



WRITING REASONS FOR JUDGMENT OR DECISION

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It is a great privilege and honour for the Australian delegation, including myself, to have been invited here and, particularly, to have been invited to speak to you this morning. The topic for discussion this morning was selected by your President, Professor Dr Ackaratorn Chularat. It is a difficult and daunting topic for us to address. Two particular reasons for the difficulty with this topic are that the work of your courts takes place in the context of a different legal system and a different language.

The Importance of Context

Your legal system has its origins in European legal systems, particularly the French system. Although your system has been developed with reference to Thai legal concepts, these European origins seem to me to be important. Judgment writing in France is quite different to judgment writing in common law countries like England and Australia. In France, judgments are quite summary in form and involve short reasons for decision. In common law countries, judgments are much more detailed. I think this is partly because in common law systems there is generally only one judge. That judge is required to carefully explain his or her reasons as a means of ensuring

fairness in the outcome. Where there are panels of judges, as in France and here in Thailand in the Administrative Courts, the consensus of views of more than one judge is itself a guardian of fairness in the outcome. It follows that the way judgments are written in Australia is not necessarily of particular use in terms of guidance to other countries and may not be particularly useful in Thailand. So that is the first matter of concern, the different legal system.

The second matter of concern I mentioned was the different language. How one writes is a product of the language itself as much as a product of the logic behind it.

In preparing for this talk, I was somewhat apprehensive. I was conscious both of the importance of the topic and the importance of not providing you with views which are not relevant. So I would like you to judge everything I say against how you think it is relevant to your system.

Having provided these qualifications, I must tell you that your President was kind enough to send me a sample of a decision of the Supreme Administrative Court of Thailand. I was very pleased and relieved to see that in its structure and organisation it was very similar to a decision of an Australian court. So I may be able to say something useful to you this morning.

I will be speaking generally about decision writing in Australia but I will do so with particular reference to the Administrative Appeals Tribunal. Justice Tamberlin will then talk about the Federal Court of Australia.

The Evolution of Judgment and Decision Writing in Australia

What do we mean when we talk about judgment writing or, as we call it in the Administrative Appeals Tribunal, decision writing? All courts and tribunals conclude their activity with a formal pronouncement of the result in the proceeding. In a court it is called a judgment. In a tribunal in Australia it is called a decision. However, it is not specifically the formal pronouncement that I will be talking about today. In Australia, when we talk about judgment

writing, in truth we do not mean judgment writing, we mean writing reasons for judgment. The word “reasons” is very important in that phrase. The document accompanying the formal order or judgment is a document which in our system and, I think, also in yours, is intended to expose the process of reasoning that has led the court or tribunal to come to the conclusion at which it has arrived. As to the determination of each issue in the case, the reasons should ask the question “why?” and should answer in a passage which will contain a word like “because...”.

Until comparatively recently, decisions of courts and tribunals in Australia were written quite differently to the way they are now coming to be written. There has been a real change in the way in which reasons for judgment or decision are written in Australia. Until recently, Australia followed a method of writing reasons that had been followed in the United Kingdom for centuries, with very little thought given to whether this was the best way to do it.

Why Publish Reasons?

The new approach starts by asking: “*Why is it that we write reasons for judgment or decision?*” I think that there are three broad reasons. The first is to explain how and why the decision was made. What is new about Australian thinking on this point is that we now address more particularly who it is that we are explaining “how” and “why” to. The first group is the parties to the proceedings, the plaintiff and the defendant. They will usually not be lawyers, certainly not administrative lawyers. What they want is a simple, clear explanation of why, for example, they have lost the case. I have chosen the loser because the winner, usually, is not particularly troubled by the reasons. The winner is more interested in celebrating than reading pages of script. So, we need in our reasons, and this is part of the change in Australia, not to explain to lawyers or administrative lawyers why the result has been reached, but to explain to the people who matter, the parties, why the result has been reached. That is not to say that we will not be grappling with difficult questions of law and difficult questions of fact in our decisions, but, unless the

Thai language is completely different to the English language, we should still be able to do this in a way which educated people, at least, can understand.

In important cases the interest of the media in the decision will be another reason why it should be explained in terms that an intelligent, informed reader can understand. I know that the decisions of your Administrative Courts, both the central and regional courts and the Supreme Administrative Court, are of great interest to the media here in Thailand. That is no doubt because they are important decisions relating generally to the rights of the Thai people. In particular, they relate to those rights when they are in conflict with government decisions.

The second reason for writing reasons is to improve the quality of decision-making within the government itself. Take, for example, a government agency that is making decisions about who shall be admitted to some position in government. If a decision of a Thai Administrative Court finds that the agency's process involves some error, that should prompt the agency to correct that error for all future decision-making. Again, explaining the reasoning in a way which the government officials can understand will have a more satisfactory effect on future decision-making within the government.

The third reason for writing reasons does not apply to the Supreme Administrative Court. However, it does apply to everyone from the Central Administrative Court and the Regional Administrative Courts. The third reason is to explain the decision that the court has arrived at, in a way which enable a higher court, such as the Supreme Administrative Court, to clearly understand the reasoning. This may require some more technical reasoning, at least in part of the decision.

There is one other reason why writing reasons for decision is a good thing. It is behind what I said earlier about why writing reasons is important in common law systems. It is because it helps us, when we are making our decision, to come to the right decision. I find that the process of sitting down, writing,

redrafting and thinking about it again assists in the actual process of working out, for myself, what should be the result in the case.

Presentation of Reasons

Drawing these thoughts together, what can we conclude about the form and structure of reasons for decision or judgment? I think that, following the changes in Australia, the conclusion is that reasons should contain everything that is relevant and nothing that is irrelevant. How do we know what is relevant? In our system, the answer to that is to identify the issues in the case. Usually the issues are simply the matters about which the parties are in disagreement.

Ten years ago in Australia you would find many reasons for judgment that began something like this: *“This is an application under s 35 of the Administrative Law Act in which the plaintiff is seeking an order under s 93”*. It might go on: *“The proceedings were commenced by the filing of an application on 10 June 2006”*.

To my mind, so far this hypothetical decision has not said anything relevant. It has not said anything that will help anyone to understand what the case was about, because I am not going to be carrying around in my mind what s 93 of the act says unless it is a very common section. As a lawyer, and I spent 35 years as a practicing lawyer / advocate before I became a judge, whenever I came across passages like that, in effect I did not read them; I just kept looking down through the pages until I could find something that actually told me what the case was about.

Nowadays, in most cases, a decision in an Australian court or tribunal will start something along these lines: *“The issue in this case is whether Fred Smith (to use a kind of all-purpose name), a fisherman who catches shark, has been allotted a sufficient quota for the forthcoming year”*. You can read the first few lines and immediately know this is a case in which a fisherman is complaining that he has not been allowed to catch as many fish as he thinks

he should be able to in the year to come. It does not say when the proceeding was commenced because that is something that could be found from the record and, frankly, in Australia we would now say it is not relevant to the case.

There are some things that modern reasons in Australia do not do. They do not set out a history of the matter. They do not summarise the file. They do not set out facts not relevant to the case. So you would not say, for example, that my fisherman was married with three children unless that happened to be significant. Further, they do not, any longer, set out matters that were in dispute between the parties but about which they are no longer in dispute.

Hopefully, the result of all of this provides a concise statement of reasons that is simple and well-reasoned. It needs to be well-reasoned. It needs to concentrate on the “why” and the “because...”: the reasons for the conclusion. It needs to be easily comprehensible. Long reasons are obscure and hard to understand. They have less impact on the reader, whether it be a government official or the plaintiff, who, after reading three pages and not really following the detail of the case, may well give up. They lead to delay in writing the decision and may be more difficult to write.

I must emphasise that nothing that I have said is intended to suggest that there should be any compromise or summary approach to the actual reasons themselves. By reasons, I mean the giving of a rational explanation for the conclusion to which the court or tribunal is arriving. There will generally be a final conclusion and a number of subsidiary conclusions that precede the final conclusion. The reasoning will frequently involve logic and often the use of syllogisms. The famous simple syllogism is: “*All men are mortal. Socrates is a man. Therefore, Socrates is mortal*”. So, the court or tribunal will ask the question, as I have said before, “why?”, and give the answer “because...”. In Australia it would not (and this has always been the case) be “giving reasons” to set out a series of facts that you find do exist and then simply to say: “*The court concludes as follows...*”. There needs to be something between the facts and the conclusion which is the reasoning.

Reasons in Australia will usually start with a general introduction of the kind I mentioned. They will then set out the issues. There will then be a statement of the facts in general terms. Next, the court or tribunal will often address the contested questions of fact and, using a process of reasoning, determine what the facts are. It will then look at the legal issues that arise and, after again using a process of reasoning to relate the facts to the law, come to a conclusion. Nowadays it is thought that the best way to begin a judgment is to identify the issues; identify what are the areas of disagreement between the parties. If you do that right at the outset, you make sure that you do not put anything into the reasons that is not relevant. The problem with coming to the issues later in the decision is that you are inclined then to set out in the early part of the decision matter such as when the case was commenced, how it proceeded, the history of the matter and so forth. Sometimes aspects of these matters will be part of the issues and will need to be included, but if you set out the issues at the outset, for your own guidance as well as the guidance of readers, you will be less likely to put in anything that is unnecessary.

The process of writing reasons does not simply involve sitting down with a sheet of paper and writing from start to finish. It requires editing and reconsideration. What is on the first page of your decision is often not what you first write. Very often it will be the last thing you write. Pascal, the famous French philosopher, once said: "*The last thing one knows when writing a book is what to put first*". Even though you might not have clearly identified the issues at the time you first begin to write your decision, it seems to me that it is appropriate to set them out clearly in the first part of the decision, before you conclude it, and then to make sure that you haven't subsequently strayed into irrelevance in what you have written.

This process has the consequence that persons reading your decision know what it is about in the first few paragraphs and, if it is not relevant to their consideration, they can then put it away and look at something else. This last matter that I have referred to is particularly relevant in common law systems

where, as you would all know, we have a doctrine of precedent. The first thing a lawyer does when he or she is advising a client is to see if there is a decision of a court that supports the client's case. The lawyer needs to know quickly whether a particular case is: (1) relevant; and (2) whether it helps or not. Being able to see, at the beginning of the case, what the case is about has become particularly important in our system because of the use of the internet. Every decision of the Federal Court of Australia or the Administrative Appeals Tribunal is available on the internet. It is particularly helpful to have an explanation of what the case is about right at the beginning of a case, because it is not quite so easy to flip through the pages of the internet as it used to be with a book. I actually go further in my decisions, in most cases, and not only say in the first paragraphs what the issues in the case are, I also say what the result is.

Conclusion

To summarise and conclude, a well-written decision should:

1. be easily readable;
2. interest the reader;
3. state the issues at the outset, not the history of the litigation;
4. resolve the issues with the minimum of detail; and
5. indicate at the outset where it is leading.

This has been a very personal perspective about decision writing. I think it will be perfectly correct if you go away from this session and decide not to take much notice of anything I have said. However, I do hope that what I have said will cause you to think and to apply that thinking to yourself and the best way to go about writing your decisions. Thank you.