

**THE HON T F BATHURST AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

**NJCA ‘WRITING BETTER JUDGMENTS’ PROGRAM: KEYNOTE ADDRESS**

**“WRITING JUDGMENTS WITH THE PARTIES IN MIND”**

**MONDAY 3 APRIL 2017\***

1. Good morning everyone and welcome to the NJCA Writing Better Judgments Program. Before I begin, I would like to acknowledge the traditional owners of the land on which we meet, the Gadigal people of the Eora nation and pay my respects to their elders, past and present.
2. I thank the Chief Justice of the Australian Capital Territory, the Honourable Helen Murrell for the invitation to speak to you this morning as you begin what will no doubt be an educational, and hopefully transformative, three days. It is particularly commendable that this forum has such wide representation from various jurisdictions and judicial institutions.
3. I want to start by saying how pleasing it truly is to be addressing a meeting of judicial colleagues who are dedicating three days to continuing judicial education, and specifically improving their judgment writing – one of the most important aspects of our role as judicial officers. I often inform newly admitted lawyers at their admission ceremony that despite their fervent wishes and those of their family and friends who have put up with them throughout their law degrees, their journey of learning is far from over. It is evident that this remains true for those of us who have now entered what is likely to be the last stage of our legal career. I also note that on this program you will be expected to complete “homework” each night – I wonder whether there will be any creative excuses from those who “forget” to complete it.

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

4. I must also pause to note that such learning would not be possible without the work of organisations such as the National Judicial College, and I thank the members of the secretariat who work so tirelessly to put together these programs for us.
5. I understand that over the course of the next few days you will be hearing from eminent former judges, current judges, writers and academics – all of whom are far more qualified than I to give advice on writing better judgments. For that reason I don't propose to give a lecture on the technical aspects of improving your judgment writing.
6. I do propose, however, to highlight three considerations I personally believe to be among the most important to keep firmly in mind when writing judgments – first, the resolution of the dispute at hand; secondly, the avoidance of self-indulgence; and thirdly, the ever-increasing importance of clarity.

#### *Resolving the dispute*

7. On that first point, resolving the dispute at hand. It is the ultimate judicial responsibility to decide cases justly and according to law and doing so comes with the responsibility to state the reasons for the decision made. That is what a judgment is and that is what it should be: reasons for the orders made in the dispute before the court.
8. We should, therefore, remove unnecessary legal pretence<sup>1</sup> and displays of learning, or what the Lord Chief Justice, Lord Judge, recalls his history teacher marking on his essay – APK, an “anxious parade of knowledge”.<sup>2</sup> It should also be noted that an anxious parade of knowledge not necessary to

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<sup>1</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>2</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.

resolving the dispute at hand also gives oneself more opportunities to fall into unnecessary error.<sup>3</sup>

9. 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. Justice Kearney, a former equity judge of the New South Wales 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>4</sup> He emphasised that what is vital is a coherent and readable expression as to why the state, through the court, was not exercising its power for or against individuals.<sup>5</sup> While the reasons are important for both parties, ultimately it is the losing party that must be convinced – the winning party is likely convinced of their rightness in any event.<sup>6</sup>

10. There are of course other audiences of judgments, including fellow judicial officers, legal professionals, students and the wider general public. Of course, an appellate 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 court will need to do in respect of the primary judge's view of the facts and any exercise of his or her discretion.<sup>7</sup> Beyond that, I think we should take heed of the words of Sir Frank Kitto, that the vulnerability to appeal inherent in giving reasons should give us comfort,<sup>8</sup> as if we have gone wrong, the damage done to the parties is not irreparable.<sup>9</sup> Judgments written

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<sup>3</sup> See *Rebenta Pty Ltd v Wise* [2009] NSWCA 212, [12].

<sup>4</sup> Allsop, above n 1, 4.

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

<sup>6</sup> Vicki Waye, 'Who Are Judges Writing For?' (2009) 34 *University of Western Australia Law Review* 274, 276.

<sup>7</sup> Sir Frank Kitto, 'Why Write Judgments' (1992) 66 *The Australian Law Journal* 787, 788.

<sup>8</sup> *Broome v Cassell* [1972] 2 WLR 645, 716 cited in *ibid*, 788.

<sup>9</sup> Kitto, above n 7, 788.

with an eye to an appellate court or with the primary aim of making them “appellate-proof” usually are neither clear nor successful in achieving their objects. 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 there overturned,<sup>10</sup> but it is something that should not be taken into account in writing the judgment.

11. While I emphasise that a judgment should be what it is — a reason for the orders that were made, and written primarily with the parties in mind — I remain aware of the requirements imposed upon intermediate courts of appeal by the High Court,<sup>11</sup> most specifically detailed in *Kuru v NSW*.<sup>12</sup> In that case the High Court considered it desirable for an intermediate appellate court to consider whether to decide all matters in issue on the appeal, not merely that which is identified as the decisive ground.<sup>13</sup> The reason for this was that should an appeal to the High Court succeed, the Court would be able to consider all of the issues and not have to remit the matter for consideration of grounds of appeal not dealt with below.<sup>14</sup>

12. It is important to remember that the Court said it was important for intermediate appellate courts to *consider* whether to deal with all the grounds.<sup>15</sup> Within that consideration includes matters such as the public interest in the speedy resolution of disputes before the courts<sup>16</sup> and the

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<sup>10</sup> Justice Roslyn Atkinson, ‘Judgment Writing’ (Speech delivered at the AIJA Conference, Brisbane, 13 September 2002) 1-2.

<sup>11</sup> *Cornwell v The Queen* (2007) 231 CLR 260, 300-301 [105]; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2004) 217 CLR 274, 312 [105]; *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1, 19-20 [34]-[35].

<sup>12</sup> (2008) 236 CLR 1.

<sup>13</sup> *Ibid* 6 [12] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

<sup>14</sup> *Ibid*.

<sup>15</sup> Allsop, above n 1, 14.

<sup>16</sup> *Rebenta Pty Ltd v Wise* [2009] NSWCA 212, [11].

undesirability of flooding the legal system with unnecessary *obiter dicta*.<sup>17</sup> Basten JA, for example, in determining in *Rebenta Pty Ltd v Wise* that it was not necessary to go further than the decisive grounds, considered the principle of parsimony in terms of the allocation of judicial resources and the fact that the Court was entitled to, and should take into account the limits of its resources, its workload, and the interests of other litigants.<sup>18</sup>

13. One final point to keep in mind is the avoidance of unnecessary citations. In a case where one High Court case is authority for a proposition, one must question the utility of padding out a judgment with a variety of other authorities to support it. In my experience, in many cases this practice will add to confusion rather than clarity. It evidently adds little to the fundamental concern of resolving the dispute at hand.

14. Speaking of overzealous citers, I would be remiss not to pay homage to a recent example in the Victorian Supreme Court – in a judgment last year the writer used the idiom “the pot calling the kettle black” to describe the conduct of the parties in the case before him.<sup>19</sup> He, helpfully, however, referenced in an accompanying footnote the meaning of the idiom, and noted that the etymology of the phrase was mired in controversy, pointing the reader to further resources should they be so inclined.<sup>20</sup> I think we can safely assume the Judge was bringing some much needed humour to the moment.

#### *Avoiding self-indulgence*

15. Nevertheless, the question of humour brings me to my second point, being the avoidance of self-indulgence.

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<sup>17</sup> *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* [2008] NSWCA 206, [832].

<sup>18</sup> [2009] NSWCA 212, [11].

<sup>19</sup> *DC Payments Pty Ltd v Next Payments Pty Ltd* [2016] VSC 315 (7 June 2016) [1] (Vickery J).

<sup>20</sup> *Ibid* n 1.

16. Whether humour constitutes an exercise in self-indulgence to be avoided or some necessary light relief in otherwise sombre proceedings is something upon which reasonable minds undoubtedly differ. There is of course the view, which has perhaps been dominant in Australian courts,<sup>21</sup> that it should be avoided at all costs, because of the significant risk that it will be misinterpreted, or come across as humiliating.<sup>22</sup> Writing in 1952, William Prosser declared that “judicial humour is a dreadful thing”, stating that “the bench 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>23</sup>

17. It does appear that the vestiges of British restraint have receded in recent years, and an increasing tendency towards humour has emerged. There is in fact a “blog” which records such attempts within the Australian judiciary – perhaps its existence is some evidence of the increasing acceptance of humour from the bench.

18. In terms of humour within the courtroom, the former Chief Justice Murray Gleeson in 1998 gave a speech to another program organised by the NJCA, the National Judicial Orientation Program, advising new judicial officers 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>24</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,

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<sup>21</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>22</sup> See Sharyn Roach Anleu, Kathy Mack and Jordan Tutton, ‘Judicial Humour in the Australian Courtroom’ (2014) 38 *Melbourne University Law Review* 621, 660.

<sup>23</sup> William Prosser (ed), *The Judicial Humorist: A Collection of Judicial Opinions and Other Frivolities* (1952) vii.

<sup>24</sup> Murray Gleeson, ‘The Role of the Judge and Becoming a Judge’ (Speech delivered at the National Judicial Orientation Program, Sydney, 16 August 1998).

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>25</sup>

19. 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 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>26</sup>

20. In meeting Justice Mason's guidelines of moderation, measure and appropriateness, it can be firmly stated that 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.

21. This is not to say that a judge 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>27</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 unfailingly capable of restraint in the face of less than helpful submissions made by counsel or the unedifying behaviour of a party. In some

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<sup>25</sup> Keith Mason, 'Judicial Humour: Law Graduation Address' (Speech delivered at The University of Sydney Law Graduation, Sydney, 20 May 2005).

<sup>26</sup> Gleeson, above n 24.

<sup>27</sup> Cited in Kitto, above n 7 at 789.

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 for an appellate court to humiliate the judge below in the course of finding error. I believe such missteps can largely be avoided by keeping in mind that the judgment should be what it is — thus “strict relevance to the matters to be determined is the only touchstone by which the propriety [of criticism] is to be assessed”.<sup>28</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 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>29</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> *Bradshaw v Unity Marine Corp*, 147 F Supp. 2d 668 (SD Tex, 2001).

## *Achieving clarity*

25. On that note, I best move to my final point – the ever-elusive pursuit of clarity in judgment writing. 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>30</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>31</sup> I have never personally managed to find a Frank Sinatra song that sums up the case before me, but I won’t give up just yet.

26. Now, while it may not be possible to generate such a pithy summary of the issues at stake in every case, I do believe that greater clarity in judgment writing is achievable, and I’m sure that this program will greatly assist with improving our skills in that respect. I should also mention the perhaps trite point, that I also believe greater clarity is desirable. This is because aiming for clarity in our reasons is a goal closely related to a commitment to the principle of open justice. Subsumed within this principle are the objectives of accountability, public confidence in the judiciary and judicial independence.<sup>32</sup> However, the judiciary cannot be accountable, nor can the public be expected to have confidence in it, if its primary outputs, that is, its judgments, are inaccessible to the public because they lack clarity.

27. This assumes particular importance in criminal cases. An offender should be able to understand why the court has come to a conclusion in his or her case.

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<sup>30</sup> *Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5, [5] (Kenny and Griffiths JJ).

<sup>31</sup> *Ibid.*

<sup>32</sup> Chief Justice Wayne Martin, ‘Freedom of the Press and the Courts’ (Speech delivered at the Judicial Conference of Australia Colloquium 2015, Adelaide, 9 October 2015).

It cannot be assumed that their legal representative will satisfactorily explain the terms of the judgment to them, nor that the offender will necessarily be satisfied with any such explanation. It should rather be assumed that they will want to 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>33</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.<sup>34</sup> 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>35</sup> The 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>36</sup>

29. Something I think it is important to avoid, therefore, is legal jargon. It is undeniably easy for lawyers and judges to descend into the regular use of jargon – we 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>37</sup>

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<sup>33</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>34</sup> Allsop, above n 1, 5.

<sup>35</sup> *Ibid.*

<sup>36</sup> M M Corbett, ‘Writing a Judgment: Address at the First Orientation Course for New Judges’ (1998) 115 *South African Law Journal* 116, 122.

<sup>37</sup> Quoted in Michèle M Asprey, *Plain Language for Lawyers* (4<sup>th</sup> ed, Federation Press) 28.

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 the judgment. Where technical expressions are absolutely necessary, a helpful explanation of their meaning for the reader does not go astray. The technical word can then be used as a convenient short hand throughout the remainder of the judgment.
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>38</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.’”<sup>39</sup> 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.
32. Further, I adopt the views of the President of the New South Wales Court of Appeal, Justice Beazley, that there is significant value to be gained in presenting a case in its context, including the factual, legal and in some cases even the social and political context, so that the reasoning and outcomes are both transparent.<sup>40</sup>
33. It must therefore be acknowledged that there are judgments that do not lend themselves to clarity or brevity. And it is important not to sacrifice accuracy for the sake of clarity – as Albert Einstein said: “[e]verything should be made as simple as possible but not simpler”.<sup>41</sup> Ultimately, the fact is that if every judgment could be written so as to be completely accessible to the entire

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<sup>38</sup> Lord David Neuberger, ‘No Judgment – No Justice’, above n 2, 9.

<sup>39</sup> Ibid.

<sup>40</sup> Justice M Beazley, ‘Judgment writing in final and intermediate courts of appeal: “A dalliance on a curiosity”’ (Speech delivered at the 20<sup>th</sup> Anniversary of the Victorian Court of Appeal, Melbourne, 20 August 2015) 9.

<sup>41</sup> Attributed to Albert Einstein in John Daintith (ed), *The Bloomsbury Treasury of Quotations* (Bloomsbury Publishing, 1994) 629.

community, we would perhaps have no need for lawyers to argue these cases on behalf of litigants in the first place – while this is perhaps a happy thought for some, it's not an entirely likely one.

34. What is therefore to be done? At the risk of sounding self-indulgent myself, I believe the recent trend throughout Australian jurisdictions for the Court to provide summaries for decided cases works to fill that void.
35. This is an initiative that the NSW Supreme Court adopted in 2014 and to my knowledge it has been a practice of the High Court since 2002<sup>42</sup> and the Supreme Court of Victoria since 2015.<sup>43</sup> The traditional view that judgments speak for themselves lacks practical workability where judgments cannot always be written in a language or style that people readily understand. The provision of judgment summaries therefore allows the judge to emphasise the main points and effect of the judgment, in plain language, whilst not forsaking the need for comprehensive reasons that adequately resolve the dispute.
36. Now, I'm not under any illusion that members of the general public sit down after a long day at work and peruse the NSW Supreme Court's twitter feed, clicking through to various judgment summaries to get up-to-date on all the latest in the law – however, the media does frequently access this resource. The practice of providing these summaries can therefore greatly assist with the misunderstandings that have hampered the relationship between the judiciary and the media in recent years. I would say, though only anecdotally, that the introduction of judgment summaries in the New South Wales Supreme Court has resulted in more accurate reporting in the media of the reasons for judgment. As Chief Justice Wayne Martin has stated in relation to

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<sup>42</sup> High Court of Australia, 'Judgment Summaries' <<http://www.hcourt.gov.au/publications/judgment-summaries/pre-2006-judgment-summaries>>.

<sup>43</sup> Supreme Court of Victoria, 'Judgment Summaries' <<http://www.supremecourt.vic.gov.au/home/law+and+practice/judgments+and+sentences/judgment+summaries/>>.

this matter: there is no point in complaining about inaccurate reporting in the media if we are not willing to assist the media in getting it right.<sup>44</sup>

37. The introduction of judgment summaries and their dissemination through social media platforms such as Twitter and Facebook has the further advantage of allowing us to engage directly with the public. While the detail of judgment summaries may not be read by all members of the public, the social media presence of the Court ensures that the public, whom we ultimately serve, have the ability to easily see the day-to-day work of the courts. Particularly on the medium of Facebook, judgment summaries and the accompanying “posts” which briefly describe the outcome in a case serve as a means to engage public discussion around the work of the judiciary.
38. This is assisted by the facility for commenting on Facebook posts, “tagging” friends and perhaps enlivening a discussion about the social issues presented in the case. It does require the moderation of these sites and the removal of inappropriate comments. However, on the whole, the exercise has been largely positive and allows courts to engage with the public on a much more direct and unmediated level than in the past.
39. I view the recent adoption by the Australian judiciary of social media as part and parcel of maintaining a strong commitment to the principle of open justice. It is beyond question that public confidence in the judiciary depends upon its transparency and accessibility. However, these objectives can no longer be achieved, in the modern environment, by simply leaving the door of the court open (although I hasten to add, this is important, and we should by no means be quick to close it).
40. To this end, I would also voice my support for initiatives such as the videoing of remarks on sentence that, “virtually” speaking, bring the public into the courtroom. In New South Wales there has been a presumption in favour of granting the media licence to film judgment remarks since 2014 under section 128 of the *Supreme Court Act 1970* (NSW). In the vast majority of cases there

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<sup>44</sup> Martin, above n 32, 18-19.

is no reason the presumption should not be displaced. The videoing of judgment remarks provides us with the opportunity to speak directly to the public when delivering judgment and ensures transparency of the highest order.

41. Now, I have most certainly steered further from the topic of writing better judgments than our hosts for this program had perhaps anticipated. I will cease to take liberties with this topic and allow the program to begin.

42. Once again, I congratulate all of you on your dedication to continuing judicial education and I am sure the program will prove to be worth the time spent. I thank the NJCA again for inviting me to speak at this event and look forward to receiving pointers on better judgment writing in my own judgments from you all in the future.