# Introduction

The requirement that decision makers give reasons for their decisions to those persons affected by their decisions may be the single most important reform in the Commonwealth administrative review package of the late 1970s.[1]

In enacting the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act), the *Administrative Appeals Tribunal Act 1975* (AAT Act) and the *Ombudsman Act 1976*, the Commonwealth Parliament laid the foundation for a new administrative review system. Access to the reasons for decisions is fundamental to the scheme embodied in the AD(JR) and AAT Acts.[2] It follows that the courts and the tribunals view the obligation to give reasons as a serious one.

This report is presented in two parts. This document, *Commentary on the Practical Guidelines for Preparing Statements of Reasons*, provides a full explanation of relevant issues, including the legal issues and legislation applying to statements of reasons. Accompanying this Commentary is *Practical Guidelines for Preparing Statements of Reasons* which works through a series of seven questions decision makers should address when preparing reasons for a particular decision. This Commentary reflects the structure of the Practical Guidelines, but provides an expanded discussion of the issues raised.

1 D O'Brien 'The Impact of Administrative Review on Commonwealth Public Administration' in M Harris & V Waye (eds) *Administrative Law* 1991, 101 at 108.

2 *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183 at 192.

## Why statements of reasons are important

There are many benefits in requiring reasons for decisions, whether viewed from the perspective of the individual affected, the decision maker or the broader community. These benefits can be identified both in a practical sense and in a more fundamental sense.

Much of the discussion as to the value of reasons generally and the adequacy of particular statements of reasons has arisen in the context of challenges to the validity of decisions. In any particular case, a statement of reasons, evidence and fact[3] will:

(a) provide fairness by enabling decisions to be properly explained and defended; and

(b) assist the person affected by a decision to decide whether to exercise rights of review or appeal.

A good statement of reasons is also the best way of showing that the decision to which it relates is the correct or preferable one.

It is clear, however, that independent of the particular interests of the parties in such proceedings, statements of reasons have a value that serves a broader and more fundamental interest,[4] in that they:

(c) improve the quality of decision making; and

(d) promote public confidence in the administrative process; and

(e) assist tribunals and courts better to perform administrative or judicial review.

These benefits are discussed below.

### (a) Statements of reasons provide fairness by enabling decisions to be properly explained and defended

A failure to explain the basis of a decision can mean the person affected by the decision is left with the real grievance that they were not told why the decision had been made.[5]

In this way, the giving of reasons can be seen as an aspect of more general due process requirements:

> [T]he respect for individual autonomy that is at the foundation of procedural due process imposes a distinct obligation upon the government to explain fully its adverse…decisions.[6]

3 Referred to throughout the Commentary as 'statements of reasons'.

4 P Bayne 'Inadequacy of Reasons as an Error of Law' (1992) 66 *Australian Law Journal* 302 at 303.

5 Megaw J in *Re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 467–70, adopted in *Palmer, supra*, at 193; see also *Dornan v Riordan* (1990) 24 FCR 564.

6 R Rabin 'Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement' (1976) 44 *University of Chicago Law Review* 60 at 78.

While access to reasons may enable the person affected by the decision to decide whether the matter ought to be taken further, it may equally persuade them that the decision was justified, satisfy their sense of justice and minimise harm to the value of reciprocity between government and the governed.[7]

## (b) Statements of reasons assist the person affected to decide whether to exercise rights of review or appeal

The practical advantage of a statement of reasons is that it requires the decision maker to explain their decision in a way which will enable a person affected 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.[8]

A statement of reasons also enables the person to decide what means to adopt for challenging the decision.

Statements assist in determining whether the person seeking the reasons has standing to challenge a decision. That is, while a person will often feel genuinely aggrieved by a decision, without a statement of reasons they will not know the grounds upon which the decision was based and will not know, for the purposes of the AD(JR) Act, whether they are an aggrieved person.[9]

While a statement may assist the person affected to identify any errors in the reasoning process which may support a challenge to the decision, it may equally persuade the person affected that any challenge is unlikely to be successful and through this prevent unnecessary appeals.

## (c) Statements of reasons improve the quality of decision making

An obligation to provide reasons can improve the quality of decision making in at least two ways.

First, the disclosure of reasons encourages decision makers to reflect more carefully on their task, to be more diligent in identifying and specifying objects and purposes and to take greater care in applying them to the circumstances of the decision.[10] A statement of bare conclusions without reasons for those conclusions leaves the decision maker open

7 M Allars *Introduction to Australian Administrative Law* 1990, at 129.

8 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507 per Woodward J.

9 *Southern Farmers Group Ltd v Deputy Commissioner of Taxation* (1989) 19 ALD 9 per O'Loughlin J.

10 D J Galligan *Discretionary Powers* 1990 at 267.

to the suggestion that they have not given the matter close enough attention or have allowed extraneous matters to affect their consideration.[11]

Second, the availability of reasons for scrutiny, either within the agency or outside it, particularly when coupled with a system of independent review, assists agencies to promote quality and consistency in decision making.[12] Agencies can also use recorded reasons to distil relevant principles from past cases and formulate standards to govern future decisions.[13]

An obligation to provide reasons helps to ensure that the decision has been thought through and is properly justified. This is particularly the case in situations where the agency deals with a large number of applications or where the decision in question is of generalised importance for the functioning of that agency.[14]

## (d) Statements of reasons promote public confidence in the administrative process

The promotion of public confidence is of particular importance in the case of those decision makers who are required to provide reasons not just to the parties or persons directly affected by their decisions but also to the wider public through notification in the Commonwealth *Gazette*.

In *Commonwealth of Australia v Pharmacy Guild of Australia*,[15] a case concerning a decision of the Pharmaceutical Benefits Remuneration Tribunal, Sheppard J commented that a prime purpose of the requirement to provide statements of reasons is the disclosure of the reasoning process to the public and the parties. The provision of reasons engenders confidence in the community that the decision maker has gone about their task appropriately and fairly.

The availability of reasons also benefits the wider community by providing examples of how the law is applied to particular factual situations.[16]

11 *Commonwealth v Pharmacy Guild of Australia* (1989) 91 ALR 65.

12 T Thawley 'An Adequate Statement of Reasons for an Administrative Decision' (1996) 3 *Australian Journal of Administrative Law* 189 at 190.

13 G Richardson 'The Duty to Give Reasons: Potential and Practice' [1986] *Public Law* 437 at 446.

14 P P Craig *Administrative Law* 3rd ed, 1994, at 311.

15 (1989) 91 ALR 65.

16 H Katzen 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *Australian Journal of Administrative Law* 33 at 36.

## (e) Statements of reasons assist tribunals and courts to better perform administrative or judicial review

Exposing the decision making process can assist courts and tribunals in identifying whether the decision maker erred in law, by revealing the factual material on which the decision was based, the considerations taken into account and the procedural steps taken by the decision maker.

A statement which is provided after the person affected has taken action to challenge a decision may still be useful to the person affected and to the tribunal, court or other body examining the original decision.[17]

The provision of reasons can assist in ensuring that procedural requirements, for example the requirement to consult or to consider representations, are observed.[18] This is a significant factor in applications for judicial review by the Federal Court under the AD(JR) Act, where statements of reasons provided under section 13 may form the basis of a challenge to the validity of the decision.

This is less of an issue with respect to reasons provided under section 28 of the AAT Act. Unless its powers are limited by the statute which conferred jurisdiction, the task of the AAT is to reconsider afresh all the relevant issues of fact, law and policy. The AAT is not bound by either the applicant's grounds for seeking review or the decision maker's grounds for the decision under review.

## Arguments against statements of reasons

A number of arguments have been made in opposition to a requirement to give reasons. These are outlined below.

### *Cost and delay*

In its 1991 report on Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions, the Administrative Review Council noted that responding to section 13 requests inevitably has an impact on an agency's resources.[19]

However, the Council noted that it was hard to find evidence of high costs in areas where there have been relatively high numbers of section 13 requests. Many agencies had reported improvement in decision making standards because decision makers

17 *Dalton v Commissioner of Taxation* (1985) 7 FCR 382.

18 P P Craig *Administrative Law* 3rd ed, 1994, at 311. For an example of a decision in which it was clear that representations had not been considered as required by the legislation, see *Chapman v Tickner* (1995) 55 FCR 316.

19 Administrative Review Council Report No. 33 *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions,* (1991) at paragraph 156.

were aware they may be called upon to justify their decisions.[20] The Council concluded that the costs involved should be regarded as part of the ordinary costs of proper administration.

### *Timidity in decision making*

It is sometimes argued that a general requirement to give reasons will lead to timidity in decision making. Busy decision makers, knowing that a decision in favour of a claimant will not be contested, may be tempted to grant a benefit which might be refused on reasonable, but not watertight, grounds in preference to giving lengthy and complex reasons for an adverse decision or in order to avoid appeal or review.[21]

This concern may also relate more to the existence of accessible appeal and review mechanisms than it does to the giving of reasons and, in any event, it is difficult to assess whether it is an accurate reflection of agency responses to the requirements to give reasons.

However, decision makers have less reason to be timid in their decision making given the decision by the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf.*[22] In that case, the Court held that a statement of reasons must set out all of the material facts, as determined by the decision maker. As such, a statement of reasons does not need to be 'watertight' and include all salient facts. As a result of that case, decision makers only need to include in their statements of reasons their findings on those facts that *they* consider to be material.[23]

20 Administrative Review Council Report No. 33 *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions,* (1991) at paragraph 157.

21 R W Cole 'The Public Sector: The Conflict between Accountability and Efficiency' (1988) 47 *Australian Journal of Public Administration* 223 at 227; Kees de Hoog 'The View from the Administration' in S Argument (ed) *Administrative Law and Public Administration: Happily Married or Living Apart Under the Same Roof?* 1994, AIAL, 67 at 77; cf R Creyke and John McMillian 'Executive Perceptions of Administrative Law' (forthcoming).

22 *Minister for Immigration and Multicultural Affairs v Yusuf (2001)* 180 ALR 1.

23 The implications of this case are considered in more detail at page 26.

question one

# 1. Does the decision maker have an obligation to provide a statement of reasons?

## Common law

### Common law in Australia – Osmond's case

There is no general common law duty on decision makers to provide reasons for decisions in Australia.

In *Public Service Board v Osmond*,[24] Gibbs CJ expressed the general principle as follows:

> There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons.

### Qualifications on the common law position

There are three important qualifications on the common law position which should be noted:

#### *Principles of procedural fairness require disclosure of adverse decisions*

The principles of procedural fairness require a decision maker who is making a decision which may adversely affect a person to give that person notice of the reasons for the proposed action.[25] The person affected is then entitled to the opportunity to respond and answer the case against them.[26]

While the courts are careful to distinguish between this general obligation to make known in advance the standards and considerations relevant to the decision and the obligation to give reasons for having made a decision in a particular way, both aspects of disclosure are important to rationality and fairness where decision makers are exercising discretionary powers.[27]

24 (1986) 159 CLR 656.

25 For example, see *Barratt v Howard* [2000] FCA 190.

26 *Public Service Board v Osmond* (1986) 159 CLR 656, at 666, per Gibbs CJ.

27 D J Galligan *Discretionary Powers* 1990 at 267; G Richardson 'The Duty to Give Reasons: Potential and Practice' [1986] Public Law 437.

### *Inference of no good reason if no reasons given*

Even if there is no formal requirement for reasons for a decision, in certain circumstances the courts may infer that a decision maker who has not given reasons had no good reasons for that decision.[28] In this case the decision may be reviewable as an error of law or on other grounds, such as, a failure to take account of relevant considerations.

### *In special circumstances the common law may require reasons*

The High Court in *Public Service Board v Osmond* left open the possibility that in special or exceptional circumstances the common law principles of procedural fairness may require the decision maker to give reasons. The Court did not identify what circumstances might give rise to such a requirement, but indicated that the circumstances before it did not do so.

## Powers of the Ombudsman

In the absence of a positive common law duty to provide reasons and where the statutory obligations considered below are not applicable, the Commonwealth Ombudsman has power to recommend to a department or agency, in a report following an investigation, that a decision maker should have given reasons for a decision or that the reasons should be improved.[29]

# Statutory obligations to provide reasons

In general terms, the obligation to provide reasons arises where:

- there is a right of merits review by the AAT and a person entitled to initiate review proceedings requests reasons; or
- there is a right of judicial review by the Federal Court under the AD(JR) Act and a person entitled to initiate review proceedings requests reasons; or
- the legislation which confers the power to make the decision requires that the decision maker give reasons when notifying the person affected of the decision.

It should be noted that even if a computer program is used to assist the decision maker in the making of a decision, the obligation to provide a statement of reasons is not removed and must be satisfied by the decision maker.

In most circumstances, the obligation to provide a statement of reasons will arise after the decision maker has made their decision, if it arises at all. As a matter of good administrative practice, decision makers should make a note of the basis of their decision at the time that they make it. The contents of that note should be informed by the requirements that are set out in the Guidelines.

28 *Public Service Board v Osmond* (1986) 159 CLR 656, at 663–4, per Gibbs CJ.

29 *Ombudsman Act 1976* ss 15(1)(c)(ii), 15(2)(c)(e).

At other times, there will be no decision until a record of that decision has been made (see sections 67, 138 and 159 of the *Migration Act 1958*).

## A right of merits review by the AAT

Section 28(1) of the AAT Act states:

> Where a person makes a decision in respect of which an application may be made to the Tribunal for review, any person (in this section referred to as the 'applicant') who is entitled to apply to the Tribunal for a review of the decision may, by notice in writing given to the person who made the decision request that person to furnish to the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision and the person who made the decision shall, as soon as practicable but in any case within 28 days after receiving the request, prepare, and furnish to the applicant, such a statement.

As such, the obligation to provide reasons arises where there is:

- a decision that is reviewable by the AAT; and
- a request for reasons made in writing by a person whose interests are adversely affected by the decision.

### *What decisions are reviewable by the AAT?*

The AAT has no general review powers and may only review decisions where it has been given jurisdiction to do so by an enactment, which includes Acts, Ordinances of Territories other than the Northern Territory, and instruments, including rules, regulations and by-laws, made under an Act or Ordinance.[30] That is, the AAT may only review a decision if the Act, instrument or Ordinance authorising the decision provides for review.

While the AAT may ultimately be able to review a decision by the original decision maker, in some situations it may be unable to do so before the decision has been reviewed by another decision maker. In this instance, the first decision maker may need to refer to the legislation authorising the decision as to whether reasons are required.

### *Who is a person whose interests are affected by the decision?*

The enactment that confers jurisdiction will identify the person or persons whose decisions are subject to review.[31] Applications for review may be made by or on behalf of a person whose interests are affected by those decisions. An organisation or association, whether incorporated or not, may have interests affected, if the decision relates to a

30 *Administrative Appeals Tribunal Act 1975* s 25(1), 3(1).

31 *Administrative Appeals Tribunal Act 1975* s 25(3)(a).

matter included in the objects or purposes of the organisation or association, provided the organisation was formed before the decision under review was made.[32]

'Interests affected' may be non-material, such as intellectual or spiritual interests; they are not confined to property, financial or physical interests. However, the 'interests affected' need to be something other than the interests of a person as a member of the general public and other than as a person holding a belief that a particular type of conduct should be prevented or a particular law observed.[33]

### *What is a request in writing?*

The request for reasons need not be formal. A person may make the request in an informal letter, fax or email, but not by telephone.

### *Notice of rights to seek review or reasons*

Section 27A(1) of the AAT Act requires the decision maker to take such steps as are reasonable in the circumstances to give any person whose interests are affected notice of the making of the decision and the right to have the decision reviewed. This requirement is subject to some exceptions listed in section 27A(2), including where another enactment requires notification of the right of review.[34]

Some legislation which requires notification of review rights may also require the decision maker to notify the person affected of their right to request a statement of reasons under section 28 of the AAT Act.[35]

### *Decision maker to file copies of their reasons*

Once an application for review is made, the decision maker must provide to the AAT two copies of a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the real reasons for the decision, together with all relevant documents.[36]

32 *Administrative Appeals Tribunal Act 1975* s 27(1), (2), (3). In *Re Autos America Pty Ltd; (Ultimate 4WD Equipment (Queensland) Pty Ltd (party joined) and Department of Transport and Regional Development* (1996) 42 ALD 758 the Tribunal held that the person seeking reasons was not entitled to be furnished with a statement under s 28(1). Its interests as a commercial competitor were not sufficiently affected by the decision of the department to give the party joined compliance plate approval for the import of up to 25 vehicles per annum.

33 *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No. 1)* (1980) 3 ALD. 74 at 77–81.

34 *Administrative Appeals Tribunal Act 1975* s 27A(2)(b).

35 For example, s 23DZE(1) of the *Health Insurance Act 1973*.

36 *Administrative Appeals Tribunal Act 1975* s 37(1).

This statement of reasons need not be limited to the reasons at the time the decision was made.[37] However, any discrepancy may enable the AAT to draw an inference that the decision maker did not carefully consider the obligation imposed by the legislation.[38]

A statement need not be provided where the President of the AAT has directed the decision maker to lodge two copies of the document by which the decision maker informed the applicant of the reasons for the decision. Such a direction can be made in respect to a particular decision or a class of decision.[39]

## A right of judicial review by the Federal Court under the AD(JR) Act

Section 13(1) of the AD(JR) Act states that:

> Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

As such, the obligation to provide reasons arises where there is:

- a decision that is reviewable by the Federal Court; and
- a written request for reasons made by a person who is aggrieved by the decision.

The decision maker may provide reasons in response to a request, even if there is doubt as to whether the decision is reviewable. A response to a request for reasons for a decision does not constitute an acceptance that the decision is reviewable under the AD(JR) Act.[40]

A person is entitled to request a statement of reasons even after proceedings to review the decision have begun.[41]

### *Decisions for which reasons do not need to be given*

Section 13(11) of the AD(JR) Act excludes the following decisions from the requirement to provide reasons:

- a decision for which reasons can be requested under section 28 of the AAT Act; or
- a decision which includes, or is accompanied by, a statement setting out findings of fact, referring to the evidence, and the reasons for the decision; or

37 *Re UK Family Reunion and Australian Postal Commission* (1978) 2 ALD 748.

38 *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183.

39 *Administrative Appeals Tribunal Act 1975* s 37(1AB).

40 *Clamback v Coombes* (1986) 13 FCR 55.

41 *United Airlines v Department of Transport and Communications* (1990) 26 FCR 598.

- a decision which falls within one of the classes listed in Schedule 2 to the AD(JR) Act.

Section 13(11)(b)(a) of the AD(JR) Act excludes a decision to which section 28 of the AAT Act applies, that is, decisions for which reasons could be requested under the AAT Act, and not necessarily decisions for which reasons have actually been obtained under that Act.

Where a particular request for reasons relates to a decision to which section 28 applies, the decision maker should not respond to a request for reasons under section 13 by saying that the request should have been made under the AAT Act. Since a request for reasons need not identify the request as being made under the AD(JR) Act,[42] it would be appropriate for the decision maker to provide the reasons.

### *What decisions are reviewable by the Federal Court?*

For the decision to be reviewable under the AD(JR) Act, it must be:

- a decision of an administrative character;[43] and
- made under an enactment;[44] and
- not a decision of the Governor-General or a decision listed in Schedule 1 to the AD(JR) Act.[45]

### *Final or operative decision*

Not all steps in the decision making process will constitute a 'decision', that is the final or operative decision which determines, at least in a practical sense, the issues of fact which must be dealt with.

An intermediate conclusion, reached as part of a course of reasoning which leads to the ultimate decision, may, however, amount to a reviewable decision if the relevant legislation requires or allows a finding or ruling on that point.[46]

42 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500.

43 See discussion in *Federal Airports Corporation v Aerolineas Argentinas* (1997) 50 ALD 54; *Queensland Medial Laboratory v Blewett* (1988) 84 ALR 615.

44 For examples of cases in which the Federal Court has refused to make an order requiring reasons, on the ground that the decision was not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* because it was not a decision 'made under an enactment', see *Burns v Australian National University* (1982) 40 ALR 707; *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 51 FCR 501; *Australian National University v Lewins* (1996) 68 FCR 87.

45 *Administrative Decisions (Judicial Review) Act 1977* s 3(1).

46 *Australian Broadcasting Tribunal v Bond* (190) 170 CLR 321.

### *Who is a person who is aggrieved by the decision?*

The person requesting the statement must be a 'person aggrieved', that is, a person whose interests are adversely affected by the decision under review and is thus entitled to make an application for review.[47]

The phrase 'person aggrieved' is a flexible one which should not be given a narrow meaning. Much depends on the nature of the particular decision and the extent to which the interest of the applicant rises above that of an ordinary member of the public. The phrase should not be confined to persons who can establish that they have a legal interest at stake in the making of the decision. For example, a person is taken to be aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision. A person is also taken to be aggrieved by a failure to make a decision where their interests are, or would be, adversely affected by the failure.

### *What is a written request for reasons?*

While the request for reasons must be in writing, the person need not specify that the request is made under the AD(JR) Act and may make the request in an informal letter, fax, email or other form of written communication, but not by telephone.[48]

A person with rights under the AD(JR) Act cannot be denied those rights merely because he or she is not aware of them in detail.

The person can give notice of the request for reasons by ordinary post and the request is deemed to have been made at the time of posting.[49]

### *Applicant to file copies of the reasons*

Where an application for review of a decision is made under the AD(JR) Act, the applicant is required, on the filing of the application or as soon afterwards as is practicable, to file copies of a statement of the terms of the decision and a statement provided under section 13 of the AD(JR) Act or section 28 of the AAT Act or any other statement of findings and reasons provided by or on behalf of the decision maker.[50]

47 *Administrative Decisions (Judicial Review) Act 1977* s 5(1), 3(4). For an example of a case in which the Federal Court has determined that the person seeking reasons had standing to challenge a decision and was therefore entitled to request a statement, see *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 71 ALR 73.

48 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500.

49 *Administrative Decisions (Judicial Review) Act 1977* s 3(6).

50 Federal Court Rules O 54 r 3(1).

## The legislation which confers the power to make the decision requires the decision maker to give reasons

### Acts Interpretation Act

The content of a general statutory duty to provide reasons is governed by section 25D of the *Acts Interpretation Act 1901*.

Where the legislation simply states that a decision maker is required to provide the reasons for a decision, section 25D of the Acts Interpretation Act extends that obligation and requires that the reasons refer to the evidence, set out the material findings of fact and state the reasons for the decision:

> Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression 'reasons', 'grounds' or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

Section 25D is designed to achieve substantially the same object as section 28 of the AAT Act and section 13 of the AD(JR) Act and has been described as another illustration of the increasing tendency of the Parliament to give effect to the principle of open government and to expose the decision making processes of government tribunals, bodies and officers to public scrutiny.[51]

### Other legislative schemes

Even if a decision is not subject to review under the AAT Act or the AD(JR) Act, sometimes legislation under which a decision is made specifically requires that reasons must be given for the decision. Often the legislative scheme will include specific requirements for providing statements of reasons. It is likely that such legislation will use the AAT Act as the basis for the requirement. In that case, it is important that the obligation to provide reasons imposed under section 28 of the AAT Act is complied with.

#### *Example of legislation requiring reasons*

A discrete example of legislation requiring reasons is section 26 of the *Freedom of Information Act 1982*, which requires a person who makes a decision refusing to grant access to a document or deferring access to give notice in writing of the decision. That notice must state the findings on material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision. The decision maker must also notify the person of their right to seek review.

51 *Dornan v Riordan* (1990) 24 FCR 564; *Dalton v Commissioner of Taxation* (1985) 7 FCR 382.

## Merits review bodies other than the AAT

What follows is an overview of the requirements to provide reasons in relation to the principal Commonwealth merits review bodies.

### *The Social Security Appeals Tribunal*

When the Social Security Appeals Tribunal makes a decision on a review, the Social Security Appeals Tribunal must give an applicant written notice of the decision: section 177(1) of the *Social Security (Administration) Act 1999*. The notice must set out the reasons for the decision, the findings on material questions of fact and refer to the evidence or other material on which those findings were based. It must include a statement to the effect that, if dissatisfied with the Social Security Appeals Tribunal decision, the person may apply to the AAT for review of the decision: section 177(2) of the *Social Security (Administration) Act 1999*.

For an application for review of a decision under Division 1 of Part 9 of the *Student and Youth Assistance Act 1973*, the Secretary of the agency must send the National Convener a statement about the decision under review that sets out the findings of fact made by the person who made the decision, refers to the evidence on which those findings were based and gives the reasons for the decision. The Secretary must also send the original or a copy of every document or part document that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision: section 157(3) of the *Social Security (Administration) Act 1999*.

### *The Veterans' Review Board*

For an application for review, the Secretary of the Department of Veterans' Affairs must have a report prepared referring to the evidence under the control of the department that is relevant to the application and serve a copy of the report on the applicant: section 137 of the *Veterans' Entitlements Act 1986*.

### *The Migration Review Tribunal*

The Migration Review Tribunal must:

- give to the applicant particulars of any information that the tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review; and
- ensure as far as is reasonably practicable that the applicant understands why it is relevant to the review; and
- invite the applicant to comment on it: section 359A of the *Migration Act 1958*.

The applicant may, within seven days of being notified that they are entitled to appear before the tribunal to give evidence and present arguments relating to the decision under review, give the tribunal written notice that the applicant wants the tribunal to obtain written evidence from a person or persons named in the notice or other written material relating to the issues arising in relation to the decision under review: section 361 of the *Migration Act 1958*.

### *The Refugee Review Tribunal*

The Refugee Review Tribunal must:

- give to the applicant particulars of any information that the tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
- ensure as far as is reasonably practicable that the applicant understands why it is relevant to the review; and
- invite the applicant to comment on it: section 424A of the *Migration Act 1958*.

## Time limits

### *Calculating time*

Section 36 of the Acts Interpretation Act states that, unless the contrary intention appears, in calculating time, dating from a given day, act or event, the time shall be reckoned exclusive of the first named day or the day of the act or event.

### Time limits for the person requesting the reasons

The time limit for a person to make a request for a written statement of reasons under the AAT Act or the AD(JR) Act depends on the form of notification of the decision.

If the terms of the decision were recorded in writing and set out in a document provided to the person, the person must make a request for reasons within 28 days after that document was given to the person.

In any other case, the person must request a statement of reasons within a reasonable time after the decision was made.

A decision maker is entitled to refuse to provide a statement of reasons if:

- the request was not made within 28 days; or
- the request was not made within a reasonable time, if the person was not advised of the decision in writing.[52]

52 *Administrative Appeals Tribunal Act 1975* s 28(1A), *Administrative Decisions (Judicial Review) Act 1977* s 13(5).

If the decision maker considers that the person has requested the statement out of time and decides not to provide the statement, the decision maker must give written notice to the person that the statement will not be provided. That notice must be given within 28 days after receiving the request if it was made under the AAT Act or 14 days if made under the AD(JR) Act.[53]

The person making the request can approach the AAT or the Federal Court for a declaration that the request was made within a reasonable time after the decision was made.[54]

### *What is a reasonable time?*

What constitutes a 'reasonable time' will depend on the circumstances. The approach of the courts to applications for extensions of time to seek judicial review is a useful guide.

In *Ho v King*,[55] the applicant requested a statement of reasons in May 1994 for an opinion expressed by the respondent in a letter of 31 December 1993 and the Federal Court granted a declaration that the request was made within a reasonable time. The Court held that the explanation for the delay after the applicant received the letter was both plausible and reasonable and the respondent had not pointed to any prejudice that it would suffer if compliance with the request were required. Any assessment of what is reasonable or not has to be made bearing in mind the remedial nature of the legislation.

In *United Airlines v Secretary, Department of Transport and Communications*,[56] Hill J suggested that even if the Court was satisfied that a request had been made within a reasonable time, there was a residual discretion not to make a declaration. In *Ho v King*, Moore J considered that even if such a discretion existed it would be only in exceptional cases that it should be exercised to deny reasons to an applicant entitled to them under section 13(1).[57]

## Time limits for the decision maker

A decision maker must provide a written statement of reasons as soon as practicable, but no later than 28 days, after receiving the request.[58]

53 *Administrative Appeals Tribunal Act 1975* s 28(1A), *Administrative Decisions (Judicial Review) Act 1977* s 13(5).

54 *Administrative Appeals Tribunal Act 1975* s 28(1B), *Administrative Decisions (Judicial Review) Act 1977* s 13(6).

55 (1994) 34 ALD 510.

56 (1990) 26 FCR 598.

57 (1994) 34 ALD 510 at 519.

58 *Administrative Appeals Tribunal Act 1975* s 28(1), *Administrative Decisions (Judicial Review) Act 1977* s 13(2).

### *Request under the AAT Act*

If the decision maker considers that the person requesting reasons is not entitled to reasons under the AAT Act, the decision maker must inform the person of that opinion within 28 days of receiving the request.[59]

The person may then apply to the AAT for a determination of whether or not they are entitled to reasons. If the AAT decides that the person is entitled to reasons, the decision maker must provide them within 28 days of the AAT's determination.[60]

### *Request under the AD(JR) Act*

If the decision maker considers that the person requesting reasons is not entitled to reasons under the AD(JR) Act, the decision maker may, within 28 days of receiving the request, give to the person requesting the reasons notice in writing of their opinion or apply to the court for an order declaring that the person was not entitled to make the request.[61] The person requesting the reasons may also, in receipt of the notice from the decision maker, apply to the court for a declaration that they are entitled to request a statement of reasons.

If the court determines that the person was entitled to make the request, the decision maker must provide the statement within 28 days of the court making its decision.[62]

### *Reasons provided where a request is made out of time*

The decision maker may decide to provide a statement of reasons even where the request is out of time. In this situation if the decision maker does not provide written notice that reasons will not be provided the statement supplied will be subject to the full requirements of the legislation. That may include an order that the decision maker provide further and better particulars if the statement is inadequate.[63]

### *Can a number of documents form a decision in writing?*

For the 28-day time limit to start there must be 'a decision the terms of which were recorded in writing and set out in a document furnished to the applicant'. A decision maker cannot generally rely on a number of documents created at different times and provided over time to the person making the request, even if in total those documents record the decision.

59 *Administrative Appeals Tribunal Act 1975* s 28(1AA).

60 *Administrative Appeals Tribunal Act 1975* s 28(1AB), (1AC).

61 *Administrative Decisions (Judicial Review) Act 1977* ss 13(3).

62 *Administrative Decisions (Judicial Review) Act 1977* ss 13(3), (4), (4A).

63 *James Richardson Corporation Pty Ltd v Federal Airports Corporation* (1992) 117 ALR 277.

In *Ho v King*,[64] however, Moore J expressed the opinion that a number of pieces of paper furnished at the same time, or a document which unambiguously incorporates by reference the text of earlier documents provided to the applicant, may be a 'document' for the purposes of section 13(5)(a) of the AD(JR) Act.

64 (1994) 34 ALD 510 at 517.

## 2. On what grounds can the decision maker refuse to provide a statement of reasons?

### Grounds for refusing to provide reasons

The decision maker may refuse to provide a statement of reasons if:

- the person requesting the reasons is not entitled to them;[65]
- the decision for which reasons are sought is not reviewable;[66]
- an adequate statement of reasons has already been provided;
- the request is not made in writing;[67] or
- the request is made out of time.[68]

These grounds for refusing to provide a statement of reasons have already been discussed. A decision maker may also refuse to give reasons if:

- other legislation overrides any obligation to provide reasons;[69] or
- in the case of reasons requested under section 13 of the AD(JR) Act – the decision is in a class of decision listed in Schedule 2 to that Act.

Even in these cases a decision maker may choose to provide reasons if there are sound grounds for doing so. A decision maker must refuse to provide reasons if an Attorney-General's certificate has been issued stating that disclosure would be contrary to the public interest.

#### Other legislation overrides the obligation to provide reasons

Occasionally, other legislation will override the obligation to provide reasons. For example, section 14ZZB of the Taxation Administration Act 1953 states that, among other things, section 28 of the AAT Act does not apply in relation to a reviewable objection decision.

#### Schedule 2 exclusions

Schedule 2 to the AD(JR) Act lists a number of classes of decisions which may be reviewable under the AD(JR) Act, but which are not subject to the entitlement to obtain a statement of reasons.

65 *Administrative Appeals Tribunal Act 1975* s 28(1), *Administrative Decisions (Judicial Review) Act 1977* s 13(1), (11).

66 *Administrative Appeals Tribunal Act 1975* s 28(1), *Administrative Decisions (Judicial Review) Act 1977* s 13(1).

67 *Administrative Appeals Tribunal Act 1975* s 28(1), *Administrative Decisions (Judicial Review) Act 1977* s 13(1).

68 *Administrative Appeals Tribunal Act 1975* s 28(1A), *Administrative Decisions (Judicial Review) Act 1977* s 13(5).

69 For example, s 14ZZB of the *Taxation Administration Act 1953*, for reviewable objection decisions.

The Schedule 2 exclusions are counter to the policy expressed in the creation of the general obligation to provide reasons, particularly where a decision for which reasons may not be sought is subject to judicial review. The Federal Court has said that while each of the paragraphs in Schedule 2 must be construed and given effect in accordance with its ordinary English meaning, the court should not adopt an overly liberal interpretation or construe the exclusions broadly.[70]

It follows that much depends on the precise wording of each of the paragraphs in Schedule 2, as to whether they provide a particular exclusion. In *Ho v King*,[71] for example, the Federal Court read Schedule 2(d) 'decisions under the *Migration Act 1958*, being…' as not including a decision made under the Migration Regulations.

## Attorney-General's certificate

Certain information otherwise relevant to a statement of reasons may be the subject of a certificate issued by the Attorney-General under section 14 of the AD(JR) Act. Such a certificate is to the effect that disclosure of the information concerning a specified matter would be contrary to the public interest:

- where disclosure would prejudice the security, defence or international relations of Australia; or
- where disclosure would involve the disclosure of deliberations or decisions of Cabinet or a Cabinet committee; or
- for some other reason specified in the certificate which would form the basis of a claim for public interest immunity.[72]

The decision maker is not required to include in a statement of reasons any matter in relation to which the Attorney-General has given a certificate and may, where a statement without that information would be false or misleading, decide not to provide the statement.[73] The decision maker must notify the person who requested the statement, giving reasons for not providing it.[74] It should be noted that in practice these certificates are very rare.

## No entitlement to reasons

If the decision maker considers that a person is not entitled to make a request for a statement of reasons, the decision maker can, within 28 days, either give the person written notice of that opinion or apply to the AAT or the Federal Court for an order

70 *Secretary, Department of Foreign Affairs v Boswell* (1992) 108 ALR 77; *Ho v King* (1994) 34 ALD 510.

71 (1994) 34 ALD 510.

72 *Administrative Decisions (Judicial Review) Act 1977* s 14(1); *Administrative Appeals Tribunal Act 1975* s 28(2).

73 *Administrative Decisions (Judicial Review) Act 1977* s 14(2); *Administrative Appeals Tribunal Act 1975* s 28(3).

74 *Administrative Decisions (Judicial Review) Act 1977* s 14(3); *Administrative Appeals Tribunal Act 1975* s 28(3A).

declaring that the person was not entitled to make the request.[75] Either the person who requested the reasons or the decision maker can apply to the tribunal or court for an order declaring that the person was or was not entitled to make the request.[76]

## Failure to respond to a request for reasons

The AD(JR) Act and the AAT Act make no provision for the situation where a decision maker, faced with a request for reasons, simply fails to respond to the request.

Section 13(4A) of the AD(JR) Act enables the person making a request for reasons to apply to the Federal Court only where the decision maker has given written notice refusing to provide a statement under section 13(3) of the AD(JR) Act. Without this written refusal, there can be no application to the Federal Court to request reasons for a decision.[77]

The effect of a failure to provide a statement of reasons may be that it constitutes an error of law.[78] In some instances, however, the legislation which imposes the obligation to advise the reasons for decision and the rights of review provides that the validity of the decision is not affected by a failure to comply with those obligations.[79] Beyond putting the person requesting the reasons in an unfair position, the failure to provide reasons may not make the original decision itself a nullity or unlawful. At present the effect of failure to provide a statement of reasons is unclear.

### *Mandamus*

If the decision maker simply does not respond to a request for reasons the person requesting reasons may seek the common law remedy of mandamus[80] to direct the decision maker to provide reasons.

While mandamus is an option for compelling the production of reasons, it is likely to revive the technicalities surrounding the obtaining of mandamus that the AD(JR) Act was intended to overcome.

It is not appropriate to seek mandamus under section 39B of the *Judiciary Act 1903* as a means of enforcing the duty to give a statement under section 13 of the AD(JR) Act prior

75 *Administrative Decisions (Judicial Review) Act 1977* s 13(3).

76 *Administrative Decisions (Judicial Review) Act 1977* s 13(4A).

77 Cooper J in *James Richardson Corporation Pty Ltd v Federal Airports Corporation* (1993) 117 ALR 277 said that 'Section 13(5)…gives the recipient an election to refuse to prepare and furnish the statement if the circumstances in paras (a) and (b) exist provided that the requisite notice is given within 14 days. If the requisite notice is not given, then the obligation imposed by section 13(2) is neither discharged nor terminated'.

78 *Dornan v Riordan* (1990) 24 FCR 564.

79 For example, s 23DZE(2) *Health Insurance Act 1973*; s 177(2) *Social Security (Administration) Act 1999*.

80 Mandamus is a prerogative writ issued to compel performance.

to the commencement of proceedings for the review of the decision in respect of which the statement is requested.[81] This defeats part of the purposes of the right to reasons, namely, to give a person an opportunity to determine whether there is any basis for commencing an action.

### *Second decision maker revokes and remakes the original decision*

If the original decision maker simply refuses to respond to a request to give reasons, the second decision maker may be able to revoke and remake the decision in order to meet the request for reasons. The authorities for revisiting a decision are equivocal and it may be that, barring the options set out below, a decision can only be remade with the consent of the person requesting the reasons.

If the original decision maker can be said to be *functus officio*,[82] the decision will only be able to be revoked and remade in limited circumstances.

#### *Legislative sources of the power to revoke*

There are two possible legislative sources of the power to revoke a decision:

- the legislative provision conferring the decision making power expressly provides for revocation of the decision; and
- section 33 of the Acts Interpretation Act provides that where an Act confers a power to make, grant or issue an instrument then there is also a power of revocation, unless a contrary intention exists.

#### *A decision that is void or voidable*

A second decision maker may make a fresh decision if the original decision was void or voidable – this principle provides a qualification to the operation of the *functus officio* doctrine. There is doubt as to whether this depends upon agreement between the decision maker and the person disputing the decision[83] or whether the mere existence of an invalid decision, regardless of consent of the interested parties, enables the decision to be withdrawn and remade.[84]

81 *Clanwilliam Pty Ltd v Bartlett* Fed C of A, Fitzgerald J, Qld G 19 of 1984, 8 May 1984, unreported.

82 *Functus officio* meaning having done his duty. When a function is performed it is finished and nothing further can be done. For example, once a magistrate has convicted a person charged with an offence, he is *functus officio* and cannot rescind the sentence and retry the case. R Bird, *Osborn's Concise Law Dictionary* 7th ed,1983, at 155.

83 *Comptroller-General of Customs and Anor v Kawasaki Motors Ltd (No. 1)* (1991) 32 FCR 219.

84 *Leung & Wong v MIMA*, decision of the Full Federal Court on 28.11.97; VG 213 of 1997.

It is unlikely that a person would consent to the withdrawal and remaking of a decision which was substantially in their interests, or to which there were competing multiparty interests, merely so that an adequate statement of reasons could be provided.

### *Second decision maker provides reasons on the basis of original decision maker's notes*

If the original decision maker is no longer available or simply refuses to respond to a request to give reasons, but has made notes clearly outlining the reasons for the decision, then the original decision maker's successor may prepare reasons on the basis of those notes. Reasons provided on the basis of notes must be free from any interpretations, assumptions or opinions of the second decision maker.[85] This will be possible, in particular, in any proceedings commenced under the AD(JR) Act.[86] If the notes contain any ambiguity as to the reasons for the decision, then the second decision maker will be unable to prepare a statement of reasons without the consent of the person requesting the reasons.[87]

### *Death of decision maker*

If the original decision maker is unable to provide reasons, for example because of death, a person obviously cannot compel the production of reasons. If the decision maker has made adequate notes of the reasons for their decision the person carrying out the original decision maker's duties (or the second decision maker) may be able to prepare reasons on the basis of those notes. The second decision maker must refrain from importing any of his or her own assumptions, interpretations or opinions into the statement of reasons.

### *Last resort*

If the original decision maker's records are inadequate, it may be necessary for the officer to state that the relevant decision maker did not record the reasons for the decision and is unavailable to provide a statement of reasons.

## Effect of failure to provide reasons

A failure of the decision maker to provide reasons may lead the court or tribunal to the conclusion that there were no issues which the decision maker regarded as material. Such a failure may reveal a reviewable error such as an error of law or a failure to take into account relevant considerations.[88]

85 *State Electricity Commission v Commissioner for Equal Opportunity* [1992] VR 79 at 86.

86 See section 17.

87 *State Electricity Commission v Commissioner for Equal Opportunity* [1992] VR 79 at 86.

88 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.

## Court's discretion to require reasons

The Federal Court has discretion whether or not to require the decision maker to provide reasons.

In *United Airlines v Secretary, Department of Transport and Communications*,[89] Hill J dismissed an application for a statement of reasons for a decision which had been revoked, commenting that it was difficult to see how a statement giving reasons for a decision that was admittedly vitiated for error could be of any assistance to the applicant.

In *North Coast Environment Council v Minister for Resources*,[90] the applicant sought reasons for a decision to grant an export licence which had expired by the time of the hearing. Sackville J distinguished the *United Airlines* case, commenting that in this case the factors that influenced the Minister to grant the licence might well be relevant to a decision to grant a fresh licence.

Sackville J relied on both the potential usefulness of the statement in a subsequent challenge to the validity of the licence and on the broader purpose of section 13 of the AD(JR) Act, namely, to overcome the real grievance persons experience when they are not told why something affecting them has been done, and to enable persons affected by a decision to see what was taken into account and whether error had been made.[91]

89 (1990) 26 FCR 598.

90 (1994) 36 ALD 30.

91 Sackville J did not resolve the issue of whether the person seeking reasons had standing to initiate the proceedings, and held that on the assumption that it was capable of being a person aggrieved, there was or may be utility in requiring a statement of reasons, evidence and facts. Sackville J subsequently held that the person seeking reasons was a 'person aggrieved' and was entitled to a statement.

## 3. What does the decision maker need to show in a statement of reasons?

Whether the decision maker is providing reasons in response to a request under the AAT Act or the AD(JR) Act, or providing reasons together with the decision, the three core requirements for the reasons are the same. The statement must:

- set out the decision; and
- contain the findings on material questions of fact; and
- refer to the evidence or other material on which those findings were based; and
- give the real reasons for the decision.

### Findings on material questions of fact

The decision maker must state its findings on those questions of fact which the decision maker considers to be material to the decision which it makes and to the reasons it has in reaching that decision.[92]

A material fact is one on which the decision turns.

Matters of fact may be the primary facts, or the ultimate facts in issue. A fact may be material because it is required by the legislation or because it is part of the evidence, whether provided by the applicant or gathered by the agency.

A number of court decisions considered what is meant by the requirement for decision makers to state their findings on material questions of fact. Some regarded it as an objective question, others that it was dependant on what the decision maker considered to be material.[93]

In *Minister for Immigration and Multicultural Affairs v Yusuf*, the High Court discussed what is meant by the requirement for decision makers to state the 'material questions of fact'.[94] In that case, the majority[95] rejected the view that 'material' meant 'objectively material'. Such a reading would impose a duty to make findings on facts in relation to a decision the tribunal was said to be notionally required to make, rather than the decision which was actually made. It was noted[96] that as objectively material facts could only be determined 'on later judicial inquiry':

92 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1, per McHugh, Gummow and Hayne JJ at paragraph 68.

93 For example, in *Xu v Minister for Immigration and Multicultural Affairs* ((1999) 168 ALR 621) the Court held that where the statute does not expressly or implicitly constrain the decision maker, the decision maker is the sole judge of what is material. This view was rejected by the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Singh* [2000] FCA 845, which held that the tribunal cannot be the sole arbitrator of materiality because " the [tribunal] is under a duty to make, and to set out, findings on all matters of fact that are *objectively material* to the decision it is required to make." ((2000) 175 ALR 503 at 512-513; emphasis added).

94 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.

95 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

96 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1, per McHugh, Gummow and Hayne JJ at paragraph 65.

> It follows that inquiring whether the duty has been performed would require examination of the whole of the tribunal's fact-finding process. The function of fact-finding would no longer be left to the tribunal.

This would be inconsistent with the doctrine outlined by Brennan J in *Attorney-General (NSW) v Quin*[97] that:

> The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison*: 'It is, emphatically, the province and duty of the judicial department to say what the law is.' 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...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.'

This does not mean that a decision maker has complete control over what they can consider material and what they can dismiss as not being significant. If a statement of reasons does not set out findings of fact on a matter, a court may infer that the decision maker did not consider that factual issue to be material. This could, for example, be a basis for arguments that the decision maker made an error of law or failed to have regard to all relevant considerations.

## Inference of material facts

Sometimes a material fact is established directly by the evidence of other material. Where, however, a decision maker infers a material fact from other facts, which are in turn established by evidence or other material, it may be necessary for the decision maker to state those other facts and the process of inference in order to provide adequate information on the way in which the decision was reached.

97 (1990) 170 CLR at 35-6.

### Specification of the relevant law

In order to identify which factual matters are relevant or material to the decision, the decision maker must first understand the legal framework within which the decision is made. The legislation will identify the essential pre-conditions for the exercise of the decision making power. These will generally be the material issues.

While the decision maker is not expected in the written statement to specify all the relevant law, or provide a legal opinion, the decision maker must draw the attention of the person affected by their decision to the relevant law, to enable that person to understand the legislative framework in which the decision was made. In some cases that may require only a brief reference to the law underlying the decision, and in others a more detailed reference to particular sections of statutes or to delegated legislation may be required.[98]

The decision maker should identify and express the relevant statutory requirement or test in terms that avoids simply reciting the formal wording of the legislation.[99] The decision maker should also avoid listing relevant cases by name, and instead explain the legal principle which is derived from those cases.[100] However, there may be times when it is appropriate to cite cases, depending on the knowledge and experience of the person requesting the reasons.

## Reference to evidence on which findings of fact are based

The evidence or other material upon which the findings on material questions of fact are based must be referred to in a statement, as there must be some evidence for a finding of fact. It is important for the reasons to demonstrate that a finding of fact was based upon logically probative evidence, otherwise the parties may be unable to determine if the decision was based on speculation alone.[101]

The statement of findings of fact is essentially an exercise in judgment, in which the decision maker sifts and weighs the various sources of evidence, and draws conclusions.[102] The statement must state what evidence was considered in relation to facts which the decision maker thought material.[103] If the statement does not refer

98 *Ansett Transport Industries (Operations) Ltd v Taylor* (1987) 18 FCR 498.

99 *Ansett Transport Industries (Operations) Ltd v Wraith* (1983) 48 ALR 500; *Koutsakis v Director-General of Social Security* (1985) 10 FCR 42; *Anderson v Australian Postal Commission* (1993) 32 ALD 138.

100 *McAuliffe v Secretary, Department of Social Security* (1991) 13 AAR 462.

101 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 at 67.

102 *Ansett Transport Industries (Operations) Pty Ltd v Taylor* (1987) 18 FCR 498.

103 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.

to particular pieces of evidence which appear relevant to an issue, this may reveal that the decision maker made an error of law or failed to have regard to all material considerations.[104] If evidence is thought to be relevant by the decision maker then it should be included in the statement of reasons.

## All reasons for the decision

Every decision should be capable of a logical explanation.

A statement of reasons must contain all steps of reasoning, linking the facts to the ultimate decision, that are necessary for the person affected to understand how the decision was reached.

A statement of reasons must go further than simply stating the decision maker's conclusions, and must give the real reasons for those conclusions.[105] Rather than simply listing the considerations which the decision maker took into account, the statement should assess the relevant considerations and indicate, either expressly or by necessary implication, how the reasoning process took account of each consideration.[106] Sackville J observed that:

> It is not necessary that reasons address every issue raised in proceedings; it is enough that they deal with the substantial issues upon which the decision turns.[107]

The decision maker should indicate the extent to which policy statements and guidelines were taken into account in the reasoning process.

### *Appeal rights*

A statement of reasons should contain appeal rights. In particular a statement of reasons should include details of rights to seek internal review, review by the AAT or another administrative tribunal, or judicial review.

104 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.

105 *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 67 FCR 40; *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675.

106 *Allen Allen & Hemsley v Australian Securities Commission* (1992) 27 ALD 296.

107 *Total Marine Services Pty v Kiely* (1995) 51 ALD 635 at 640.

## Expectations of reasons prepared by lawyers, lay people

Kirby J in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* drew a distinction between reasons prepared by lay decision makers, and reasons prepared by legally qualified persons:

> This admonition has particular application to the review of decisions which, by law, are committed to lay decision makers, ie tribunals, administrators and others. This is not to condone double standards between the reasons and decisions of legally qualified persons and others. It is simply to recognise that where, by law, a decision is to be made by a person with a different, non-legal expertise, or no special expertise, a different mode of expression of the decision may follow.[108]

More is expected of tribunals, particularly those constituted by members with legal qualifications, than is the case with primary decision makers.[109] This approach does not, however, detract from the requirement that a statement contain the three essential requirements, that are set out under Question Three, that is, the findings on material questions of fact, reference to the evidence or other material on which those findings were based and the reasons for the decision.

108 (1996) 185 CLR 259 at 291.

109 *Dodson v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 451 at 465.

question four

# 4. How and when should the statement of reasons be prepared?

## General

> There can be no blueprint or universal pro forma for statements of reasons. The characteristics of an individual decision will largely determine the material to be set out in a statement of reasons. Adequacy is a question of degree.[110]

The High Court commented on the approach which should be adopted by the courts when scrutinising a statement of reasons in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*.[111] In expressing approval of the approach of the Federal Court which held that reasons 'are not to be construed minutely and finely with an eye keenly attuned to the perception of error',[112] Brennan CJ, Toohey, McHugh and Gummow JJ said:

> These propositions are well settled. They recognise the reality that the reasons of an administrative decision maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.[113]

In a separate judgment, Kirby J commented:

> 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.[114]

Particular issues which may be relevant in the preparation of a statement of reasons include:

- language and length; and
- preparation of drafts; and
- precedent and standard form reasons.

110 H Katzen 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *Australian Journal of Administrative Law* 33 at 38.

111 (1996) 185 CLR 259.

112 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287.

113 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

114 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291.

## Language

The statement of reasons must be expressed in terms intelligible to a lay person.[115] The language used should be clear and unambiguous, avoid vague generalities and not merely repeat the formal language of the relevant legislation under which the decision was made.[116] The language must be able to be understood by the parties to the case.[117]

The decision maker needs to be aware of the potential audience for the statement. This is sometimes apparent in a negative sense, where the statement is drafted with a view to withstanding scrutiny by the Federal Court on a judicial review application. However, where that appears to be the case, the Federal Court will give little if any weight to the statement.[118]

Where the decision maker is required to provide reasons both to the person directly affected by their decision and to the wider public through notification in the Commonwealth *Gazette*, the decision maker will also need to be aware that potential readers may not have the expert background of the parties.

In *Commonwealth of Australia v Pharmacy Guild of Australia*, the Federal Court criticised a decision of the Pharmaceutical Benefits Remuneration Tribunal, finding that many of its conclusions were couched in esoteric terms which, while they may have been clear enough to those persons who appeared regularly before the tribunal, 'because of their elliptical and allusive character are difficult for the uninitiated to understand fully'.[119]

## Length

The appropriate length of a statement of reasons depends on the nature and importance of the decision, its complexity and the time available to formulate the statement. A statement for a comparatively simple decision may need to be only one or two pages in length.[120]

115 *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183.

116 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500.

117 *McAuliffe v Secretary, Department of Social Security* (1991) 13 AAR 462.

118 *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 67 FCR 40.

119 (1989) 91 ALR 65 at 67.

120 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500.

## Preparation of draft statements of reasons

### The decision maker is a delegate

The obligation to provide a statement of reasons is that of the decision maker personally and the decision maker should avoid adopting uncritically a draft statement prepared by someone else.

In reality, decision makers do not work in isolation, and there are many circumstances where it would be appropriate for a junior officer to provide a submission to the decision maker. Such submissions should summarise the factual material relevant to the decision and make recommendations which the decision maker is free to adopt or amend.[121] However, the person upon whom the obligation to provide reasons rests is ultimately responsible for the statement.

In *Palko v Minister for Immigration and Ethnic Affairs*,[122] the Federal Court criticised the practice of framing a submission in a form which included headings of 'Findings on material questions of fact' and 'Evidence or other material on which the findings are based'. That practice was not consistent with the role of an officer who did not have the function of making any findings.

Keely J commented that it is highly desirable that there be a clear differentiation between the function of the delegate, on the one hand, and the function of the officer preparing the departmental submission on the other. It is inappropriate for a departmental submission to attempt to perform two quite separate functions. The appropriate function of a departmental submission was considered to be:

> [T]o make recommendations to the delegate; the submission includes a summary of factual material which may vary in its significance from material which may well be regarded by the delegate as being of considerable relevance, on the one hand, to material that may well be regarded by him as being background information of little relevance on the other.

It is not appropriate that a departmental submission provide the delegate with a document which can simply be 'adopted' for the purpose of fulfilling the statutory obligation at a time when the decision maker has not decided the matter or even given any consideration to it.

121 *Palko v Minister for Immigration and Ethnic Affairs* (1987) 16 FCR 276; *Maitan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 307.

122 (1987) 16 FCR 276.

## Notes should be made at the time of the decision

In all cases, a note of a decision should be made at the time the decision is taken. Even if the decision maker prepares the statement of reasons some time after the decision is taken, and even if only after a request for the statement is made, if a sound, original note is made at the time of the decision that is the best means of showing that the decision is correct. The contents of a contemporaneous note should be informed by the requirements for a sound statement of reasons.

As a practical matter, it is difficult for any decision maker to reconstruct the reasoning process subsequently, particularly after a gap of some weeks, when a request for reasons is made.

In *Singh v Minister for Immigration, Local Government and Ethnic Affairs*,[123] Keely J commented on the departmental practice of another officer preparing a draft statement simply by working from the case file, without any instructions from the delegate as to what the reasons were at the time the matter was decided, and commented:

> Whatever may be said in favour of that practice when the 'reasons' are drafted almost immediately after the decision, in my opinion it is obviously undesirable where the reasons relate to a decision given some six months earlier.

## Precedents and standard form reasons

It is common for agencies and decision makers to develop standard form sentences or paragraphs for particular types of decisions. Use of such paragraphs is acceptable, provided it does not prevent the decision maker from considering the particular issues relevant to the case of the person requesting reasons and provided it does not conceal the real reasons for the decision.

For example, in *Lek v Minister for Immigration, Local Government and Ethnic Affairs*,[124] a number of different delegates made decisions refusing applications for refugee status, entry permits and visas by 48 individuals. The delegates used a series of standard paragraphs prepared for use in reasons for decisions on refugee claims by another section of their department.

Wilcox J held that use of the standard paragraphs did not indicate that the delegates had inflexibly applied policy. It was necessary to consider the content of the standard paragraphs, which in this case had been either statements of the law or summaries of the substance of documentary material concerning conditions in Cambodia.

123 (1989) 18 ALD 638 at 640.

124 (1993) 43 FCR 100.

*Wu v Minister for Immigration and Ethnic Affairs*[125] also concerned the determination of claims of refugee status by a large group of individuals. In that case, the delegates determining the claims participated in the development of the standard paragraphs.

Wilcox J rejected an argument that use of the paragraphs indicated that the delegates had failed to give proper, genuine and realistic consideration to the merits of each case. Some standard paragraphs set out matters of law or procedure and others summarised a common aspect of the claims as put on behalf of all of the applicants. Some paragraphs expressed personal judgment, but since not all of the delegates had used them, Wilcox J inferred that those who had used this material did so because it expressed views that accorded with their own opinions.

None of the standard paragraphs in *Wu* concerned assessments of the circumstances of individual applicants. This aspect of Wilcox J's judgment was not considered by the Full Court of the Federal Court on appeal or argued in the High Court on appeal. Brennan CJ, Toohey, McHugh and Gummow JJ did, however, make the following comment:

> A statement of reasons for a decision reviewable under the AD(JR) Act is not invalid merely because it employs a verbal formula that is routinely used by persons making similar decisions. If the formula is used to guide the steps in making the decision and reveals no legal error, the use of the formula will not invalidate the decision. On the other hand, if the decision maker uses the formula to cloak the decision with the appearance of conformity with the law when the decision is infected by one of the grounds of invalidity prescribed by the Act, the incantation of the formula will not save the decision from invalidity. In such a case, the use of the formula may even be evidence of an actionable abuse of power by the decision maker.[126]

125 (1994) 32 ALD 735.

126 *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1996) 185 CLR 259 at 266.

question five

# 5. How should recommendations, reports or submissions be treated?

## Recommendations or reports

The giving of reasons requires the decision maker to indicate the factors considered in the final analysis, the relative weight given to them and the reason for the ultimate judgment.[127] Therefore, while a statement of reasons may state a finding by reference to an earlier document, it is not sufficient that it simply adopts another officer's report or recommendation.[128]

Where recommendations are considered in making a decision, the statement should incorporate the recommendation or report. However, decision makers will need to be aware that when referring to such a report or recommendation, their statement of reasons must contain adequate information to satisfy the three essential requirements that are set out under Question Three. That is, the findings on material questions of fact, referring to the evidence or other material on which the report writer based those findings, and the reasons upon which the recommendation was based.[129] The decision maker cannot avoid the obligation to state reasons simply by indicating that they relied on a particular expert.

Where the decision maker differs from the report or recommendation, they should explain how and why.[130]

## Submissions

Where a person has made submissions on a question of fact that the decision maker considers to be material, the statement must deal with the submission.[131] Although the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf* [132] has indicated that the decision maker only has to state the findings it regarded as material the Court also indicated that a serious omission of a material factual matter could be an error. If a decision maker fails to refer to representations on a key issue, the omission may leave the decision maker open to the suggestion that the representations were not considered to be material by the decision maker and the statement may accordingly support an argument that the decision maker made an error of law or failed to have regard to all relevant considerations.[133]

127 *Maitan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 307.
128 *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183.
129 *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183; *Dornan v Riordan* (1990) 24 FCR 564; *Peverill v Backstrom* (1994) 54 FCR 410.
130 *Peverill v Backstrom* (1994) 54 FCR 410.
131 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.
132 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.
133 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1; *Hoskins v Repatriation Commission* (1991) 32 FCR 443 at 448.

## 6. How should confidential information used in preparing a statement of reasons be treated?

A statement of findings on questions of material fact or a reference to the evidence or other material on which they are based may reveal or indicate information, or the source of information, which has been received on a confidential basis.

It may be possible for the decision maker to prepare the statement without disclosing confidential information.[134] If it is not, then the following provisions apply.

### Under the AD(JR) Act

A decision maker is not required, in a statement of reasons provided under section 13 of the AD(JR) Act, to disclose information relating to a person or business affairs of a person other than the person making the request, if:

- the information was supplied in confidence; or
- the publication of the information would reveal a trade secret; or
- the information was furnished in compliance with a statutory obligation; or
- to furnish the information in accordance with the request would contravene a statutory duty.[135]

That may mean that a statement cannot state the factual findings as precisely as would otherwise be the case.[136]

If the statement would be false or misleading without the confidential information, the decision maker is not required to provide the statement.[137]

If the information is not included, or the decision maker decides not to provide the statement, the decision maker must notify the person requesting the statement giving reasons.[138]

134 In *Soldatow v Australia Council* (1991) 28 FCR 1, the person seeking reasons had unsuccessfully applied for a writer's fellowship. The statement of reasons, evidence and facts did not show how his work was considered to stand in relation to that of the successful applicants and, while acknowledging the difficulties, the Federal Court concluded that questions of confidentiality would not inevitably have been involved in disclosing the factors that were taken into account in his case and how his particular application was considered.

135 *Administrative Decisions (Judicial Review) Act 1977* s 13A.

136 *Ansett Transport Industries (Operations) Ltd v Taylor* (1987) 18 FCR 498.

137 *Administrative Decisions (Judicial Review) Act 1977* s 13A(2)(b).

138 *Administrative Decisions (Judicial Review) Act 1977* s 13A(3).

## Under the AAT Act

The AAT Act does not have any equivalent provision to those under the AD(JR) Act for information received on a confidential basis.

If, however, you must disclose a document to the AAT under section 37 of the AAT Act, the AAT may do all things necessary to ensure that the information or the matter contained in the document is not disclosed to any other person.

## Under the Privacy Act

If information relevant to a request for a statement of reasons is 'personal information' as defined in section 6 of the *Privacy Act 1988*, that is, information or an opinion about an individual whose identity is apparent or can reasonably be ascertained (other than the person making the request), certain Information Privacy Principles would apply (among them IPP 11). The agency concerned would be required under IPP 11 not to disclose that information unless the person concerned has consented to the disclosure.

It should also be noted that agencies may be required by law to disclose personal information. For example, a law may require an agency to reveal relevant personal information to a review tribunal or a person seeking review of a decision. The agency must comply with this law – although if the law also gives the agency a discretion to withhold specific information, it should exercise that discretion where appropriate.[139]

139 Australian Privacy Commissioner's Office, *Federal Privacy Handbook*, 1998, at 14,204.

## 7. What happens if the statement the decision maker prepared is not adequate?

A statement of reasons must be intelligible to the person seeking the reasons and be of sufficient precision to give them a clear understanding of why the decision was made. A court or tribunal will judge the adequacy of a statement by reference to the purposes of the obligation to furnish reasons, in particular that of enabling persons affected to determine whether to challenge the decision and how to do so.

The diversity of decision making contexts and the varying degrees of complexity of decisions themselves make it difficult to generalise about the standards applicable to all statements of reasons. The crucial requirement is that the statement be an accurate reflection of the decision making process.

A statement cannot be used to provide a retrospective justification for a decision that may be challenged. If it appears in the course of preparing a statement of reasons that there may have been an error in the original decision the appropriate course is to concede that the decision requires reconsideration, rather than preparing a statement which does not disclose the error.[140] The real reasons for a decision, the findings of material facts relied upon, and the evidence on which those findings were based, that were identified at the time of the decision, must be set out in the statement. Other reasons, facts or evidence which may subsequently have come to light or appear to be more desirable should not be substituted.[141]

The rewriting of history, when a statement of reasons is being prepared, should not be undertaken.

That said, when the reasons for a decision are examined at the time that a statement is required to be given, it may appear to the decision maker that they are inadequate or in error or that other reasons would provide a sounder basis. In such a case, the following principles may be of assistance:

- Where the reasons appear to be wrong and render the decision unlawful, the decision must be withdrawn and a new decision given with reasons.
- Where the decision is the preferable one, but further or better reasons appear than those at the time of the decision, a statement of those further or better reasons

140 *Minister for Immigration, Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162.

141 *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183.

may be given separately from the actual reasons for the decision. However, the decision maker should be aware that any reasons, additional to those prepared at the time of the decision, may be called for in an AD(JR) Act proceeding, and by the AAT or other tribunals, and compared with the original statement that is presented. In those instances, any discrepancy between the reasons at the time the decision was made and later reasons may be used to draw an inference that the decision maker did not carefully consider the obligation imposed by the legislation.

## Tests employed by the courts and tribunals

There are a number of ways in which the test of adequacy has been referred to by the courts and tribunals. In *Re Palmer and Minister for the Capital Territory*,[142] the AAT expressed the test in these terms:

> The reasons, when properly given, ensure that the citizen is sufficiently informed to determine whether he wishes to take the matter further, and if so whether to make representations to the Minister, proceed in the appropriate court of law or seek review by this Tribunal.

In *Soldatow v Australia Council*,[143] Davies J said:

> Section 13(1) requires proper and adequate reasons which are intelligible, which deal with the substantial issues raised for determination and which expose the reasons process adopted. The reasons need not be lengthy unless the subject matter requires but they should be sufficient to enable it to be determined whether the decision was made for a proper purpose, whether the decision involved an error of law, whether the decision maker acted only on relevant considerations and whether the decision maker left any such consideration out of account.

In *ARM Constructions Pty Ltd v Commissioner of Taxation*,[144] Burchett J said:

> Section 13 is a crucial provision designed to ensure that the basis upon which a decision is made is able to be seen, so that its legality can be determined. It should not be viewed by any decision maker as a threat to be evaded by a camouflage of obscurity. All it requires to be set out is a statement of the matters the administrator must have considered in making the decision in the first place – what he found the facts to be, what material he considered in arriving at those findings, and the reasons for his ultimate decision.

142 (1978) 1 ALD 183 at 193.

143 (1991) 28 FCR 1 at 2.

144 (1986) 10 FCR 197 at 203.

These statements of the approach of the courts and tribunals to the issue of adequacy emphasise the value of a statement of reasons both in assisting the person affected to decide whether or not to challenge the decision and in assisting the process of review of the decision. That is not surprising given that the issue of adequacy will in general only arise when the person to whom the statement was provided seeks more details or the statement comes under scrutiny in the review process.

If the reasons for the decision are inaccurate, wrong, need other reasons or evidence or have to be supplemented, the decision may be found to be unlawful by a court or tribunal. Alternatively, the obligation to provide reasons may not have been met, and appeal rights that depend on adequate reasons being given will not expire until adequate reasons are provided.

## Requests for further and better particulars

If a statement of reasons is not adequate, the person to whom it has been provided can apply to the AAT (in respect of reasons provided under section 28(1) of the AAT Act) or to the Federal Court (in respect of reasons provided under section 13(1) of the AD(JR) Act) for further and better particulars.[145] The applicant cannot apply if the decision maker has refused to provide a statement because the request was made out of time.[146]

### Under the AAT Act

If the AAT considers that the statement does not contain adequate findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the AAT may make a declaration accordingly.

The decision maker must furnish an additional statement or statements containing further and better particulars in relation to the matters specified in the declaration. This additional statement must be provided as soon as is practicable and, in any event, within 28 days of the AAT's declaration.

The AAT then has power to order the decision maker to provide a statement or statements containing further and better particulars, if it considers that the statement provided to the AAT under section 37 is not adequate.[147]

### Under the AD(JR) Act

For reasons provided under section 13 of the AD(JR) Act, the Federal Court has power to order the decision maker to provide an additional statement or statements within such time as is specified in the order under section 13(7).

145 *Administrative Appeals Tribunal Act 1975* s 28(5), *Administrative Decisions (Judicial Review) Act 1977* s 13(7).

146 *Singh v Minister for Immigration and Ethnic Affairs* (1995) 38 ALD 295.

147 *Administrative Appeals Tribunal Act 1975* s 38(1).

Before making an order, the court has to be satisfied that ordering a fuller and better statement would be a useful step in furthering the interests of justice.

An order made under section 13(7) will need to specify matters in relation to which additional information should be supplied. If the statement fails to explain the reasoning process at all, so that it is not possible to specify further matters in respect of which additional information should be supplied, the court may order that a fresh statement of reasons be prepared.[148]

## Additional statements of reasons

If on reconsideration the decision maker considers that a statement of reasons already provided to the person seeking the statement is deficient, the decision maker can provide an amended statement. The weight to be attached to the original statement and to the amended statement would be a matter for the court to consider on review.[149]

148 *Soldatow v Australia Council* (1991) 28 FCR 1; *Federal Airports Corporation v Aerolineas Argentinas* (1996) 44 ALD 226.

149 *Chapman v Tickner* (1995) 55 FCR 316.

# Other issues to be considered

## Use of reasons in court

If the decision maker is required to provide reasons with a decision, a failure to do so is an error of law.[150] Similarly, a failure to provide adequate reasons is generally regarded as an error of law, even if the evidence available in fact supports the decision.[151]

Not all errors justify the setting aside of a decision. In some instances the courts have held that a mere misstatement of the law, or an error which would not have affected the decision, is not enough to find that the decision maker has made an error of law.[152]

In some instances the legislation which imposes the obligation to advise the reasons for decision and the rights of review provides that the validity of the decision is not affected by a failure to comply with those obligations.[153]

## Reasons do not affect discovery and inspection

The provision of a statement of reasons does not affect the power of a court to order discovery and inspection in subsequent judicial review proceedings.

Discovery and inspection are processes by which a party to litigation can obtain from the opposite party documents relating to issues between them for the purpose of preparing for proceedings. It is a procedural process of the courts to assist in the resolution of conflicts between litigants. The purpose of a statement of reasons is quite different, namely to inform the person affected by a decision of the matters fundamental to the decision and to equip them to determine their future course of action.[154]

## Evidential use of statements of reasons

### Admissibility

A statement of reasons prepared after the decision is made and in response to a request can be tendered with the consent of the applicant and the decision maker. Otherwise, the statement is regarded by the courts as falling within the general principle that a statement made after the event is a self-serving statement and will not generally be regarded as evidence in favour of the person making the statement.[155]

150 *Dornan v Riordan* (1990) 24 FCR 564.

151 *O'Brien v Repatriation Commission* (1984) 1 FCR 472.

152 *BTR Plc v Westinghouse Brake and Signal Co (Australia) Ltd* (1992) 34 FCR 246.

153 For example, s 23DZE(2) *Health Insurance Act 1973*; s 1244(2) *Social Security Act 1991*.

154 *Federal Commissioner of Taxation v Nestle (Aust) Ltd* (1986) 12 FCR 257.

155 *Minister for Immigration Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162, per Davies and Hill JJ. *Adelaide Chemical and Fertilizer Co Ltd v Carlyle* (1940) 64 CLR 514; *Williams v Lloyd* (1934) 50 CLR 341.

Concern for the evidential value of section 13 statements under the AD(JR) Act was expressed in *Minister for Immigration, Local Government and Ethnic Affairs v Taveli*,[156] by Hill J:

> The fact that a section 13 statement is often prepared at a time somewhat distant from the actual decision, at a time when the possibility of litigation will be obvious and often with the assistance of legal advisers attuned to the issues which are likely to arise, cannot be ignored.

In a dissenting judgment, French J focused on the policy background to the requirement to provide reasons and in that context considered that a properly authenticated statement of reasons should be accepted:

> …as 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. That the statement may be used in evidence to support such an inference does not exclude the possibility that a contrary inference may be drawn from its form and contents considered alone or against other evidence in the case.[157]

Where the tender of a section 13 statement is supported by an affidavit, the statement will be admissible without the consent of the person seeking reasons. This will mean that the decision maker may be open to cross-examination, which may be directed to showing, for example, that the statement did not state accurately the matters to which the decision maker had regard or that it omitted to state that regard was had to some matter.[158]

The situation is different if reasons are provided at the same time as the decision, whether as part of the decision maker's practice or because of a legislative requirement to do so. In those circumstances, the statement is admissible as part of the decision making process itself.[159]

A statement of reasons is also admissible to support the case of a person seeking reasons. While the decision maker cannot use a statement of reasons as evidence in their favour, a person is entitled to extract from a statement any statements that are admissions in his or her favour.[160]

156 (1990) 23 FCR 162 at 190.

157 (1990) 23 FCR 162 at 179.

158 P Bayne 'Reasons, Evidence and Internal Review' (1991) 65 *Australian Law Journal* 101 at 103.

159 *Minister for Immigration Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162.

160 *Minister for Immigration and Ethnic Affairs v Arslan* (1984) 4 FCR 73.

## Evidentiary value

A statement of reasons may reveal a defect in a decision.

In *Minister for Immigration and Ethnic Affairs v Keenan*,[161] for example, the statement prepared under section 13 of the AD(JR) Act discussed all the matters that would be relevant to a decision to deport under section 55 of the *Migration Act 1958*, rather than the matters which would be relevant for a decision under section 60, which was the purported basis for the deportation order. Ninety per cent of the statement dealt with matters that were entirely extraneous to the issues which should have been taken into account in the exercise of the power under section 60. The Federal Court concluded that the decision taken under section 60 was flawed and set aside the deportation order.

The fact that a statement of reasons may not always be an accurate reflection of the reasons for a decision is recognised to some extent by the entitlement of the person seeking reasons to rely on a ground which was not set out in the application for review.[162]

Despite the High Court's statements in *Minister for Immigration and Multicultural Affairs v Yusuf*[163] a court may infer that any matter not mentioned in the statement was not considered by the decision maker to be material. This may reveal some basis for judicial review on the ground of jurisdictional error, for instance. The tribunal's identification of what it considered to be the material questions of fact may demonstrate, for example, that it took into account some irrelevant consideration or did not take into account some relevant consideration.[164] In that situation the court may infer there are grounds for the court to step in.

The decision maker may rely on the absence of a reference to a particular matter in the statement to support an argument that an irrelevant matter was not taken into account.

161 (1993) 32 ALD 725.

162 *Administrative Decisions (Judicial Review) Act 1977* s 11(6); see *Faulkner v Conwell* (1989) 21 FCR 41.

163 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.

164 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1 at paragraph 69.