[2015] AATA 304

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/6370 |
| Re | Department of Human Services |
|  | APPLICANT |
| And | WNRW |
|  | RESPONDENT |

# INTERLOCUTORY Decision

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| Tribunal | **Deputy President J W Constance** |
| Date | **7 May 2015** |
| Place | **Sydney** |

The Tribunal has jurisdiction to hear and determine the application for review, lodged on behalf of the Department of Human Services on 10 December 2014.

................................**[sgd]**........................................

**Deputy President J W Constance**

Catchwords

*PRACTICE AND PROCEDURE – alleged inadequate statement of reasons in support of application – whether Tribunal has jurisdiction to hear an application for review where supporting reasons are decision not correct and preferable - consideration of section 29(1)(c) of the Administrative Appeals Tribunal Act 1975 (Cth) – Tribunal has jurisdiction*

Legislation

Administrative Appeals Tribunal Act 1975 (Cth) ss 2A; 29(1)(c); 29(1B)

Cases

Ansell v Wells (1982) 43 ALR 41

Beiruti and Commissioner of Taxation [2013] AATA 634

Chun Wang v Minister for Immigration and Multicultural Affairs (1997) 71 FCR 386

Posner v Collector for Inter-State Destitute Persons (Vic) (1946) 74 CLR 461

# REASONS FOR INTERLOCUTORY DECISION

**Deputy President J W Constance**

**7 May 2015**

# introduction

1. In December 2011, the Respondent wrote to an agency of the Department of Human Services requesting the production of certain documents under the provisions of the *Freedom of Information Act 1982* (Cth) (“the FOI Act*”).* On 10 February 2012, the Department notified the Respondent of its decision to release some of the requested documents in full and some partially redacted. The Department claimed that some documents were exempt from production. The Respondent then applied to the Privacy Commissioner to review the Department’s decision.
2. On 18 November 2014, the Privacy Commissioner made the following decision:

I set aside the access refusal decision of the Department of Human Services (the Department) of 10 February 2012, and substitute my decision, under s 11A of the Freedom of Information Act 1982 (the FOI Act) refusing access to some of the documents sought and granting access to others , some modified by deletions.

1. The Commissioner provided to the Respondent and to the Department detailed reasons for his decision. In those reasons he dealt specifically with each document in dispute and gave reasons for his decision in relation to it.
2. Exercising the right given to it by section 57 of the FOI Act, on 10 December 2014 the Department applied to the Tribunal to review the Commissioner’s decision. The application was lodged on behalf of the Department by its Solicitors
3. In its application the Department stated that its reasons for seeking a review of the decision were:

The decision of the Privacy Commissioner is not the correct and preferable decision.

1. On 29 December 2014, the Respondent sent an email to the Tribunal which stated in part:

I note under Section 29(1)(c)of the AAT Act that the application must contain a statement of the reasons for the application. Section29(1B)(b) of the AAT Act implies that this statement must be sufficient to readily identify respects in which the applicant believes that the decision is not the correct or preferable decision, not simply state that the decision is not the correct and preferable decision.

I draw the tribunal’s attention to 29(1B)(b) and ask you to consider whether it should request the applicant to amend the statement in the application.

The Respondent forwarded a copy of this email to the Solicitors for the Department.

1. On 2 January 2015, the Tribunal emailed the Respondent as follows;

I refer to the above matter and to your email dated 29 December 2014.

The Tribunal does not propose at this stage to require the Applicant to amend its statement of reasons for application provided in the application for review dated 9 December 2014.

As you may be aware, section 37 of the Administrative Appeals Tribunal Act 1975 requires that the department must lodge with the Tribunal a statement that: identifies the decision and the person supplying the reasons if that person is not the decision maker; sets out the findings on material questions of fact; refers to the evidence or other material on which those findings were based; and gives reasons for the decision. The section 37 documents are expected to be filed with the Tribunal on before 15 January 2015.

Additionally, the Tribunal’s General Practice Direction requires that prior to the first conference, the Government department file and serve a Statement of Issues which sets out the issues that the Department considers to be in dispute. The statement of issues must address these specific issues in question and must not be expressed in general terms.

Should you remain concerned that the above documents do not allow you to adequately ascertain the Applicant reasons for application, you may wish to raise this at the preliminary conference on 17 February 2015.

1. By email of 4 January 2015 the Respondent applied to the Tribunal:

…to consider the application of the Department of a [sic] Human Services dated 09 December 2014 as not made, on account that it does not meet the mandatory requirement of Section 29(1)(c) of the Administrative Appeals Tribunal Act 1975 because it does not provide a “Statement of the Reasons” in a manner (noting the standard identified in Section (1B)(b) sufficient to readily identify the respects in which the applicant believes the decision is not the correct or preferable decision.

I request that this application be dealt with as a preliminary matter prior to any conference or directions hearings relating to the “as yet undeclared” substantive issue/s before the Tribunal.

……

I believe the application of the Department is incompetent and therefore unable to invoke the jurisdiction of this Tribunal and I respectfully ask you to make this finding.

In his application, the Respondent set out detailed arguments in support of the finding he sought.

1. On 5 January 2015 the Department filed a Statement of Issues which provides:
2. *The ultimate issue in this application is whether three documents are exempt documents under the Freedom of Information Act 1982 (Cth) (the FOI Act).*
3. *The issues in relation to each of the three documents are as follows:*

*(a)* ***Document 6*** *is an executive minute (brief) to the Minister for Human Services. The Applicant considers that the entirety of this document is an exempt document under s 42 of the FOI Act (which deals with legal professional privilege). The Tribunal will need to consider whether or not Document 6 attracts legal professional privilege.*

*(b)* ***Documents 63 and 64*** *are an email chain. The Applicant considers that the entirety of an email dated 19 August 2011 is an exempt document under s 42 of the FOI Act. The Tribunal will need to consider whether or not Documents 63 and 64 attract legal professional privilege.*

*(c)* ***Document 131*** *is an email chain. The relevant issue in relation to this document is whether or not privilege in the document was waived. The Applicant does not consider that privilege has been waived.*

This Statement of Issues was provided to the Respondent.

# Legislation

1. Section 29 of the *Administrative Appeals Tribunal Act 1975* (Cth) relevantly provides:
2. An application to the Tribunal for a review of a decision:
   * + 1. *(a) shall be in writing; and*
       2. *(b) may be made in accordance with the prescribed form; and*
       3. *(c) except if paragraph (ca) or (cb) applies – must contain a statement of the reasons for the application …*

*………*

*(1B) If:*

* + - * 1. *an application contains a statement under paragraph(1)(c); and*
        2. *the Tribunal is of the opinion that the statement is not sufficient to enable the Tribunal to readily identify the respects in which the applicant believes that the decision is not the correct or preferable decision;*

*the Tribunal may, by notice given to the applicant, request the applicant to amend the statement, within the period specified in the notice, so that the statement is sufficient to enable the Tribunal to readily identify the respects in which the applicant believes that the decision is not the correct or preferable decision.*

# the issue

1. The issue for determination is whether the Tribunal has jurisdiction to determine an application in which the reasons for the application are merely stated to be that the decision sought to be reviewed *“is not the correct and preferable decision.”*

# the respondent’s argument

1. The Respondent argues that *“the use of “must” is indicative of an imperative command, either positive or negative, depending upon the word or words which follow it in the relevant statutory provision. It expresses necessity in the sense of an obligation or requirement.”* In support of this proposition he referred me to *Posner v Collector for Inter-State Destitute Persons (Vic)[[1]](#footnote-1)* in which Williams J. stated that:

“’Must’ is a word of absolute obligation and occurs in a section which is concerned with a fundamental principle of justice. It is not merely directory. …… I adhere to what I said in Cameron v. Cole [(1944) 68 CLR 571, at p.604] that ‘where (as in the present case) service of a particular nature is required to give an inferior court jurisdiction, failure to effect such service will make all the subsequent proceedings null and void.’”

1. In *Chun Wang v. Minister for Immigration and Multicultural Affairs*,*[[2]](#footnote-2)* Merkel J. referred to the judgement in *Posner*  and said:

In my view the use of the word ’must’ in s 478(1)(b) and (2), in relation to the 28 day time limit, is not merely directory but ‘is a word of absolute obligation’. … Such an interpretation also accords with the principle that enactments requiring that a specified procedure be followed in courts are usually mandatory and not merely directory …

1. The Respondent also referred me to the Hearing Rule which he argues requires a party to be given prior notice, disclosure and an opportunity to comment: Lockhart J. in *Ansell v. Wells*.[[3]](#footnote-3)

# CONSIDERATION

1. The issue raised in this application was given detailed consideration by the Tribunal in *Beiruti and Commissioner of Taxation[[4]](#footnote-4).* In that matter Deputy President Forgie considered the legislative history of section 29 which is instructive as to the meaning intended by Parliament when the section was amended to its present form.
2. Deputy President Forgie concluded:

65. When it is understood that a statement of reasons has a limited role in the course of an applications proceeding to resolution, when it is seen that’s 29(1B) contemplates an application without a statement, it seems to me that Parliament has chosen to use the word “must”, rather than “shall” to frame a provision that is exhortatory rather than mandatory. It is a provision in the nature of s 2A of the AAT Act which also uses the word “must” rather than “shall” when it provides:

“In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economic or, informal and quick.”

*66. Provisions of the sort found in s 2A have been described as “general exhortatory provisions” and are intended to be facultative and not restrictive. Just as the 5 qualities that the Tribunal is exhorted to aspire to by s 2A may be difficult for that Tribunal to achieve simultaneously, it seems to me that s 29 (1B) recognises that those who come to the Tribunal may not always be able to express their reasons in their application. Therefore, to read the requirements in s 29(1)(c) as anything more than exhortatory would be to disadvantage persons who find themselves in that category. It would be inconsistent with the exhortation that the Tribunal provide a mechanism a review that is economical, informal and quick for it would tend to lead to the introduction of further administrative processes. In many instances, the fact the application has been made at all will be a good indication of the reasons for its being made. In others, there will be no delay caused by the absence of reasons for they can be explored at the first conference in the Tribunal. If there is any need to tease out the reasons before that, resort can be had to the power in s 29(1B) of the AAT Act.[[5]](#footnote-5)*

1. I agree entirely with the reasoning of Deputy President Forgie and respectfully adopt those reasons in deciding that the Tribunal does have jurisdiction to determine the application made by the Department.
2. It should be noted that in the application before Deputy President Forgie, Mr Beiruti did not set out any reasons for his application at the time it was made by his representatives. The application was made in the form of a letter. The following day the representatives lodged an application in the form set out in the Regulations made under the AAT Act. This document included a statement of reasons.
3. In the present application, there was a very brief statement which purports to be a statement of reasons for the application. Certainly it is uninformative. However within three working days of the Respondent raising his concerns as to the lack of information, the Department provided a Statement of Issues which set out the reasons it considered the Commissioner’s decision was incorrect. I am satisfied that this document, read in conjunction with the Commissioner’s reasons, provides the Respondent with adequate information to enable him to properly prepare for the next stage of these proceedings.
4. Whilst it is less than ideal, the practice of the Tribunal has always been to accept applications which contain statements of reasons such as *“…the decision is wrong”* and *“… the decision is contrary to law”.* To do otherwise would result in many applications, made by both legally represented applicants and unrepresented applicants, being rejected on the basis that the Tribunal would not have jurisdiction to hear those applications. This would be an unduly formal approach and would cause delay and unnecessary expense, making it difficult for applicants, and particularly unrepresented applicants, to access the review process provided by the Tribunal. There are many steps which are taken by the Tribunal once an application is received to ensure that a respondent is treated fairly and is afforded a proper hearing at all times.
5. I have considered the judgments to which I have referred along with additional authorities to which the Respondent referred in his written submission and during argument. I do not consider that any of these authorities cause me to reach a conclusion other than that which I have.
6. I note that in *Posner* and in *Wang* the Courts were considering the processes which commence court proceedings. As Deputy President Forgie set out, these principles do not necessarily guide the way in which this Tribunal should deal with an application made to it. Further, it is to be noted that Williams J. delivered a dissenting judgement in *Posner.* The majority judgement of the High Court was that the fact that a defendant had not been served with a summons in proceedings in a State court did not render those proceedings null and void.

# conclusion

1. The Tribunal has jurisdiction to hear and determine the application of the Department of Human Services made to the Tribunal on 10 December 2014.

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| I certify that the preceding 23 (twenty -three) paragraphs are a true copy of the reasons for the decision herein of Deputy President J W Constance. |

............................**[sgd]**............................................

Associate

Dated 7 May 2015

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| Date(s) of hearing | **23 February 2015** |
| Date final submissions received | **23 February 2015** |
| Solicitors for the Applicant | **C Sibley; Clayton Utz** |
| Respondent | **In person** |

1. (1946) 74 CLR 461 at 490. [↑](#footnote-ref-1)
2. (1997) 71 FCR 386 at p.391. [↑](#footnote-ref-2)
3. (1982) 43 ALR 41, at 62. [↑](#footnote-ref-3)
4. [2013] AATA 634 paras 51-68. [↑](#footnote-ref-4)
5. Beiruti and Commissioner of Taxation [2013] AATA 634 paras 65 to 66. [↑](#footnote-ref-5)