APPLYING REASON TO REASONS – START, MIDDLE AND THE END

AGS Administrative Law Forum

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11 November 2016, Canberra

INTRODUCTION

Writing is hard. Writing reasons for decision is harder. It is a process – not unlike completing a 3D jigsaw puzzle.

This morning I want to offer some thoughts on the process of writing reasons, based on my own experiences. I hope that what I am about to say is useful to those who write reasons, as well as those who give advice to decision-makers.

The title of this speech – "Applying reason to Reasons – start, middle and the end" – reflects two propositions that underpin my views on writing: that reason must be applied to reasons for decision and must be applied at three stages of writing – the start (before pen is put to paper or fingers to the keyboard), the middle (the writing) and at the end (after completing the draft). The stages merge but the task at each stage is different.

Whatever stage you are at, however, there is one overriding, crucial question that should underpin every step you take – "why?" Why, in the sense of what is the reason for me doing this? Why, in the sense of why is this needed? Why is this material? Why do I need to address this? It is by asking and answering the "why" question, at each and every stage, that a draft is more likely to be not only clear, accurate and comprehensive, but also concise.

Let me take each stage in turn.

THE START

The task of writing reasons starts well before putting pen to paper or fingers to the keyboard. (Dictaphones, in my experience, are not at all conducive to clear and concise drafting, and should never be used). In matters concerning statutory provisions, you start with the statute. You must ask yourself, have I got the correct version for this matter? Is it complete? Is it the version that the applicant relied upon? If there is a discrepancy, you will need to resolve it.

Then you need to read that statute, and understand its terms, context and purpose. Why?

First, the statute identifies the relevant question or questions that need to be asked and answered by the reasons for decision. Just because the question posed and answered in yesterday's matter was correct, that does not mean that it is the question and answer for today's matter. The statute also identifies the facts, matters and circumstances relevant to answering the relevant question or questions. Put simply, the statute identifies the *playing field*. And if you ask yourself the question without having proper regard to the statute, you will ask yourself the wrong question, and, consequently, you will get the wrong answer. Put another way, you will end up on the wrong playing field.

Second, the playing field created by the statute is not an isolated field – it is occupied and sits inside an arena. Its occupants vary from game to game – from applicant to applicant. And the arena – the wider legal context – changes from case to case. I accept that the arena is *largely* determined by the statute. That arena – the wider legal context – includes any relevant and up to date rules, regulations and/or administrative guidelines, and other Acts that inform or affect the operation of the statute, and/or its interpretation (such as the *Acts Interpretation Act* 1901 (Cth)). That list is not exhaustive. But the arena will, not may, also include a wider legal context – for example, fundamental principles of procedural fairness, natural justice,

the criminal process and the like. What is the relevant wider legal context will vary from statute to statute, from matter to matter and from time to time.

Third, there are some irreducible minimums.

The statute not only provides the playing field, but it usually provides at least one of the umpires on whether the decision-maker has done their job. What do I mean? There is no free-standing common law duty to give reasons[1]. The duty imposed on an administrative decision-maker to give reasons is often, if not always, "no more and no less than the statutory duty" imposed by the statute that requires that reasons be given[2]. And the "content of that statutory duty defines the statutory standard that a written statement of reasons must meet to fulfil it"[3]. That means, in each case, the adequacy of reasons will be determined against the standard imposed by the statute[4].

As we know from *Minister for Immigration and Border Protection v Singh*, if there is an "intelligible justification" for a decision, the justification "must lie within the reasons the decision-maker gave for the exercise of the power"[5]; "either the reasons given by the decision-maker demonstrate a justification or they do not"[6].

Finally, if a statute requires that reasons for decision be given, then we know from provisions such as s 25D of the *Acts Interpretation Act* 1901 (Cth), s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and s 28 of the *Administrative Appeals Tribunal Act* 1975 (Cth), that the reasons must set out "the findings on *material* questions of fact and refer to the evidence or other material on which those findings

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1 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 662, 675-676; [1986] HCA 7.

2 See *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 498 [43]; [2013] HCA 43.

3 *Wingfoot* (2013) 252 CLR 480 at 498 [43].

4 *Wingfoot* (2013) 252 CLR 480 at 498 [44].

5 (2014) 231 FCR 437 at 446 [47].

6 *Singh* (2014) 231 FCR 437 at 447 [47].

were based"[7] (emphasis added). The word "material" has meaningful content and is important. You should not gloss over it or look past it. It means you do not have to set out findings of fact that are not material. And, of course, what is material will depend on the terms of the statute and the facts, matters and circumstances particular to the applicant and the matter. It is the facts, matters and circumstances particular to the applicant and the matter that compels you to then ask have I got, and read, a complete copy of the material that is to be considered?

With those items in hand (the statute, the two facets of the wider legal context I have mentioned and a complete copy of the relevant material), then and only then, can the process of writing, thinking, more writing, more thinking and then editing, finally begin.

THE MIDDLE

Your reasons should be structured, with headings, and be persuasive. For my part, reasons are usually divided into six parts – introduction, legislative framework, issues, facts, analysis, conclusion.

Introduction

The hardest paragraph to write is the first paragraph – the introduction to the matter at hand. It should encapsulate the issue and then set out the answer upfront. The introduction is written last because, when you start writing, the content of your work is not finally settled. You cannot summarise and pithily encapsulate that which does not yet exist. I will come back to it, at the end.

Legislative framework

Next, the "legislative framework". I start with the statute and I end with it. I read the contents page. I remind myself how the Act is structured. I read the

[7] s 25D of the *Acts Interpretation Act* 1901 (Cth). See also s 13 of of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and s 28 of the *Administrative Appeals Tribunal Act* 1975 (Cth).

objects of the statute. I type my own judgments. I read and type out each of the relevant statutory provisions. I do not cut and paste them. Why? Because I find that the process of writing reinforces in my mind what statutory provision (or provisions) I am dealing with, and helps me become familiar with its text and where it sits in the framework of the statute. Use the text of the statute. Be precise. If there are relevant defined terms – read them, manually insert them into the relevant statutory phrase and use them. The words are critical and the way they are written is important. Do not paraphrase. Do not use secondary sources. By being familiar with what the provision *actually says*, you are less likely to incorrectly understand its operation based on an impressionistic understanding of how you think or assume that the provision operates. Never look at a provision in isolation.

Issues

Then I identify the question or questions to be determined by reference to those statutory provisions. This appears under the heading "Issues". Why? Because it ensures that I have identified what it is I need to address. It is at this point that it is often useful, as a cross-check, to ask yourself – what is the end-play? What is it that the applicant wants and what is it that I need to consider to answer that question?

The facts

In statutory terms, what facts must the applicant establish? What is not disputed? What is contested? What are the material findings of fact I must make? As already mentioned, you only need to refer to evidence or other material on which the material factual findings are based – not every piece of evidence submitted to the decision-maker. So, leave out of your reasons that which is not necessary. It will make your reasons shorter and easier to read and understand.

Write out the material facts, always cross-referenced to the sources. You do not have time to later go back and do the cross-referencing or to find the source or

check the accuracy of your statement of the fact. The recitation of facts should, except in the rarest of cases, be chronological. Life is chronological.

If a material fact is not in dispute, identify it and the material that supports it and state the parties' position. If there is a material fact that is disputed about which you need to make a finding, what material is relevant to that fact? If the material is consistent with your finding, identify that material and say so. Where there is competing material, an evaluative assessment needs to be made. Why do you choose one piece of evidence over another? Your reasons need to explain:

- What is the fact that the evidence or material is said to establish?
- What is the competing evidence or material?
- Why is one view preferable to another?
- Why have you not accepted certain evidence or material?

If, after reviewing the material, you form the view that it is insufficient to make a particular finding of fact, say so. "I am asked to find X but there is no evidence to support X"; or "there is not sufficient material to be satisfied that the finding is open". The reader should know why a finding is or is not made.

Analysis

Next is the critical stage of applying the findings of fact to the statutory questions. Again, the reasons should be structured. Use sub-headings. I often put the sub-headings in after completing the review of the legislative framework and before I start the facts section. If there are statutory criteria to be satisfied separately – separate them out. That approach provides a reliable way of checking that you have addressed each part of the statutory task.

I often print out what I have already written – the legislative framework, the issues and the facts – while I write the analysis section. Why? It enables the analysis

section to be cross-referenced to the earlier sections of the draft and, no less importantly, I check as I am going that I have made the *necessary* findings of fact and that the language I have used is appropriate and necessary. In other words, I mark on those earlier sections of the draft amendments I need to consider and/or make. It is an organic process.

Conclusion

Then, the conclusion. This is not unimportant. What is it that you are doing? Are you rejecting a claim? Are you allowing it in part? What is the direct consequence of your conclusion? Revisit the other parts of the reasons and check that the conclusion you have drafted reflects the text of the statute, the issues, the facts and the analysis.

Introduction

Finally, I return to write the introduction – what was the end-play and have I asked the right question and answered it? The shorter the introduction, the better. I adopt the Bryan Garner[8] approach to issue identification. His thesis is that any issue can be (and should be) reduced to 75 words and should be structured by reference to premise, premise, premise, question. He gives the following example[9]:

> "[1] A Turk, having three wives, to whom he was lawfully married, according to the laws of his country, and three sons, one by each wife, [2] comes to Philadelphia with his family and dies, leaving his three wives and three sons alive, and [3] also real property in this State to a large amount. [Q] Will it go to the three children equally, under the intestate law of Pennsylvania?" [67 words].

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[8] Bryan A Garner, *Garner on Language and Writing: Selected Essays and Speeches of Bryan A Garner*, (2009) at Ch 3; Bryan A Garner, *Garner's Dictionary of Legal Usage*, 3rd ed (2011), entry for "Issue-Framing" at 484-487.

[9] Bryan A Garner, *Garner on Language and Writing: Selected Essays and Speeches of Bryan A Garner*, (2009) at 121.

Notice the following things about it. How simply the facts are stated – no dates, no names, it is structured by reference to premise, premise, premise, question. There are no intensifiers, no colourful words, just facts. But they are facts that point unambiguously to one outcome rather than the other. The reader not only knows the issue but knows the answer or, at the least, wants to know the answer. That structure – premise, premise, premise, question, can be used whether the premises are one of fact, fact and law or law. The importance of issue framing in writing reasons for decision – succinctly, directly and upfront – cannot be understated.

THE END

Contrary to many misconceptions, the completion of a draft is not the end. It is simply the start of another process – redrafting and editing. This means that the process of thinking, writing, and re-writing begins again.

For my part, I stop and ask myself the following questions:

- Have I answered each of the questions I identified at the beginning? And, on reflection, were the questions I posed the right questions?
- Is the draft persuasive? Go through and analytically review each finding, factual or legal – sentence by sentence – and ask "why?" Why is this necessary and have I explained my conclusion? If it is not necessary, remove it. If the conclusion is necessary but you have not explained it, amend the draft. Remember your audience. You cannot write any piece of writing intended to persuade an audience without knowing who your audience is.
- Have I written in the English language? This question may seem facetious, but it is important to ensure you do not write in some foreign tongue called "legalese". Write *clearly*, *simply*, using accepted canons of *grammar* and *punctuation*. This is always important. But perhaps even more so when it

comes to administrative decisions, where, in many cases, the person affected by the decision will not be a lawyer. Of course, if you must use technical terms, use them properly. But using technical terms does not mean that you cannot and should not take time to simplify and clarify your written work.

- Have I left a small footprint? In other words, do not include things that are not necessary to answer the questions. Why? You simply run the risk of confusing the reader and muddying the waters.

After completing a draft, put it aside for a period. When you go back to it, print it out in hard copy. Do not read off the screen. Then, take a red pen in one hand and complete the following tasks:

- remove every unnecessary word; Why? To make it clearer and more concise.
- remove every amplifier and adjective i.e., "clearly", "very", "most", etc;
- substitute the simple for the complex or formal[10]. For example, "cease" should read "stop", "endeavour" should read "try". There are many others.
- avoid legalisms and lawyerisms[11]: For example, "adjacent to" should read "next to", "be able to" should read "can", "enter into a contract with" should read "contract with", "for the duration of" should read "while". Again, there are many others.
- provide it to someone who knows nothing about the draft and ask them to read it. If they cannot understand it, then it is a sure bet that the intended audience will have great difficulties.

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[10] Bryan A Garner, *Garner's Dictionary of Legal Usage*, 3rd ed (2011), entry for "Formal Words" at 373-374.

[11] Bryan A Garner, *Garner's Dictionary of Legal Usage*, 3rd ed (2011), entry for "Legalisms and Lawyerisms" at 531-532.

CONCLUSION

As I said at the beginning, writing reasons is hard. It takes time and considerable intellectual effort. Every piece of writing can be improved, and every writer can improve their skills. What you write should be judged against four criteria.

- Is it clear?
- Is it concise?
- Is it accurate?
- Is it comprehensive?

From the decision-maker's perspective, finalising the statement of reasons may be the end of the matter for you, but it is just the start for others. It will be read by the intended audience – the applicant. That should never be forgotten.

Next, the decision may be subject to review – merits and/or judicial review. If reasons are expressed clearly, concisely, accurately and comprehensively then the chances of the decision being misunderstood, or being seen as incomplete, inaccurate or lacking intelligible justification are substantially diminished.

I wish you well – the task of writing is hard but fun.