order declaring the rights of the parties in respect of any matter to which the decision relates
  d. an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

  Also orders in respect of: review of conduct (s 16(2), and failure to make a decision (ss 7, 16(3)).

- Powers conferred by the *ADJR Act* **s 16** match those exercisable by a court exercising common law or equitable jurisdiction
  - It is **construed liberally; flexible:** Not confined by limitations of prerogative writs: *Conyngham*; *Park Oh Ho*
  - But it **does not 'transform' the judicial review** role of the court: see *Conyngham*, *Park Oh Ho*, and *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253
  - It's cannot contradict the legal/merits divide
  - Under s 16(1)(a) – the court can set aside a decision from such **date as the court specifies**: see *Wattmaster*
  - General provisions such as s 16(1)(d) do not expand the jurisdiction of the court to provide for an award of damages because that is not what judicial review is about: see *Park Oh Ho*

Judicial Discretion

Discretion to *refuse* relief/remedy

- The court has discretion to refuse a remedy, notwithstanding that a breach of a ground of review has been established. See:
  - *Enfield*
    - Gordon J confirmed that the rule of law supports a presumption that courts can provide a remedy, because courts should provide available and appropriate remedies that would ensure the government is acting lawfully
    - Practically, though, is that there are going to be times when the granting of a remedy would actually be inappropriate → **but the discretion to refuse should be used sparingly**
  - *Ozone Theatres* and *Cooney*.
- **The standard discretionary grounds** for refusal:
  - inexcusable delay by an applicant in commencing proceedings;
  - ineffectiveness or futility of granting a remedy;
  - existence of a more convenient and satisfactory alternative remedy;
  - failure of the applicant to utilise the statutory appeal procedure before commencing judicial review proceedings;
  - acquiescence by an applicant in or waiver of a breach;
  - unwarranted prejudice to the interests of a party relying on the administrative decision;
  - competing public interest;
  - stopping an imminent national election.
- Some discretionary considerations are particular/unique to individual remedies
  - e.g. authority that a declaration would be ineffective in respect of an error of law within jurisdiction, and it should be refused, e.g. *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448
- Barriers can arise at the conclusion and outset of judicial review proceedings, e.g. a more suitable alternative remedy is more likely to be raised at the outset and will preclude a full hearing
  - Or it might be better to go down the appeal route, in which the court might say to do that instead
  - See *ADJR Act* s 10(2)(b)(ii), *Administrative Decisions Tribunal Act 1997* (NSW) s 123, *Bragg*, and *NSW Breeding & Racing*.
- No relief if judicial review proceedings are used inappropriately to review decisions made in the course of a criminal prosecution → Courts do not want to interfere with the criminal process

💡 **Think about what you want to achieve**

1. If you want a different outcome or decision, then go to a tribunal
2. If the merits review can't give you what you want, then go to judicial review
3. But what do you want from the judicial review?
    a. Do you want to set aside the decision (certiorari)
    b. Do you want a clear statement as to what your rights are (declaration)
    c. Do you want a decision-maker to stop implementing the decision while the issue is getting resolved? (injunction)
4. Which body or jurisdiction is going to help you get to what you want?
    a. Are they even able to give you the thing you want?
5. What's the likelihood of getting what you want?
6. *Then* commence your proceedings

Reasons in Australian Administrative Law

Links back to access to information and privacy

The importance of obtaining reasons

***When* to provide reasons**

- Cth Administrative Review Committee (the Kerr Committee) recognised that if people were to make an effective claim against the government, they needed reasons for the decision
- Reasons requirements –

  ***ADJR Act* s 13 (for JR), s 13A exceptions**

  - Requires the original decision-maker to provide reasons to the affected person
  - Once you have a decision, it can then be reviewed in the Tribunal because it is a decision reviewable under the *Tribunals Act*, and the persons standing under that Act

  ***ART Act* s 269 (for MR)**

General arguments in favour of an obligation to give reasons

- To encourage **better and more rational decision-making**
- Enhance government **transparency and accountability,** and give legitimacy to a decision
- **Fairness:** People affected can see whether the decision was lawfully made and why they didn't succeed; whether there are grounds for review or appeal; and to assess the strength of the case against them should they seek review or appeal: see *Osmond*
  - A natural justice imperative (similar to a defendant responding to a criminal case against them)

Statutory duty to provide reasons for decisions

- Section of the ADJR Act (standard template for reasons) and s 28 of the AAT Act, or **s 269** of the ART Act → The requirement also extends to administrative tribunals

    - Tribunal legislation **provides an obligation on administrative tribunals to provide reasons**
- Duty to provide reasons also appears at the State and Territory levels, e.g. in NSW, the Uniform Civil Procedure Rules, Rule 59, gives someone seeking judicial review before the Supreme Court in Administrative Law matters, the right to seek a statement of reasons from a public authority
- Increasingly, individual statutes also impose a specific duty on decision-makers to provide reasons for decisions at the time a person is first advised, e.g. ASIC under s 915G of the *Corporations Act 2001* (Cth)
    - **s 5** and **s 6** ADJR Act for review of **decision** and review of **conduct**
    - **s 13** ADJR Act says you can get reasons for the decision, they might want to review

      (1) Reasons need to **refer to the evidence or other material that was relied on**
- Reasons need not be given under the *ADJR Act* for all decisions, e.g. decision not covered by the *ADJR Act* because it is not 'administrative' in character, or because reasons were already given
- Statement of reasons need not include information
    - which relates to personal or business affairs of a person (other than the person making the request)
    - was supplied in confidence
    - would reveal a trade secret
    - was furnished in compliance with other legislation
    - divulgence of which is prohibited by legislation per **s 13A** *ADJR Act*

Common law position on the obligation to give reasons

- No duty at common law, nor under principles of natural justice, that requires administrative decision-makers to provide reasons for their decisions, **but a duty may arise in 'special'** (Gibbs CJ at 670) **or 'exceptional'** (Deane J at 676) **circumstances:** see *Public Service Board of NSW v Osmond* (1986) 159 CLR 656
- Affirmed in *Wingfoot v Kocak* (2013) 252 CLR 480, 498 [43] (French CJ, Crennan, Bell, Gageler and Keane JJ):

> 'there is in Australia no free-standing common law duty to give reasons for making a statutory decision'

- But, there are more statutes requiring reasons to be given (Parliament is taking it upon itself to impose a statutory duty on administrative decision-makers) → it's in the public's interest *and* it benefits the government to reduce complaints, etc.

Exceptions at common law that would create the obligation to give reasons

Special or exceptional circumstances: *Sherlock v Lloyd* (2010) 27 VR 434

1. Natural justice/procedural fairness exception: Where a failure to do so would breach **natural justice** (only comes up in limited circumstances)

   In some cases, it's been **considered 'fairness' as a basis** for requiring the giving of reasons after the decision

    - '[T]he obligation is … an aspect of the duty to act fairly in the particular circumstances': *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 QdR 462, 476

- The Solicitors Complaints Tribunal did not give reasons for a penalty, which 'led to a miscarriage of judicial process': *Attorney-General v Kehoe* [2001] 2 Qd R 350 [22]
- But other cases illustrate reluctance to rely on this exception, e.g. *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW* (2007) 4 DDCR 607

2. Right of appeal exception: Where, in the absence of reasons, **a right of appeal would be frustrated**
    - The statutory right of appeal may be a sufficient justification to identify whether there is a question of law to be appealed: *T v Medical Board of South Australia* (1992) 58 SASR 382; and Martin CJ in *Hancock v Executive Director of Public Health* [2008] WASC 224
    - But you must have a *statutory right to appeal* → this exception is not a free-ranging right to reasons, e.g. there is no obligation for reasons to be given when seeking JR under s 75(v) of the *Constitution*. It would be contradictory to the HC's position in *Osmond*, where there is no general common law right to reasons
        - **Note**: What gives you the statutory right to appeal is not the same as common law JR
3. Quasi-judicial nature of proceedings exception: In **decisions of a quasi-judicial nature** (as compared to administrative)(the circumstances are interpreted quite strictly)
    - Provides justification to imply an obligation to give reasons
    - *Mauro v Hooper* [2008] SASC 159 — charge of unprofessional conduct before Medical Board of South Australia attracted an obligation to provide reasons because of the board's quasi-judicial character: at [26]
        - Because of the **quasi-judicial character**, because of the powers it had, and the outcomes and consequences of the board
    - *Sydney Ferries v Morton* [2010] NSWCA 156, [79] per Basten JA

        > 'The better course is to consider the specific issue, namely the obligation to give reasons, by reference to the characteristics of the power and the circumstances of its exercise'.

        - It's not looking at the character of the body, but rather the **characteristics of the power it exercises**

Content of the Statement of Reasons

***What* needs to be in the reasons**

- General considerations:
    - Contents will depend on the **statute** or **context** of the decision
    - **Content requirement** is likely to be influenced also by general considerations, e.g. **nature of the body** required to provide reasons, the purpose to be served by requiring a reasons statement, and administrative law principles about lawful decision-making
- HCA in *Wingfoot* (502, [55] French CJ, Crennan, Bell, Gageler and Keane JJ) said that

    > '[t]he statement of reasons must explain the actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law'

    - If the review body cannot **figure out what the link** is between the facts and the outcome, or between the facts and the outcome, or between the findings of fact and law that underpins the decision, then we would say that the statement of reasons is **inadequate**

- HCA in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 366 [76] (Hayne, Kiefel and Bell JJ)

  > 'Unreasonableness is a conclusion which may be applied to a decision which **lacks an evident and intelligible justification'**

  - Whether there are grounds for review also has bearing
  - The statement of reasons has to disclose a rational decision-making process → have to see an evident and intelligible justification

  > 💡 The statement of reasons has to disclose a rational decision-making process → it provides the arguments in challenging a decision where the **reasons appear inadequate or flawed**

- **Statutory duty** to provide reasons
  - *ADJR Act* **s 13** Decision-maker is to: 'furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision'
  - **Scope** of obligation? We need more information

    Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500, 507 (Woodward J): Content of the statement must be such that, a person affected can say: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'

- The reasons need to be
  - **Intelligible** (and expressed in language which can be understood by the parties), deal with the **substantial points raised and disclose the intellectual process** used to reach the decision
  - **Length depends** on 'nature and importance of the decision, its complexity and the time available to formulate the statement' (sometimes in high-volume jurisdictions, oral reasons might be sufficient): *Ansett Transport Industries (Operations) Pty Ltd v Wraith*
  - Where there is judicial scrutiny of reasons provided by tribunals, the **tribunal may need to set out whether it has rejected** or not accepted evidence **going to a material issue**

- **Variable nature of the obligation** to provide a statement of reasons
  - Summary by Administrative Review Council of the scope of the obligation to provide reasons imposed by *ADJR Act* s 13 (for JR) and *AAT Act* s 28 (for MR) (**Note:** This summary was made before the *ART Act*)
  - Summary in *Croser* of the scope of obligation imposed in a particular context — on a medical panel dealing with compensation and rehabilitation claims

Legal status of a statement of reasons

- The difference between reasons and an actual decision is that reasons are not reviewable, and decisions are
  - Do not form part of the record under the common law
  - **Global view** → there seems to be lacking a connection between the evidence and the material relied on
- A statement of reasons can be used by the court in deciding whether the decision is valid

    - The decision is reviewed (on appeal or by means of JR), and not the reasons
    - Recognition by courts that reasons statements of tribunals and officials **should not be examined too critically**: see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259
- Circumstances in which the court will have regard to a reasons statement
    - Irrelevant matter was taken into account
    - Relevant matter was overlooked, or
    - The legislation was misconstrued
- It is for the court to decide what inference is to be drawn from the statement → material relied on to establish an inference varies
    - **NOTE:** If the remedy being sought is certiorari, the error must appear on the record, and reasons are not part of the record (*Craig v South Australia* (1995) 184 CLR 163)
    - Where there is a failure to provide reasons, or to address an issue in a brief statement, then it is open to the court to infer irregularity (this isn't done lightly)
        - **NOTE:** This is a non-jurisdictional error, and it can be remedied by getting the decision-maker to give reasons → remember that this doesn't change the decision
        - The court might choose *not* to order a statement of reasons (part of their discretion) → it depends entirely upon the proper construction of the relevant statute and regime of decision-making

Reasons created ex post facto

- The general duty of judges is to provide reasons when they hand down their decisions, so usually, the decision is being written as the matter is ongoing (*Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 441)
- No obligation on other decision-makers to do so until requested or the statute requires it
    - Reasons are frequently created *after*, sometimes well after
    - Request for reasons under *ADJR Act*, e.g. must be made within 28 days of receipt of decision — **s 13(2)** (unless it's challenged or extended as approved)
- Consequences of an ex post facto nature?
    - The probative value of the statement is diminished by the lack of contemporaneity
    - When reconstructing, the decision-maker may be tempted to put the statement in a form that puts the best light on the process and reasoning
    - *Minister for Immigration, Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162, 179 — The Court is

      > 'aware of the pressures associated with administrative responsibilities for high volume and urgent decision-making to accept that mistakes will occur which can and should be redressed without any personal reflection upon the competence or integrity of the officials whose decisions are under challenge. But the statute requires that a statement provided... **will reflect the true reasons** for the decision in question. Anything less would approach, if not amount to, a fraud upon the public and the Court.'

        - They accept that drafting a statement can be fraught with difficulty, but the statement needs to ensure that the decision-maker is not trying to rewrite history, because it would mislead the court