Practical Decision Making and Reason Writing

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Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback

Defensible decision making

- Defensible administrative decision making:
  - ‘the best possible decision
  - on the basis of the information available at that time
  - that is within legislative parameters and
  - can be justified’

- A defensible decision:
  - should withstand ‘hindsight scrutiny’
  - requires recording a clear rationale for the processes and reasoning that led to the decision
  - must be fair and reached through a fair process

Key understandings for decision makers

- **Key areas of understanding** decision makers should have:
  - the **legislative, policy and regulatory context** under which the decisions are to be made
  - the **administrative principles** relevant to the lawful exercise of administrative decision making **how to deal with facts;** and
  - **fairly evaluate evidence** relevant to your legislative scheme

Importance of good record keeping

- Need to keep full record of decision
  - Copies of documentary evidence, notes, drafts, findings of fact, reasoning
- Decision record should contain:
  - Date of decision
  - The decision maker and under what authority decision maker is authorised to make decision
  - Legislative provisions
  - What matters were taken into account
  - What matters were not taken into account and why
  - Evidence that was before the decision maker at the time of making the decision
  - Reasons for decision
  - Notes about weighing of evidence and reasoning process
  - The decision that was made

Content of written reasons

Reasons must be adequate. What is adequate?

- Legislation may define the minimum standard
- Difficult to ascertain standard when legislation is silent
- It should show the “actual path of reasoning” *(Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480).
- It is not necessary to address every issue raised in a proceeding and that it is enough to make findings on the material facts upon which its decision turns and to explain the logic of the decision *(Commissioner of Taxation v Anderson* (2004) VSC 152)
- As a general rule, pro forma reasons have the potential to fail to be satisfactory in this regard, and accordingly to attract the operation of s.49(4) of the VCAT Act (*Filonis & Others v Transport Accident Commission [2003] VCAT 445*)

Content of written reasons

Use a framework (but be careful of templates)

1. Introduction
   - Who you are, what decision making power you are acting under
2. Legislative Framework
   - Important for decision maker to have understanding of power and broader scheme
3. Documents and material considered
   - Documents, information, submissions (oral and written), policies
   - **Don't** include or refer to legal advice unless you are happy for it to be disclosed
4. Reasons for decision
   - facts
   - reasoning process
   - see separate slides
5. Decision
6. Review rights

Practical tips for drafting reasoning process

1. **Set out the facts and evidence**
   - What facts must be established
   - What is not disputed
   - What is disputed
   - What are the material findings you must make
   - Refer back to the evidence
2. **A decision maker only needs to refer to evidence or other material on which the material factual findings are based**
   - Do not need to address every issue raised in the proceeding – substantive or material only
   - Every submission made during the process need not be recited
   - When referring to facts and findings, need to refer to the evidence or other material on which its finding was based

Practical tips for drafting reasoning process

3. Set out the findings of fact you have made

- Explain why you made findings on material issues - and explain why
- To decide an issue in dispute, an evaluative assessment needs to be made
- 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.
  - refer back to the evidence and say why you accept it
  - refer to evidence you reject and say why you reject it

4. Explain the actual path of reasoning by which you arrived at the finding

Practical tips: making findings of fact

Making findings of fact

Why do I need to make findings of fact?

- Administrative decisions are based on facts and an important element of decision making is making findings of fact about those facts
- Many facts needed to support a decision are clear and uncontroversial
- When there is conflicting evidence - information needs to be evaluated
- There is no magic formula
- It is a difficult task to undertake

Not all errors in fact finding amount to a legal error

- Error = findings (of fact or credibility) that are reached without a logical or probative basis
- Error = irrational or illogical reasoning
- Error = a finding of fact made when there was no evidence for that fact

A framework for making findings of fact

1. Establish the facts

- Facts must exist in order for the statutory power to make a decision is enlivened
- Identify the material facts that must be established
- Before making a finding of fact, a decision maker should ensure they are thoroughly familiar not just with the issues in dispute, but also the totality of the evidence that is presented. To ensure all evidence is accounted for, it may be helpful to draft a chronology, or timeline, to help reduce the complexity of factual disputes

You can then analyse the table in two ways:

1. See whether there is one witness whose observation differs significantly from the others.
2. See if there is an hypothesis with which all the evidence, or most of the evidence is consistent.

A	T419	Z wore red dress. Z entered bank with Yvonne Yeats at 1.45 pm.
B	T47	Z wore red dress. Z left bank with Fred Fisher at 2 pm.
C	T235	Z wore red dress. Saw Z at North Sydney having lunch at 1:50 pm.
D	T112	Z wore red jacket and grey trousers, Spoke to Z in bank at 2 pm.
E	T365	Can't remember what Z wore. Diary shows interview with Z at 2.30 pm.
Z	(Zoe herself)	I don't own any red dress, I do however have a wine coloured twin set which I wore that day. I was in Burwood buying a bottle of water at about 2.15 pm, but I didn't go to the ANZ Bank.

A framework for making findings of fact

- Only relevant or probative evidence may be considered
- Probative evidence is not evidence that necessarily establishes or controverts the facts or facts in issue but whether either alone or taken with other evidence it tends to do so
- Evidence is not proof – it is information, documents, and other material that can be used to demonstrate the existence of a fact or the truth of something
- It can take many forms

2. Assess the evidence

- Need to weigh and judge evidence
- All evidence is not of equal weight
- Findings in relation to facts must be based on evidence that is relevant and logically capable of supporting the findings
  - Must not be based on guesswork, preconceptions, suspicion or questionable assumptions.
  - Doesn't preclude a decision maker from taking in to account ‘notorious facts’ which are part of ordinary experience or common knowledge – for example that each person’s handwriting is unique**.**

The question to be decided is whether, on the basis of the logically probative evidence, the decision maker is reasonably satisfied that a particular fact is more likely than not to be true.

Assessing the evidence

Tip 1 – Rules of evidence don't apply

What does this really mean?

Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, though many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth (R v The War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228 at 256)

Now, while it is clear the an investigation is not bound by the rules of evidence – it does not absolve it from the obligation to make findings of fact based upon material which is logically probative (Sullivan v Civil Aviation Safety Authority)

Assessing the evidence

Tip 1 – Rules of evidence don't apply (con't)

1. The question to be decided is whether on the basis of the logically probative evidence, the decision maker is reasonably satisfied that a particular fact is more likely than not to be true.
2. Not bound by rules of evidence. Should not apply them strictly – to ignore relevant evidence is likely to be an error.
3. You can consider legally inadmissible evidence.
4. Rules of evidence can be a useful guide when assessing and weighing evidence:
   - The fact that the rules of evidence do not apply does not mean that facts can be established merely by assertion. You can't spin a coin or consult an astrologer.
   - Further, if a fact in issue involves serious wrong doing, is inherently unlikely or has grave consequences, better evidence might be required to establish the fact. For example, it would be unsound to make a finding based solely on uncorroborated hearsay evidence that a person forged a document.

- Example: person A says to person B that they were assaulted by person C. Only have evidence from person B.

Assessing the evidence

Tip 2 – Look for corroborating evidence

- Evidence does not need to be corroborated in order to be considered or to have weight.
- But this does not mean that corroboration plays no part in the assessment of evidence.
- The search for supporting evidence plays an important role in weighing evidence that is in dispute
- You should be looking for supporting evidence
  - Is there a duty to inquire?
  - In the context of administrative decision-making, the High Court has held that "a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained", could, in some circumstances, amount to a legal error (*Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429).
  - Balancing act between finding supporting evidence and not prolonging the investigation

Assessing the evidence

Tip 3 – Make credibility findings when necessary

- Important in administrative decision making.
- Free to receive relevant and probative evidence and make findings of credit on facts
  - Should not make findings of credit on gut or a subjective belief about whether the person is telling the truth
  - Finding needs to be free from perceptions or biases
- Matters bearing on the credibility of a witness include
  - truthfulness or veracity
  - intelligence
  - bias
  - motive to be untruthful
  - opportunities of observation
  - reasons for recollection of belief
  - powers of perception and memory
  - any special circumstances affecting competency
  - prior statements consistent or inconsistent with evidence
  - ambiguities in testimony and direct contradiction of testimony

Assessing the evidence

Tip 3 – Make credibility findings when necessary (con't)

- Exercise extreme care in making credibility findings based on demeanour
- Cultural differences has an effect on demeanour and oral communications
- Number of circumstances that may affect an applicant's ability to provide oral evidence:
  - Taking of evidence must be done in a way that facilitates the taking of evidence
  - Anxious or nervous
  - Traumatic experience
  - May have a disorder or illness which may affect his or her ability to give evidence, memory or ability to observe and recall specific events or details
  - Mistrust in speaking to persons in authority
  - Giving evidence via an interpreter

Assessing the evidence

Tip 3 – Make credibility findings when necessary (con't)

It is true … that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses.

Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility... (*Fox v Percy* [2003] HCA 22)

Contemporaneous reliable documents and external factors are likely to be better indicators of credibility than matters such as the demeanour of the witness.

Assessing the evidence

Tip 3 – Make credibility findings when necessary (con't)

- If inconsistencies (or omissions) arise, should consider all of the evidence before it to assess whether inconsistencies are material to the issue and lead to an adverse credibility finding
- Confusion or forgetfulness – does not necessarily imply not telling the truth
- Inconsistencies and omissions may mean that a person's evidence is unreliable and therefore lacks creditability
- BUT a lack of credibility of a person's account because it is unreliable does not necessarily imply that the person is dishonest

Assessing the evidence

Tip 3 – Make credibility findings when necessary (con't)

In evaluating the accuracy of a witness's statement, you should be conscious of the following factors, which may adversely affect the accuracy of evidence given by a witness:

- the significance of the event,
- the period over which it was observed,
- observation conditions,
- whether the witness was under stress at the time, and
- the witness' capacity, so far as memory was concerned.

In addition, the consistency of the statement should be assessed having regard to other evidence:

- A statement is more likely to be true if it accords with known facts, the documentary evidence, or other evidence from a source independent of the witness.
- The decision maker should also note whether the witness's statement is internally consistent and whether it accords with what the witness has said on other occasions.
- If a decision maker has evidence that contradicts the witness they should put the substance of that evidence to the witness—or, if that is not possible, to the affected person who is relying on the witness's statement—and offer them an opportunity to explain.
- If a witness varies their account of the facts in response to questions, the decision maker needs to assess the reasons for the change.
- If the inconsistencies are unexplained, it might be useful if the decision maker prepares a summary of the conflicting evidence and seeks the opinion of a more senior officer.

Assessing the evidence

Tip 4 – Be mindful of practical limitations and prejudice

- The exercise of making a findings of fact involves the application of common sense and the decision makers experience of life.
- However, care must be taken not to apply one's own prejudices and cultural conditioning.
- It is important that you stick as closely as possible to basic principles when making administrative decisions
- Can result in error: irrational or illogical or unreasonable findings

Examples of fairness in decision making

There are two main rules of fairness:

- The hearing rule
- The bias rule
  - Actual Bias
  - Apprehension of bias

These rules have a significant body of case law and commentary in relation to defining what exactly is required but two common examples where they may impact day to day decision making are:

- Not allowing enough time for someone to respond (hearing rule); and
- One person ‘infecting’ the decision making process of others (bias rule).

Examples of fairness in decision making

Not allowing enough time to respond

Nobarani v Mariconte [2018] HCA 36

- This matter related to a dispute over a will.
- Mr Nobarani had two caveats lodged against the grant of probate. Separatley Ms Mariconte filed a claim for probate but did not join Mr Nobarani to this claim.
- Three days before the probate claim was heard Mr Nobarani was joined and required to put on a defence. At various stages he sought adjournments but was granted none.
- HCA unanimously found this was a denial of procedural fairness:
  - The compounding effects of changing the nature of the case, the lack of time to prepare and lack of time to respond to issues raised in court amounted to a denial of procedural fairness.
  - “All the appellant needs to show was that the denial of natural justice deprived him of the *possibility* of a successful outcome”

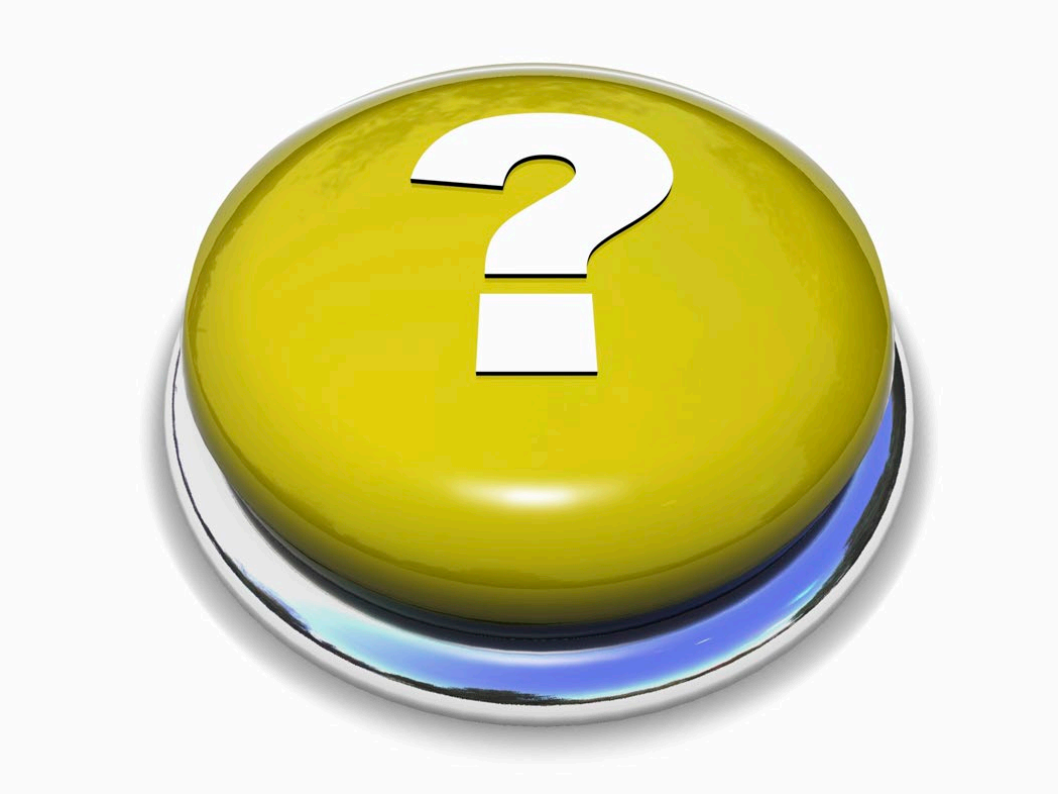
Examples of fairness in decision making

Infecting the decision making process

Isbester v Knox City Council [2015] HCA 20

- This matter related to the decision by a council whether or not to destroy a dog after it had been seized in relation to a dog attack
- The dog's owner had been prosecuted and found guilty of an offence in relation to the dog attack.
- An officer of the council was involved in the criminal proceeding including determining that charges should be laid, arranging for the charges and summons to be drafted and signed and instructing the council's lawyer.
- The same officer then organized a panel of three delegates (including herself) to determine whether the dog should be destroyed. The ultimate decision was made by the officer's supervisor.
- HCA found:
  - The officer was not at the same level of personal involvement as other cases (for example, she had not been subject to an alleged bribe (*Dickason)* or the target of abuse *(Stollery*)).
  - "The participation of others [in making the decision] does not overcome the apprehension that [the officers' interest in the outcome might affect not only her decision-making but that of others".
  - No criticism of the Officer's approach but that her connection to the prosecution meant the fair minded observer might apprehend bias.

Questions



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