

Ex tempore decisions

Or saving your sanity

A reflection by Lorraine Walker,

Chief Magistrate and Chief Coroner of the Australian Capital Territory

Why?

- the parties' needs
- institutional efficiency
- your sanity



Why not?

- You do not know the correct outcome
- You simply cannot do justice to the evidence/the issues raised without reflection/time
- The issue has wide significance
- A circuit breaker is required – whether for a party or for you

But just in case....

honour the Girl
Guides code and
“be prepared”



Factors in preparation

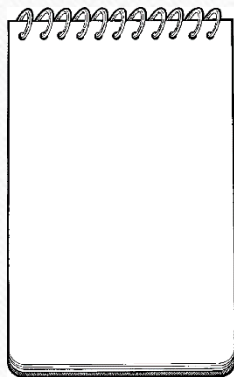
- Notice: docket, list , hospital pass
- Time available in advance
- Risk analysis – will it run?
- How long will it run – on the go prep?



The case type

The (almost) blank page:

Charge sheet
self-rep application



The tantalising mystery

Basic pleadings
Preliminary applications



The Dostoevsky novel

Multiple pleadings and
applications in proceedings;
voluminous documents –
affidavits; T documents



The first fork in the road...



Preparing for the possibility

Highly likely

- Open a document
- Put in the basic knowns
- Prepare a structure by headings
- Insert known legal principles which will or may have application
- Issues which may arise on information available to you.
- You may choose to have a number of template documents
- Never wasted – same for reserved decision

Decision-makers battle brief

The hearing book

- NOT a tear off note pad
- exercise spiral/hard back book
- Two way lines
- iPad/laptop?
- Chronology- dates or times
- Likely exhibit list?

The tools

- Coloured pens
- Sticky tabs!!!
- Template document
- "Cheat sheets" for different issues
- Relevant texts/legislation etc – excerpts?

Personal preparation

- Physical
- Psychological



Extracting your pound of flesh (or requiring the parties to do their job)

Before the hearing:

- Targetted case management
- Notices to admit or equivalent

The opening address

- Clarification
- Narrowing the issues
- Confirm agreements – in writing or on the record

In the hearing

- Controlling the flow
- Require copies of documents to annotate
- Confirming relevance
- Requiring the parties to “pin their colours to the mast”
- Confirming your understanding of their positions
- Inviting written summaries as part of oral closing submissions

Revisit- should you reserve?

- Do not hedge your bets by announcing the decision but reserving your reasons- if you are so certain, explain why; tidy up for publication if necessary
- If unsure whether or not to reserve, take a brief adjournment to determine that issue primarily – a stitch in time is *still* worth nine
- If you must reserve, set a date for delivery of decision

Delivery - I

- Immediate or a little later; on or off the bench
- Simple language, scope for imagery, and personality, but rarely humour
- Active voiced, conversational, avoid double negatives
- Communicate with your audience
- Announce the decision: at the outset? Or the end? Or both?

Lloyd's Bank v Bundy [1975] 1 QB 326

- Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there. His home was at Yew Tree farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want him to get out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him...now there is an appeal to this court. The ground is that the circumstances were so exceptional that Herbert Bundy should not be held bound.

Delivery II

- Use names rather than party descriptor (mostly)
- Use of headings
- Only address what you need to-law which is not settled, facts which are in dispute and essential to the decision
- Slower pace- allows thought, adjustment, careful expression, reference to notes
- Be sure to address the losing party's (potential appellant!) position

<https://Letting emotion do the talking - or what you might really like to say!>

Corrections

- “Guide to judicial conduct“ by the Council of Chief Justices
- Cannot alter the substance
- May revise reasons if a slip means what was said was not what was intended or is poorly expressed
- Correct grammatical errors
- Add case references and citations

Are you ready?



“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” Justice Michael Kirby
Western Australia Law Review [Vol 25] Dec 1995 213

Your practice, your way

- Prepare
- Practice
- Reflect
- Refine

