EX-TEMPORE REASONS

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The Hon Justice Michael Kirby AC CMG*

REASONS ON THE RUN

The giving of reasons is "an incident of the judicial process". So wrote Mahoney JA in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Limited*[1] in words which have now been endorsed by the High Court of Australia[2]. with the qualification that whilst this is a *normal*, it is not a *universal*, incident of the process.

Fulfilling the duty which derives from that aspect of the life of a judicial officer results in the constant obligation to provide a public statement of reasons for decisions. Such reasons and the orders which follow them resolve disputes and aspects of disputes in a formal way in a wide variety of courts and tribunals throughout the country. Reasons may be given in a formal statement prepared by the judicial officer, certified by the clerk or associate, entered in the records of the court and sometimes (in the case of superior courts) published in the law reports as precedents for the future. In England, until recently, the tradition of the continuous oral trial required the judge always to read such reasons in open court so that the parties, the profession and the public could understand the outcome of the case and follow it from beginning to end.

In Australia (and now increasingly in England) this salute to the oral traditions of the common law has largely been abandoned. It is not uncommon, at all levels of the judicial hierarchy, and in a multitude of tribunals, for reasons to be prepared and handed down at an appointed and notified time. Judicial officers who reserve decisions may do so for the opportunity to reflect upon a difficult issue of law; to study complex precedents; to enjoy the benefit of a transcript of evidence and argument; and, in a collegiate body, to enjoy the advantage of discussion and the exchange of different perspectives upon the case. When decisions are reserved, experience teaches that the sooner the first draft of reasons is prepared, generally, the easier is the task of its ultimate completion. Succeeding controversies tend to blot out the recollection of the fierce debates by particular parties or their representatives on particular points. The arduous grind of revisiting transcript and reconsidering one's notes imposes the discipline to act quickly lest the problem becomes obscured by more immediate issues and gets lost in the hidden recesses of the mind.

Most Australian judicial officers, and many lawyers, realise the heavy burden imposed by the obligation to prepare reasons for decision which are liable to be scrutinized most closely by the parties, their legal advisers and appellate courts. However, this ethos of understanding does not extend far beyond the legal profession. The community is impatient of delays in the judicial process, whether at first instance or on appeal. A recent editorial in the *Canberra Times*[3] reflected this impatience. It took judges to task

for a lack of a proper sense of urgency and business efficiency:

> *"Recruited from decades of [adversarial] work, small wonder judges take so much time making up their minds. Judges go straight from Bar to Bench. They get no training in management. They are answerable to no one except Parliament and only then when they are mad or corrupt. They are not answerable to either deadlines or profit and loss accounts. They are removed from the pressures of accountability. Small wonder, then, a five year delay is not questioned. ... On any normal management criteria nearly every judge in Australia would be fired for non-performance. It is time the legal system was judged by the standards of ordinary people, not by the warped standards of legal professionals. When one looks bluntly at the Court system and asks: 'What is it supposed to do and what does it actually do', one is left with a chasm of non-performance. [I]t provides an expensive quagmire, a forum of despair from which no party emerges satisfied. ... A hideous mutation of justice."*

Strong words. Some of them exaggerated. But sufficient truth for judicial officers to be obliged to take notice. The judiciary are mostly cloistered in lives which are somewhat removed from fellow citizens. Amongst themselves they are generally sensitive to the burdens cast upon their colleagues by a system which they did not design but inherited. In such circumstances there is a risk that judicial officers will tolerate features of the system regarded as intolerable by outsiders. "The law's delay" is linked with "insolence of office" amongst the most horrible catalogue of this world's ills which almost drove the undecided Hamlet to contemplate suicide.[4]

There is no doubt that the workload of judicial officers, at least in New South Wales, is rising rapidly. In the Court of Appeal, for example, the number of appeals filed annually, which the Court must dispose of, has risen by 247%

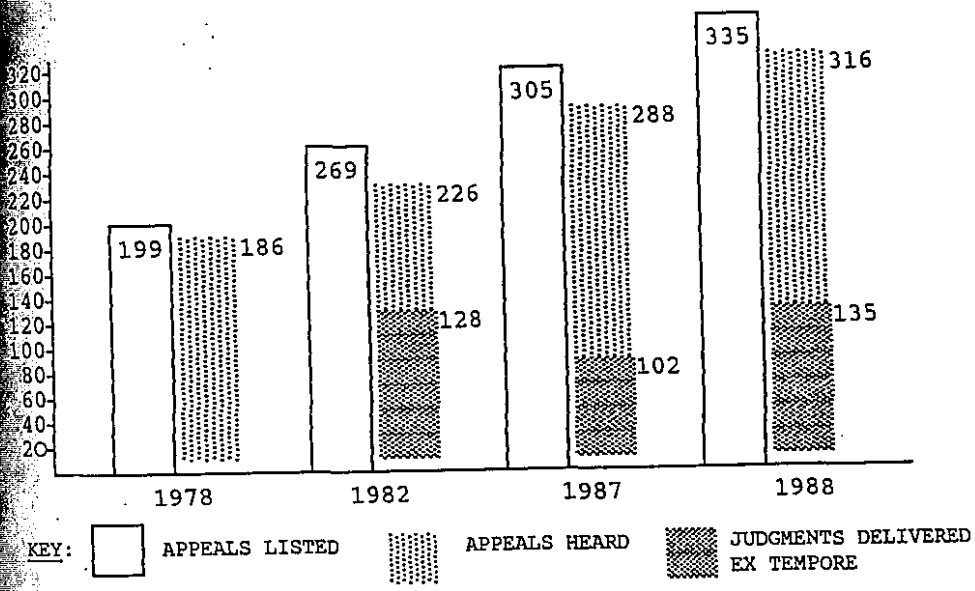
since the establishment of the Court in 1965.[5] In the same time, the judicial complement has remained exactly the same. The judicial establishment of other courts has increased in that time. But so has their workload. The forces which I have collected contribute to the pressure which now exists on judicial officers to provide reasons immediately after argument is concluded and not to reserve their decisions.

In the New South Wales Court of Appeal the extent of *ex tempore* decision-making has varied over time. The variance reflects the personalities of particular judges, the growing pressure on the Court and the changing characteristics of the work before it. Some judges have a marked skill in the delivery of *ex tempore* reasons which are at once accurate, graceful and elegant. Notable examples readily spring to mind in this regard. Other judges, of like intellectual gifts, may prefer the quiet of their chambers to assemble their thoughts or to explore a fascinating corner of the law which, during argument, has captured their interest.[6] Commentators have noted the great tendency in recent years of the High Court of Australia and of the New South Wales Court of Appeal to receive (some say even encourage) academic writing, law review articles and even non-legal analysis of issues coming before those courts. A glance at the *Commonwealth Law Reports* or the *New South Wales Law Reports* will demonstrate the considerable increase in recent times of the citation of such material.[7] Because many legal practitioners are unfamiliar with such material (some even treat it with disdain) it is often necessary for the judicial officer to track it down unaided. Some practitioners long for the return of the rule

that texts and academic writing may only be cited when the author is dead. But an interest in historical material was a notable and beneficial feature of the judgments of Windeyer J[8]. It can also be seen in the writings of Priestley JA.[9] The reasons of Deane J, of McHugh J and some of my own reflect an interest in academic analysis of legal policy.[10] Such particular interests help to explain why, with changing composition of courts and tribunals, the proportion of decisions given *ex tempore* will change over time.

In the New South Wales Court of Appeal, the following graph shows the changes in recent years.[11]

GROWTH OF APPEALS BEFORE THE COURT OF APPEAL 1978-88



In trial courts, judicial officers do not have the same "luxury" to reserve decisions as do appellate judges. At every level of the hierarchy, important decisions may be reserved and dealt with in the way I have described. But in the midst of a jury trial it is simply not possible to

interrupt the proceedings for a lengthy period to prepare detailed reasons for each and every ruling which must be made on the way.

The summing up cannot be honed and fashioned like a reasoned judgment; nor ought it to be. The judge is speaking to a jury of lay citizens. That imposes obligations of oral communication which are somewhat different from the refined written prose of a reserved legal opinion. This feature of the summing up is often mentioned as a reason why appellate review, necessarily confined to the transcript, should take into account the purposes of the communication when judging suggested criticisms of it. Indeed, in *Soulemezis v Dudley (Holdings) Pty Limited*,[12] McHugh JA pointed out[13] that is only comparatively recently that the common law has had to concern itself at all with complaints about the failure of a judicial tribunal to give reasons. This is because, until a century ago, judges of the common law were not concerned with deciding issues of facts. Facts were the province of the jury. The jury gave no reasons. They could not be interrogated as to what facts they had found or principles they had applied.[14] In the words of Lord Denning, the jury was and is as inscrutable as the sphinx.[15]

It is the gradual abandonment of the jury trial which has changed so significantly the nature of judicial office in the superior courts. The enlargement of fact-finding by judicial officers sitting alone and the creation of a large, professional and wholly independent magistracy[16] have contributed to the enlargement of the professional class whose badge is reasoned justice according to law. It is this

badge which imposes on the members of the judicial *cadre* the obligation to disclose the grounds for at least the most important rulings on the way to a final decision and to provide the reasons for that decision when it is reached and publicly announced.

The starting point for an appreciation of the obligations imposed upon the judicial officer proceeding to state reasons *ex tempore* is an understanding of what the law requires. Upon that subject, in Australia, there has been a flowering of judisprudence which has proved beneficial to the judiciary and to the performance of its task. It has raised the standards of the Australian judiciary, although necessarily at a cost in time and delay. The obligations to explain decisions puts a break on the arbitrary exercise of power.[17] It facilitates appeal and judicial review which might not otherwise be possible. It emphasises the essentially declaratory nature of the judicial function, reserving most law-making to the other branches of government.[18] It emphasises the essential rôle of a judiciary in a society adhering to the rule of law.[19]

It is useful to keep these features of the judicial function in mind when approaching the provision of reasons, whether *ex tempore* or otherwise. It is therefore appropriate to turn to the legal obligations imposed on judicial officers. They represent the minimum requirements which must be complied with in providing *ex tempore* reasons for judicial decisions.

THE LEGAL OBLIGATION

Most of the early decisions in this country which established the obligation of judicial officers to provide

reasons were laid down in a context where the facility of appeal was limited to one on a point of law. Such right to appeal would therefore be frustrated if proper reasons were not given. In *Carlson v King*[20] the New South Wales Full Court had to consider an appeal from a decision of a Judge of the District Court, who delivered a judgment, obviously *ex tempore*, in these terms:[21]

> *"I do not agree with the submissions on behalf of the defendant. I find a verdict for plaintiff for 175 pounds. Judgment accordingly."*

It was held that this was insufficient. Jordan CJ, delivering the judgment of the Court said:[22]

> *"It has long been established that it is the duty of a Court of first instance, from which an appeal lies to a higher Court, to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision. The duty is incumbent, not only on magistrates (Ex parte Powter; Re Powter (1945) 46 SR (NSW) 1, 4; 63 WN 9 NSW) 34, 35) and District Courts, but also upon this Court, from which an appeal lies to the High Court and the Privy Council (Ex Parte Reid; Re Lynch* (1943) 43 SR (NSW) 207, 212; 60 WN (NSW) 148, 150)."

This principle was adopted and expounded in the well known decision of the New South Wales Court of Appeal in *Pettitt v Dunkley*.[23] In that case, which involved a claim by a pedestrian plaintiff who was struck by a motor vehicle in a pedestrian crossing, the trial judge in the District Court entered judgment for the defendant. He did so with *ex tempore* reasons as follows:

> *"It would not help in view of this lady's condition of health, psychomatic (sic) or otherwise, for me to give any other reasons. I simply enter my verdict. I return a verdict for the defendant."*

By reference to the earlier authority of New South Wales courts, and also to decisions in Victoria,[24] the Court of Appeal held that the findings so recorded by the primary judge were insufficient to meet the legal standards imposed upon him. Judicial officers sitting without a jury were declared, by Asprey JA, to be subject to this rule:[25]

> *[W]here ... there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for the application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how these various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached."*

The foregoing reasoning of the obligation was founded squarely on the facility of appeal. Such a facility was provided by statute. In the words of Asprey JA:

> *"... the failure of a trial judge in the appropriate case to state his findings and reasons amounts, in my view, to an encroachment upon those rights."*

However, as a hint of a further development of the common law yet to come, Asprey JA also grounded his opinion in the obligations of the judicial officer as such:[26]

> *"...the judge has a duty, as part of the exercise of his judicial office, to state the findings and reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law."*

Picking up the latter suggestion, Mahoney JA in *Tatmar*[27] made it plain that the duty to provide reasons was not limited to a case in which an appeal existed whether on a point of law or otherwise. It was rather "an incident of the judicial process". This explanation of the obligation was approved by the High Court of Australia in *Osmond*.[28] In *Soulemezis*, McHugh JA pointed out why this was inevitably so:[29]

> *"[I]t is clear that it is no longer correct to say that a judge has no duty to give reasons unless there is a right of appeal against his decision. If it was, an ultimate court of appeal would have no duty to give reasons. In my opinion, the duty rests on a wider basis: its foundation is the principle that justice must not only be done but it must be seen to be done."*

An attempt by the New South Wales Court of Appeal to push further the common law duty to state reasons, so that it applied to administrators exercising statutory powers[30] was rejected by the High Court.[31] However, since at least *Pettitt v. Dunkley* the duty imposed on judicial officers has not been in doubt in New South Wales. That decision has also influenced the expression of legal obligations in other States of Australia[32] and in the Federal Court of Australia.[33] The duty of judicial officers to provide reasons must be taken to state the general rule now

applicable, by the common law, throughout Australia. The general rule has been utilised with vigour, at least in New South Wales, in attempts to circumvent the limitations imposed by statutory provisions limiting appeals to points of law only. Before recent amendments to the *Compensation Court Act*[34], for example, many cases were brought to appeal urging that the failure of a judge to provide reasons for the decision challenged amounted to an error of law. Properly analysed, many of those cases were found to be challenges to factual findings. They were rejected for that reason. *Soulemezis*[35] was such a case. There, the judge of the Compensation Court had terminated compensation on a given day by reference to the result of a CAT scan. That result provided, according to the evidence, no rational basis for such a decision. It was my view, consistent with an approach earlier expressed[36], that irrational or perverse reasons were not proper reasons at all for the purposes of the law. However, the majority of the Court of Appeal held that reasons had been given which were adequate to comply with the judicial obligation. In expressing his opinion to this effect, McHugh JA charted one of the limits upon the judicial obligation to provide reasons:[37]

> *"It is not to the point that his Honour's finding was erroneous or, as counsel for the applicant claimed, perverse. An erroneous or perverse finding of fact raises no question of law and cannot be challenged by way of appeal. What is decisive is that his Honour's judgment reveals <u>the ground for</u>, although not the detailed reasoning in support of, his finding of fact. But that is enough in a case where no appeal lies against the finding of fact. Accordingly there was no failure to give reasons sufficient to constitute an error of law."*

In the light of this decision it is clear that the obligation

of a judicial officer, at least when subject to an appeal limited to error of law, does not extend to revealing all of the reasoning which led to the decision. It is enough if the ground for the decision is stated, by reference to the facts necessary to establish that ground.

Other limitations on the duty to provide reasons were acknowledged by all of the members of the Court in *Soulemezis*. Decisions upon evidentiary rulings or procedural applications do not ordinarily require reasons, or at least extended reasons.[38] Nor is it necessary for a judicial officer, exercising a discretion, to detail every factor which has been found to be relevant or irrelevant. Nor, in an assessment of damages, must the judicial officer itemize each factual matter to which regard has been had.[39] On some issues, even hotly contested, particularly where parties are represented by legal practitioners who understand and can explain what has occurred, the exchanges which take place with the judicial officer may adequately comply with the duty to provide reasons. It is not always so. The attempt to avoid the obligation by the incorporation of the unsuccessful party's reasons in *Carlson*[40] shows this. However, especially in routine, procedural, practice, evidentiary and simple discretionary decisions, the obligation to provide reasons will depend upon the requirements of the justice of the case. The rule, as the High Court has stressed, is not an inflexible one.[41]

In appellate courts, except for rulings on evidence or decisions which are administrative, procedural and wholly discretionary, it is usual for reasons to be given, at least where the substantive rights of parties are thereby

affected. Views differ concerning the obligation of an appellate court to provide reasons, however briefly, for dismissing applications for leave to appeal. Some appellate judges hold the view that reasons should not, at least ordinarily, be given. Despite the inevitable difficulty of encapsulating in a few *ex tempore* words, the reasons for such decisions, my own belief is that, ordinarily, they should be given. Generally, the refusal of leave by the Court of Appeal or its equivalent in other States, represents the end of the litigious line for those parties.[42]

The High Court of Australia has accepted the discipline of providing short reasons when refusing applications for special leave to appeal to that Court.[43] This has followed statutory provisions which render that Court's appellate jurisdiction wholly by its own special leave. The result has been a proliferation of short statements, sometimes Delphic, often now reported,[44] occasionally influential.[45] Another result, much to be discouraged, is a new phenomenon by which parties in later cases comb the *ex tempore* exchanges between appellate judge and counsel arguing leave applications in the hope of divining from those exchanges the *real* reasons why leave was refused, so as to guide other courts on the authority of the decision which is then sustained. The thought that such unguarded remarks, put to test propositions (and sometimes even light-heartedly to test counsel advancing them) might later be utilised as a building-block for the common law is too awful to contemplate seriously.

FEATURES OF *EX TEMPORE* REASONS

I have come to the point where it may be assumed that

the judicial officer has decided that the case is one requiring reasons (or otherwise one where it is suitable to give them) and that the exigencies make it desirable or necessary that they be given *ex tempore*. What then are the features which such reasons should reflect?

I have elsewhere pointed out that judicial officers constitute an empire of individualists.[46] To lay down general rules amounts to a presumption. Individuals have different ways of expressing themselves. Some have great gifts of oral communication and will reflect them in *ex tempore* reasons. Others who have gifts of advocacy may not have that special talent which is necessary for the delivery of compelling *ex tempore* reasons. An accurate recall of the detail of relevant evidence and a clear perception of applicable principles of law afford the best foundations for proceeding to an *ex tempore* judgment which is convincing.

In that judgment, necessarily, the judicial officer will disclose aspects of his or her own personality. I have previously suggested that humour should be kept to the minor key because of the seriousness with which the parties themselves generally take their litigation and out of respect for their inability to answer back effectively.[47] Allusions to literature may trip off the tongue of someone who is well read. It is curious how brain cells send their unexpected messages of half forgotten poetry from schooldays in the exposition of reasons for resolving a particular dispute. A recent analysis of the Australian efforts in that regard extracted only muted praise from a non-lawyer.[48] Perhaps the most interesting feature - reflective doubtless of the literary education of today's judicial officers - was

the neglect of Australian literature or the writings of other cultures in favour of the classics of England.[49] There are exceptions. These include Evatt J's invocation of Joseph Furphy in *Chester v The Council of the Municipality of Waverley*[50] and Murphy J's allusion to Marcus Clarke's *Civilisation without Delusion*.[51] In short, one has to be well grounded in literature to cite it on the run. It can be perilous. The lines may be forgotten at the critical moment, in mid-sentence - something not conducive to an easy passage to the conclusion. The judicial officer should be on guard against the offensive or irrelevant or condescending. But judicial exposition, at every level of the hierarchy, need not be turgid and boring. The judicial officer is, or should be, a civilized citizen. In some ways he or she is a teacher to the community and to fellow citizens coming before the court. Without pretention, a graceful style can earn admiration and acceptance of judicial authority. It may reinforce the point of a decision.

In my earlier foray into this subject I suggested that the use of heavy-handed irony was best avoided, for much the same reasons that humour falls flat in the cold pages of court transcript.[52] I also urged the abandonment of Latin. However, as if in vengeance, Meagher JA, to demonstrate his judicial individuality, has increased his use of it.[53] In Canada much attention has lately been paid to educating judicial officers, as leaders of the community, to avoid sexist or gender-specific language in their reasons.[54] I support this move. The High Court of Australia has given a firm lead to judicial officers throughout the country in this regard. A scrutiny of its

reasons in recent years will demonstrate the care with which the Justices have mostly avoided the exclusive use of the male personal pronoun.[55] All judicial officers do well to follow this lead and to ensure that in their courtrooms the attitudes and prejudices of earlier times have no place. They can give a lead by their public utterances both during the conduct of the case and most especially in the expression of their reasons for rulings, orders and judgments which they pronounce.

Finally, it is necessary to have clearly in mind who it is that one is addressing when giving reasons. The audience must be defined, at least in a general way, whether one is preparing the reasons in the quiet of chambers or delivering them to the watchful parties, lawyers and others in open court. On this question there is much writing. However, it is generally agreed that judicial reasons are addressed principally to the litigants (especially the losing litigants), to the legal profession, to one's judicial colleagues and ultimately to oneself and to conscience.[56]

In appellate courts different considerations apply. At trial, I believe that the main focus of the *ex tempore* exposition of reasons should be the litigants whose lives will be affected by the rulings, orders or judgment which follow. Thus, it would be discreditable for a judicial officer to provide reasons, grounded in recorded observations about the credibility of witnesses, if the sole object of doing so were to make the decision "appeal-proof", having regard particularly to the recent authority in the High Court.[57] Many of the best judges, both of trial and of appeal have stressed the preference that should ordinarily be

given to an ounce of evidence over a much greater measure of judicial impression of truth-telling.[58] Recent scientific experiments demonstrate the difficulty of telling the truth from the impression which witnesses give in the artificial environment of the courtroom.[59] At least in the case of policemen, who are usually seasoned witnesses, the High Court has now required that juries be warned of the difficulty of discerning the truth of their evidence from their appearances in the witness box.[60] It has been held that a judicial officer must, in rejecting otherwise credible evidence, disclose in reasons the features of the witness's evidence, demeanour or of the particular circumstances in relation to the other material evidence in the case which explain the rejection. Otherwise, the appellate court may be deprived of the opportunity of assessing the weight given to a finding on credit. It may then give that evidence a greater cogency than, in the whole of the evidence, it properly deserves.[61]

SOME PRACTICAL POINTS

I will now express some practical suggestions for the giving of *ex tempore* reasons. Much depends, of course, upon the opportunity which the judicial officer has had to anticipate the issue under decision and to prepare for it. At trial, there may be little or no opportunity. The pleadings, the charge or the other court documents may direct the judicial officer to an area of the law that can usefully be studied in advance of the hearing. In some cases, written submissions will provide a useful guide to the questions likely to arise. But all too often, at trial, the drama will unfold, carried on by its own inexorable momentum. Typically, there will be little time, mid-trial, for

reflection and research. In country and suburban courthouses, the resources for research may be minuscule. Most judicial officers do not have professional research staff to assist them. Regrettably, the quality of the assistance of legal practitioners appearing for the parties is variable. Often, in Local Courts, the litigant will be unrepresented and unfamiliar with the law.

These features of daily life cast burdens on judicial officers which are sadly inescapable. Each must do the best possible in the circumstances. If the judicial officer has observed just procedures in dealing with those before the court, exhibited an honest endeavour to discover and find the facts relevant to the controversy and demonstrated a faithful attempt to express and apply the law, the reputation of our institutions of justice will be advanced. Appellate courts will respect the difficulties under which judicial officers often labour. Appellate judges enjoy the privilege of wisdom after the event. Reversal on appeal should not offend the *amour propre* of any judicial officer who has done the best possible in the circumstances.

The basic structure of any judicial opinion or statement of reasons is syllogistic. This much derives from the nature of the judicial office.[62] The relevant facts are found. The applicable rule of law is stated. The conclusion results from the application of the law so stated to the facts so found. In a busy trial court, the findings of fact need not be lengthy. They can be confined to the barest outline. However judicial officers should mention and resolve any important relevant disputes of fact which have been the subject of evidence or address. Otherwise, the

parties will leave the court with a sense of grievance that a pertinent issue tendered for decision was overlooked. If an issue appears irrelevant or does not affect the outcome, the judicial officer should say so and seek to explain why this is so. Care must be taken to avoid the mistake of reliance upon evidence not formally before the court. Depending upon the way in which the trial has been conducted, for example, the history given to a medical practitioner is not of itself proof of the facts there stated. Indeed, if those facts are then not otherwise proved, the expert opinion may itself be vulnerable.[63] In specialised courts (such as the Land and Environment Court, the Compensation Court, the Court Session of the Industrial Commission) it will not be necessary to re-prove in each case basic facts which are well known to the expert judicial officer.[64] Thus, a compensation judge will be taken to know much more about myocardial infarction than other judicial officers. Equally, it will not be necessary for that judge to expound in reasons, the entire knowledge which he or she has about a relevant medical opinion. But because the litigant does not know so much, relevant controversies should be exposed and determined. Repeated experience demonstrates that even expert courts, operating under a familiar statute, can mistake the statutory provisions to be applied.[65] Unless a judicial officer is absolutely sure that the words of an applicable statute are known and fixed accurately in mind, it is useful, in applying those words, to repeat the statutory provision in the course of giving *ex tempore* reasons. The very act of repetition will permit a concentration of the mind on the precise language to be applied. It is surprising how often knowledge

of apparently familiar statutory words is assumed but, when revisited, such words are found to carry other messages.

It has often been said that the findings of fact determine the overwhelming majority of legal disputes. Judicial officers at first instance must therefore take special pains to discover the facts, resolve relevant disputes about them and to state them, in as brief a form as possible. Usually, a chronological presentation of facts is the most logical. Some judicial officers have a marvellous recollection of detailed facts. Others, like myself, must take full notes - sorting and shifting the facts as they are presented into a chronology from which the basic outline can later be stated when giving reasons. Once the facts are clear, attention shifts to the statement of the applicable rule(s). It is important then to have the relevant statute close at hand - or the applicable casebooks with the passage of authority conveniently flagged. Copious quotation from previous decisions is undesirable. Preferable by far is the extraction of the principle and a bare citation of the case or text from which that principle is derived. However, in the midst of a busy case, there may be little time (at least with an unfamiliar principle) to digest case law or to extract the essence of it from the applicable passage. The books may assault the mind in their complexity and number. If that is so, relevant passages can be read in their entirety. Doing so will sometimes add to the length of reasons. But it may help to demonstrate the way in which similar problems have been addressed on earlier occasions by other judicial officers and bring the court on this occasion more comfortably to its own conclusion, reasoning by analogy.

Probably the most horrible thing that can happen to a judicial officer in the midst of giving *ex tempore* reasons for a decision is to change one's mind. There has been little scientific analysis of how the process of judicial decision-making actually occurs - physiologically or psychologically. However, it is a commonplace that, even in preparing well thought out reasons, a judicial officer may change the conclusion half-way through the text. A previously unnoticed but vital ingredient of evidence may tip the scales. The perception of a key word in a statute or the appreciation of the requirements of binding authority may lead the judicial officer to the grim realization that a result must follow different from that which was intended when the giving of reasons was commenced. What to do?

If the judicial officer is in the comfortable seclusion of chambers, no problem is presented by this Damascus road conversion. The reasons can be recommenced. Or they can be recast and edited by the miracles of word processing to erase even the slightest evidence of earlier opinions later recanted. But if the judicial officer is in a crowded courtroom, every word noted by vigilant lawyers and anxious litigants, the situation will be different. The temptation may appear irresistible to sail on to the previous destination, ignoring the offending rock of authority which has so unkindly and belatedly appeared ahead - leaving that rock to be revealed by the appellate court if the case goes so far. To do this may be psychologically understandable. Presenting a resolute and decisive face to the world is an expected attribute of judicial office. But resolution and decisiveness are one thing. Honesty, integrity and fidelity

to legal duty are another.

An honest judicial officer, faced with the predicament I have recounted, will pause. He or she will invite further submissions on the point which has just appeared. If necessary an adjournment will be called to reflect upon the problem and to reach a sound decision - the best that can be offered, true to conscience and to the law as it is finally understood. After all, the judicial officer always remains in charge of the sittings of the court. An adjournment will allow time to collect one's thoughts and to re-think the problem faithfully, freed from the pressures imposed by the public performance which judicial office in this country invariably requires. If, then, the earlier opinion is confirmed, and the looming rock appears as but another wave, the reasons can continue from where they broke off. If, however, the decision is altered, the judicial officer is duty-bound to announce that fact. The reasons must then either start again or candidly explain the change of opinion and the ground which has occasioned it. A judicial officer, elegant in style but proud and seen to be unwilling to contemplate error, will be no adornment to the bench. One who strives to satisfy the law and conscience, even at the occasional sacrifice of style and of the image of self-assurance, will earn the love of the profession, the respect of those who are affected and be an example to those who follow.

In an appellate court, the participation of a number of judicial officers together makes it necessary to establish rules different from those which govern judicial officers sitting alone at first instance. The system of the New South

Wales Court of Appeal is no secret. It has been disclosed in *Annual Reviews* of the Court.[66] Before each month's hearing list is settled and the appellate judges assigned to their respective cases, it is the function of the President to designate one of them as responsible for giving the first judgment. It is then the duty of that judge to prepare in advance to give a statement of the relevant facts, to outline the controversy, to express the applicable legal rule and principal authorities and to propose orders. A proportion of the cases are determined by the President to be apparently suitable for *ex tempore* judgment. These are indicated. The judges assigned to such cases must prepare them upon an assumption that the decision will be given *ex tempore* at, or soon after, the conclusion of argument on the day of hearing. A larger proportion of the cases listed are designated as probably appropriate for a reserved judgment. It remains the duty of the assigned judge to prepare the first draft and to circulate it to his colleagues. If at the end of argument the members of the Court believe that the case is, after all, despite appearances, appropriate for *ex tempore* judgments they will so proceed. Usually the judge with the primary responsibility will state his reasons first. If at any time a judge (whether with or without the primary responsibility) wishes to reserve the decision, that wish must be respected. A case cannot be forced to *ex tempore* judgment if any member of an appellate court needs time for further research or reflection. The foregoing procedures represent an economic deployment of scarce judicial manpower. They contribute to the reduction of multiple opinions. If there are differences, they assist in

the isolation and refinement of disagreements. They help an extremely busy Court (such as the New South Wales Court of Appeal) to despatch its caseload with efficiency.

A few words of reassurance can close this section. First, it is always possible, and entirely proper, for a judicial officer to revise *ex tempore* reasons, even extensively, without altering their substance or the orders which they sustain. It is not proper to revise the transcript of a summing up to a jury, except to the extent that an obvious typographical mistake has occurred or a mechanical mis-hearing of what was actually said. Then a marginal note can be transmitted to the appellate court setting out the alternative version. This may prompt the parties, if they do not agree, into proving the correction of transcript in the formal way.[67] On the other hand, where no jury is involved, the judicial officer may elaborate and correct the text when it is presented by the court reporter. This should always be done promptly as the delay in the presentation of revised reasons is a major source of delay in the conduct of appeals. It can become a cause for parties becoming out of time or filing deficient notices of appeal.

Depending upon the rules of court which typically govern such matters, judicial officers in superior courts can make even more substantial corrections to *ex tempore* reasons, extending even to the correction of their orders if it is demonstrated that they have made a mistake or slip.[68] Or if the orders do not properly reflect the reasons and have not been taken out.[69] Except for the case of the summing up or direction to a jury, a wide latitude is given to judicial officers to refine their *ex tempore*

reasons. Litigants will not be hard to complain about the modifications made between delivery and the release of the certified text.[70] It is obviously essential for each judicial officer to be familiar with the rules of court governing the delivery of reasons. Such rules may contain particular requirements which limit the power of the judicial officer to alter the transcript or to deliver reasons on a date different from that on which the orders were made.[71]

The most reassuring message is that facility in the giving of *ex tempore* reasons usually improves with time. Time's companions are experience and, with it, self-confidence. This is true of any profession. What at first appears a standard impossible to achieve later seems attainable. When it is fully attained, it may be time to move on to fresh challenges.

THE FUTURE

Given the serious predicaments of cost and delay facing the courts of Australia it is likely that we will see more, and not less, of *ex tempore* judicial reasons in the future. Some writers call for a return to briefer *ex tempore* reasons in the appellate courts because the burgeoning quantity of legal reports and other legal literature is becoming crushing. Lawyers are running out of bookshelves.[72] One judge in the United States complained that judicial opinions "have become less luminous and more voluminous".[73] This has produced a call - addressed mainly to the higher courts - to return to ruling on the vital issues of the case rather than providing academic dissertations.[74] Isolated for particular condemnation is the "scourge of footnotes" to United States judicial opinions

which has now become something of a plague in that country.[75]

If in appellate courts we are to return to a higher proportion of *ex tempore* reasons than are given at present it will probably be necessary to increase the written, and to reduce the oral, proportions of argument. Written material can be digested, on average, four times more quickly than the same material presented orally. Properly digested, written material can present the appellate judge in a succinct way with the components of a judgment - the facts; the applicable law and the suggested conclusion.

So far, in most parts of Australia, the written submissions of the parties have not adopted a form suitable for adaptation and use by a judicial officer in *ex tempore* reasons. But in the Court of Criminal Appeal of New South Wales, following an initiative of Street CJ, it is the duty of the Crown, in virtually every appeal, to present a succinct statement of facts, a list of the accused's grounds of appeal and the Crown's argument upon each ground referring to and extracting any applicable authority. This Crown "brief" may then be readily adapted in the preparation of *ex tempore* reasons. It allows an extremely busy appellate court to complete, in a typical day, four or five significant appeals. Under Gleeson CJ, the assignment of responsibility for the lead judgment in that Court has followed the pattern of the Court of Appeal set out above. So successful has been the technique adopted that it is now common to receive written submissions in a similar format from the accused, who naturally receives the Crown's submission in advance of the hearing. This technique helps

to reduce what is often a mechanical burden on the judges - of expounding the primary facts and expressing the issues for decision by reference to the applicable law. It conserves the judicial energies to the tasks which judicial officers need to concentrate on - making decisions.

There are only three effective ways to cope with the steady growth of business before the courts in Australia. The first is to increase the judicial establishment by the appointment of more judicial officers. This is an option uncongenial to hard-pressed governments with limited budgets. The second is to divert cases from the courts. Important initiatives of alternative dispute resolution are being tried. But there will always remain significant areas of public and private law which must be dealt with by independent judicial officers who form part of the judicial branch of government. That leaves the third option: the improvement of judicial techniques.

One of these techniques is the increase in the availability of *ex tempore* decisions. They have the undoubted merit of immediacy and, usually, comparative brevity. I believe that in the next decade, the pressures on the courts (especially the appellate courts) will oblige us to modify our procedures in order to facilitate *ex tempore* decision-making. This will require the reduction of oral argument, the improvement of written argument and, essentially, the presentation to judicial officers by the parties of succinct written material which can be adapted readily to provide the basic framework of a judicial opinion. The time of limitless oral argument before judges trapped at their benches, is coming to a close. A judiciary,

concerned with the good management of the courts and the efficient provision of justice according to law, will be ready to adapt even time honoured techniques to ensure the continued or even heightened relevance of the court system.

I began with an editor's condemnation of our system as it presently appeared to him. But at the beginning of this century the American Bar Association invited an obscure Professor from the University of Nebraska to address its Annual Dinner. Dean Roscoe Pound, later doyen of the Harvard Law School, astonished the participants with these words:[76]

> *"Gentlemen, the American Bar Association, of which you are members, has been for long furthering the interests of the rich, who are a very small section of the American public. Legal accessibility is denied to the poor, justice has been denied, justice has been delayed, justice is so formalistic that it is beyond the reach of the average person; it is sometimes a negation of justice."*

The judicial officers of Australia, as inheritors of a proud tradition of eight centuries should heed these criticisms which are true today, half a world from where they were first spoken. The work of the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration assists Heads of Jurisdiction and court committees to face squarely the problems of delay and equal access to justice. The greater provision of sound *ex tempore* reasons is one component of an overall strategy for improving the efficiency of, and the performance of their duties by, judicial officers. All us need to reflect upon our individual contribution to the efficiency of the system which is in our temporary charge. By our daily work, it is for us to demonstrate that we are not engaged in a "negation of

justice" or "a hideous mutation of justice" but in the resolute, efficient and fair determination of issues placed before us, resolved clearly and according to law.

ENDNOTES

* Text of a paper on which was based a lecture to an Orientation Course for Magistrates organised by the Judicial Commission of New South Wales given at Windsor, New South Wales on 30 April 1991.

1. [1983] 3 NSWLR 378, 386.
2. *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667.
3. 23 March 1991, 8. For Dowd's reply see *The Canberra Time*, 6 May 1991, 8.
4. This is a point made by A Karpin, "Delays in Local Courts" in *Current Issues in Criminal Justice*, 49.
5. Supreme Court of New South Wales, *Annual Review* 1990, forthcoming.
6. P Young, "Writing of Judgments", unpublished paper for the Law & Literature Conference, Sydney University, 22 April 1990, 3.
7. L J W Aitkin, "No well-tuned cymbal", *A Bar Rev* 83, 85 (1991) 7.
8. See *Randwick Corporation v Rutledge* (1959) 102 CLR 54, 69.
9. See *Adler v District Court NSW* (1990) 19 NSWLR 317, 344; *R V Connors* (1990) 20 NSWLR 438, 450; *Spautz v Gibbs* 28 November 1990, unreported.
10. As for Deane J see eg *J v Lieschke* (1987) 162 CLR 447, 462. As for McHugh J, see his treatment of materials in *Soulemezis v Dudley (Holdings) Pty Ltd*

(1987) 10 NSWLR 247, 278 (CA).

11. See Court of Appeal of New South Wales, *Annual Review*, 1988, 34.

12. (1987) 10 NSWLR 247.

13. *Ibid* at 277.

14. *Otis Elevators Pty Limited v Zitis* (1986) 5 NSWLR 171, 200f (CA).

15. *Ward v James* [1966] 1 QB 273, 301 (CA).

16. Some of the history is told in *McRae v Attorney General for New South Wales* (1987) 9 NSWLR 268, 279 (CA) and in *Quin v Attorney General for New South Wales* (1988) 16 ALD 550 (CA).

17. D L Shapiro, "In Defence of Judicial Candour" 100 *Harv L Rev* 731, 737 (1987).

18. See discussion in *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26, 39, 58 (CA).

19. Cf *McKinney v The Queen*, (1991) 65 ALJR 241 (HC) where a new "rule of practice" was declared "for the future". *(ibid*, 244).

20. (1947) 64 WN (NSW) 65 (FC).

21. *Ibid*, 66.

22. *Id.*

23. [1971] 1 NSWLR 376 (CA).

24. Notably *Donovan v Edwards* [1922] VLR 87, 88; *Brittingham v Williams* [1932] VLR 237, 239; *D Aicovo v Lacaneale* [1957] VR 553, 557.

25. *Pettitt*, above, n 23, 382.

26. *Loc cit.* Emphasis added.

27. See n 1 above, 386.

28. See n 2 above.

29. See n 12 above, 278.

30. See *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 477 (CA).

31. Above n 2.

32. See eg *Watson v Anderson* (1976) 13 SASR 329; *Perez v Transfield (Queensland) Pty Limited* [1979] Qd R 444, 450.

33. *Australian Timber Workers' Union v Monaro Sawmills Pty Limited* (1980) 42 FLR 369, 374, 380.

34. See s 32 of the Act which formerly limited appeals to points of law and the wrongful admission or rejection of evidence.

35. Above n 12.

36. *Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139, 146 (CA).

37. Above n 12, 282.

38. *Tatmar* n 1 above at 386. Cf *Capital & Suburban Properties v Swycher* [1976] Ch 319, 325-6.

39. Above n 12, 270 and see the cases there cited.

40. See n 20 above.

41. Above n 2 citing with approval Woodhouse P in *R v Awatere* [1982] 1 NZLR 644 at 649 (NZCA).

42. See discussion *Southern Cross Exploration ZL & Ors v Fire and All Risks Ins Co Ltd & Ors (No 2)*, Court of Appeal, unreported, 15 October 1990; (1990) NSWJB 130 (SLR by High Ct).

43. See *Judiciary Act* 1903, s 35A.

44. See eg *Hunter v The Queen* (1990) 65 ALJR 194; *Breen v Breen* (1990) 65 ALJR 195, (HC).

45. See eg *Jago v District Court of New South Wales &*

Ors (1988) 12 NSWLR 558, 564 (HC).

46. M D Kirby, "On the Writing of Judgments", (1990) 64 ALJ 691.

47. *Ibid*, 698f.

48. M Meehan, "The Good, the Bad and the Ugly: Judicial Literacy and the Australian Cultural Cringe", (1990) 12 *Adel L R* 431.

49. See eg L J W Aiken, "Success at the Bar: Lessons from Literature and Prosopography" (1990) 6 *Aust B Rev* 169.

50. (1939) 62 CLR 1, .

51. *Church of the New Faith v Commissioner of Payroll Tax (Victoria)* (1983) 154 CLR 120, 150.

52. See n 46 (above), 700.

53. See *Giannoulis v Email Superannuation Pty Ltd (as Trustee of "Email Retirement Fund")* (1990) 33 IR 479, 481 where there appears an untranslated citation from Horace.

54. See note (1991) 65 ALJ 3, 5.

55. See n 46 (above), 702 and cases there cited.

56. See *ibid*, 694.

57. *Jones v Hyde* (1989) 63 ALJR 349, 351; 85 ALR 23, 27; *Abalos v Australian Postal Commission* (1990) 65 ALJR 11, 15; 96 ALJ 354, 363.

58. See eg Atkin LJ in *Soc d'Avances Commerciales v Merchants Marine Insurance Co* (1974) 20 LL L Rep 140, 142 (CA)

59. See eg Loretta Re, "Oral v Written Evidence: The Myth of the 'Impressive Witness' (1983) 57 ALJ 679.

60. See *Carr v The Queen* (1987) 165 CLR 314 at 355;

McKinney & Judge v The Queen (above) n 19.

61. *NRMA Insurance Limited v Tatt and Anor* (1989) 92 CLR 299, 312 (CA).

62. See Kitto J in *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Limited* (1970) 123 CLR 361, 374f; *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173, 197.

63. *Ramsay v Watson* (1961) 108 CLR 642; *Lynch v Lynch* (1966) 8 FLR 433; 84 WN (Pt 1) (NSW) 315; *Paric v John Holland (Constructions) Pty Limited* (1985) 59 ALJR 844, 846; 62 ALR 85, 87.

64. See discussion D Byrne and J D Heydon (eds) *Cross on Evidence* Third Australian Edition, Butterworths, Sydney 1986, 111f.

65. See eg *Westfield Shopping Centre Management Co Pty Limited v Cassem* (1985) 4 NSWLR 344; *Holden v Toll Chadwick Transport Limited* (1987) 8 NSWLR 222; *Steggles Pty Limited v Aguirre* (1988) 12 NSWLR 693; *Sydney County Council v Ince* (1989) 16 NSWLR 690.

66. See the New South Wales Court of Appeal, *Annual Review*, 1988, 14.

67. See *Government Insurance Office of New South Wales v Fredrichberg* (1968) 118 CLR 403, 410; *Builders' Licensing Board v Mahoney* (1986) 5 NSWLR 96.

68. See *Arnett v Holloway* [1960] VR 22; SCR Pt 20 r 10(2) (NSW Supreme Court).

69. See eg *Bailey v Marinoff* (1979) 143 CLR 1; *Commissioner of Pay Roll Tax v Group Four Industries Pty Ltd* [1984] 1 NSWLR 680.

70. See *Wentworth v Rares*, unreported, Court of Appeal (Mahoney JA) 13 December 1990.

71. See *Palmer v Clarke* (1990) 19 NSWLR 158 (CA). See also *Ex parte Hall; Re Howie* (1932) 50 WN (NSW) 60 and *Ex Parte Currie; Re Dempsey* (1969 70 SR (NSW) 443; 91 WN (NSW) 34; [1970] 1 NSWR 617 (CA).

72. A J Mikva, "For Whom Judges Write", (The Lester W Roth Lecture), 61 *S Calif L Rev* 1357 (1988).

73. *Ibid*, 1357.

74. *Id*, 1363 (quoting Wigmore).

75. *Id*, 1367.

76. R Pound cited in C Weeramantry, "Judicial Reasoning: Myths and Mysteries" [1990] NZLJ 352.