"Reasons for Judgment: 'Always Permissible, Usually Desirable and Often Obligatory"

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The Age of Reasons

I begin, as the ever-so-readable judgments of Lord Denning often did, with a story. A personal reminiscence. My family had little connection with the law. When, as an articled clerk, I first ventured into Sydney courtrooms, I could not believe my good fortune. Every day was a Perry Mason drama, in which I was a very minor character. Was my life really to be filled with such exciting conflicts, resolved by such a majestic system? More than three decades later a measure of the same excitement and admiration lingers.

Most of the judicial officers I saw in those early days were articulate, logical, courteous. They explained their decisions at the end of the case with conviction and sincerity. Even when I disagreed, I did not doubt the integrity of their opinions. But there was one judge into whose courtroom I always entered with trepidation. He stared about with fury as the oath was administered, lest the slightest paper should rustle in the courtroom. False dignity was everywhere about him. Justice was often a stranger to that place. Typically, in dismissing a claim by my client he would intone no more than two sentences:

> This claim fails. There will be an award for the respondent.

My heart was pumping. The next case was called. A flurry of books. The papers were collected. Bundled out of the courtroom with a confused client, it generally fell to me to try to explain what had happened. The recriminations ensued. The barrister shook hands and disappeared. I, at 19 years, had to do what the judge had failed to do: explain to a client for whom the decision was often vitally important the reasons for the decision. No other judge would ordinarily impose such an obligation on me. The sense of injustice and of an immaturely perceived denial of due process of law overwhelmed me at the time. The searching eyes of the disbelieving client remain with me more than three decades later.

We are all the products of the values we learn in our infancy and the experiences we undergo in our youth. When, by chance, it fell to me to add to the jurisprudence of judicial reasoning, I held steadfast the memory of perceived wrongs which I would do my best to prevent and,

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* See *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd (No 2)* (1990) 21 NSWLR 200 at 214.

† President of the New South Wales Court of Appeal; Chairman of the Executive Committee of the International Commission of Jurists. This was a paper delivered to the Family Court of Australia Conference in Sydney on 3 July 1993.

where they occurred, to correct. I would strive to ensure that no-one would leave my court with such a sense of grievance.

My experience was by no means unknown to the legal profession of Australia in earlier times. In *Brittingham v Williams*[1] a Victorian County Court judge who disposed of a claim for money lent and reserved his decision (for five days no less) returned simply to give judgment for the defendant with 10 guineas costs. Counsel for the plaintiff asked the judge to state his reasons. His Honour said that he refused to give any reasons. The Full Court in Victoria solemnly intoned that the judge's conduct was 'a matter for regret'.[2] It pointed out that the case was one where the decision might possibly be justified on more grounds than one. The appellate court would not, therefore, always find it easy to say whether it agreed or differed from such a baldly stated decision:

> The reasons could have been stated very shortly, probably in twenty words, and the statement of them would probably have taken less time than was taken by the request for and refusal to state them.[3]

The Full Court of Victoria nonetheless dismissed the appeal from this tongue-tied judge who thought he was a juryman. I have no time for such judicial solemnities. By their decisions, appellate courts set standards. There is no remonstrance that carries its message so clearly as a reversal order which upholds due process. Yet as recently as 1989, the Full Court of Victoria seems to have considered that its earlier decision could still be justified upon the footing that:

> The simplicity of the context of the case or the state of the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision.[4]

I do not agree with this approach. I do not consider that it is one which would be applied in the courts of New South Wales or in the federal courts in Australia.[5] Increasingly (as I will show) a higher standard is being imposed and accepted by appellate and trial courts throughout this country[6] and in the United Kingdom.[7]

The general judicial duty to state reasons began as a traditional practice of the judiciary of the common law tradition. It developed

1 [1932] VLR 237.
2 [1932] VLR 237 at 239 per curiam.
3 [1932] VLR 237 at 240 per curiam.
4 *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 19 per Gray J.
5 See, for example, *Dornan v Riordan* (1990) 24 FCR 564 at 573 per curiam; *Crowe v Riordan* (1992) 26 ALD 712 at 718-19.
6 See, for example, *Fidler v Green* (1993) 17 MVR 138; *Capaz Pty Ltd v Cupples*(CA(Qld), App No 228 of 1992, 19 March 1993, unreported), where an appeal was allowed on the ground of a trial judge's failure sufficiently to state reasons for future economic loss.
7 For recent unreported English decisions: see, for example, *Hillingdon London Borough Council v H* [1992] WLR 521; [1993] 1 All ER 198; *W (Minors) v Hertfordshire County Council*, Times LR 14 September 1992; *R v Dairy Produce Quota Tribunal for England and Wales; Ex parte P A Cooper & Sons (a Firm)*, [1993] 19 EG 138; *Re W (Minor: Secure Accommodation Order)*, Times LR, 8 February 1993; *R v Higher Education*

naturally from the centuries-old tradition of the continuous oral trial, held with very few exceptions in public.[8] Departure from such a traditional practice of professional convention would not, however, amount to an error of law. Despite the (comparatively recent) introduction of the appellate facility and the decline of jury trials, for a long time it was left to judicial self-regard, at least in most cases, to ensure that reasons were given for decisions or orders having any substantial importance for the legal rights of parties or other persons before the court. Against this perspective, it was often held that the failure of a judicial officer to state reasons for a decision would not constitute an error of law warranting disturbance by an appellate court.[9]

This was the world in which cases like *Brittingham* were decided. Appellate courts confined themselves to pious laments about the absence of reasons and gentle invocations to judicial officers to give them. But little more. By the 1940s, in Australia, it was increasingly accepted that a judicial tribunal was obliged in law to state reasons for a decision if that decision was itself susceptible to appeal.[10] The point was really self-evident. If Parliament conferred a right of appeal (for none existed at common law) a judicial officer could not frustrate the exercise of that right by the simple expedient of refusing or failing to state reasons at least sufficient to ground the exercise. Based on this perspective, the long-standing judicial practice or convention flowered into a legal obligation.[11]

Notwithstanding this development, in the upper reaches of the law, judicial officers of the kind that I described at the beginning of this paper continued to flourish. It thus became necessary for the New South Wales Court of Appeal in *Pettitt v Dunkley*[12] to make clear beyond doubt the standard required where an appeal lay. In giving his reasons in that notable case, Asprey JA[13] hinted at the further development of the obligation which would shortly follow.

In *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd and Penrith Pastoral Co Pty Ltd*,[14] Mahoney JA picked up the larger idea when he said that the giving of reasons was 'an incident of the judicial process'. This opinion was confirmed, although in remarks not necessary for the decision, in the judgment of Gibbs CJ in *Public Service*

8 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 667 per Gibbs CJ.
9 *Lawson v Lee* (1978) 19 SASR 442. See also Green G, 'Reasons for Judgment', Papers from the Judicial Development Conference, Family Court of Australia, Hobart, 1991, p 62. This line of authority conforms to earlier opinions of the Judicial Committee of the Privy Council: see, for example, *Selvanayagam v University of the West Indies* [1983] 1 WLR 585 at 587ff per curiam. The continuing application of that decision in New South Wales was questioned by McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 281.
10 See, for example, *Carlson v King* (1947) 64 WN (NSW) 65 at 66 per curiam.
11 See *Delacovo v Lacanale* [1957] VR 553 at 558.
12 [1971] 1 NSWLR 376.

Board of New South Wales v Osmond.[15] The Chief Justice pointed out that the giving of reasons was a 'normal but not a universal' incident of the judicial process.

In the New South Wales Court of Appeal, I sit in the busiest appellate court of Australia. Although excluded from the heartland of family law, I see an enormous range of legal disputes. Where, as sometimes happens, the dispute raises questions relevant to family law, I always strive to inform myself about the jurisprudence of the Family Court and, where pertinent, to observe the same principles.[16] By reason of our constitutional and statutory arrangements, I cannot speak with authority of the judicial obligation to give reasons in the specific area of the Family Court. In *Bennett v Bennett* the Full Court of that Court has spoken on the subject.[17] Its instruction must be followed by Family Court judges and officers. I do not understand that instruction to be different in principle from that of my own court. In any case, it is always useful for specialised courts to draw upon the broad streams of legal thinking found in courts of more general jurisdiction. It is desirable that we, as judicial officers, should seek, within the law, to harmonise its applications and steady its broad direction.

The New South Wales Court of Appeal has probably been faced with more cases involving the challenge to a suggested failure of a judicial officer to provide adequate reasons for his or her decision than any other Australian court. In part, this may be explained by a line of cases involving appeals from the Compensation Court of New South Wales.[18] Following the establishment of the Court of Appeal, a large jurisdiction was conferred upon it to conduct appeals from Judges of the Supreme Court by way of rehearing.[19] Soon after, the earlier limitations on appeals from the District Court were removed. Although appeals from the Compensation Court involved, quite frequently, much larger issues than such appeals, where more was at stake, appeals from the Compensation Court were initially confined (as had been appeals from the Workers' Compensation Commission), in effect, to points of law.

To overcome this perceived injustice, a vogue developed of challenging decisions of Compensation Court judges on the ground of their failure to

15 See above note 8. The decision is also reported at (1986) 63 ALR 559; (1986) 60 ALJR 209.

16 See, for example, *Bryson v Bryant* (1992) 29 NSWLR 188 at 195ff per Kirby P, Sheller JA, Samuels AJA.

17 *Bennett v Bennett* [1991] FLC ¶92-191 at 78,267 per curiam:

> [T]he inadequacy of her Honour's reasons ... might well amount to [an error capable of vitiating the proceedings]. At the very least the failure to give adequate reasons places a duty on an appellate court to scrutinise the decision with particular care.

See also *In the Marriage of GJ & AP Harris* (1993) 16 Fam LR 579 at 583 per curiam; *In the Marriage of RJ & EM Merriman* (1993) 17 Fam LR 22.

18 Compensation Court Act 1984 (NSW) s 32. For some of the cases see *Russell v F J Walker Pty Ltd* (1989) AWCCD ¶74-000; *Australian Electrical Industries Pty Ltd v Marlborough* (1989) AWCCD ¶74-029.

state reasons as required by law. So vigorous did this stream of cases become that it was necessary to say, ultimately, that the complaint about judicial reasons should not be permitted to circumvent the clear purpose of Parliament in confining appeals to points of law.[20] In due course the New South Wales Parliament amended the Compensation Court Act 1984. Now, in most cases, appeals lie on points of fact as well as law. Nevertheless, many cases still come from that direction, which include complaints about the absence of adequate reasons.[21]

Another explanation, workers' compensation cases aside, why so many cases involving complaints about the lack of reasons come before my court may be the wide variety of decision-makers operating in the most litigious state of Australia who are subject to its jurisdiction. Thoughtful observers have stated that the real problem for the adequacy of judicial reasons is to be found in practical considerations involving the calibre, experience and training of the decision-maker in question, the resources available to him or her and the assistance typically provided by lawyers or other advocates.[22]

Perhaps another reason is the deliberately high standard which the Court of Appeal has insisted upon, at least since *Pettitt v Dunkley*. I am conscious of the remark of one of my colleagues (said not entirely in jest) that, with my appointment, there was introduced 'The Age of Reasons'. Let it be so. There is no doubt that judicial philosophy and considerations of policy (apart from personal experience) influence the view taken by every judicial officer concerning the extent of the obligation to provide reasons. I shall return to this point. For the moment it suffices to state the point which the law of Australia has reached on judicial reason-giving.

The controversy is no longer whether judicial officers are obliged to give reasons. Now it is clear that usually they are. Sometimes that obligation is expressed in a governing statute[23] but usually it is no more than a rule of the common law.[24] As a result, its precise boundaries are generally more indistinct than they would be if expressed in legislation. Various attempts at judicial formulae are made in cases but these necessarily deal with the specific facts before the court.

20 See *J Robbins (Chippendale) Pty Ltd v Sakic* (1989) AWCCD ¶74-038.

21 See, for example, *Australian Wire Industries Pty Ltd v Nicholson* (CA(NSW), 4 February 1985, unreported) p 10 per McHugh JA; p 12 per Kirby P. See also *Kesen v Luke Singer Pty Ltd* (1989) 18 NSWLR 566 at 568 per curiam; *O'Loughlin v The Zinc Corporation Ltd* (CA(NSW), 404/1988, 21 December 1989, unreported), p 1.

22 Smith M, 'The Obligation of the Administrative Appeals Tribunal to Give Adequate Reasons' (1992) 3 *Public Law Rev* 258 at 263. For further commentary on the duty to give reasons under the Administrative Appeals Tribunal Act 1975 (Cth), see Katzen H, 'Inadequacy of Reasons as a Ground of Appeal', (1993) 1 *A J Admin L* 33.

23 See, for example, District Court Rules 1973 (NSW), Pt 31 rr 9, 10 discussed in *Palmer v Clarke* (1989) 19 NSWLR 158. A similar result was reached in England; see *H v Hillingdon & London Borough Council*, above note 7. The Federal Administrative Appeals Tribunal is under the duties imposed by the Administrative Appeals Tribunal Act 1975 (Cth) s 43(2B). See *Australian Postal Commission*

Typically, they are expressed in language of considerable generality. The court need state only the 'grounds' for its decision.[25] It must reveal only 'the basis' of the decision.[26] It must do so at least sufficiently to satisfy the appellate court or to answer suggestions that there has been a serious error of fact-finding, a relevant error of law or the miscarriage of a discretion reposed on the decision-maker.

These formulae give some guidance, it is true. They recognise that it is not every trivial decision by a judicial officer which must be formally explained. The large canvas having now been filled, what remains interesting about the judicial obligation to provide reasons is its extent. It is to be found by exploring the limits of the suggested exceptions and what they teach about the fundamental values which inform the approaches of individual judicial officers to those limits and lead them to differing conclusions in particular cases. As is often true in our legal system, the major premise of legal principle is clear enough. It is in the minor premise and in fact-finding that the essence of the decision-making process is to be found. It is therefore upon that premise that judges, striving for consistency and lawfulness, will seek to clarify their ideas. It is here that the advocate must find his or her target on this issue. It is here too that appellate courts must concentrate their attention in resolving the particular disputes before them.

Limitations and Exceptions

Procedural and Discretionary

In some Australian decisions on the judicial obligation to provide reasons it has been suggested that the duty does not extend to providing reasons in purely procedural applications involving the mere exercise of discretion. This was certainly said in England in *Capital and Suburban Properties Ltd v Swycher*.[27] It appears to have attracted the approbation of Mahoney JA in my court.[28] However, such an exception cannot be stated too broadly or dogmatically.

In 1987 an application for leave to appeal was made to a court comprising Justices Priestley, McHugh and myself.[29] The application arose following an interim award of custody of an ex-nuptial child to his grandmother. That order was contested by the boy's mother. Her application for custody was supported by his natural father, although living apart from the mother. A former relationship of the mother with a man who had allegedly over-disciplined the boy had dissolved. The lad was thirteen and a half years of age. He was not separately represented. The mother sought expedition of the hearing of her application. Unless expedited, the hearing could have been delayed for as long as 18 months.

25 *Soulemezis*, above note 9, at 280. See also *R v The Associated Northern Collieries* (1910) 11 CLR 738 at 740 per curiam.

26 *Yates Property Corporation Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 at 189 per Handley J.

27 [1976] Ch 319 at 325ff per Buckley LJ.

28 *Soulemezis*, above note 9, at 280.

The duty judge dismissed the motion for expedition with no reasons. All three members of the Court of Appeal granted leave, upheld the appeal and returned the application for expedition to the Equity Division to be reconsidered.

Priestley JA disclaimed 'any wish to intrude into the ordinary practice and procedure of that [Equity] Division'[30] but he stated that the parties were entitled to have an indication 'however shortly' of the reason why expedition should be denied 'in view of its substantive importance to the parties'.

McHugh JA was careful to reserve most listing decisions as exempt from an obligation to state reasons. He said:

> Ordinarily, no appealable error would arise from a judge's failure to give reasons for refusing to expedite the hearing of an action. Such a decision concerns an interlocutory matter which does not directly affect the rights or duties involved in the litigation. A judge who has to contend with the enormous volume of work ... cannot reasonably be expected to give reasons for every decision made in the course of administering his list. If he was, court lists would become even more congested than they are; the expense of litigation would increase substantially but from what we were told from the Bar table the present application for expedition was not an ordinary one.[31]

His Honour grounded his decision in the fact that, effectively, denial of the expedition would determine the substantive rights of the mother. He was also concerned by the possible appearance, unexplained, that the judge had been influenced by access to a confidential report which had not been made available to the parties.[32]

I expressed my conclusions in these terms:

> In the absence of such reasons, the parties are left to speculation. Was it something not available to them in the departmental report which influenced his Honour? Was it a decision, without a full hearing in the merits, that Jason was actually better off with his grandmother? Was it a consideration that other cases should have a higher priority in the Court's listing arrangements than the determination of the custody of a child? Was it the possible implication of a decision granting expedition in this case, for many other like cases? Was it some unknowable feature of the Equity list, known to his Honour, but undisclosed to the parties or their representatives?
>
> Because in this case the decision refusing expedition in large measure disposes, as a matter of practicality, of the right which the claimants assert ... and does so without a full hearing and without any reasons stated—it is my opinion that a sufficient error has been shown in the proceedings below to warrant intervention of this Court. It is possible that, if reasons had been given, an application such as the present would not have been brought. It is possible that, upon brief reasons being given for refusing expedition, this Court would not intervene. But in the absence of any reasons at all, an error has occurred which warrants the setting aside of his Honour's order ...[33]

30 (1987) 11 NSWLR 350 at 355.

31 (1987) 11 NSWLR 350 at 356.

I pause to note the difference of the approach in this case from that taken by the Full Court of Victoria in *Brittingham*.

Admissibility of evidence

In *Soulemezis v Dudley (Holdings) Pty Ltd*[34] McHugh JA sought to explain, in economic terms, the limits on the judicial obligation to give reasons for the admission or exclusion of evidence:

> The limited nature of judicial resources and the cost to litigants and the general public in requiring reasons must also be weighed. For example, many reasons concerning the admissibility of evidence may require nothing more than a ruling: in New South Wales common law judges have long held that they are not obliged to hear argument on the admissibility of every question of evidence let alone give reasons. It all depends on the importance of the point involved and its likely effect on the outcome of the case.
>
> But when the decision constitutes what is in fact or in substance a final order, the case must be exceptional for a judge not to have a duty to state reasons.[35]

This general principle does not relieve a judge, particularly in criminal trials (and one might add cases involving status) of providing, however briefly, reasons for important evidentiary rulings. This is, indeed, a common practice. More in the Court of Criminal Appeal than in the Court of Appeal, complaints are made concerning the admission or rejection of evidence. Because the jury gives no reasons for its decision the occasional importance of such rulings is self-evident. The appellate court is simply unable to determine precisely what effect, if any, the included or excluded evidence might have had upon the jury.[36] It can only speculate.

Leave to appeal

Also in *Soulemezis*, Mahoney JA said that in applications for leave 'where the considerations of fact and law are clear', reasons need not ordinarily be given.[37] Views differ amongst judges on this subject. Evidence of the differing views has emerged in decisions of the New South Wales Court of Appeal.[38]

The High Court of Australia, in the discharge of its general superintendence of Australian court decisions by the facility of special leave, has now accepted an obligation to provide short reasons for the dismissal of all, or most, applications. These reasons are now being

34 (1987) 10 NSWLR 247.
35 (1987) 10 NSWLR 247 at 279.
36 *Domican v R* (1992) 173 CLR 555 at 564; 106 ALR 203 at 209 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.
37 *Soulemezis*, above note 9, at 270.
38 See *Southern Cross Exploration NL v Fire and All Risks Insurance Company Ltd (No 2)* (1990) 21 NSWLR 200 at 215, 218. In (1990) 21 NSWLR 200 at 214 I said (in dissent) that reasons should be given in dismissing the summons for leave to appeal which

published. They can be seen in the unauthorised reports of the decisions of that Court. They are sometimes influential, as, for example, was Mason CJ's admonition in dismissing the summons for leave to appeal in *Watson v Attorney General for New South Wales*[39] that it was a jurisdiction to be exercised 'sparingly and with the utmost caution, such that its exercise is not encouraged'.[40] This sent a signal to the Australian courts which perhaps spoke even more clearly than lengthy reasons in a contested appeal might have done.

For default of fuller reasons in such applications, there has now developed, at least at the Bar table, an attempt to qualify or modify decisions reviewed by appellate courts by reference to remarks made during the course of leave applications. In my view, this is a practice that should be permitted only with extreme caution. Rarely can such exchanges amount to considered opinions. It is the very duty to provide considered opinions which imposes a discipline on the mind and thinking of the judicial officer and which oral exchanges of this kind may not always exhibit.

Too plain for argument

A further suggested exception is that the judicial officer is relieved from having to explain a decision 'too plain for argument'. So much was said by the Privy Council in *Mohamad Kunjo S/O Ramalan v Public Prosecutor*.[41] The opinion was expressed in the context of relieving a judge from referring in his judgment to every possible defence available to an accused in a criminal matter. Such an opinion must now be regarded as subject, at least in Australia, to the obligation on the judge to give directions to a jury on relevant matters of law even if not raised by any party or their counsel.[42] This may occasionally give judicial interventions and explanations 'an air of unreality'.[43] Nonetheless, the plainness of the argument will not be enough to relieve the judge of the strict duty to deal with the matter.

Uncontested issues

The point is often made that, especially with *ex tempore* reasons, they frequently follow the argument of advocates and can only be understood fully in the light of the issues then argued. This is a reason for the identification, by judicial officers in their reasons, at least of those important matters which were accepted by the parties or not specifically disputed. There is clear authority in law that a judicial officer will ordinarily be relieved, at least in civil cases, of the obligation to elaborate matters which were not in contest. Again, this principle cannot be taken too far. I have already mentioned the special rule applicable in criminal

39 (1987) 8 NSWLR 685.
40 See *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 564, 567 per Kirby P.
41 [1970] AC 135 at 142 per curiam

trials before a jury. It is also clear law that where a jurisdiction of a court or tribunal may be in question, it is the duty of a judicial officer to be satisfied as to jurisdiction. Depending upon the nature and extent of the doubt, that duty may be reflected in an obligation publicly to justify the assertion or rejection of jurisdiction, whatever the parties may contend.

Processes of fact-finding

The matter which ordinarily takes up most time in appellate courts reviewing the suggested failure of a primary decision-maker to give adequate reasons is the process of fact-finding upon which the legitimacy of the decision challenged rests. This was the case in *Soulemezis*, where an appeal was limited to a point of law. The primary judge reached a conclusion which appeared to be arbitrary and to rest on an unexplained and apparently illogical foundation in the evidence, namely, a CAT scan report.[44] Mahoney and McHugh JJA were at pains to emphasise that it is not necessary for the decision-maker to reveal the steps in the reasoning process and the subjective elements involved in the process of fact-finding, except perhaps for the establishment of particular jurisdictional facts.[45] McHugh JA explained:

> If no right of appeal is given against findings of fact, a failure to state the basis or even a crucial finding of fact, if it involves no legal standard, will only constitute an error of law if the failure can be characterised as a breach of the principle that justice must be seen to be done. If, for example, the only issue before a court is whether the plaintiff sustained injury by falling over, a simple finding that he fell or sustained injury would be enough, if the decision turned simply on the plaintiff's credibility. But, if, in addition to the issue of credibility, other matters were relied on as going to the probability or improbability of the plaintiff's case, such a simple finding would not be enough.[46]

Findings of credibility should thus be clearly made; not least because of the importance presently attached to them by the High Court of Australia.[47] Nevertheless, the mere invocation of a credibility opinion will in some cases not render an inadequately reasoned judgment immune from disturbance on that ground by the appellate court.[48]

Assessors and experts' reasons

Although a high standard has been set in New South Wales for legally trained judicial officers, the Court of Appeal has adopted a somewhat different approach to the reasons stated by non-lawyers who make up specialised bodies subject to its review. In the Land and Environment

44 See *Soulemezis*, above note 9, at 256.
45 See above note 9, at 273.
46 See above note 9, at 281.

Court, assessors make important decisions. Often they are engineers and architects without legal training. In *Brimbella Pty Ltd v Mosman Municipal Council*[49] I remarked:

> [I]t is undesirable in an appeal from a lay tribunal, where the appeal court is confined to a question of law, that it should examine too narrowly the words used in the decision, at least unless the words are central to the decision involved. Increasingly courts have to review, on questions of law, expert specialist tribunals. Thus the Federal Court of Australia must review, on questions of law, decisions of the Administrative Appeals Tribunal. This Court has functions to review on questions of law the Government and Related Employees' Appeals Tribunal, certain decisions of the Land and Environment Court and other bodies. There are powerful reasons of policy, quite apart from loyalty to the statutory language, that would suggest restraint in criticising the language used in their decisions by lay tribunals ...
>
> It would be quite wrong ... for this Court to examine their decisions as if they were written by a lawyer. I am not, by these comments, suggesting double standards; simply that the Court should take into proper account the composition of the tribunal, as it has been created by the Parliament.

McHugh JA agreed with these remarks.

General appellate restraint

There remains a closing consideration. Appellate courts are not concerned to become the supervisors of judgment writing style. Their duties involve them in the review of orders made. Retrials involve delay, expense and great inconvenience. They should not be ordered for want of reasons except upon substantial grounds. Sometimes this has been said to involve such a failure to state reasons as indicates the omission or refusal of the primary decision-maker properly to exercise the requisite jurisdiction as required by law.[50] I would not myself go as far as this but I certainly agree with the comments of Handley JA in the recent decision of the Court of Appeal in *Gregory R Ball Pty Ltd v Stead*:

> Appellate courts exist to remedy errors of law and miscarriages of justice not to dot 'Is' and cross 'Ts' in the reasons for judgment of trial judges.[51]

Concentrating on the purposes for which reasons are required by the law and the proper function of appellate courts helps to keep in perspective both the extent of the duty to provide reasons and the limits

49 (1985) LGERA 367. See also *Bisley Investment Corp Ltd v Australian Broadcasting Tribunal* (1982) 40 ALR 233 at 255-6; 59 FLR 132 at 157 per Sheppard J, cited in *Idriss*, above note 23 at 258.
50 See, for example, Brennan J in *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 446:

> If a failure to give adequate reasons for making an administrative decision warrants an inference that the tribunal has failed in some respect to exercise its powers according to law ... the court may act upon the inference and set the decision aside

upon the scope of that duty, properly understood.[52] Impetuous interference in a decision otherwise lawfully and justly arrived at upon the presumptuous footing that one could have written a better explanation than was offered by the primary judge undermines finality of trials and involves appellate over-reach.[53]

Fidelity to the true scope of independence guaranteed to each judicial officer by the law must also involve acceptance of the high measure of individuality in the way in which each judicial officer conducts trials and appeals and provides explanations for what is done.

The Rationale of Differences

The Australian cases on judicial reasons now show a large measure of commonality in appellate opinions on this subject. Yet it can probably be said that some judges, including myself, have a higher expectation in the provision of reasons than other judges. I demonstrated this, outside the sphere of the judicial obligations, in the decision given in *Osmond v Public Service Board of New South Wales*[54] which was reversed in the High Court of Australia. My decision, and that of Priestley JA in concurrence, has received plaudits from the academic community.[55] To some extent the reversal has been overtaken by legislative developments. Thus, in every jurisdiction of Australia now there is enacted a Freedom of Information statute which goes part of the way to providing citizens with reasons and supporting documentation for most of the decisions affecting them.

Judicial officers should see the debate about judicial reasons in a wider context. That context includes:

- An appreciation of social and political developments which require greater public accountability on the part of modern decision-makers;
- Technological developments that increase and expand the range of materials available and the magnitude of information presented to decision-makers generally in society;
- The institutional developments which have produced greater candour in judicial decision-making;[56] and
- Greater sensitivity to the rights of litigants and enlarged attention to problems of communication, including in simpler English which the readers of judicial opinions may understand.

How does one explain the remaining points of difference in emphasis and in application of the foregoing principles amongst judicial officers? A

52 See *Minister for Health v Charvid Pty Ltd* (1986) 10 ALD 124 at 129 per Woodward J.
53 See generally Smith M, above note 22, at 260.
54 *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 462ff.
55 See, for example, Taggart M, '*Osmond* in the High Court of Australia: Opportunity Lost' in Taggart M ed, *Judicial Review of Administrative Action in the 1990s*

psychological analysis of the process of judicial decision-making remains to be done. It is an intriguing question as to how each decision-maker's mind comes to important conclusions. I have no doubt that psychologists, and perhaps others, studying the philosophy and physiology of the mind could throw light in the dark corners where are found the keys to explaining the leap to a particular judicial decision.

Perhaps those who have themselves not felt the sting of apparent injustice in a courtroom or who never had a great expectation that justice would there be done or who simply take a mechanical view of the possibilities of the system, set the standards of reasoning a notch or two lower. For them, the attention to the obligation to provide full and public explanation of important steps on the judicial path to decision may appear over-formalistic, inattentive to the costs of trials and retrials and unnecessarily intrusive into the proper functions of primary decision-makers. Most such persons are as well able to do justice as the appellate judge.

There is a common thread that runs through the judicial approach to the appellate function in respect of the credibility of witnesses and the scope of the duty to provide reasons. Those who place a large store on the former are inclined to define more narrowly the latter. From my perspective they adopt a viewpoint of the legal process which is insufficiently attuned to the justice of the case and inadequately concerned with the duty of public and rational accountability of those who hold office. Their approach is overly attentive to the mechanical rules of the system, which were framed in earlier times when appeals did not exist or were newly created and when perspectives of the judicial role were quite different from what they are at present.

The scope of the duty to provide reasons is defined for me, at the margin, by considerations which go far beyond the proper explanation to the parties, their representatives, the legal profession, judicial peers and the whole community, of the decision in the particular case. For me, what is at stake is a basal notion of the requirement imposed upon the donee of public power. Unaccountable power is tyranny. If the exercise of power is accounted for, and is thought unlawful or unjust, it may be remedied. If it is hidden in silence, the chances of a brooding sense of injustice exists, which will contribute to undermining the integrity and legitimacy of the polity that permits it.

Judicial officers, as part of the government of this country, must, by this standard, err on the side of providing reasons. They must do so on the footing that they are part of the accountable government of Australia. Not elected, it is true, but accountable nonetheless. Acting by this discipline, they will tend to have [illegible]

discipline.[57] They will be more inclined to candour and I would hope that they will be more alert to the very process of decision-making which inescapably involves them in philosophical assumptions and policy considerations.[58] They will see more clearly the leeways for choice which open up before them in the kaleidoscope of human dramas that come under their judicial attention.[59]

I do not pretend that such approaches will remove altogether the controversies about when and to what extent reasons are required to be given by a judicial officer facing a particular decision, large or small. Appellate courts will continue to decorate the explanation for their decisions on such issues by reference to the vague criteria as to whether there has been a 'substantial failure' to reveal the 'basis of the decision', the 'substance' of it,[60] or whether the decision is just 'too unsatisfactory' to stand.[61]

These formulae are, however, merely the banners under which the judges of Australia severally march. True, some would go further, faster. Others would hold back with caution. But, on this subject, for the last two decades in Australia the judicial officers have been moving in the one steady direction. The lesson of authority is plain. On the main banner is its message. Reasoned justice is an attribute of freedom. Free people demand it. It is a badge of office of their judges. There are other, non-judicial ways, of solving social and even legal conflicts[62] but judicial officers must conform to a high code of patent lawfulness and fairness in the performance of their duties. This obligation derives from the fact that they are the judiciary and, as such, part of the permanent government of the country. With their tenure and power go many obligations to justify the tenure and put a check on the power. The giving of reasons is part of what it is to be a judicial officer today in Australia and although there are limits, the trend of authority has confined them. It is a trend which I support. It is a standard which I accept for myself before I impose it on others.

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Postscript

When the above paper was delivered to the Conference of the Family Court of Australia in Sydney on 3 July 1993, it was followed by commentaries from members of a panel chaired by the Hon Mr Justice John Milne, a Judge of the Appellate Division of the Supreme Court of South Africa. The panel comprised the Right Hon Sir Stephen Brown, President of the Family Division of the High Court of Justice, England; the Right Hon the Lord Cameron of Lochbroom, Court of Sessions of Scotland; and the Hon Justice John Fogarty of the Family Court of Australia.

Sir Stephen Brown emphasised the changes which had occurred in his professional lifetime in the giving of reasons by judicial officers. Legislation now required magistrates to make findings of fact in disputed cases. There were two reasons for these developments:

- to demonstrate to litigants the reasons for the decision; and
- to facilitate appellate review where this was invoked.

The broadening of appeal rights and the enlargement of judicial review of administrative decisions made the giving of reasons much more common in England today than in earlier times. The more important for the parties the order made by the judicial officer, the more vital it was that the order be supported by reasons. Sir Stephen said that the development of the law in Australia, recounted in the paper by Justice Kirby, indicated that the law was developing in much the same way as in England.[63] This was not surprising, because of the shared inheritance of the common law, the frequent meetings of practitioners and the shared benefits of the law reports and of other legal publications.

Lord Cameron expressed concern about the expansion of the obligation to give, and therefore to prepare, reasons for judicial decisions. He contrasted this expanding obligation with the earlier resort to jury trial where no reasons were given but where the verdict could not ordinarily be attacked, unless it was shown to be perverse. This mode of dispute resolution may have been unreasoned; but it was generally final and was accepted by litigants. Once reasons are given, there is a natural inclination to challenge them and to appeal against the orders supported by them.

In the particular area of family law, Lord Cameron suggested that sometimes reasons did more harm than good. The judicial officer will often have to determine which of the conflicting family members is to be believed. Credibility is often a very important component in decision-making in the family law field. Sometimes, it is best to avoid moral judgments which, exposed in reasons, leave at least one party aggrieved but often unable to do anything about the grievance. In sensitive family situations, judges must be careful by their reasons not to add to the burdens of the parties in their endeavours to solve their legal disputes.

Justice Fogarty emphasised that, in his view, the giving of reasons was part of the professionalism and integrity of the judicial office. Judging, where it involves choice, amounts to the exercise of power. In traditional

57 *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479 per Wilcox J; *Crowe v Riordan* (1992) 26 ALD 712 at 719.

58 See Weeramantry C G, 'The Importance of Philosophical Perspectives to the Judicial Process', (1991) 6 *Connecticut J Int L* 599 at 607.

59 Above note 58, at 605.

60 See *Dornan v Riordan*, above note 5, discussed in Smith, above note 22, at 262ff.

61 See, for example, *Nicholson*, above note 21.

62 Judge Weeramantry, for example, explains the complex Japanese system of Civil Liberties Commissioners which usually obviates the use of court proceedings: see

63 See, for example, *R v Secretary of State for the Home Department; Ex parte Doody* [1993] 3 WLR 154 at 157; *R v Court Service Appeal Boards; Ex parte Cunningham* [1991] 4 All ER 310; *Hillingdon & London Borough Council v H* [1992] 3 WLR 522 at 527ff. For commentary on the decision in *Doody* see Campbell M P ...

areas of judging, it was therefore ordinarily necessary for reasons to be given as a check on the arbitrary exercise of power. In much of the work of the Family Court (and of other courts exercising like jurisdiction) significant elements of subjectivity affected the decision-maker's conclusion. This feature of decision-making sprang from the very nature of the jurisdiction and the large discretions conferred by law upon its decision-makers. This should not, however, produce a reticence on the part of the decision-maker from giving candid explanations of the reasons underlying the decision reached.

Where a judicial discretion was exercised in a matter affecting property arrangements, maintenance, custody, or access to children, the litigant was entitled to know how the judge reached his or her conclusion. It was incumbent upon the primary judge to recognise that, in most instances, the decision would be final between the parties, especially in light of the difficulty in Australia in securing effective appellate review of a discretionary decision. Professionalism and integrity required that the judge should expose the reasons for the decision. The litigant may not like the decision or the reasons but at least the anger engendered by arbitrary, unexplained decision-making would be avoided.

In his reply, Justice Kirby referred to the antithesis of the judge of good reasons. He quoted J B Atlay, *The Victorian Chancellors*,[64] on the life of Lord Brougham. Reportedly, his motto was, despatch regardless of consequences. To win applause by clearing off arrears rather than fame as a master of the law of Equity was his ambition. Towards the end of his Chancellorship, he became careless and heedless on the Bench. He would write letters, correct proofs, read newspapers, do anything, in short, but follow the argument or listen to the affidavits:

> In *Townley v Bedwell*, tried when he had occupied his high position for over three years, he was only saved by accident from perpetrating a gross injustice. Two cross petitions of considerable magnitude were in his list, and assuming that they were appeals and that the decision of the Vice-Chancellor was probably right, he did not even open the papers, but marked them 'Petitions dismissed; orders affirmed with costs'. The first glance showed the registrar that they were original petitions, that there were no orders to affirm or disaffirm, and that a hearing was absolutely necessary. Had Brougham's supposition been correct, the whole costs of the appeal would have been thrown away and it was commonly believed in Lincoln's Inn that his much-vaunted despatch was only feasible by these methods. [65]

Fortunately, such sacrifices of legal principle and justice to the objective of clearing the list do not occur in modern Australia. Nonetheless, the obligation to state reasons is a useful corrective against any Brougham-like tempation to return to such practices.

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64 Vol 1, Smith, Elder & Co, London, 1906.
65 *The Victorian Chancellors*, above note 64, p 318