

**THE HON T F BATHURST AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**COAT NSW ANNUAL CONFERENCE**  
**EFFICIENT, INFORMAL & FAIR: TRIBUNALS DELIVERING UNDER PRESSURE**  
**WRITING BETTER JUDGMENTS**  
**FRIDAY 7 SEPTEMBER 2018\***

**Introduction**

1. Why should a tribunal member worry about writing or delivering better reasons? It is important to consider this question at the outset, and thus provide some justification for what I say next. In my opinion, tribunals perform functions indispensable to the administration of justice in this State. They provide for large numbers of individuals without complex cases a means of resolving their disputes quickly and cheaply, offering access to justice to a segment of society that may not otherwise see justice done. They also check the exercise of governmental power in reviewing administrative decisions. The fact that experts, and not just lawyers, are involved in the decision making process also means disputes are resolved by those with specialist professional knowledge in the relevant matters.
  
2. However, like any other institution involved in the administration of justice, it must be seen to be done as well as done, and it is seen to be done through the giving of reasons for decisions. The general rule, that reasons should be given and stated or published in the open, is of “the essence of the administration of justice.”<sup>1</sup> It enables the public to be convinced that justice has been done, “or at least that an honest, careful and conscientious effort has been made” to do so.<sup>2</sup>

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\* I express thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

<sup>1</sup> Sir Harry Gibbs, ‘Judgment Writing’ (1993) 67 *Australian Law Journal* 494.

<sup>2</sup> *Ibid.*

3. I think there is a general feeling that this part of the job is difficult or tiresome. Sir Harry Gibbs regarded it as a “painstaking, arduous effort”<sup>3</sup> and Sir Frank Kitto reminisced of a time at the beginning of his judicial career when he had thought that as the years went by the writing of judgments would prove easier, but they did not.<sup>4</sup> That two judges who are widely admired for their judgment writing skill described the process as such should, I think, give us mere mortals some comfort.
4. However, I also think it is important to remember that there can be enjoyment in the process. I see some scepticism in the room. However, I was reminded of this at the retirement ceremony of Justice Simpson from the Court of Appeal earlier this year, where she made the following remarks of her time on the bench:

“The highlights are the satisfaction of working through sometimes complex factual disputes, deciding what the facts are, applying the law to those facts and producing a judgment still warm from the printer, to be savoured like a loaf of freshly baked bread. Sheer bliss – at least until it works its way through the judicial hierarchy, when it might turn into chook food.”
5. Prior to the “chook food” stage, I do think this is a helpful outlook to adopt. Nevertheless, I won’t deny it is challenging. It is also something that judges and tribunal members do not, as a matter of course, receive some special training in. While many of us might have experience in the analogous tasks of writing opinions or considering legal issues, there are subtle differences and trial by error or fire is the accepted learning curve.
6. However, there are ways to improve on the skill. The first is to simply read examples of good judgments and perhaps also bad ones. Unfortunately, examples of both abound in law reports and online, and it is not hard to tell the difference. Reading the various judgment styles can also be a useful way to discover what style you feel most suits your own manner of thinking and

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<sup>3</sup> Ibid 502.

<sup>4</sup> Sir Frank Kitto, ‘Why Write Judgments?’ (1992) 66 *Australian Law Journal* 787. See also Susan Kiefel, ‘Reasons for judgment: objects and observations’ (Speech delivered at the Sir Harry Gibbs Law Dinner, Emmanuel College, University of Queensland, 18 May 2012) 7.

reasoning, and it can be emulated. Of course, each of us has an individual manner of expression. Reasons expressed in a style natural to the decision-maker generally evince greater authenticity.<sup>5</sup>

7. Secondly, there are many resources available on the matter, published by the Judicial Commission and Judicial College, and speeches or articles written by eminent judges such as Sir Harry and Sir Frank. Thirdly, judgment writing programs do exist, such as those run by the National Judicial College, which are open to tribunal members to attend. I am told by Supreme Court Judges who have attended that these programs are extremely useful. They are run in an interactive manner, where attendees are tasked with writing and rewriting their judgments led by experienced judges and authors.
8. This forum is not conducive to an interactive judgment re-writing session, nor would it be fair to spring writing tasks on you with no notice. Procedural fairness must be strictly observed. Rather, what I intend to do is first, outline some overarching considerations to be kept in mind in formulating reasons, whether *ex tempore* or written, before moving on to some practical tips. These broad considerations can be distilled to three key principles: first, the resolution of the dispute at hand, secondly, the avoidance of self-indulgence and third, the importance of clarity.
9. Before I begin, however, I should also say that I am obviously not, nor have I ever been, a Tribunal Member. To that extent I can't pretend to understand the difficulties which you each face on a daily basis dealing with a wide range of matters under unimaginable time pressures – and with parties ranging from senior counsel to public servants experienced in proceedings to litigants with no prior engagement with the justice system or the law. In that respect, I make the disclaimer that my particular experience is limited to writing judgments in intermediate appellate courts. While I have attempted to tailor my remarks to this particular audience, I doubt I could fully empathise without having been in your

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<sup>5</sup> Linda Dessau and Tom Wodak, 'Seven Steps to Clearer Judgment Writing' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing*, (Education Monograph 2, Judicial Commission of New South Wales, 2003) 117, 124.

position – so take from the following what is applicable to you and otherwise disregard or correct me at the end.

## **Some non-exhaustive guiding principles**

### *Resolving the dispute*

10. On my first point, resolving the dispute at hand. Tribunal reasons are just that: reasons for the decision made in the particular dispute before you on the day. Reasons should not contain unnecessary legal pretence<sup>6</sup> and displays of learning, or what the Lord Chief Justice, Lord Judge, recalled his history teacher marking on his essay – APK, an “anxious parade of knowledge”.<sup>7</sup> In any event, an anxious parade of knowledge not necessary to resolving the dispute at hand simply gives you more opportunities to fall into unnecessary error.<sup>8</sup>
11. In considering the need to adequately explain the reasons for the decision it is important to keep in mind the parties, and particularly the losing party. They are the audience for whom you are writing. Justice Kearney, a former equity judge of the Supreme Court said, on his last sitting day, that the former Vice-Chancellor and well-known law academic Sir Robert Megarry had once told him the identity of the most important person in the courtroom: the party which was to lose.<sup>9</sup> He emphasised that what is vital is a coherent and readable expression as to why the state, through the court or tribunal, was exercising its power for or against individuals.<sup>10</sup> While the reasons are important for both parties, ultimately it is the

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<sup>6</sup> Chief Justice James Allsop, ‘Appellate Judgments – the Need for Clarity’ (Speech delivered at the 36th Australian Legal Convention, Perth, 19 September 2009) 5.

<sup>7</sup> Quoted in Lord David Neuberger, ‘No Judgment – No Justice’ (Speech delivered at the 1<sup>st</sup> Annual BAILII Lecture, 20 November 2012) 9. See also Lord David Neuberger, ‘Sausages and the Judicial Process: the Limits of Transparency’ (Speech delivered at the Annual Conference of the Supreme Court of New South Wales, Sydney, 1 August 2014) 9.

<sup>8</sup> See *Rebenta Pty Ltd v Wise* [2009] NSWCA 212, [12].

<sup>9</sup> Allsop, above n 6, 4.

<sup>10</sup> *Ibid* 4-5.

losing party that must be convinced – the winning party is likely convinced of their rightness in any event.<sup>11</sup>

12. The losing party before a tribunal may frequently be an administrative decision-maker. That audience should also be kept in mind and reasons directed to improving the quality of future decision making by explaining as clearly as possible the error involved. In this way, the tribunal's reasons can have a remedial effect on the quality of administrative decision-making in future cases.
13. There are of course other audiences of judgments, including fellow tribunal members or judges, legal professionals, students and the wider general public. Of course, an appeal panel or Court may also ultimately become the audience. To the extent that the prospect of appeal is considered in judgment writing, such consideration should be limited to ensuring that the reasons make clear what the appeal panel or court will need to do in respect of your view of the facts and any exercise of your discretion.<sup>12</sup> Judgments written with an eye to an appellate court or with the primary aim of making them “appeal-proof” usually are neither clear nor successful in achieving their objects.
14. I don't of course ignore, or pretend to be impervious to, the entirely natural and human feeling of disappointment that may be felt when a matter is appealed and overturned.<sup>13</sup> However, appeal panels or courts do not give marks out of ten and first instance members are not sitting for an examination when giving reasons. When an appellate body says you are wrong, they are simply saying they have a different view. To that end, I don't think there is any sense in putting things in a qualified fashion. If you have to reach a conclusion, just do it. I remember a client once complaining to me about an opinion she had received from a very senior silk. She complained that there were 10 pages of legal analysis as to why the answer to her question was yes, 10 pages of legal analysis as to why the answer was no and the 21<sup>st</sup> page was simply blank. A judgment of this nature is useless.

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<sup>11</sup> Vicki Waye, 'Who Are Judges Writing For?' (2009) 34 *University of Western Australia Law Review* 274, 276.

<sup>12</sup> Kitto, above n 4, 788.

<sup>13</sup> Justice Roslyn Atkinson, 'Judgment Writing' (Speech delivered at the AIJA Conference, Brisbane, 13 September 2002) 1-2.

15. Decisiveness is simply characteristic of any good writing – the renowned guide on writing, “Elements of Style” by Strunk and White commands the writer to “make definite assertions”, and considers that “it is worse to be irresolute than wrong”.<sup>14</sup> You might not feel so strongly about it, but it is a fair point – why compound the losing party’s discontent with uncertainty? It is more productive to view the prospect of appeal as one that lifts a burden from you. If you get it wrong, as we all do at some stage, it can be corrected on appeal, and the damage to the parties is not irreparable.<sup>15</sup>

16. One final point to keep in mind is, in cases where there is authority of a superior court on a matter of law, the Tribunal must follow that authority. However, it is not necessary to go into detailed legal opinions before reaching a decision. Where one superior court decision is authority for a proposition, there is little utility in padding out a judgment with a variety of other authorities to support it, or which say substantially the same thing in different terms. In my experience, this practice tends to add to confusion rather than clarity. It evidently adds little to the fundamental concern of resolving the dispute at hand.

### *Avoiding self-indulgence*

17. The second guiding principle is the avoidance of self-indulgence, which can manifest in different ways in writing reasons. One way is in the attempted use of humour. Whether humour is an exercise in self-indulgence to be avoided or some necessary light relief in otherwise sombre proceedings is a matter upon which reasonable minds undoubtedly differ. The dominant view in Australian courts<sup>16</sup> has been that it should be avoided at all costs, because of the significant risk that it will be misinterpreted, or come across as humiliating.<sup>17</sup> Writing in 1952, William Prosser declared that “judicial humour is a dreadful thing”, stating that “the bench

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<sup>14</sup> William Strunk Jr and EB White, *The Elements of Style* (Pearson, 4<sup>th</sup> ed, 2000) xviii.

<sup>15</sup> *Broome v Cassell* [1972] 2 WLR 645, 716 cited in Kitto, above n 4, 788.

<sup>16</sup> See Jack Oakley and Brian Opeskin, ‘Banter from the Bench: The Use of Humour in the Exercise of Judicial Functions’ (2016) 42 *Australian Bar Review* 82, 86-9.

<sup>17</sup> See Sharyn Roach Anleu, Kathy Mack and Jordan Tutton, ‘Judicial Humour in the Australian Courtroom’ (2014) 38 *Melbourne University Law Review* 621, 660.

is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig”.<sup>18</sup>

18. It does appear that the vestiges of British restraint have receded in recent years, and an increasing tendency towards humour has emerged. In fact, there is a blog recording these attempts within the Australian judiciary – perhaps its existence is some evidence of the increasing acceptance of humour from the bench. I can’t say precisely what it contains as the Court’s intranet blocks the site on the grounds that it contains “inappropriate content” – whether that is a sign in itself, I’ll leave to your judgment.

19. In terms of humour during proceedings, the former Chief Justice Murray Gleeson in 1998 gave a speech to new judges, advising them in the following terms: “[w]ithout wishing to appear to be a killjoy, I would caution against giving too much scope to your natural humour or high spirits when presiding in a courtroom. Most litigants and witnesses do not find court cases at all funny”.<sup>19</sup> Referring to these comments in a speech given in 2005, Justice Keith Mason noted that “[h]is wise advice cautions restraint but does not banish smiles from the courtroom. Humour must always be moderate, measured and appropriate to the occasion. But beyond this, humour needs no further justification. It is a legitimate expression of humanity and individuality. These are judicial virtues in the eyes of all except those who want courts to be staffed by robots preferably made in their own image”.<sup>20</sup>

20. In terms of judgments, my own view, for what it is worth, is that they are generally not a place for jokes. If humour is to be introduced in a judgment, then care should be taken that it does not belittle the parties to the proceedings. It must

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<sup>18</sup> William Prosser (ed), *The Judicial Humorist: A Collection of Judicial Opinions and Other Frivolities* (1952) vii.

<sup>19</sup> Murray Gleeson, ‘The Role of the Judge and Becoming a Judge’ (Speech delivered at the National Judicial Orientation Program, Sydney, 16 August 1998).

<sup>20</sup> Keith Mason, ‘Judicial Humour: Law Graduation Address’ (Speech delivered at The University of Sydney Law Graduation, Sydney, 20 May 2005).

always be borne in mind that regardless of what one's own view of the case is, it is generally a matter on which the parties place considerable importance.<sup>21</sup>

21. What is not ever appropriate is humiliation or disrespect: of counsel, of witnesses or of the parties themselves. This is the main point to which I am concerned with when I speak of the avoidance of self-indulgence. This is not to say that a judge or member at any level should not be robust in fact finding and in the assessment of the credibility of a witness. But it is not necessary to criticise for the sake of criticising. One method of avoiding this may be to follow the wisdom of Sir John Latham, who used to say that a judgment should only express acceptance or rejection of a witness's evidence, rather than belief or disbelief of them, unless consideration of the parties' credibility is essential to the determination of the proceedings.<sup>22</sup>

22. Similarly, there may be the temptation to criticise the behaviour of counsel or that of the parties in the action. I hasten to add that I do not count myself as being unflinchingly capable of restraint in the face of less than helpful submissions made by counsel or the unedifying behaviour of a party. In some rare cases, chastising may be appropriate where there has been some deliberate wrongdoing or abuse of process. However, in many cases, criticism is entirely unnecessary and does more to relieve one's own sense of frustration than resolve the dispute which has arisen between the parties.

23. Finally, it will never be necessary or appropriate in the context of an appeal to humiliate the decision-maker below in the course of finding error. I believe such missteps can largely be avoided by keeping in mind the resolution of the dispute at hand — strict relevance to the matters to be determined is the touchstone by which the propriety of criticism or even humour should be assessed".<sup>23</sup>

24. I think we can all agree that the following opening of a judgment was not moderate or measured in the sense Justice Keith Mason described. I quote from

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<sup>21</sup> Gleeson, above n 19.

<sup>22</sup> Cited in Kitto, above n 4, 789.

<sup>23</sup> Ibid.



a 2001 decision of the United States District Court in the Southern Division of Texas:

“Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact – complete with hats, handshakes and cryptic words – to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor’s edge sense of exhilaration, the Court begins.”<sup>24</sup>

### *Achieving clarity*

25. On that note, I best move to the final principle – clarity. There is perhaps no better example of a clear and concise description of the relevant issues in a case than that contained in a decision of the Full Court of the Federal Court. Justices Kenny and Griffiths began their judgment with a recitation of the popular song: “Love and Marriage, love and marriage, go together like a horse and carriage, this I tell you brother, you can’t have one without the other”, and proceeded to state that “these memorable lines ... substantially encapsulate the issue which is at the heart of this appeal”.<sup>25</sup> Incidentally that issue was whether, for the purpose of relevant provisions of migration legislation relating to partner visas, there must be love and affection for there to be a genuine spousal or de facto relationship.<sup>26</sup> I have never managed to find a Frank Sinatra song that sums up the case before

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<sup>24</sup> *Bradshaw v Unity Marine Corp*, 147 F Supp. 2d 668 (SD Tex, 2001).

<sup>25</sup> *Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5, [5] (Kenny and Griffiths JJ).

<sup>26</sup> *Ibid.*

me but I still have a couple of years left to try. In the context of a family dispute a succinct opening might be to quote from Tolstoy – “happy families are all alike; every unhappy family is unhappy in its own way”.

26. While it may not be possible to generate such a pithy summary of the issues at stake in every case, clarity in reasons is important. Clarity is also, it is probably trite to say, desirable. Clarity in reasons evidences a commitment to the principle of open justice. Tribunals cannot be accountable, nor can the public be expected to have confidence in them, if the reasons they give for the decisions they make are inaccessible to the people they affect, simply because they lack clarity.

27. This assumes particular importance in tribunal matters, given you are frequently dealing with the parties in person. In my opinion, it should always be assumed they will listen to or read the judgment and to that extent they must be able to understand it. When thinking about this particular audience, we should keep in mind that a staggering 44% of Australian adults lack the literacy skills required for everyday life.<sup>27</sup>

28. Clarity also helps achieve an objective I earlier spoke of, namely, writing for the losing party. If the party cannot understand why he or she has lost, it is likely they will remain dissatisfied and the reasons will not have served a fundamental purpose. Further, “unnecessarily adorned reasons” will enliven distrust in a party in a simple case, where over-complication tends to undermine confidence that the legal system is accessible to all.<sup>28</sup> Former Chief Justice Corbett of South Africa once wrote that “society’s distrust of lawyers and the law is mainly due to the tendency of lawyers in the past to keep the law to themselves”.<sup>29</sup>

29. Something I think it is important to avoid, therefore, is legal or technical jargon. It is undeniably easy for lawyers to descend into the regular use of jargon – we

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<sup>27</sup> Australian Bureau of Statistics, ‘Programme for the International Assessment of Adult Competencies, Australia, 2011-2012’ <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4228.0main+features992011-2012>>.

<sup>28</sup> Allsop, above n 6, 5.

<sup>29</sup> M M Corbett, ‘Writing a Judgment: Address at the First Orientation Course for New Judges’ (1998) 115 *South African Law Journal* 116, 122.

have only in recent years seen the tail end of Latin from most judgment writing (although there are some holdouts out there). I would adopt the view of Arthur Wellesley, the first Duke of Wellington, who counselled a new member of parliament in the late 1700's: "[d]on't quote Latin; say what you have to say, and then sit down".<sup>30</sup>

30. That is not to say that maxims and technical expressions do not, on occasion, have their place – but people need to be able to understand your reasons. Where technical expressions are absolutely necessary, a helpful explanation of their meaning does not go astray. The technical word can then be used as a convenient short hand throughout the remainder of the reasons.

31. Clarity is undoubtedly greatly assisted by brevity. The President of the United Kingdom Supreme Court, Lord Neuberger, in a speech a number of years ago now, suggested that judges take a more rigorous approach to cutting the length of their judgments.<sup>31</sup> In his words: "I am not thereby suggesting that we follow the lead of Judge Murdoch, a judge of the US Tax Court. ... "It is reputed that a taxpayer testified, 'As God is my judge, I do not owe this tax'. [To which] Judge Murdoch replied, 'He is not, I am; you do.' I cannot imagine such an approach ever catching on here, nor should it. Brevity is a virtue, but, like all virtues, it should not be taken to excess."<sup>32</sup>

32. From the perspective of an appellate judge, a tribunal's reasons need only show that it has properly exercised its jurisdiction. NCAT, for example, frequently deals with matters involving residential tenancy disputes. In a case seeking a termination order, all that may need to be shown is the existence of an agreement, the nature of the alleged breach, and why it is or is not appropriate to issue a termination order. The reasons need do no more than show that each of those matters has been considered – and in many cases one or two of those matters may not even be in issue.

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<sup>30</sup> Quoted in Michèle M Asprey, *Plain Language for Lawyers* (4<sup>th</sup> ed, Federation Press) 28.

<sup>31</sup> Lord David Neuberger, 'No Judgment – No Justice' (Speech delivered at the 1st Annual BAILII Lecture, 20 November 2012) 9

<sup>32</sup> *Ibid.*

33. However, there are certain matters that will not lend themselves to clarity or brevity, or where it will not be appropriate to be brief. This might be the case, for example, in a disciplinary matter where more detailed reasons are appropriate given the person is to be deprived of their livelihood. How long or short the reasons should be, will depend on the nature of the proceedings. And it is important not to sacrifice accuracy for the sake of clarity – “[e]verything should be made as simple as possible but not simpler”.<sup>33</sup> While we should try to deal with all matters of relevance, it is not meticulous to deal with every possible argument, whether raised or not. Some of the most common mistakes in judgments are to record things that did not need to be recorded or to decide things that did not need to be decided.<sup>34</sup>

34. I don't think that that the matters which the legislature has tasked tribunals with deciding generally require long theses on matters of law. Non-lawyer members particularly are not expected to immediately grasp the law involved. You are appointed for your expertise in the factual issues in question. If you get the law wrong it is most likely because it has not been explained properly or accurately by the parties. In any event, in many matters I imagine there is no or scant regard required to legal principles. Long theses are generally unnecessary on factual issues either. In a matter where a landlord refuses to give back a rental bond because of the growth of mould, I don't think you would need to look to how courts interpret the matter of mould or the science behind the growth of mould. If you have photographs or other evidence it should simply be the case that you make the finding based on that evidence. There could be nothing worse than seeing reasons opening with “The expression mould has received little judicial consideration. However, the Oxford English Dictionary describes it in this way, whereas the Macquarie dictionary describes it as such”. The only purpose that will serve is the parties will think you are stupid. There is no question of law involved, nor is there any complicated question of fact. If the evidence shows

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<sup>33</sup> Attributed to Albert Einstein in John Daintith (ed), *The Bloomsbury Treasury of Quotations* (Bloomsbury Publishing, 1994) 629.

<sup>34</sup> Professor James Raymond, as recorded in David Lloyd, ‘How to develop effective judgment writing’ (2007) 19(5) *Judicial Officers Bulletin* 42.

there is mould it should suffice to say that. As Oliver Wendall Holmes Jr wrote, and I quote, “I abhor, loathe and despise these long discourses, and agree with Carducci the Italian poet who died some years ago that a person who takes half a page to say what can be said in a sentence will be damned”.<sup>35</sup>

## **Some practical suggestions**

### *Crafting ex tempore reasons*

35. First, let me start with oral reasons. Preparation for the delivery of an *ex tempore* judgment will obviously start well before the proceedings, where one would read the claim and any material which has been brought forward. My personal approach would then be to create a table of two columns. On the left, you would work out what elements have to be shown to establish the claim, leaving the column on the right blank. As the proceedings are heard, you can then make notes on what evidence you have heard that has convinced you, or not, that each one is made out. Prior to the delivery of the reasons the best advice I can give is to simply take a moment to take a breath and collect your thoughts so that what comes out is coherent.

36. While *ex tempore* reasons are given in the tribunals as a matter of course, I would say that there is no need to give reasons orally just for the sake of it, particularly where you are not sure of the answer or the reasons for it. For myself, I find the process of sitting down and writing and redrafting of great assistance in the actual process of working out what I think is the right result – and I frequently do so in difficult cases even if in the end I agree with the reasons of another Judge and my own wind up in the shredding pile. I recognise that this is probably a luxury and most cases are not factually or legally complex and can be dealt with quickly and orally.

37. It is nevertheless important to pick your case. For example, in a matter where Bill Smith alleges that Mary Jones made a contract at a meeting in Sydney in April, and Mary Jones says that she did not and provides passport and immigration

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<sup>35</sup> Oliver Wendell Holmes Jnr & Frederick Pollock, *Holmes-Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock 1874-1932* (Harvard University Press, 1961) 245, quoted in *ibid* 43.

records to show she was not in the jurisdiction in April – oral reasons are plainly appropriate. The objective facts simply show no contract has been made. On the other hand, in a contractual matter involving a range of conversations and documents which are not easy to sift through, it may not be appropriate to deliver reasons orally but rather take the time by reserving judgment to sort through the relevant material. In all cases, whether oral or written, I think it is important to remember that the parties will probably prefer a quick result showing an adequate understanding of the issues rather than a treatise which take months to produce.

### *Written judgments*

38. In written judgments, a useful template is to first set out the findings of fact, then deal with the principal issues by reference to the parties' contentions. For example, in an anti-discrimination matter, this would involve first setting out the relevant facts giving rise to the claim. Second, you would deal with any disputed elements of those facts. Third, say why it is that you prefer the factual version of one party as against another. You then have a relatively clear factual basis upon which to consider the ultimate question by relevance to the statute.
39. In longer reasons, particularly, there is commonly an introductory paragraph. In the not-too-distant past this might sound something like "This is an application under s 163A of the *Health Practitioner Regulation National Law* in which the applicant is seeking an order under s 163B. The proceedings were commenced by filing of an application on 10 January 2016". Two sentences in, the reader still has no idea what the matter is about, and anyone listening to the judgment *ex tempore* has most likely stopped doing so.
40. In most cases decisions should start with a short explanation as to what the case is about, such as "The applicant, April Smith, was formerly registered as a pharmacist. Her registration was cancelled by an order of this Tribunal following a finding of professional misconduct. The tribunal has now been asked to review the cancellation of her registration." The reader immediately knows what the case is about, and if given *ex tempore*, the party listening is immediately given reassurance that the tribunal has understood what it was being asked to decide.

41. Whether to state the conclusion at the beginning is a matter of preference. I generally do not, but that is because in written judgments the orders are listed on the cover page prior to the reasons. Your preference may also depend on the nature of the case – in reasons given orally where the decision is going to significantly impact the person involved it may be more humane to reveal the conclusion at the outset, particularly where the reasons will take some time.<sup>36</sup> Equally, it may be the case that you feel a party is more likely to accept the decision at the end if forced to listen to your reasons, which they will be less motivated to do if the conclusion is stated at the outset. This is probably a matter for your judgment.

*Prioritisation, time management & procrastination*

42. Finally, I want to cover prioritisation, time management and the pernicious issue of procrastination. I have personally seen a number of cases involving judges who get 1 or 2 judgments outstanding for many months, while they continue to get more recent matters done quickly. In my opinion, this is not effective prioritisation. Obviously, there will be matters that are more urgent and easy than others but all parties want and are entitled to as quick a result as possible. The worst thing, I think, that one can do is procrastinate the hard decisions, because they only get harder with time. It also leaves more time for procedural unfairness to engender, increasing the chance that new thoughts, new arguments or even lines of authority will occur to you that were not raised by either party – and the converse, that what was raised by the party will be overlooked.<sup>37</sup> It is important to not give yourself the liberty of investigating matters that were simply not in issue.

43. In my opinion, prioritisation can be simple – the matters outstanding for the longest should be done first – subject to a matter of particular urgency arising in the meantime. And if there is one thing to avoid, I think it is dealing with the easiest matters first. If anything, the hard matters should be done first and the easy ones will tend to more or less take care of themselves.

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<sup>36</sup> Dessau and Wodak, above n 5, 8.

<sup>37</sup> See JD Heydon, 'Practical Impediments to the Fulfilment of Judicial Duties' (2004) 6(4) *The Judicial Review* 429, 441.

44. One of the common refrains in judgment writing, or indeed any writing, is that “the most important thing is to begin”. That is easier said than done. One way to ensure you do it is to take notes of what you think of witnesses as you are going, and in that way start to write the judgment as the hearing is ongoing.
45. There are some people who have many matters in various stages of writing at once. I don’t think this is an efficient method of working – at least for my part, I would not be able to recall where I was up to in judgment number 1 when I gave up on judgment number 5. I think it is possible to manage around 2 at once, but not more than that.
46. A simple but effective time management tool is to simply ask questions. Where there is a particular piece of legislation you need to find or you are wondering if there are cases on a particular point, it will often be much more efficient to simply go and ask someone who might know rather than doing it yourself. I say this fully aware that most of you don’t have the benefit of tipstaves or researchers who can be directed to do these chores instead, but there is no reason that difficult issues can’t be discussed with fellow panel members or colleagues.

#### *Proofing and rewriting*

47. Finally, I think it goes without saying that the process of proofing and re-writing is vital. I do it often, re-reading the draft and checking things as I go. Often something will stand out as not quite right and upon returning to the material I find I have misstated or misunderstood a matter in the first draft. Justice Brandeis, who was later quoted by Sir Harry Gibbs when speaking on this topic, said “there is no such thing as good writing. There is only good re-writing”.<sup>38</sup>
48. In this process, every attempt should be made to simplify and shorten sentences and paragraphs. You could say, “In the circumstances, I am of the opinion that the evidence that Mr Bloggs has given is somewhat inconclusive”. You could just

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<sup>38</sup> Gibbs, above n 1, 496 quoting Justice Louis Brandeis, as quoted in Robert Leflar (ed), *Appellate Judicial Opinions* (West Publishing Co, 1974) 187.



as accurately and more concisely say that “Mr Bloggs’ evidence is inconclusive’.<sup>39</sup>

49. Of course, this takes an abridged form in the delivery of *ex tempore* reasons, but the natural ability of the human eye to read slightly ahead of what is being spoken, or even the practice of taking pauses between sentences, can allow you to notice mistakes in prepared notes and correct them. At the close of the judgment, either party can of course rise and point out some matter that should have been dealt with that is not – hopefully meritoriously and not vexatiously – and errors can be corrected in that manner on the spot.<sup>40</sup>

## **Conclusion**

50. Good judgment writing is an art not a science. But in saying that, a judgment is not a literary work to be handed down with increasing admiration from generation to generation at the literary worth of the author or its deep and scholarly erudition. Rather, generally speaking, a judgment is simply an explanation of the reasons a tribunal has come to a particular decision. It should be directed to the parties, not to a law professor, much less an English professor. Once that is understood, it follows that in any judgment, the most important matters are first to gain a clear understanding of the factual and legal issues involved and second to deal with them alone, clearly and concisely. Not only will this be of great benefit to those most concerned with the outcome but it will generally lead to a judgment which is right.

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<sup>39</sup> I am grateful to Justice Linda Dessau and Judge Tom Wodak for the example: see Dessau and Wodak, above n 5, 10.

<sup>40</sup> Heydon, above n 37, 441.