DELIVERING REASONS IN THE TRIBUNAL CONTEXT

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Introduction

1 Much has been written by judges (both curially and extra-curially) and academics on the topic of judgment writing.[1] This, of course, should come as no surprise and, from the judges' perspective, is no mere matter of introspection or self-absorption.

2 At a judges' conference in 1993, Sir Harry Gibbs described the task of judgment writing as going "to the very heart of the exercise of the judicial function".[2] And so it does. As Sir Harry explained, "the general rule, that reasons for the decision should be stated, or published, in open court is of the essence of the administration of justice".[3] That includes justice administered in and by NCAT across the vast terrain of its jurisdiction. Reasons that demonstrate "adherence to the law, attentiveness to argument, impartiality and logical reasoning"[4] serve to maintain public confidence in the integrity of our system of law.

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[1] For an interesting account of the historical development of giving reasons, see Justice Debbie Mortimer, 'Some Thoughts on Writing Judgments in, and for, Contemporary Australia' (2018) 42 *Melbourne University Law Review* 274, 276-284. See also Justice Susan Kiefel, 'Reasons for Judgment: Objects and Observations' (Speech delivered at the Sir Harry Gibbs Law Dinner, 18 May 2012, Queensland) 2-3.

[2] Sir Harry Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 494.

[3] Ibid.

[4] Justice Michael Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 693.

3 In *AK v Western Australia*,[5] Heydon J adopted the following extra-curial statement of Chief Justice Gleeson regarding the objectives underlying the giving of reasons:

> "First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Secondly, the general acceptability of judicial decisions is promoted by the obligation to explain them. Thirdly, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions."[6]

4 The enormity of this essential task is magnified by the sheer volume and diversity of matters dealt with by NCAT (**NCAT** or **the Tribunal**). In the 2017-2018 financial year, an extraordinary 65,549 applications were lodged in the Tribunal, 81,978 hearings were held and 66,375 applications were finalised.[7] It is apt that last year's conference was themed "Tribunals Delivering Under Pressure" – I have no doubt that this is a recurring, if not persistent, theme of your judgment writing experience. The "world of unprecedented stress and pressure"[8] in which judgments are written today was described by Justice Kirby almost 30 years ago as follows:

> "The backlog increases. Community and institutional pressure for speedier justice is relentless. The time for reflection, for careful planning, thoughtful research and for polishing prose, is strictly limited. And diminishing."[9]

5 In the preparation of this address, I have sought to be mindful of the challenges and limitations created by such demands. These challenges are relatively new to me as a relatively recently appointed judge. That means that such insights as I am able to share with you are relatively fresh.

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[5] (2008) 232 CLR 438; [2008] HCA 8.
[6] Ibid 470 [89] citing Chief Justice Murray Gleeson, 'Judicial Accountability' (1995) 2 *Judicial Review* 117, 122. Heydon J's citation of Chief Justice Gleeson was cited with approval by French CJ and Kiefel J in *Wainohu v New South Wales* (2011) 243 CLR 181; [2011] HCA 24 at 214-15 (**Wainohu**).
[7] NSW Civil and Administrative Tribunal, 'NCAT Annual Report 2017-2018' (Annual Report, NSW Civil and Administrative Tribunal, 21 November 2018) 8.
[8] Kirby, above n 4, 691.
[9] Ibid. See also Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18 *Australian Bar Review* 4, 18.

6 NCAT's caseload, in addition to the types of cases it deals with and the purpose for which it exists, means that judgment writing in the tribunal context differs from judgment writing in the court context. Indeed, even within the court context, different considerations arise in respect of first instance judgments, intermediate appellate court judgments and judgments of the High Court.

7 As I noted recently in *New South Wales Land and Housing Corporation v* Orr [2019] NSWCA 231 (**Orr**), a case to which I will return, "the quality of a court or tribunal's reasons can vary immensely depending upon a range of considerations including the experience and skill of a judicial officer or tribunal member, the complexity of the subject matter, the quality of the submissions made before the court or tribunal, the availability of transcript, the urgency of the matter and the time the judicial officer or tribunal member has to compose his or her reasons."[10] None of these considerations, of course, excuses the giving of inadequate reasons. But it is important to acknowledge that a number of factors bear upon the task. As Basten JA said in *Resource Pacific Pty Ltd v Wilkinson*,[11] "[t]ransparency in decision-making is an important value, but it is not cost free, and may involve separate parameters of quantity and quality".[12]

8 In terms of the former parameter, the quantity (or detail) of reasons necessary for reasons to be adequate may vary both with the nature of the decision maker, i.e. whether or not it is a court of tribunal, and, if the latter, possibly the type of tribunal, and the nature of the question being decided.[13] Thus even superior courts are not required to give reasons for every interlocutory decision,[14] and other aspects of decision making such as findings on pure

[10] [65].
[11] [2013] NSWCA 33 (**Resource Pacific**).
[12] Ibid [48].
[13] *Wainohu* (2011) 243 CLR 181; [2011] HCA 24 at [56] per French CJ and Kiefel J.
[14] *Wainohu* at [56], [98]; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at [42]; *Lodhi v Attorney General* (NSW) [2013] NSWCA 433; 241 A Crim R 477 at [29]; *R v Kay; Ex parte Attorney-General (Qld)* [2017] 2 Qd R 522; [2016] QCA 269 at [27].

credibility or matters that necessarily call for estimation or impression may require less or only allow for limited reasoning to be exposed.[15]

9 As to the *quality of reasons*, it is generally accepted that the sheer volume of work undertaken by tribunals such as NCAT is such that a perhaps more relaxed standard of review of reasons with corresponding compensation for linguistic infelicities is appropriate than may be the case when an appellate court is hearing an appeal from another court. In the *Orr* case, I said that statements from well-known administrative law decisions relating to the limits of judicial review and the need for practical as well as principled restraint in that context also informed what constituted adequate reasoning on the part of an administrative tribunal such as NCAT.[16]

10 That having been said, even in the less formal setting of a tribunal which has significant powers the exercise of which is capable of affecting the lives of citizens in profound ways, there are certain minimum characteristics that a tribunal's reasons must, in my opinion, possess. These are readily supplied, in relation to the Tribunal, by s 62(3) of the NCAT Act which requires there to be set out in reasons (when requested by a party):

(a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based;

(b) the Tribunal's understanding of the applicable law; and

(c) the reasoning processes that lead the Tribunal to the conclusions it made.

11 I will return to these considerations in due course.

[15] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280 but cf. *Camden v McKenzie* [2008] 1 Qd R 39; [2007] QCA 136 at [34], *Pollard* at [65] and see the discussion in *Resource Pacific* at [48]−[58].
[16] See at [76]-[77].

12 It is also worth acknowledging at the outset that judgment writing is not an easy task. Nor, at least in Sir Frank Kitto's experience, is it a task that necessarily proves easier with time.[17] That being said, judgment writing is a craft that in the words of Linda Dessau, the current Governor of Victoria can be "learned, practised, improved and refined".[18] Her Excellency started her judicial career as a part-time member of the Small Claims and Residential Tenancies Tribunals in Victoria before being appointed to the Children's Court of Victoria and then the Family Court. Irrespective of one's level of experience, all decision makers should constantly strive towards writing better judgments. This begins with recalling why and for whom we and, in particular, the Tribunal, engages in the task.

Why and for whom does the Tribunal write judgments?

13 Judgments, like any piece of writing, are shaped and defined by the purpose and audience for which they are created. To the extent that most questions regarding judgment writing – whether they concern the content of a judgment or the judgment writing process – can be answered by reference to these two considerations, it is worth remembering why and for whom the Tribunal gives reasons. As Meagher JA recognised in *Beale v Government Insurance Office of NSW*,[19] "it is the purpose which the reasons serve which assumes primary importance in determining the content of the reasons".[20]

14 In the tribunal context, the parties to the relevant dispute are the primary audience, particularly as a tribunal such as NCAT's main function is to resolve disputes, as distinct from "law revealing or lawmaking".[21] In particular, it has often been said that reasons should be written for the losing party. As Justice Atkinson observed:

[17] Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, 787.
[18] Justice Linda Dessau and Judge Tom Wodak, 'Seven Steps to Clearer Judgment Writing' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003) 117, 117.
[19] (1997) 48 NSWLR 430 (**Beale**).
[20] Ibid 444. See also *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386 (Mahoney JA) (**Tatmar**).
[21] Mortimer, above n 1, 284.

> "It is natural for someone who loses to feel disenchanted with the legal process so it is important that the reasons for judgment show that the losing party has been listened to, that the evidence has been understood, the submissions comprehended and a decision reached."[22]

As her Honour acknowledged, this is particularly important in respect of unrepresented litigants.

15 In this regard, reasons serve to ensure that justice is not only done, but is seen to be done.[23] The parties "should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice".[24] Reasons demonstrate to the parties that the exercise of your decision-making power was not arbitrary. By explaining how and why a particular outcome was reached, reasons act as an accountability mechanism.

16 Accessibility of the reasons for judgment to its audience is of cardinal importance. It is a part of access to justice. An incomprehensible judgment is of little to no value and serves only to "alienate judges and lawyers from the community they serve".[25]

17 Similarly, in respect of the judgment writing process, given that tribunal members are writing principally for the parties, who no doubt desire the quick resolution of their dispute, questions of time management and prioritisation arise. We know that litigation is stressful for litigants. I suspect that waiting for a judgment only prolongs that stress.

18 My own view and philosophy is that judgments should be written as expeditiously as possible. That applies both for courts and tribunals. This is not only for the benefit of the parties but also for the benefit of the judge or tribunal member. The longer a judgment is reserved, the more difficult and

[22] Justice Roslyn Atkinson, 'Judgment Writing' (Speech delivered at the AIJA Conference, 13 September 2002, Brisbane) 2.
[23] Chief Justice T F Bathurst, 'Writing Better Judgments' (Speech delivered at the Council of Australasian Tribunals NSW Annual Conference, 7 September 2018, Sydney) [2].
[24] Kiefel, above n 1, 1.
[25] Kirby, above n 4, 702.

time consuming it is to write, and the scope for error may well increase. As to prioritisation, as Chief Justice Bathurst suggests, "the matters outstanding for the longest should be done first – subject to a matter of particular urgency arising in the meantime".[26]

19 Beyond resolving disputes for the immediate parties, reasons delivered by the Tribunal serve a number of other purposes, each of which targets a different audience.[27] They provide guidance to and set standards for the general community, to the extent that they are read by members of the public. They are no doubt read by members of the legal profession – both those involved in the particular dispute and the profession more generally – for "the learning and precedents that they provide".[28] They may be read by other tribunal members and thereby guide the determination of future cases. They may also and should, in certain cases, have the effect of improving the quality of future administrative decision-making, to the extent that an administrative decision-maker is often party to disputes before the Tribunal.[29] Where the Tribunal finds that an administrative decision-maker erred in the exercise of his or her power, the reasons for judgment should serve as a guide for future decision-making.

20 The Tribunal's reasons also enable an appellate court to exercise its functions. As Hutley JA stated in *Tatmar*, "[a] court must not nullify rights of appeal by giving no or nominal reasons. He went on to say, however, that "there is no duty to expound reasons so as to facilitate appeals".[30] Similarly, in *Pettitt v Dunkley*,[31] Asprey JA explained that:

> "The rights of appeal … are statutory rights granted by the legislature to the parties … and the failure of a trial judge in the appropriate case to state his findings and reasons amounts … to an encroachment upon those rights. The

[26] Bathurst, above n 23, [43].
[27] See, eg, Gibbs, above n 2, 494; Mortimer, above n 1, 284-5; Kirby, above n 4, 692-696; Kiefel, above n 1, 1-2; Sir Anthony Mason, 'The Nature of the Judicial Process and Judicial Decision-Making' in Sheard, above n 18, 1, 1-2.
[28] Kirby, above n 4, 693.
[29] Bathurst, above n 23, [12].
[30] [1983] 3 NSWLR 378, 381.
[31] [1971] 1 NSWLR 376.

> omission of the trial judge makes it impossible for an appellate court to give effect to those rights, either for one party to the appeal or another, and so carry out its own appellate functions."[32]

21 Accordingly, a judgment should, as Sir Frank Kitto observed:

> "… make clear for an appeal court what it will need to do in respect of [the primary judge's] view of the facts and exercise of his [or her] discretion, and what it will need to declare to be the law, if it is to overturn his [or her] decision".[33]

22 This, however, does not mean that you should write with a view to making your reasons appeal-proof. The best judges, it has been said, including the best tribunal members, "perform their reasoning function honestly and to the best of their ability without undue concern that an appellate court may find error or reach a different conclusion".[34] Your position on any given issue should not, for example, be stated ambiguously so as to guard against being overturned on appeal. Essential to any good judgment is decisiveness. This includes making clear findings on any issues of law, as well as any disputed facts and explaining your preference.

The content of a judgment

23 It follows from the fact that the giving of reasons is one way of demonstrating that justice has been done that they must explain why the conclusion that was ultimately reached was reached. This explanation need not take any particular form, but as Sir Harry Gibbs observed, there are some matters which most judgments must contain:

> "The judgment should show the way in which the matter comes before the court and the questions which it raises, and should give an account of the relevant facts which give rise to those questions, and should state the

[32] Ibid 381.
[33] Kitto, above n 17, 788. See also *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43, 501 [55] (French CJ, Crennan, Bell, Gageler and Keane JJ): "The standard required of a written statement of reasons given by a Medical Panel under s 68(2) of the Act can therefore be stated as follows. The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law."
[34] Kirby, above n 4, 694.

> principles of law which, when applied to the facts, lead to the conclusion which the judgment reaches."[35]

24 Similarly, in *Beale*, Meagher JA observed that:

> "… reasons need not necessarily be lengthy or elaborate: *Ex parte Powter; Re Powter* (1945) 46 SR (NSW) 1 at 5; 63 WN (NSW) 34 at 36. The scope of the reasons to be given is, as Mahoney JA said in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386, related '… to the function to be served by the giving of reasons'. Accordingly, the content of the obligation is not the same for every judicial decision. No mechanical formula can be given in determining what reasons are required. However, there are three fundamental elements of a statement of reasons, which it is useful to consider."[36]

25 A judge must, his Honour considered, refer to relevant evidence, set out any material findings of fact and any conclusions or ultimate findings of fact reached and provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found.

26 These minimum requirements are reflected in s 62(3) of the *Civil and Administrative Tribunal Act 2013* (NSW), the terms of which I have set out at [10] above. Section 62(3) suggests a basic structure or template which can be applied to any judgment:

(1) briefly explain what the matter is about and the nature of the case;

(2) set out any relevant facts and, if necessary, the procedural background;

(3) identify the relevant issues or questions raised by the dispute;

(4) set out the relevant legal principles, including any relevant case law or statutory provisions;

(5) review the evidence and make any necessary findings of fact;

[35] Gibbs, above n 2, 497.
[36] (1997) 48 NSWLR 430, 443.

(6) consider each of the issues or questions to be determined by reference to the parties' submissions and apply the law to the facts as admitted or found; and

(7) state your conclusions and orders.

27 This is, of course, but one of a number of ways to structure a judgment. Some judges, for example, prefer to announce the outcome at the start of the judgment. The point to be made is that some form of structure should be imposed, whether your reasons are written or delivered orally. This does not only work to ensure that what you write is logical and organised, but is useful to ensure that you do not omit any steps in the reasoning process, such as inadvertently overlooking an issue that requires determination.

28 While it is possible to speak somewhat formulaically about the basic structure of a judgment, it is impossible to be as formulaic as to what constitutes an *adequate* statement of reasons. Three qualities that are often cited as being essential to a good judgment should, however, guide you: clarity, brevity and simplicity – what Justice Kirby called the "blessed trinity".[37] What I mean by "brevity" is that your reasons should not be unnecessarily long or unnecessarily detailed. What is "necessary" will, of course, depend on the nature of the matter and the issues to be decided,[38] but neither undue length nor laborious detail assists in achieving clarity. Indeed, as Justice Mortimer has put it:

> "Long and complex judgments obscure the exercise of judicial power, rather than reveal it. Perhaps it is more comfortable to be hidden in obscurity; nevertheless, we are not in this role to feel comfortable."[39]

29 Put simply, the parties should, from reading your judgment, understand the result that was reached and how you reached it. In this regard, your writing style and manner of expression can have a significant impact on the

[37] Kirby, above n 4, 691. See, eg, Bathurst, above n 23, [25]-[34].
[38] See *Wainohu* (2011) 243 CLR 181; [2011] HCA 24, 215 [56] (French CJ and Kiefel J).
[39] Mortimer, above n 1, 296.

accessibility of your reasons. Sir Anthony Mason recognised that "if we want people to understand what we are doing, then we should write in a way that may make it possible for them to do so".[40] I should add that we should all want people, that is the public, to understand what we are doing. Decision making, whether by Tribunal members or judges, is part of the rule of law in action.

30 Although style is inherently personal, using plain language, for example, is a simple technique that can be used to facilitate understanding.[41] Lord Denning advised of a number of pitfalls to be avoided when writing, including: using long words; using terms of art that are not well-known; using over-long sentences; failing to use plain, simple words and sentences; and failing to split up the text, including by using headings, thereby producing a "massive, unbroken page of print [that] is ugly to the eye and repulsive to the mind".[42] Ultimately, "[w]hat gives the judgment style is the lucidity, accuracy and economy of the language used, the logical coherence of the thought and the rejection of the irrelevant".[43]

31 It will aid understanding if you "say everything that needs to be said as to why a decision was reached and no more".[44] For example, only the material facts need to be set out and they should be stated as concisely as possible. It goes without saying that they should also be stated accurately and, usually, chronologically. As Justice Michelle Gordon has stated, "life is chronological".[45] I should add that I always found in practice that without a clear understanding of the chronology of a case or a dispute, it was difficult properly to be able to analyse it.

[40] Sir Anthony Mason, 'Opening Address New South Wales Supreme Court Judges Conference (1993) 1 *Judicial Review* 185, 187.
[41] See generally Mark Duckworth, 'Clarity and the Rule of Law: The Role of Plain Judicial Language' in Sheard, above n 18, 91.
[42] Lord Denning, *The Closing Chapter* (Butterworths, 1983) 59-65.
[43] Gibbs, above n 2, 499.
[44] Atkinson, above n 22, 2. See also Bathurst, above n 23, [10].
[45] Justice Michelle Gordon, 'Applying Reason to Reasons – Start, Middle and the End' (Speech delivered at the AGS Administrative Law Forum, Canberra, 11 November 2016).

32 Similarly, any applicable legal principles should be stated clearly and succinctly by reference to authority but there is no need in the tribunal context especially to overdo or unnecessarily multiply reference to authority. There is usually little utility in citing a number of authorities or discussing a series of cases to support a settled and uncontroversial proposition. It is usually sufficient to cite the leading authority for the point or a recent authority of a superior court. Unless absolutely necessary, it is also preferable to summarise any pleadings, submissions and evidence, rather than set them out verbatim.

33 In terms of things that "need to be said", some things will rarely, if ever, satisfy this requirement. As a general rule, although opinions are divided on the matter,[46] there is little room in a judgment for humour and irony. For the parties, litigation is no laughing matter. Reasons should also not contain "unnecessary legal pretence and displays of learning"[47] or engage in self-indulgence.[48] There are, as Justice Mortimer stated, "plenty of textbooks or scholarly articles to be written if a judge [or tribunal member] has the spare time and energy to do so, but the place for them is not in the law reports".[49]

34 Nor should derogatory remarks or unnecessarily adverse criticism or condemnation of the parties, witnesses, counsel or any decision-maker, whether a fellow tribunal member or the administrative decision-maker subject to review, feature in a judgment, however provoked the judge or tribunal member may be. You will, of course, be required at times to assess the credibility of certain witnesses and make clear and adverse decisions. However, it is important to bear in mind that "[t]he judge is there to decide the case rather than to denounce human evil or folly".[50] It is beyond question that "calm detachment in thinking and moderation in expression are essential to

[46] See, eg, 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.
[47] Bathurst, above n 23, [10].
[48] Ibid [17]-[24].
[49] Mortimer, above n 1, 285.
[50] Gibbs, above n 2, 498

the judge's task".[51] As Sir Frank Kitto emphasised, "strict relevance to the matters to be determined is the only touchstone by which the propriety of [criticism or praise] is to be assessed".[52]

35 Critical to any judgment is a logical and rational explanation of how the law applies to the facts as found. What should be avoided is a judgment, that:

> "… recites the facts – in a degree of pedestrian detail that scorns to discriminate between those that really bear on the problem, those that may interest a story-lover but not one possessing the lawyer's love of relevance, and those that are not even interesting but just happen to be there – which identifies the question to be decided, and then, without carefully worked out steps of reasoning but 'with a blinding flash of light' … produces the answer with all the assurance of a divine revelation."[53]

36 The parameters and practical operation of some of these principles were explored recently by the Court of Appeal in *Orr*. The case involved a social housing tenancy agreement to which the applicant landlord and respondent tenant were parties. The landlord brought an application in the Tribunal for the tenancy to be terminated on account of the tenant having used the premises for an unlawful purpose. The Tribunal found that the tenant (who relevantly suffered a disability) would not suffer "undue hardship" by reason of termination and that it was therefore mandated by the Act to terminate the tenancy. The Tribunal went on to consider, however, whether, on the basis that it was wrong and the tenant would suffer undue hardship, it should in any event exercise its discretion to terminate the tenancy. The Tribunal found that it should and the tenancy was terminated.

37 The matter came before the Court of Appeal challenging the finding by a judge of the Supreme Court that the reasons given by the Tribunal for a discretionary decision were inadequate. The substance of the complaint advanced in respect of the Tribunal's reasons was that, while they demonstrated that the Tribunal had considered "undue hardship" to the tenant

[51] Kitto, above n 17, 789.
[52] Ibid.
[53] Ibid.

in determining whether termination was mandated, they failed to indicate that *that* fact and *how* hardship (a mandatory relevant consideration) had been taken into account in determining whether to exercise the discretion to terminate.

38 The Court of Appeal held, by majority, that the reasons given by the Tribunal for making a discretionary decision to terminate the tenancy were not inadequate. In particular, the decision illustrates the point that reasons need not take any particular form and that concision, within reason, is not a shortcoming.

39 The Court referred to the decision of Mahoney JA In *Tatmar* at 386, who had observed in the context of the obligation to give reasons for a discretionary judgment that it was not necessary for a judge:

> "who is exercising a discretionary judgment to detail each factor which he has found to be relevant or irrelevant, or to itemi[s]e, for example, in the assessment of damages for tort, each of the factual matters to which he has had regard: see *O'Hara v Evans* (Court of Appeal, 23rd September, 1976, unreported; *Colacicco v Colacicco* (Court of Appeal, 15th March, 1977, unreported). ... Nor is a judge required to make an explicit finding on each disputed piece of evidence. It will be sufficient, if the inference as to what is found is appropriately clear: see *Selvanayagam v University of the West Indies* [1983] 1 WLR 585, at 587, 588; [1983] 1 All ER 824 at 826.
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> But, subject to matters such as these, the basis of the decision of a trial judge or of an intermediate court of appeal should be made apparent. This does not mean that the reasons given need to elaborate: an elaborate argument may not require an elaborate answer. Reasons need be given only so far as is necessary to indicate to the parties why the decision was made and to allow them to exercise such rights as may be available to them in respect of it."

40 The Court also referred to the decision of Basten JA, in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] NSWCA 112 at [46] where his Honour said:

> “Generally, the concept of ‘reasons’ requires an explanation connecting any findings of fact with the ultimate decision. Where the legal test to be applied involves an evaluative judgment, it may well not be practicable to provide a detailed articulation as to how specified (and conflicting) factors have been

> weighed in the balance; the scope of the obligation must recognise that constraint. (A different question arises if mandatory considerations have not been identified.)" (emphasis added)

41 You will also be pleased to learn that the Court, in reaching its conclusion, also reflected upon the nature of appellate review of the adequacy of a tribunal's reasons and noted that "the function of an appellate court is to determine not the optimal level of detail required in reasons for a decision but rather the minimum acceptable standard"[54] and that "[t]he standard is not one of perfection".[55]

42 The Court explained, for instance, that it was satisfied hardship had been taken into account because the Tribunal had considered the *evidence* of hardship to the tenant. This was so notwithstanding that certain findings relevant to hardship were made in that section of the Tribunal's decisions which considered whether "undue hardship" was made out. The important point, as it appeared to the Court, was that the Tribunal had found that the tenant may suffer hardship were the tenancy terminated.

43 The Tribunal's description of the case as "finely balanced" (the two matters in the balance being hardship to the tenant and the degree of the tenant's fault) was also said to illustrate that hardship had been properly taken into account by the Tribunal. So too was the Tribunal's consideration of whether "in all the circumstances" the discretion to terminate ought to be exercised. The Court was further satisfied that the Tribunal had taken hardship into account by its affording to the tenant an extension of the tenancy for some time after the termination order, in recognition that the circumstances of the case were exceptional and justified a suspension of the order for possession.

[54] [66], citing *Resource Pacific* [2013] NSWCA 33, [48].
[55] [66], citing *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 40 ALR 233, 255.

The judgment writing process

44 Turning then to consider the *process* to be undertaken, in my experience, time spent preparing before the proceedings is time saved during and after the proceedings. It has been said that the judgment writing process should begin "well before the end of the case, and well before a pen is put to paper or a dictaphone raised ... A great deal depends on the preparation for the case".[56]

45 Familiarising yourself with the facts and applicable legal principles *before* the hearing means that the hearing itself can be conducted with greater efficiency, with a focus on the issues in dispute. I also find it helpful to begin writing as soon as possible – the facts and legal principles can often be set out *before* the hearing (subject, of course, to amendment depending on what transpires during the hearing). Time spent during the proceedings is equally valuable. The notes you take, whether they be comments on the credibility of a witness or the strength of an argument, can later form the basis of your reasons. So too, the opportunity the oral hearing presents for clarification of issues can greatly assist and often result in the streamlining of the writing process. Some matters may fall away or, if misconceived, can be clarified.

46 In addition to the purposes and audiences to which I referred earlier, it has been suggested that the writing of reasons may assist a judge or tribunal member "to clarify [their] own thoughts".[57] To the extent that "the act of writing [is] part of the working out of the arguments"[58] and "tests the correctness of one's thinking and reveals any errors that may lurk in it",[59] it is understandable why some judges have expressed a strong preference for written reasons over the delivery of ex tempore judgments. Sir Frank Kitto, for example, insisted that judgment should be reserved in every case, at least in the higher

[56] Dessau and Wodak, above n 18, 118.
[57] Atkinson, above n 22, 2.
[58] Mortimer above n 1, 286.
[59] Gibbs, above n 2, 495.

courts.[60] His Honour urged against not only the giving of oral reasons, but also dictating reasons, stating that:

> "… the very exercise of writing ensures more careful thinking and rethinking, gives greater opportunity for detecting hidden fallacies, and reduces the chance that some relevant point has been missed or glossed over in the argument".[61]

47 A general rule in favour of the "handwritten reserved judgment"[62] cannot be applied in the tribunal context. To say nothing of the fact that most, if not all, tribunal members have limited time to indulge in the luxury of reserving judgment in every matter, as well as the fact that the Tribunal was designed to provide parties with "efficient justice", the matters dealt with by the Tribunal often warrant the giving of oral reasons. They are certainly warranted, and indeed, often required, in urgent cases, but they are also warranted in what Sir Frank Kitto described as "your easy cases, your obvious cases"[63] – in other words, those straightforward "judgments [that] almost write themselves. They are purely mechanical and can be dealt with quickly."[64]

48 On the other end of the spectrum sit those judges who urge the giving of ex tempore judgments as a general rule. Justice Kirby, for example, again acknowledging the pressures of judgment writing, stated that:

> "In a perfect world, one might reserve decisions of any complexity in order to have time to reflect upon difficult issues of fact and law. But the backlog of reserved judgments increases. And in the background are the waiting litigants, the vigilant lawyers and the angry editorialists reflecting increasing impatience with judicial delay. These forces contribute to the pressure which exists today. It obliges all judicial officers, wherever possible, immediately after argument is concluded, not to reserve. But to provide reasons on the run."[65]

[60] Kitto, above n 17, 790.
[61] Ibid 792.
[62] Elwyn Elms, 'Ex Tempore Judgments' in Sheard, above n 18, 81, 82.
[63] Kitto, above n 17, 791.
[64] Atkinson, above n 22, 1.
[65] Justice Michael Kirby, 'Reasons on the Run' (1991) 3(5) *Judicial Officers Bulletin* 1, 1.

49 Similarly, in *Hadid v Redpath*,[66] Heydon JA, although noting the criticisms often levelled against ex tempore judgments,[67] stated that "[o]ne way of avoiding the dangers associated with delay is to adopt a routine practice of delivering unreserved judgments. It is a technique with which famous names can be associated".[68] Be that as it may, not every case is suited to being dealt with by way of oral reasons. Sir Harry Gibbs observed that:

> "… sometimes the intense pressure of judicial work, and the need to endeavour to avoid delay, tempt judges to take the quicker and easier path and to deliver an ex tempore judgment in cases where the result would benefit from the discipline of writing".[69]

50 Another virtue of oral reasons, perhaps particularly in the Tribunal context where the parties will frequently be present, is that the parties are literally hearing the verdict or judgment from the mouth of the person who has just heard the argument. Justice in this way is delivered not only quickly but directly. For many lay parties, verbal communication may be a superior means of communication to written communication such that verbal reasons may be more readily comprehended.

51 In more complex cases, whether due to complexity of a legal issue or the sheer quantity of evidence led, correctness of outcome should not be sacrificed to expediency. Such cases will invariably benefit from the discipline of writing. If a matter requires further reflection, an immediate decision should not be delivered for the sole reason of avoiding adding to your list of reserved judgments.

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[66] [2001] NSWCA 416; (2001) 35 MVR 152 (**Hadid**).
[67] His Honour said, at 163 [50], "[a]ttractive though the practice of delivery of ex tempore judgments can be, it has many critics. Vigorous and combative methods, lack of regard for tender feelings, and impatience need not necessarily accompany the practice of giving unreserved judgments, but they commonly do. The intense concentration called for in seeking to understand every nuance of the case as it happens – the desire then to marginalise and discount the irrelevant – the need to remember earlier aspects and balance them against later ones – the insistent pressure of the next case waiting to be heard – naturally engender those characteristics. Some litigants do not like them, and if they fail they use them as the basis of a bias allegation … The faults of expression typical of unreserved judgments are often said on appeal to manifest errors of thought."
[68] Ibid 162 [45].
[69] Gibbs, above n 2, 496.

52 This does not justify undue delay. But between an insufficiently considered, and possibly incorrect, outcome delivered on the spot and a considered outcome delivered a day or two later, the latter is much to be preferred. To the extent that there is truth in the maxim justice delayed is justice denied, it has been said that "hurried justice is not justice at all … it is not justice done sufficiently, and … it is not justice done manifestly".[70] And, if speed translates into error, it is a false economy for the overall system of justice, and does no favours to the parties.

53 The dilemma of whether to deliver an ex tempore judgment was described by a former Local Court Magistrate, Dr Elwyn Elms, in the following terms:

> "… you take the view that you are seized of the matter, the issues are fresh in your mind, reserving may mean delay in the context of other judgments already reserved which have priority, and you feel that the time to strike is now – perhaps after a moment or two for reflection.
>
> Whether you have made the wrong or right decision may not become immediately apparent. That I made the wrong decision, or thought that I may have done so, has sometimes dawned upon me after walking down the corridor to my chambers after adjourning for the day. Only then has the realisation dawned about some aspect which I did not cover or did not place sufficient emphasis upon in my judgment. There have even been occasions when I have managed to convince myself that I should have found for the other party.
>
> This soul searching is not unnatural, but for one's own piece of mind, it is best and more fruitfully indulged in before a rash precipitate plunge into an unreserved judgment …
>
> On the other hand, yet another addition to one's own personal cellar of reserved judgments may well see it submerged behind those others waiting their turn in the queue, and the sea of never ending cases still to be heard, never forgetting that a judge is also a human being who has his or her own family and personal responsibilities to work into their list of priorities somewhere. The facts and nuances of the case fade from one's mind, and the task of resurrecting them becomes correspondingly more difficult with the passage of time. If the delay is extended, inferences can be drawn that the judge has forgotten large parts of the facts and evidence in the case, and that he or she has no clear recollection or impression of the demeanour of the witnesses of fact or their credibility when the time eventually arrives to deliver judgment."[71]

[70] Kitto, above n 17, 790.
[71] Elms, above n 63, 85-6.

54 Similarly, Heydon JA, sympathetic to the challenges of being a trial judge, stated:

> "… the trial judge, like all District Court judges, was confronted with a dilemma. Had she delivered judgment ex tempore, or after only a short period of reservation, she would have been exposed to the type of criticism indicated above. On the other hand, by seeking to prevent those disadvantages arising, she instantly created the risk of delay. There are only a limited number of hours in the working day even of a District Court judge, and if many of them are consumed in hearing cases on every working day, the totality of whichever judgments have been reserved must inexorably tend to rise. If it is not possible for District Court judges to be given more time in which to write reserved judgments, the dilemma facing members of the court will continue to exist. The position of the trial judge in this case must thus attract considerable sympathy."[72]

The same can be said of tribunal members.

55 What then can be done about the dilemma which a tribunal member is faced as to whether or not an ex tempore judgment should be delivered? Dr Elms suggested approaching each case as if one were intending to deliver an ex tempore judgment.[73] There is much to commend adopting such a mindset. As Dr Elms explained, such an approach ensures that you engage in active preparation and take valuable notes during the hearing.[74] It also means that even if you do not ultimately deliver an ex tempore judgment, the writing process will prove less burdensome and you will likely be in a better position to deliver judgment shortly thereafter, the "hard work having been done during the currency of the case".[75] And, I might add, before it.

56 If, in tackling a case with this outlook, you produce a draft judgment before the conclusion of the hearing, there is an issue as to how it should be delivered. It has been said that to read out [an] obviously pre-written judgment "give[s] the unfavourable impression to both the litigants and their legal advisers that you had made up your mind before hearing all the evidence or the

[72] *Hadid* [2001] NSWCA 416; (2001) 35 MVR 152, 164 [52].
[73] Elms, above n 63, 87.
[74] Ibid.
[75] Ibid 88.

submissions, and that you were not open to argument".[76] I tend to agree with this, and not only as a matter of optics. The oral argument matters – it may not alter initial or provisional views formed but it does nothing to engender confidence in the process for a judge or tribunal member to give the impression that the oral argument has been a waste of the parties' time and effort.

57 This is not a reason not to deliver ex tempore reasons nor a reason not to refer to notes or even a draft outline you may have prepared beforehand in delivering an ex tempore judgment but it is a counsel to advert to the oral argument in any ex tempore reasons. A halfway house is to adjourn for a short period, review notes or an outline that may have been prepared in advance in light of the oral argument, consider whether or not any provisional views need alteration or qualification in light of the oral argument and, whether they do or not, integrate references to the oral argument into the notes or outline before returning to the bench to deliver reasons.

58 If, at the conclusion of the hearing, it is necessary to reserve, it is wise, if time permits, to force yourself, even if weary, at least to sketch out the key issues ands arguments as they are in your head when you come off the bench. The sharpness of detail will leave you quickly and the effort required when you eventually return to the task will be so much more difficult. This will not always be possible, as Heydon JA recognised in *Hadid* where he said "the pressure to deliver judgments means that even the hour or two after a case finishes cannot [always] be devoted to considering that case while it is wholly fresh in the memory, but must be used in the early stages of the next trial".[77] But where even a short space of time is available, push yourself to use it to put down your thoughts. As Dr Elms warned:

> "If the case is simply put away in a drawer or on the shelf 'to simmer' for some months, you will probably have little recall of the evidence or the witnesses …

[76] Ibid 88-9.
[77] *Hadid* [2001] NSWCA 416; (2001) 35 MVR 152, 161 [43].

> The sheer task of getting it all back into one's head again becomes an ordeal in itself."[78]

Conclusion

59 Sir Harry Gibbs concluded his address at the 1993 judges' conference with the observation that:

> "To write a satisfactory judgment usually involves painstaking, arduous effort. There is no advice that can be given to make the task easier, and there are no glittering prizes for its successful performance."[79]

60 True it is that, more often than not, judgment writing is a difficult and sometimes thankless task. But it is a critical part of our system of justice and is fundamental to the maintenance of respect for the judiciary and decision making more generally. And as to the availability of advice, much more has been written on the topic in the 26 years since Sir Harry gave his famous address. Guidance as to good and bad judgment writing can also be derived from reading the judgments of others. But the most useful guide to good judgment writing is remembering why and for whom you are writing.

61 Decisions made by the Tribunal are capable of affecting members of the community in profound ways. Public confidence in the Tribunal and the administration of justice more generally depends on these decisions being explained by accessible reasons. As Sir Anthony Mason has pointed out:

> "… the duty of the judge is to reveal fully the reasons for the decision. That duty is a legal duty which is reinforced by the modern emphasis on judicial accountability, transparency and openness."[80]

62 The same can be said of tribunal members.

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[78] Elms, above n 63, 88.
[79] Gibbs, above n 2, 502.
[80] Mason, 'The Nature of the Judicial Process', above n 27, 14.