2025 COAT NSW Conference

Diversity, accessibility & inclusion

Fri 21 November

Oral Reasons: When, Why and How

Judge Susanne Cole

Why
Why give reasons at all?

- *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 High Court

There is no general duty on administrative decision makers to give reasons. It's a matter for the legislature as to whether and when a duty is to be imposed.

- *Civil and Administrative Tribunal Act 2013*, s 62 – circumstances in which reasons must be provided.

- *Administrative Review Tribunal Act 2024*, *s. 111, 112*.

Why
Why give reasons at all?

Justice Bell (as he then was) in 2019 – purposes of reasons given by NCAT:

- Guidance to, and setting of standards for, the general community,
- Learning and precedent for the legal profession,
- Guidance for Tribunal Members in the determination of future cases,
- Improving the quality of administrative decision-making,
- Providing reasons to be the subject of an appeal where there is a right of appeal given by the relevant legislation (preventing nullification of appeal rights on account of there being no reasons to consider).

Why
Why give oral reasons

- Facilitates the just, quick and cheap resolution of the matter
- If it is customary in the type of matter, the parties might expect it
- Early resolution may assist the parties
- It will reduce your workload and stress
- In high volume jurisdictions, you may have no choice

When
When should you give oral reasons?
When should you refrain from giving oral reasons?

You should

- Whenever there is no reason not to,
- Particularly when the high volume of cases gives you no real alternative.

You should consider refraining from giving oral reasons

- When the parties are highly invested and/or emotional and/or aggressive,
- The issues are factually or legally complex and you don’t know the answer or haven’t got the structure of the answer clear in your mind,
- One or more of the parties may not be able to follow oral reasons because, for example, they are not in the right frame of mind, they are deaf, they have ADHD or autism, their English is not good enough and they have declined to use an interpreter,
- You need to get out of the hearing room,
- You intuit that someone else needs to get out of the hearing room.

What are you preparing for?

Broken Hill Cobalt Project Pty Ltd v Lord [2022] NSWCA 271 at [102] – [109]

- The unsuccessful party should be left in no doubt about why they were unsuccessful,
- The parties can see that their arguments have been understood and accepted or rejected (and why),
- The essential grounds upon which the decision rests must be articulated,
- The reasons for preferring one conclusion over another must be given,
- The reasons probably do not need to be long or elaborate,

What are you preparing for, continued: *Broken Hill Cobalt Project Pty Ltd v Lord*

- More elaborate reasons may be required where there is a right of appeal,
- The reasons must be enough so that the losing party's right of appeal is not frustrated,
- If the appeal court is called upon to assess the adequacy of the reasons at first instance, the function of the appeal court is to determine the minimum acceptable standard of reasons, not the optimal standard; the standard is not one of perfection,
- Good judgment writing is an art, not a science,

What are you preparing for, continued: *Broken Hill Cobalt Project Pty Ltd v Lord*

In *Wainohu v New South Wales* (2011) 243 CLR 181; [2011] HCA 24 at [56] by French CJ and Kiefel J, as her Honour then was, His Honour noted that:

> 75. To like effect, in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] NSWCA 112 at [46], Basten JA said:
>
> > Generally, the concept of 'reasons' requires an explanation connecting any findings of fact with the ultimate decision. Where the legal test to be applied involves an evaluative judgment, it may well not be practicable to provide a detailed articulation as to how specified (and conflicting) factors have been weighed in the balance; the scope of the obligation must recognise that constraint. (A different question arises if mandatory considerations have not been identified.)

What are you preparing for, continued:

Alexandria Landfill Pty Ltd v Transport for New South Wales (2020) 103 NSWLR 479 at [29] (approved in Sweeney v He [2023] NSWCA 68:

> … Having regard to the purpose of giving reasons, the standard is properly identified negatively: it must be shown that the decision has not been reached capriciously or arbitrarily, but rationally. The reasons must thus reveal that all material factors have been identified and addressed, and that no prohibited considerations have been operative. If there is an available process of reasoning from the evidence to the outcome which has been adopted, either expressly or by implication, the appellate court should be slow to reach the conclusion that the function of the trial court has not been exercised according to law.

How
Pre-hearing preparation

What are you preparing for, continued:

Rahman v Rahman [2024] NSWCA 191 concerned the question of whether an AVO should be extended in time, which is an administrative decision, albeit made by a Court. In the decision of Ward P, Adamson JA and Stern JA, the Court said, at [62] – [63]:

How
Pre-hearing preparation

What are you preparing for, continued: *Rahman v Rahman*

> The primary judge's reasons were relatively brief but it must be remembered that they were being delivered *ex tempore*, at the conclusion of a long day (the morning adjournment having been taken for the purpose of reading the file, there having been a truncated luncheon adjournment, and the reasons not being concluded until 4.10pm), with the added pressure that the primary judge had another matter listed before him that day and was understandably concerned at not being able to reach that matter in the list (see 18/1/24; T 9). In those circumstances the latitude ordinarily given when considering the adequacy of *ex tempore* reasons must be borne in mind. It has been said, in various contexts, that in considering the adequacy of reasons, regard must be had to the nature of the decision-maker and the nature of the question being decided (see *Wainohu v State of New South Wales* (2011) 243 CLR 181; [2011] HCA 24 at [56] (French CJ and Kiefel J)). In this Court, in *New South Wales Land and Housing Corporation v Orr* (2019) 100 NSWLR 578; [2019] NSWCA 231, dealing with a matter that had been before the NSW Civil and Administrative Tribunal, Bell P, as his Honour then was, noted at [70] that the sheer volume of work undertaken by tribunals was such that a "perhaps more relaxed standard of review of reasons with corresponding compensation for linguistic infelicities" might be appropriate. The same observation may be made for a review of ex tempore reasons delivered at the end of a long day in the hearing of an application such as the one considered by the primary judge in the present case.

How
Pre-hearing preparation

What are you preparing for, continued:

Della Bruna v Health Care Complaints Commission [2025] NSWCA 105, a decision of Bell CJ and Kirk JA with Adamson JA dissenting.

> [55] Consistently with what has been explained above at [12]-[16], it is not the role of a Court on appeal or judicial review to assume that there must have been some good reason for any conclusion reached and, on that assumption, then to conclude that the failure to give a rational reason manifests no error. Doing so is circular. Where a judge is "bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result": *Waterways Authority v Fitzgibbon* [2005] HCA 57; (2005) 79 ALJR 1816 at [130] (Hayne J). This principle has been applied to administrative decision-makers who are obliged to give reasons: *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242 at [101]-[105] per Beazley P, Bathurst CJ agreeing at [1]. It applies here.

What are you preparing for, continued: *Della Bruna*

> 63. The Majority's approach involved error that can be expressed in various ways. Reversal of onus of proof (ground 2) might be a way in which the error could be expressed. Regardless, it was certainly a legal error by failure to give adequate, intelligible or logical reasons (raised by ground 6). It was also a constructive failure to exercise jurisdiction insofar as it involved a failure to grapple with a substantial and clearly articulated aspect of the appellant's case (raised by ground 4). That type of error can also be expressed in terms of procedural fairness (as raised by ground 5(b)): *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 at [24].

How
Pre-hearing preparation

What are you preparing for, continued:

- Reasons should be written or spoken in language which is as clear and simple as possible, with parties (and other potential readers) for whom English is not their first language in mind.
- The restatement of findings and determinations can assist comprehension.
- Technical evidence and technical concepts should be explained in plain English wherever possible, to assist comprehension in the reader and to demonstrate understanding in the writer.

- Read the file and check that you have jurisdiction,
- Prepare an outline (or find your template),
- Gather documents to have on the bench: a printout of the relevant legislative provisions, other key legislation, any key authorities on the issues,

Templates: suggested structures

Narrative – Justice Biscoe:

- an introduction explaining what the proceedings are about and contextualising the issues to be determined,
- formulate the issues to be determined in a logical sequence,
- headings for each issue and under each heading a brief reference to the relevant evidence and law, the unsuccessful party's position and the flaw in that position and determination of the issue. In relation to questions of fact refer to significant evidence of the party (either by way of affidavit or oral evidence) who carries the onus of proof, followed by the opposing party's evidence. State which evidence is to be preferred and why, and try to find "objective documentary evidence for the determination".
- conclusion and orders.

How
How to prepare

Templates: suggested structures

Issues based – Justice Fryberg

- nature of proceedings
- statement of undisputed facts
- findings on any disputed facts
- statement of relevant law
- findings on disputed points of law
- application of law to facts
- disposition of the proceedings

Preparing your mind-set

- Perfection is not the standard,
- Centre yourself before a hearing using box breathing,
- Identify and challenge negative self-talk,
- Take yourself seriously and recognise the importance of your work,
- Take your time when you arrive in the hearing room.

How
During the hearing

- Stay centred,
- Project your voice and use your gaze to retain control of the structure of the hearing,
- Take notes in way that is natural for you and which helps you craft reasons,
- Give yourself space after the submissions to decide whether you can give adequate oral reasons,

How
Delivering oral reasons

- Use your template, either during the hearing or after submissions,
- Consider having a standard way of beginning oral reasons,
- Go through your reasons first and give the decision at the end,
- You can abandon the oral reasons part way through and reserve your decision if you realise that you are not ready.
- The only changes you can make to a written record of oral reasons are improvements to infelicities of expression, correction to errors of syntax and grammar and addition of citations of authorities. You may not change the substance, including adding in findings regarding credibility. *Todorovic v Moussa 920020 53 NSWLR 463*.