

# **Judicial Review of Decisions: The Statement of Reasons**

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# Judicial Review of Decisions

## The Statement of Reasons

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### Introduction

1. This paper has been drafted for the purposes of a seminar designed to assist administrative decision-makers to produce decisions that are fair, appropriate and clearly articulated with evidence. The focus of the seminar is on the decision making process.
2. Australian law and practice contain various measures that promote (whether by design or otherwise) open and accountable governance and decision-making. At a practical level, one of the implications of this is that the work of administrative decision-makers may be reviewed and (literally) judged by a Court through the process of judicial review.
3. This paper attempts to provide a conceptual outline of judicial review generally, as well as some of the judicial review principles that may be of interest to those who make the decisions that become the subject of review.

### Judicial review generally

4. Administrative decisions made by government agencies and departments are generally subject to review by the Courts. This process of “judicial review” is limited to the legality of the decision, rather than its merits. As explained in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 by Brennan J:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

5. Thus, in judicial review proceedings, errors of fact and matters of discretion are not (with few exceptions) allowable grounds of review. Judicial review is not concerned with the 'merits' of the decision, but is rather directed towards questions of law, or the various points of law and procedure appearing within the available grounds of review in the Queensland and Commonwealth judicial review Acts.<sup>1</sup>
6. Before an application for judicial review is made, it is almost always necessary to first pursue any available avenue of merits review (or other appeal). Under the Queensland legislation, if the applicant has not pursued an alternative review that is available the Court “must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so”.<sup>2</sup> The Commonwealth legislation provides that the Court “may, in its discretion, refuse to grant

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1 *Judicial Review Act 1991* (Qld) (the **JR Act**) and *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**).

2 JR Act, s 13. Compare *Freier v Jordan and State of Queensland* [2002] QSC 385.

an application” if adequate provision is made for an alternative review.<sup>3</sup> Of course, in appropriate cases, there may be exceptions to this rule.<sup>4</sup>

7. In order to be reviewable under the judicial review legislation, a decision must generally be “of an administrative character made ... under an enactment”.<sup>5</sup> The test for whether a decision is one that is made under an enactment was stated by the High Court as follows:<sup>6</sup>

The determination of whether a decision is “made ... under an enactment” involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be “made ... under an enactment” if both these criteria are met.

8. One of the examples cited by the High Court was a case involving a decision to issue a search warrant. That decision was said to affect legal rights or obligations because it provided the police officers executing the warrant with authority to do acts which would otherwise amount to trespass.
9. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Mason CJ pointed out that a reviewable “decision” for the purposes of the judicial review legislation “is one for which provision is made by or under a statute” (at 337). His Honour explained (at 337):

That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.

10. The judicial review legislation sets out the grounds of review that are available when challenging an administrative decision. Some of the more commonly relied upon grounds include:<sup>7</sup>
  - (a) Breaches of the rules of natural justice or procedural fairness.
  - (b) Failure to observe necessary procedures.
  - (c) Taking into account irrelevant considerations, or overlooking relevant considerations.
  - (d) Legal unreasonableness.
  - (e) Errors of law.

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3 ADJR Act, s 10(2)(b). Compare *Heslop v Secretary, Department of Families, Housing, Community Services & Indigenous Affairs* [2010] FCA 1345.

4 See *Hagedorn v Department of Social Security* (1996) 44 ALD 274, 281. Judicial review prior to the completion of merits review might, for example, be appropriate where the decision-maker is intending to apply a particular legal test which the applicant contends is erroneous.

5 JR Act, s 4; ADJR Act, s 3. Other decisions may nevertheless be reviewable in the Courts' inherent jurisdiction, or (in the Commonwealth sphere) under the *Judiciary Act 1903*.

6 *Griffith University v Tang* (2005) 221 CLR 99, [89].

7 See JR Act, ss 20, 23; ADJR Act, s 5.

11. By the time a party receives an adverse decision, it will often be the case that a significant volume of documentation will have accumulated. That might include evidence obtained by the party themselves, evidence obtained by other parties (or by the decision-maker), and the correspondence or submissions that have been put to the decision-maker. However, from the perspective of the party who receives an adverse decision, perhaps the most critical document is the decision-maker's statement of reasons.
12. There is no general or common law duty for a decision-maker to give reasons for a decision.<sup>8</sup> However, many statutory schemes require the giving of a statement of reasons and, in any event, the judicial review legislation enables an aggrieved party to call upon the decision-maker to give a statement of reasons.<sup>9</sup> As will be discussed further, that statement of reasons will often become the 'centrepiece' of any judicial review proceedings.

### **Why and which decisions are challenged through judicial review**

13. Which decisions are likely to be challenged through judicial review, and why? Perhaps the simple answer is: the decisions likely to be challenged are the ones that are adverse to the party involved. And, that is probably the reason why they are challenged as well!
14. A more complete answer to the question is that there are certain features of an administrative decision which tend to make it more or less likely that it will be subject to judicial review. Some of those features include:
  - (a) The availability of other avenues of review. As noted above, one of the general principles of judicial review is that, if there are other avenues of review available, those avenues should be pursued before applying to a Court for judicial review. So, where there are no (or limited) rights of 'merits review' or statutory appeal, a decision is more likely to be the subject of judicial review.<sup>10</sup>
  - (b) The nature of the decision. Judicial review proceedings can be expensive to litigate. Rationality would suggest that decisions with low financial stakes will tend to be the subject of judicial review to a lesser extent than decisions with significant financial stakes. Decisions that involve a person's liberty<sup>11</sup> or right to reside in Australia<sup>12</sup> will tend to be subject to more judicial review, because the financial risks will often be less of a concern to the affected party.
  - (c) The issues involved in the decision. If the facts are largely uncontroversial, but there is a novel point of law or a disputed interpretation of the law, this will tend to make the decision more susceptible to judicial review. A party may have an interest in challenging the decision-maker's interpretation of the law, even if the benefits of doing so are not immediate.<sup>13</sup>

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<sup>8</sup> See *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162.

<sup>9</sup> JR Act, s 33; ADJR Act, s 13.

<sup>10</sup> A few examples from the Queensland jurisdiction include parole and corrections decisions, police management decisions, and various public service decisions.

<sup>11</sup> As at 8 March 2016, all 5 of the Supreme Court's published judicial review judgments for 2016 were brought by prisoners (2 of the 5 were successful).

<sup>12</sup> There are continuing high numbers of judicial review cases in the migration area, as revealed by a glance at the published decisions of the Federal Circuit Court between January and March 2016.

<sup>13</sup> Eg, *Calanca v The Queensland Parole Board* [2016] QSC 3.

(d) The ‘quality’ of the decision-making process, and the reasons for the decision. This is perhaps a more anecdotal suggestion, but experience suggests that parties who feel they were not treated fairly during the decision-making process or who are not satisfied with the stated reasons for the decision tend to be more inclined to seek review of the decision. On the other hand, a well-reasoned decision may dissuade a party from seeking judicial review because of the difficulty of establishing reviewable error.

15. Put simply, and perhaps unsurprisingly, decisions that are open to ‘merits’ review and that have modest financial stakes will not commonly be subjected to judicial review. On the other hand, decisions that represent the final decision on the ‘merits’ and which involve significant financial or other stakes will be more likely to be subject to judicial review.

### **Distinction between 'decision' and 'reasons'**

16. There is an important distinction between a decision, and the reasons for that decision.<sup>14</sup> The reasons for decision are not themselves the “decision”.<sup>15</sup> The decision is essentially the ‘what’; whereas the reasons are essentially the ‘why’.

17. In *Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCA 49, the Federal Court said (at [31]):<sup>16</sup>

... the reasons which attend an administrative decision are conceptually distinct from that decision and it is the decision, and not the reasons which accompany it, which is the subject of judicial review ... The reasons have no legal consequences in themselves. Rather, they provide material from which arguments about the correctness of a decision may be crafted. Their legal relevance is, therefore, derivative from the decision to which they are appurtenant. ...

18. As noted above, a “decision” is ordinarily some final or operative conclusion or finding that is provided for in the relevant legislation. It might be a conclusion that a licence, permit or benefit should or should not be granted. But it might also include some more “intermediate” finding, such as a finding that a person is not “fit and proper” for a statutory purpose.<sup>17</sup> It is important, of course, for a decision-maker to clearly identify what decision (or decisions) he or she is making.

19. The reasons for a decision are usually set out in the form of a formal statement. Section 27B of the *Acts Interpretation Act 1954* (Qld) states:<sup>18</sup>

If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also—

(a) set out the findings on material questions of fact; and

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14 Although, of course, “the making of a decision and the preparation of a written statement setting out that decision often constitute a single process”: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [30].

15 *Negri v Secretary, Department of Social Services* [2016] FCA 879, [10].

16 An appeal against that judgment was allowed, but on other grounds: *Civil Aviation Safety Authority v Central Aviation Pty Limited* [2009] FCAFC 137.

17 As was one of the decisions in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

18 See also *Acts Interpretation Act 1901* (Cth), s 25D.

(b) refer to the evidence or other material on which those findings were based.

20. In *Ansett Transport v Wraith* (1983) 48 ALR 500, Woodward J said (at 507):

... the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: “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.”

21. In *Negri v Secretary, Department of Social Services* [2016] FCA 879, the Administrative Appeals Tribunal initially gave oral reasons for its decision and the subsequently provided a written statement of reasons. After reviewing various authorities, Bromberg J held that the Tribunal was permitted to give written reasons that were different from, or more elaborate than, its oral reasons (at [26]-[27]). However, he said that the Tribunal was “not permitted to substantially divert from the reasoning upon which its decision was made” (at [27]). He held that if the Tribunal's written reasons disclosed “new or substantially-altered reasoning”, then that reasoning should be disregarded (at [28], [30]).

22. Although the decision and the statement of reasons are “conceptually distinct”, there is a clear link between a decision and the reasons for that decision. In *Civil Aviation Safety Authority v Central Aviation Pty Limited* [2009] FCAFC 137, the Full Court referred to cases where the giving of reasons with a decision is required and said (at [41]):

Where there is an inadequacy in the reasons provided ... a party has been denied a fundamental and important right. The decision-maker has not applied to his or her decision-making task the discipline imposed by the legislature to make those findings on material questions of fact relevant to the decision to be made and then to explain that decision by reference to those facts. The winning party may not be the first to complain – that party has the desired result, albeit for reasons that cannot be discerned. However the losing party does not know why he or she has lost. The reviewing Court is in no better position. A reviewing Court cannot properly discharge its functions if the reasons for the decision under review are not set forth.

23. It has been said that, at least in respect of public decisions, a “prime purpose” of the giving of reasons for a decision is to “inform the public and the parties” of the reasoning process.<sup>19</sup> It has also been said that “the discipline of the necessity to render reasons helps to keep any tribunal on the path of sound reasoning to sound conclusions”.<sup>20</sup>

### **The status of reasons in judicial review**

24. Ultimately, a statement of reasons for a decision may become evidence in judicial review proceedings. There have, however, been differing views on the admissibility of a statement of reasons. In *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162, a delegate of the Minister made a deportation order. A statement of reasons was subsequently prepared, although only after judicial review proceedings had been commenced. At the hearing of the judicial review application, the Minister's counsel sought to tender the statement of reasons (without verification by affidavit). The applicant's counsel objected, and the trial judge ruled the statement of reason was inadmissible; saying:

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<sup>19</sup> *Comcare v Levett* (1995) 131 ALR 645, 654-655.

<sup>20</sup> *Martin v Australian Postal Corporation* [1999] FCA 655 at [19].

I think, in terms of principle, a self serving statement made not on oath outside Court is not normally regarded as admissible at the hands of the person who makes the statement. It comes into its own category in the absence of some statutory provision so I think I have to reject the tender.

25. On appeal, a majority of the Full Court upheld the trial judge's conclusion that the statement of reasons was inadmissible. However, the Court held that:
  - (a) Where a statement of reasons is prepared as part of the decision-making process, then the statement of reasons will generally be admissible as part of the “record”.
  - (b) Where a statement of reason is prepared some time after the decision is made, the statement of reasons may be admissible under oath (by way of affidavit) but (absent consent of the other party) the reasons cannot simply be tendered without the author being (potentially) liable to cross-examination.
26. The decision in *Taveli* might suggest that, from a decision-maker's perspective, it would be preferable to prepare and issue a statement of reasons contemporaneously with giving the decision (at least where judicial review is a real possibility).<sup>21</sup>
27. Once a statement of reasons is admitted into evidence, the question then arises as to what the statement of reason proves. That is: what is it evidence of?
28. Whilst there is no special limit to the potential use of a statement of reasons in evidence, it will normally be relevant in two main ways: showing what the decision-maker did, and showing what the decision-maker did not do. First, the statement of reasons is important evidence of what the decision-maker actually did. In *Taveli*, French J (as his Honour then was) said that when “properly authenticated, they can be treated as evidence of the reasons for which the decision was made”. His Honour explained:

... a properly authenticated statement of reasons [is] evidence of the truth of what it says, namely, that the findings made, the evidence referred to and the reasons set out were those actually made, referred to and relied upon in coming to the decision in question and that no finding, evidence or reason which was of any significance to the decision has been omitted. ... The inferences which may be drawn about its accuracy as a true account of findings and reasons are derived from the facts implicit in its authentication and that it was prepared by the decision-maker in the exercise of a statutory duty to give such an account of his decision.
29. Secondly, the statement of reasons may be evidence of what the decision-maker failed to do. Thus, a “failure to include reference to a matter in a statement of reasons may justify the inference that, as a matter of fact, the matter was not taken into account”.<sup>22</sup> And the requirement that the statement of reasons must set out “findings on *material* questions of fact” means “that it is to be inferred from the absence of a reference to, or, a finding with respect to some particular matter that the [decision-maker] did not consider that matter to be material”.<sup>23</sup>
30. However, the things that are said (or not said) in a statement of reasons are not conclusive one

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21 See also *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 1521, [169].

22 *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59, [46].

23 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [35].

way or the other.<sup>24</sup> As was pointed out in *Taveli*, the statement of reasons “is a piece of evidence to be weighed and assessed like any other”. In *Turner v Minister for Immigration and Ethnic Affairs* (1981) 55 FLR 180, the Court said (at 184):

In many cases it will be clear whether or not the decision maker has taken a relevant consideration into account. That is not to say that the mere assertion by the decision-maker that he has done so will conclude the matter. It may be possible to demonstrate from a consideration of all the reasons leading to the decision, or indeed from the decision itself, that a consideration has not been taken into account in any real sense.

31. There is no rule against a decision-maker being cross-examined about his or her reasons for decision.<sup>25</sup> Evidence can be led of the decision-making process, and what material was available to the decision-maker. This approach probably becomes more significant in cases where reasons for the decision are provided some time after the decision is made, or where the decision-maker seeks to supplement the record in terms of the reasons or matters taken into account.<sup>26</sup>
32. Finally, it should be noted that a statement of reasons will generally not be evidence of the underlying facts found by the decision-maker. That is, whilst the statement of reasons may be evidence that the decision-maker made the findings of fact set out in the statement, it is not evidence that those findings of fact are objectively true.<sup>27</sup>

### **Reading reasons: a fine-tooth comb?**

33. As a general proposition, the Courts have held that an administrative decision-maker's reasons for decision should be read fairly rather than pedantically. In the oft-cited case of *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, Kirby J said this:

The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law ...

34. The plurality in *Wu Shan Liang* cited, with approval, the Full Federal Court's earlier statement that “The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error”.
35. On the other hand, a party receiving an adverse decision – and that party's lawyers – probably will comb through the words of the statement of reasons “with an eye keenly focussed ... or an ear keenly attuned to the perception of error”.<sup>28</sup> And, of course, it will sometimes be the case that a legitimate error of law only becomes evident upon careful scrutiny of the reasons.
36. In the Courts, a “beneficial” reading of a statement of reasons can only go so far. In *Soliman v University of Technology, Sydney* [2012] FCAFC 146, the Full Court said that its “eyes should not be so blinkered as to avoid discerning an absence of reasons or reasons devoid of

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24 Eg, *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 1521, [172]; *Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)* (1996) 69 FCR 28, 77.

25 Eg, *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162; *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 1521, [166].

26 Eg, *Garland v Chief Executive, Department of Corrective Services* [2004] QSC 450.

27 Eg, *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162.

28 See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, footnote 60.



any consideration of a submission central to a party's case" (at [57]). Earlier, in *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9, Stone J said that a "beneficial" construction of a decision-maker's reasons "does not require this Court to assume that a vital issue was addressed when there is no evidence of this" (at [26]).

37. Whatever approach is taken, one thing is clear: there is no amount of formulaic recitation of principles and no standard form of words that will make a decision immune to review. Rather, the Courts encourage decision-makers to simply set out the reasons which led to the relevant conclusions "in clear and unambiguous language, not in vague generalities or the formal language of legislation".<sup>29</sup>
38. It may also be noted that the Courts will generally (although not always) be understanding of the realities of administrative decision-making. In *Powell v Evreniades* (1989) 21 FCR 252, Hill J said (at 265):

Although it may be regrettable, statements [of reasons] are generally prepared by administrators and not lawyers and are often not prepared with the care or precision which the policy of the section contemplates. It clearly would not follow merely because a statement did not set out the findings on a particular material question of fact that no such finding was made. ...

39. In *Taveli*, French J emphasised that what the Courts are looking for in a statement of reasons is "a statement of the real findings and the real reasons". His Honour encouraged decision-makers, when giving a statement of reasons some time after making a decision, to be frank and to acknowledge any errors or omissions that come to light. He said:

The Court is sufficiently 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.

## **Conclusion**

40. In almost any case, there are contestable facts and legal principles. There will always be administrative decisions that are found to be vitiated by reviewable error, but that does not necessarily amount to criticism of the decision-maker. A decision-maker who has endeavoured to adopt a fair decision-making process, and who has explained how the disputed issues have been resolved one way or the other, will have contributed to an open and accountable process of administration whatever the eventual outcome.

Dated: 3 March 2016 (updated 6 August 2016)

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<sup>29</sup> *Ansett Transport v Wraith* (1983) 48 ALR 500, 507.