

Reconciliation of jury secrecy in light of administrative law principles

Journal Title: Australian Journal of Administrative Law

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Article Citation: 18 AJ Admin L 172

Publication Year: 2011

Jurisdiction: Australia

ABSTRACT

Juries in criminal law trials are said to represent the bulwark of justice in Australia. The jury is said to bring with it the representation, quite directly, of the wider community to the fundamental promotion of justice. Yet, interestingly, the jury is prohibited from providing reasons for their decision. Such a prohibition is said to rest upon many arguments, one of which is the impediment of the proper administration of justice. Despite the foregoing, there has been a growing trend in recent years that administrators provide reasons for their decision, so as to promote the administration of justice and ensure justice is not only done, but is also seen to be done. Such is said, quite rightly so, to demonstrate transparency and open justice. This article argues that various administrative law principles not only seriously call into question the jury secrecy principle, but also suggest that the prohibition of the provision of reasons for a decision by the jury is inconsistent with dictates of proper open decision making.

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Introduction

Introduction

The more significant the decision the clearer the duty may be, the clearer the reasons should be and the clearer the consequences will be for the breach. Some decisions cry out for a clear explanation. Especially is this so where ... the decision is very important for the person affected and for others close to that person. ^[1]

Administrative law is principally an area of public law that regulates the relationship between the citizen and the state. ^[2] In a similar manner, use of the jury in criminal law trials is a process whereby the jury are utilised to regulate the relationship between the person charged with a criminal offence, and the application of the relevant criminal provisions of the state. This is not the only common ground between administrative law principles and the jury process in the criminal law.

A major opposition to the jury secrecy rule is that it runs counter to the principle, now entrenched to some extent by statute, that public agencies invested with powers to make decisions affecting individual's legal rights and liabilities should be obliged to furnish reasons for their decisions. To continue to allow Australian juries to deliberate in private without requiring them to account publicly for their decisions, is to accord them a privilege denied to most other public tribunals, and indeed a privilege inconsistent with existing notions of public accountability. ^[3]

Silence inherent in jury secrecy flies in the face of trends in all other areas of law and government where there is a growing need for decision-makers to give reasons for decisions, which is sound, modern policy. ^[4] Further, as Chief Justice Gleeson has outlined, a decision made by an independent tribunal that is obliged to hear both sides of an argument, to sit in public, and to give a reasoned decision is probably more likely to be right, and is almost certainly more likely to be acceptable to somebody adversely affected, than a decision made without those constraints. ^[5] Given that the Australian jury is said to be an independent body that is obliged to hear both the defence and the

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prosecution's submissions and sit in public, it follows that the jury should also be made to provide reasons for its decisions, so as to ensure, applying the reasoning of Chief Justice Gleeson, the decision made by the jury is not only more likely to be right, the verdict of the jury is almost certainly more likely to be acceptable to somebody such as the accused in a criminal trial.

Access to information

Access to information

Absence of duty

Absence of duty

At common law, courts have a key duty to give reasons where it is essential in order to allow a person to prosecute an appeal effectively.^[6] Nevertheless, administrators do not have any wide-ranging obligation at common law to give reasons for any decisions that they make.^[7] However, this principle, known so well in administrative law, may appear likely to be an exception to the general rule that administrators should provide reasons for any decisions that they make.^[8]

Indeed, in the New South Wales Court of Appeal in *Osmond v Public Service Board (NSW)* [1984] 3 NSWLR 447, Kirby P expressed the view that administrators have a duty to provide reasons for their decisions, basing his judgment upon a line of taxation cases, a line of jurisprudence from English case law and obiter dicta in other common law jurisdictions. In *Kioa v West* (1985) 159 CLR 550; 62 ALR 321 at 380, Brennan J outlined in the context of administrative law cases, where adverse allegations are credible, relevant, and important to a decision to be made they should be disclosed to a person whose interests are likely to be affected by that decision, so that the person may have an opportunity to invalidate such allegations made against them. Accordingly, within the context of criminal law cases heard by a jury, a person who has been convicted of a criminal offence will almost certainly have no chance to invalidate a decision on the basis of those important allegations considered by the jury, because the jury is prohibited from disclosing what they have made of the allegations and evidence in question.

Deduction to be drawn from an absence of reasons

Deduction to be drawn from an absence of reasons

Even though an administrator does not act unlawfully in not giving reasons for a decision in the absence of any statutory obligation to do so, nonetheless the lack of reasons for a decision leaves open the prospect that a court upon judicial review may infer an error of law for taking into account irrelevant considerations, or failing to take into account relevant considerations, or acting unreasonably.^[9] For example, in *Jackson v Director-General of Corrective Services* (1990) 21 ALD 261, the Director General was not required to provide reasons under relevant legislation when reviewing an application from a prisoner for day leave, where the Director General refused leave without giving reasons. Despite this, the court inferred from all the facts and circumstances that the decision to decline leave was based on trepidation of the response by the community and this was an irrelevant consideration under the legislation and thus the decision was invalid.

Quite clearly, members of the community or indeed the Court of Criminal Appeal might infer from the lack of reasons by a jury when delivering their verdict that they took into consideration irrelevant considerations. However, mere speculation based on inference, without more, would not be enough to have the jury verdict set aside by an appellate court.

It has been argued that the Australian jury verdict is apt to be based upon irrelevant considerations such as sympathy for a plaintiff who has been injured, or for a widow and children of an employee

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who has been killed in the course of his employment, or sympathy for a plaintiff of moderate means as against a defendant who is insured or otherwise well able to pay any damages awarded.^[10] Because deliberations in the jury room are secret, it is hard to know what substance there is in the contention that the jury may be taking into account irrelevant considerations.^[11]

Statutory framework for administrators to provide reasons

Statutory framework for administrators to provide reasons

Within the area of administrative law, there are various laws that place a direct duty upon administrators to provide reasons for their decisions. For example, s 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) provides that a person who, under s 5 of that Act, is entitled to apply to the Federal Court or the Federal Magistrates Court for an order of review of a decision that is reviewable under that Act, may make a written request to the decision-maker to provide a statement of the reasons for the decision made. In conjunction with giving reasons for a decision made, an administrator, pursuant to a s 13 statement, must set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

In *Soldatow v Australia Council* (1991) 28 FCR 1 at 2, Davies J outlined that the purpose of a s 13 statement is to allow a person adversely affected by a decision reviewable under the ADJR Act to obtain an explanation as to why that decision was reached.^[12] Similarly, if the jury was made to provide reasons for any verdict delivered, then, the accused or convicted person in a particular case will be able to have an explanation as to why a verdict was reached.

Moreover, as the court made clear in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, the

reasons outlined in a s 13 statement are meant to inform, not to be scrutinised upon overzealous judicial review seeking to discern whether some inadequacy might be gleaned from the way in which the reasons are expressed. In this sense, if jurors had to provide reasons for their decisions, the written determination that they made should not be overtly criticised in order to invoke judicial review, unless the reasons themselves quite clearly demonstrate an error of law upon the reasoning of the jury.

Pearce has stated that a s 13 statement is intended to conquer the real sense of grievance experienced by a person who is not told why something affecting them has happened, and the information in the statement should help them in charting their future course of action.^[13] This opinion was later adopted by Ellicott J in *Burns v Australian National University* (1982) 40 ALR 707 at 715.^[14] In this sense, if a convicted person or the prosecution wanted to appeal a decision of the jury on the basis that it was unreasonable, how can they charter a future course of action without information in the nature of a statement setting out the reasons why a particular decision was made? It appears in these circumstances, the convicted person or members of the prosecution will be seeking judicial review on mere speculation, unsupported by clear evidence.

Although it is true that the Court of Criminal Appeal may examine the evidence adduced by the parties in a case, and, on that basis form their own view, this process itself seems to undermine the institution of trial by jury and the exercise of appellate jurisdiction by a senior criminal court. Indeed, criminal courts are concerned with questions of law, which are evidently based, although not always, on the written decisions of the court at first instance.

In *Ansett Transport Industries (Operations) Pty Ltd v Taylor* (1987) 18 FCR 498 at 502, Lockhart J outlined that the statement of reasons to which s 13 of the *ADJR Act* refers, may satisfy the grievance or may disclose to the person a finding of fact or of law which he or she believes is worth

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challenging by bringing an action under the *ADJR Act*.^[15] Accordingly, it may be argued that because the jury is prohibited from disclosing their reasons for a verdict to a convicted person in a criminal law matter,^[16] this law in itself may have subverted the intention of the legislature in the passing of s 6(1) of the *Criminal Appeal Act 1912* (NSW), which provides that a jury's verdict can be set aside if it is unreasonable, or cannot be supported having regard to the evidence.

As the reasoning in the judgment of Lockhart J in *Ansett* makes clear, the statement of reasons for a decision may disclose to the person affected a finding of fact or of law, which may allow them to seek judicial review under the *ADJR Act*. The prohibition of jury reasons for a decision flows in the opposite direction, suggesting that a person convicted of a criminal offence will find it difficult to reconcile a particular use for s 6(1) of the *Criminal Appeal Act*, when indeed they do not have a statement of reasons for why they were convicted of the criminal offence(s) in question.

Further, in *Minister for Immigration, Local Government & Ethnic Affairs v Taveli* (1990) 23 FCR 162; 94 ALR 177 at 193, French J outlined that a further policy of the legislative scheme to which s 13 belongs was to improve decision-making by requiring administrators to identify for themselves the reasons for their decisions.^[17] As a result, the introduction of a legislative scheme that provided for the mandatory provision of reasons for decisions by the jury would improve the system of trial by jury, by requiring jurors to identify for themselves the reasons for their decisions. The improvement itself is inherent in the notion that justice is not only done, but is seen to be done.

It may be argued that although there are strong policy grounds upon which administrators should provide reasons for their decisions, these same justifications supporting the provision of reasons by administrators does not have the same weight in relation to justifying why the veil on jury secrecy rule should be lifted. It may be argued that members of the jury are not government appointed, and the area of criminal law is a completely different species to that of administrative law. After considering these arguments, a number of important points can be raised for consideration.

First, although it may be true that administrative law and criminal law evidently serve a different purpose in the community, as criminal law is dealing with regulating the criminality of citizens conduct in society,^[18] whereas administrative law controls the legality of governmental decisions made by administrators, both areas of law have the clear potential to adversely affect the rights of citizens. Further, how can it be that administrators in many instances have to provide reasons for their decisions, and jury members do not, when in fact those persons affected by decisions of a jury verdict may have far greater implications than a decision made by an administrator? Conviction of a criminal offence in Australia has the clear potential to take away from a person their liberty, whereas as decisions of administrators, although important, do not generally bring about a conclusion where a person is to end up in jail.

Secondly, although it may also be true that technically the jury in a criminal or civil case are not appointed by the government in the same way a tribunal member or delegate of a particular Minister is, in fact it could be argued that jurors are indeed appointed by the government in a very limited sense, because it is the legislature through respective pieces of legislation on juries that have empowered the government to summon certain persons for jury service.^[19] In this way, jurors should be accountable for their actions, in the same way, if not more, than the accountability that attaches to decisions of administrators.

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The duty to provide reasons for a decision is imposed on tribunals and decision-makers under a wide variety of legislation.^[20] Even the office of the Ombudsmen has a duty to give reasons for decisions that they make. For example, pursuant to s 12(1) of the *Ombudsman Act 1976* (Cth), a decision not to investigate must be conveyed to the complainant and the department or authority with reasons. In this sense, the importance in the provision of reasons for a decision made represents good governance. It does not allow decision-makers to make decisions that may be incorrect by law, and ensures that such decision-makers are discharging the function of their job in a satisfactory way. Without the provision of reasons for decisions made by jurors, we do not really know whether the Australian jury really is discharging their role as finders of fact in a civil or criminal law trial.

Freedom of information law

Freedom of information law

Another area in which we can learn about the importance in the provision of information, is that related to freedom of information laws. Access to documents in the possession of the Australian governments is regulated by freedom of information laws, which apply in every Australian jurisdiction and form an essential part of a broader network of laws that augment the overall transparency of Australian governments.^[21]

In all jurisdictions throughout Australia, the key points for consideration regarding the Freedom of Information laws have three vital elements in common: one, subject to certain exceptions it creates universal rights of access to documents in the control of government agencies and Ministers;^[22] two, it obliges government agencies to publish specific information about their actions and the documents held by them and to make accessible the internal laws which administer their decision-making as it affects members of the community;^[23] and, three, it includes a procedure whereby persons who have acquired access to their own individual records can apply for their amendment.^[24]

Significantly, the association which freedom of information laws have in common with the notion of jury secrecy is simple. That is, many of the rationales for the implementation of a policy of freedom of information can be extended to support the argument for lifting the veil of jury secrecy. We shall now consider several of these here.

First, freedom of information laws reflect a view that transparency is a fundamental prerequisite for political accountability and for discouraging corruption and other forms of misconduct.^[25] Without jurors having to provide reasons for their decisions, corruption in the deliberations of a jury matter may go unchecked. Indeed, in knowing that jurors do not have to provide reasons for the verdict that they reached, there is no real incentive to be discouraged from corruption whilst acting as a juror.

Secondly, given that the system of trial by jury is itself a creature of statute, created by parliament, without the jury having to provide reasons for a decision, we do not know in truth whether the system of trial by jury is indeed actively working in an effective manner. In that way, the political accountability of trial by jury goes unchecked without any real answerability to the very government who maintains the system of jury service.

Thirdly, another rationale for the freedom of information laws is that open government improves the potential for the common everyday citizen in the community to actively participate in the

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formulation of governmental policy and in the procedure of the government itself.^[26] In the same way, the idea of partaking in a jury trial allows common everyday citizens of the community to actively contribute and participate in the procedure of the Australian legal system. It might be argued that by making jurors provide reasons for their verdict, this may promote members of the community to play a more active part in the formulation of decisions made by courts, because, as it currently stands, the Australian jury makes a determination on findings of fact without having to provide not even a short judgment of a verdict with reasons. By making jurors provide reasons for a verdict, they will be more actively participating in the judicial process.

Fourthly, participation is valuable to the functioning of a healthy democracy because it gives everyday citizens an investment in government affairs and provides them with a means for controlling their own affairs and those of the general public in which they live.^[27] If jurors had to provide reasons for their decisions, they would certainly be controlling the affairs of the public more fully by undertaking a more active role in explaining why a person is to be found guilty or innocent. The provision of reasons for a verdict does not necessarily in an unreasonable way expand the function of the jury, but, rather, gives everyday citizens an investment in governmental affairs, especially within the context of criminal law matters, where the state seeks to protect members of the community.

Fifthly, a further purpose of freedom of information relates to its utility as a device for the exercise of certain aspects of privacy

rights. That is, the ability of individuals to obtain access to their personal records, ask for their amendment and improve their level of control over individual records.^[28] It might be argued that the provision of reasons for a decision by jurors itself acts as a device so that persons convicted of a criminal offence can gain access to their personal records (ie, reasons why they were convicted), and use this information for the possible basis of an appeal, in circumstances where that private information deliberated upon in the jury room was not used properly according to law. Freedom of information laws certainly serve the purpose of possibly allowing a person to bring a matter to court to have their rights which have been affected fixed, as Head makes clear:

the FOI laws may offer important opportunities for lawyers and their clients, and also the media, researchers and community or political activists, to probe and challenge administrative actions and policies in a way not provided for by judicial or quasi-judicial review. This information may be critical in deciding whether there are grounds to seek review of an official decision.^[29]

Natural justice and procedural fairness

Natural justice and procedural fairness

Main principles

Main principles

The rules of natural justice are principles that evolved at common law to ensure the fairness of the decision-making process of administrators and courts.^[30] Currently, these principles also apply to arbitrators,^[31] referees^[32] and costs assessors.^[33] The term natural justice is used interchangeably with the expression duty to act fairly, or, for the most part in Australia, procedural fairness.^[34]

The conception that an obligation to give reasons is a principle of procedural fairness, requiring an administrator to give reasons for a decision in appropriate circumstances, was originally rejected in

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Australia.^[35] On this basis, it might be argued that given administrators do not have a mandatory obligation to provide reasons for their decisions, then the appropriateness of attempting to reconcile the need for the jury to provide reasons for their verdict is therefore not appropriate. Nonetheless, it has since been held in the United Kingdom that, in certain circumstances, an obligation to provide reasons for a decision may be part of the content of a fair hearing by an administrator.^[36] Since then, the courts in Australia have given limited recognition to the prospect of implication of an administrator's duty to give reasons when exercising a power that, as a matter of statutory interpretation, affects rights, property or legitimate expectations of a person.^[37]

In *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 676, Deane J noted in obiter, that in relation to a disciplinary hearing where a person's livelihood is in jeopardy, an administrator would have a duty to provide reasons for their decision. Given that in many instances where a person is charged or convicted of a criminal offence the implications could clearly mean their livelihood is in jeopardy, in the sense they could lose their freedom, it makes reasonable sense that jurors should also be made to provide reasons for the verdict. An extension of the comments made by Deane J in *Osmond* to criminal law matters would not be to subvert his intention in that principle, because, Deane J appears to recognise and appreciate the importance of reasons given by a fact finder in circumstances when a person's livelihood is or could be threatened.^[38]

Interestingly, in *Xuereb v Viola* (1989) 18 NSWLR 453 at 472, 473, the court found that where a referee provided a report to the court pursuant to the *Supreme Court Rules* (NSW), Pt 72 r 11, that referee was required to provide reasons in order to justify the validity of the observations and overall outcome as illustrated in the report. In the same way, when a jury makes a determination as to the innocence or guilt of a particular person on trial in a criminal matter, they should also be made to provide reasons for their verdict in order to justify the validity of their findings of fact and overall outcome in a case. It is simply illogical that a referee is made to justify his findings, and a jury is not, when in fact, jurors in criminal law trials have far greater power to adversely affect the rights of a person than does a referee. The logic in this simply does not stand to reason.

As Davies J made clear in *Yung v Adams* (1997) 80 FCR 453, in the absence of an express clear statutory duty to give reasons a court may imply such a duty, particularly where the president of the tribunal must hold judicial office, or an appeal on questions of law lies to a court.^[39] When the same case was appealed, Beaumont J, in *Adams v Yung* (1998) 51 ALD 584 at 620, agreed with Davies J's reasons for implying in the relevant statute a duty on the part of the decision maker to state its reasons for reviewing a determination. Further, Burchett and Hill JJ also agreed with Davies J that for a court to fulfil its responsibility to resolve an appeal on a question of law, the tribunal must give sufficient reasons so that the question of law in issue is made manifest. In this way, a jury must give the Court of Criminal Appeal sufficient reasons so that the proposed error of law in question can be properly

determined.

However, it is also true that there have been a number of judicial pronouncements rejecting the need for administrators in certain circumstances to give reasons for their decisions.^[40] For example, it has been doubted that a cost assessor has a duty to provide reasons for any decisions that they make.^[41] Despite the line of authority in cases such as *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* (unreported, Supreme Court, Qld, Shepherdson J, 312/94, 25 July 1994) and *Smits v Buckworth* (unreported, Supreme Court, Qld, Young J, 3869/96, 22 September 1997), that have rejected or questioned the need for administrators to provide reasons for their decisions, it is doubted that these cases can be reconciled with the need for jurors to provide reasons for their verdicts, on the basis that in criminal jury trials, the rights of a person can more extensively be affected in contrast to those persons subject to decisions of administrators.

The bias rule

The bias rule

The bias rule of procedural fairness is based upon the principle that justice should not only be done, but should also manifestly be seen to be done.^[42] The argument could be made that given jurors do not provide reasons for their decisions, although justice may have been done by the act of determining a verdict, the decision of the jury verdict is not manifestly being seen to be done, as the jurors are prohibited from disclosing their deliberations that took place during trial in the jury room.

As Gleeson CJ, McHugh, Gummow and Hayne JJ made clear in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, the appearance of the bias rule operates to nullify a decision made by a decision-maker where a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring to the resolution of the question the decision-maker is required to decide. As noted above, apprehension of the bias rule is based upon the view that it is of primary significance that justice should not only be done, but should manifestly and unquestionably be seen to be done (at 345).^[43] Within the context of a criminal law trial, the adducing of evidence before a jury and the verdict reached by merely saying guilty or not guilty is a prime example of where although justice might be done, it is not actually and manifestly being seen to be done. To come within the scope of justice actually being seen to be done, would require the jury in a case to actually provide reasons and cogent justifications as to why particular evidence adduced at trial led the jury to a particular verdict.

The test of bias in relation to jurors is the same as the test for judges and members of a tribunal.^[44] That is, the test is whether a fair-minded lay observer might reasonably apprehend that the juror might not have brought an impartial mind to the resolution of the question the juror was required to decide.^[45] Such a test is problematic in circumstances where a person may be challenging that a juror was biased in determining their case, because, an appellate court applying the fair-minded lay observer test will find it difficult to place themselves in the position of the juror who actually took part in the jury trial. If jurors were made to provide reasons for their decisions, it follows that the appellate court could use the lay observer judgment of the jury to actually determine whether any bias was evident in the determination of the decision by the jury. Without the provision of reasons, an appellate court may actually find bias existed by the jury without any evidence to support such a conclusion. In almost all circumstances, apart from extrinsic or internal evidence from persons who can provide clear and express evidence that a particular juror was biased, the actual reasons for a decision itself may lead a fair-minded observer to determine whether a jury was actually biased or not.

Presently, in considering whether a reasonable apprehension of bias existed in the determination of a jury verdict, it is essential to consider the likely effect of the judge's directions (if any) as well as the irregularity in question.^[46] Accordingly, without the provision of reasons for a decision, an appellate court may be merely speculating in relation to the question of whether a jury verdict was tainted in part by bias.

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A decision made in denial of procedural fairness is void ab initio when challenged successfully.^[47] In this sense, if a jury were obliged to provide reasons for their decisions and they did not, a convicted person could challenge the decision of the jury verdict and gain a remedy that the decision is void, and, therefore, has no legal effect in law.^[48] There is overwhelming authority in support of the rule that procedural fairness stands on a higher plane and does not oblige an applicant to establish that the denial of procedural fairness is likely to have affected the result of the decision-making process.^[49]

Abuse of power and broad ultra vires

Abuse of power and broad ultra vires

Within the context of administrative law, any decision made by an administrator that they were not empowered to make by statute is beyond power. That is, an administrator's decision in these circumstances is ultra vires, having no legal effect against the person to whom the decision is purported to apply. There exist within administrative law various types of abuse of power statutory provisions that may render an administrative decision ultra vires. Some of these statutory abuse of power provisions reveal a number of legal

principles that could be utilised for the purposes of arguing that the nature of the current jury verdict structure is very much concerned with decisions that may be ultra vires. Accordingly, we will examine some of these provisions and see whether and to what extent administrative principles regarding abuse of power can be used to appreciate why lifting the veil on jury secrecy may assist to support the argument that jury decisions reflect a strong commonality with ultra vires.

Irrelevant and relevant considerations

Irrelevant and relevant considerations

Administrators, in exercising discretionary power, must not take into consideration irrelevant considerations,^[50] and, when making a decision, must take into consideration relevant considerations.^[51] Accordingly, when the jury is discharged in a criminal trial after they have provided the court with a verdict,^[52] without the provision of reasons, in most instances it will be difficult to determine whether jurors have taken into consideration irrelevant considerations or relevant considerations.

Within the context of administrative law, the court in *Allen Allen & Hemsley v Australian Securities Commission* (1992) 27 ALD 296 at 305 held that a failure to indicate in a statement of reasons how itemised relevant considerations were taken into account may provide the basis for an inference that the decision-maker did not take relevant considerations into account. There is no reason to suspect that jurors should be exempt from this principle, especially in light of the fact that administrators may have more knowledge and appreciation for applying the law correctly as opposed to the lay person of the community who may not properly understand the nature of evidence and trial process itself, despite the assistance of trial directions.

Within the context of criminal jury trials, the main considerations the jury should both take into consideration and apply in reaching a verdict is the actual legitimate evidence adduced during the trial. Further, the jury is also obliged to take into consideration and follow any directions of the judge on

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points of law. Conversely, the jury should not take into consideration irrelevant considerations, such as convicting a person in a criminal trial on the basis of what a spirit had told the jury during a séance.^[53]

Improper purpose

Improper purpose

When an administrator makes a decision, they must not act for an improper purpose.^[54] That is, a statutory power that gives an administrator the power to make a decision must be exercised in accordance with purposes that are expressed to be the purposes of the empowering statute in an objects clause.^[55] When the purposes of the statute are not expressly stated the court must construe the statute in order to determine which purposes are proper.^[56] This is not a big problem for the courts when construing the purposes for which a jury must act, because, in general, it is well known that jurors are finders of fact, and their duty does not extend beyond the provision of a verdict decided on the basis of the lawful evidence admitted in court. However, it is also true that the lack of reasons for a decision by jurors could tend to suggest that the jury verdict handed down was made for an improper purpose. If no reasons are put forward to justify why a particular decision of the jury was made, it follows there is no evidence to confirm whether the jurors in question have actually discharged their statutory purpose to decide a verdict on the facts in issue and admissible evidence put before the court.^[57]

As Gaudron J outlined in *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 671, a person challenging the exercise of a power on the basis of improper purpose bears the onus of establishing that issue.^[58] Without the provision of reasons for why a particular verdict was reached, the onus of a convicted person challenging the verdict of the jury on the basis that it was made for an improper purpose will be clearly harder to make out.

Bad faith

Bad faith

Bad faith^[59] occurs where a power is exercised for corrupt or dishonest motives which amount to *male fides* or a deliberately malicious or fraudulent purpose.^[60] Decisions such as *SBBS v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 194 ALR 749 and *Engler v Commissioner of Taxation (No 2)* (2003) 52 ATR 642 have outlined an important consideration in establishing lack of good faith, namely, the court must make a decision as to whether or not bad faith is shown by inference from what the decision-maker has done or failed to do and from the extent to which the reasons disclose how the decision-maker approached its task. Clearly, in the case of a verdict by the jury, without the provisions of reasons for a decision, a court examining the legality of the decision by the jury will be placed in a more difficult position in determining whether any of the juror members have acted in bad faith.

Unreasonableness?

Unreasonableness?

In circumstances where an exercise of statutory power is so unreasonable that no reasonable person could have so exercised the power, there occurs an abuse of power or improper exercise of power.^[61] This ground of review is directly based upon the test devised by Lord Greene MR in review at general law in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

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Within the context of administrative decisions, some Federal Court of Australia judges have favoured a formula of unreasonableness based upon a decision that is devoid of any plausible justification.^[62] The High Court of Australia has desisted from identifying any one principle as being of more help than another, although there is support for the view that an unreasonable decision is one for which no logical basis can be discerned.^[63] Accordingly, it might be argued that without jurors providing reasons for their decisions, such a verdict reached in a trial is more likely to be unreasonable than a decision made with the provisions of reasons. This is simply because as jurors do not provide reasons for their verdict, this tends to suggest that the decision made by the jury is not only devoid of any plausible justification, but is also one for which no logical basis can be discerned.

How can a jury verdict delivered to the court have a logical basis and be made with plausible justification when in fact there are no reasons for a decision? Are we to conclude that the deliberations of jury members in the jury room are enough to make any decision reached justified and correct by law? Surely not. The provision of reasons is the fundamental basis upon which any decision-makers can justify the decision that they have made. To suggest otherwise is to support a policy of decision-making that is not only incoherent, but fails to demonstrate that justice is being seen to be done in the eyes of all those persons whose rights are affected at law.

Conclusion

Conclusion

In this age of transparency, in which decision-makers must give reasons for their decision, surely anyone charged with a criminal offence has a right to expect that reasons will be given for a conviction.^[64] In the same way, the prosecution should also have a right to access reasons from the jury as to why a particular person was acquitted of particular charges.^[65] The inscrutability of a jury decision is a euphemism for no reasons given.^[66] Such a policy of decision-making is out of step with modern, liberal thinking. It is hoped that the legislature will both acknowledge and recognise that decision-makers such as jurors should join the party and get on board with a whole host of other decision-makers who provide reasons for their decisions.

Some of the most fundamental administrative law principles of unreasonableness, failure to take into account relevant considerations and taking into account irrelevant considerations, procedural fairness, bad faith and freedom of information laws can teach us a lot about the value of reasons for a decision. It seems inescapable that the force of arguments legitimately put forward to support the proposition that error will be found in administrative law cases where reasons are not outlined by the decision-maker can also have application to the verdict of a jury. Perhaps it is the case that there is a more essential purpose for the current jury secrecy rule. And, it may lay in the fact that the law as it currently stands, as bold as it sounds, does not want to reveal the reasoning of the jury, on the very basis that it indeed will reveal error. *Tempus est optimus iudex!*

Footnotes

- * BA (Macq), LLB (Uni Medal) (Hons 1) (UWS), GDLP (COL), Barrister, Lecturer-at-law (UWS).
- 1 *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 229-230 per Kirby J.
- 2 Head M, *Administrative Law: Context and Critique* (Federation Press, NSW, 2005) p 18.
- 3 Campbell E, "Jury Secrecy and Contempt of Court" (1985) 11(4) MULR 169 at 194.
- 4 Bagaric M, "Should juries explain?", *Herald Sun*, 11 March 2008, <http://www.news.com.au/heraldsun/story/0,21985,23351581-5000117,00.html> (viewed 13 April 2010).
- 5 Gleeson M, *Outcome, Process and the Rule of Law*, Address delivered to the Administrative Tribunals 30th Anniversary Dinner, Canberra, 2 August 2006, <http://www.aat.gov.au/SpeechesPapersAndResearch/30thAnniversary/pdf/OutcomeProcessRuleLawAugust2006.pdf> (viewed 12 April 2010).
- 6 *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR

378; *King Ranch Australia Pty Ltd v Cardwell Shire Council* [1985] 2 Qd R 182; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247.

7 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

8 Bagaric, n 5.

9 *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997 at 1049, 1053, 1061, applied in *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Sordini v Wilcox* (1982) 42 ALR 245; *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 663-4 (Gibbs CJ); *Anderson v Release on Licence Board* [1984] 2 NSWLR 312 at 320.

10 Bar Council, *Your Right to a Jury Trial: Statement of the Bar Council of NSW* (The Council, Sydney, 1965), p 13.

11 Bar Council, n 10.

12 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507; *Brackenreg v Comcare Australia* (1995) 56 FCR 335.

13 Pearce D, "Administrative Review Council, Statement of Reasons: An Explanatory Memorandum" in *Administrative Law Service* (1979), 5003.

14 See also *Minister for Immigration, Local Government & Ethnic Affairs v Taveli* (1990) 23 FCR 162; 94 ALR 177 at 192-193 (French J).

15 *Australian Institute of Marine & Power Engineers v Secretary, Dept of Transport* (1986) 13 FCR 124 at 130-131 (Gummow J); *Dalton v Deputy Commissioner of Taxation (NSW)* (1985) 7 FCR 382.

16 Effect of *Jury Act 1977* (NSW), s 68B.

17 For further treatment on the *ADJR Act* and the provisions for exclusion of certain decisions from the requirement to provide a statement of reasons, see *Australian Securities Commission v Somerville* (1994) 51 FCR 38.

18 Clough J and Mulhern C, *Criminal Law* (2nd ed, LexisNexis, NSW, 2004) p 3.

19 See *Jury Act 1977* (NSW), Pt 4.

20 See, eg *Migration Act 1958* (Cth), s 368(1)(b); *Veterans' Entitlements Act 1986* (Cth), s 34(1); *Social Security (Administration) Act 1999* (Cth), s 177(1)(a)(ii); *Broadcasting Services Act 1992* (Cth), s 205(a).

21 See *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1989* (NSW); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA); *Information Act 2002* (NT); *Freedom of Information Act 1989* (ACT).

22 *Freedom of Information Act 1982* (Cth), s 11; *Freedom of Information Act 1989* (NSW), s 16.

23 *Freedom of Information Act 1982* (Cth), Pt II; *Freedom of Information Act 1989* (NSW), Pt 2.

24 *Freedom of Information Act 1982* (Cth), Pt V; *Freedom of Information Act 1989* (NSW), Pt 4.

25 Commonwealth Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978* (Australian Government Publishing Service, Canberra, 1979), cited at http://www.aph.gov.au/Senate/committee/legcon_cte/completed_inquiries/pre1996/freedom (viewed 11 April 2010).

26 *Report on the Freedom of Information Bill 1978*, n 25.

27 *Report on the Freedom of Information Bill 1978*, n 25.

28 NSW Department of Premier and Cabinet, *The NSW FOI Manual* (August 2007), cited in http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0019/685/FOIManual15Aug07.pdf (viewed 13 April 2010).

29 Head, n 2, p 55.

30 *Xuereb v Viola* (1989) 18 NSWLR 453.

31 *Gas & Fuel Corp of Victoria v Wood Hall Ltd* [1978] VR 385.

32 *Xuereb v Viola* (1989) 18 NSWLR 453.

33 *Attorney-General (NSW) v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729.

34 These terms have been in use in the UK since the period of 1967: *Re HK (an infant)* [1967] 2 QB 617; *R v Birmingham City Justices; Ex parte Chris Foreign Foods (Wholesalers) Ltd* [1970] 3 All ER 945; *Furnell v Whangarei High Schools Board* [1973] AC 660.

35 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

36 *R v Secretary of State for the Home Dept; Ex parte Doody* [1994] 1 AC 531 at 560; see also *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92.

37 *Coope v Luliano* (1996) 65 SASR 405 at 408.

38 See further *Attorney-General (NSW) v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729 at 734, 735 (Priestley JA).

39 Davies J had followed *R v Secretary of State for the Home Dept; Ex parte Doody* [1994] 1 AC 531.

40 *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* (unreported, Supreme Court, Qld, Shepherdson J, 312/94, 25 July 1994).

41 See, eg *Smits v Buckworth* (unreported, Supreme Court, NSW, Young J, 3869/96, 22 September 1997). This case was varied on appeal (*Attorney-General (NSW) v Smits* (1998) 45 NSWLR 521), but not in regard to the duty to give reasons question observed in the original case.

42 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 (Lord Hewart CJ).

43 See also *Webb v The Queen* (1994) 181 CLR 41; 68 ALJR 582 at 585 (Mason CJ and McHugh J).

44 *Webb v The Queen* (1994) 181 CLR 41; 68 ALJR 582 at 586 (Mason CJ and McHugh J), 589 (Brennan J), 596

(Deane J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

45 *Webb v The Queen* (1994) 181 CLR 41; 68 ALJR 582 at 583 (Mason CJ and McHugh J), 589 (Brennan J), 596 (Deane J), 605 (Toohey J).

46 *Webb v The Queen* (1994) 181 CLR 41; 68 ALJR 582 at 586-587 (Mason CJ and McHugh J), 599-600 (Deane J), 606 (Toohey J).

47 *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708 at 720, 721, 716; *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 277 (Aickin J).

48 Where a decision-maker who has a statutory duty to give reasons fails to give adequate reasons, an error of law is made: see *Doran v Riordan* (1990) 24 FCR 564; *Commonwealth v Pharmacy Guild of Australia* (1989) 19 ALD 510; *Preston v Secretary, Dept of Family & Community Services* (2004) 39 AAR 177.

49 *General Medical Council v Spackman* [1943] AC 627 at 644-645 (Lord Wright); *Hamblin v Duffy (No 2)* (1981) 37 ALR 297; *Village Roadshow Corp Ltd v Sheehan* (1987) 17 FCR 324; *Kioa v West* (1985) 159 CLR 550 at 633; *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268 at 283.

50 *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(2)(a), 6(2)(a).

51 *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(2)(b), 6(2)(b) provide for review of decisions and conduct engaged in for the purpose of making decisions in cases of failing to take a relevant consideration into account in the exercise of a power.

52 *Jury Act 1977* (NSW), s 55E.

53 *R v Young* [1955] QB 324; *R v Duncan* [1944] 1 KB 713.

54 *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(2)(c), 6(2)(c).

55 *Municipal Council of Sydney v Campbell* [1925] AC 338; *Bromley v Dawes* (1983) 34 SASR 73.

56 *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170; *Schlieske v Minister for Immigration & Ethnic Affairs* (1987) 79 ALR 554.

57 *Jury Act 1977* (NSW), s 57A makes clear that the jury is to determine the facts in issue during a criminal and civil law trial.

58 See also *Municipal Council of Sydney v Campbell* [1925] AC 338 at 343.

59 *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(2)(d), 6(2)(d) provide for review of decisions and conduct engaged in for the purpose of making decisions in cases of an exercise of a discretionary power in bad faith.

60 *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689.

61 *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(2)(g), 6(2)(g).

62 *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155 (Wilcox J); *Doran v Riordan* (1989) 19 ALD 185 at 188 (Wilcox J); *Secretary, Department of Social Security v Willee* (1990) 96 ALR 211 at 222 (Foster J); *Wouters v Deputy Commissioner of Taxation (NSW)* (1988) 20 FCR 342; 84 ALR 577 at 584 (Bowen CJ, Wilcox and Lee JJ).

63 *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379; *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611; 54 ALD 289 at 311 (Gaudron and Kirby JJ).

64 McCusker M, *Letter from Malcolm McCusker QC*, cited at http://www.postnewspapers.com.au/special_coverage/extra_walsham_stories/2007_08_04_1.shtml (viewed 11 April 2010).

65 McCusker, n 64.

66 McCusker, n 64.