

Tips for Writing Clear, Logical and Concise Decisions

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In preparing for this presentation I have used materials made available to me by the National Judicial College of Australia as a presenter in the College's programs on Judgment Writing.

Former Australian Chief Justice Gleeson identified the objectives of the duty to give reasons as:

An obligation to give reasons promotes good decision making

The general acceptability of judicial decisions is promoted by the obligation to explain them

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

As referred to by Heydon J in *AK v The State of Western Australia* [2008] HCA 8; (2008) 232 CLR 438 at [89].

This duty applies equally to Tribunal members.

the authorities that govern judges' duties to give reasons are, or should be, permanently engraved in the minds of all judicial officers. These duties are designed to ensure that a judge wrestles adequately with the issues in the case, to enable appellate accountability and to provide basic fairness to the losing party. Judges should be as familiar with these duties as they are with the route they travel each day to work. Unhappily, however, some still get lost.

Thalman v Kogarah Municipal Council [2007] NSWCA 5 at [1] per
Reason P; Ipp and Tobias JJA

For whom is a decision given?

- “ ourselves
- “ the parties, particularly the losing party
- “ their lawyers
- “ other Tribunal members and lawyers
- “ any relevant Government department
- “ the public
- “ the media
- “ the commentators
- “ the legislature
- “ the appeal courts

To be effective a decision must:

- “ deal with the *substantial* points raised by the parties
- “ include findings on *material* questions of fact
- “ refer to the *evidence* upon which those findings were based
- “ provide an intelligible explanation of the *process of reasoning* that has lead the Tribunal member:
 - “ from the *evidence* to the *findings*; and,
 - “ from the *findings* to the *ultimate conclusion*.

What problems are there with decisions?

- “ too long (and too late)
- “ incomprehensible – using legal jargon, complex sentences
- “ not deciding all the issues in the case
- “ not making clear what findings are made
- “ not disclosing all steps in the process of reasoning

What is an issues based decision?

A decision which:

- “ sets out the issues clearly and concisely at the beginning of the decision
- “ uses the issues to generate and develop a logical structure for the decision
- “ resolves the issues (to the extent necessary) to reach the conclusion

Planning

- “ no correct way
- “ depends on
 - “ how your Tribunal is organised
 - “ the type of cases you are hearing
 - “ your work style, and
 - “ personal preferences
- “ case management can help planning for the decision
- “ planning for the decision will help the writing task

What decision are you planning?

Ideally one that is:

- “ correct
- “ issues-based
- “ easily understood
- “ delivered in a timely way

When, what and whether to read?

Before hearing:

- “ the read everything school – applications, affidavits, witness statements, submissions?
- “ the read nothing school – going into the hearing cold?
- “ the middle ground – reading at least the basic documents to identify the issues?
- “ different approaches for different types of matters?

Researching the law?

- “ before the hearing if the area of the law is unfamiliar?
- “ during the hearing – ask the parties or the lawyers for the leading authority
- “ wait until the submissions?

When to write?

- “ at the commencement of the hearing – confirm what is not contentious and what is in issue
- “ use that for the introduction to the decision and issue identification
- “ revise list of issues throughout hearing
- “ use the issues to create decision headings
- “ posing issues in question form can help the writing task
- “ link evidence to the issues

Issues list

- “ during the hearing continually revise what remains in issue
- “ during closing submissions challenge lawyers or the parties with concerns you have about their arguments
- “ confirm with the lawyers or the parties what are the issues for resolution before reserving
- “ in your reasons for decision explain why you do not accept the losing party’s case on each issue

How to handle the history and facts

- “ the history of the parties’ dealings may be much more extensive than is required for the decision
- “ consider including enough background to set the scene for the dispute that must be resolved by the decision
- “ include only facts relevant to the decision

Dunhill v Burgin [2014] UKSC 18

Per Lady Hale at [1]

There are two issues in this case, both of them simple to state but neither of them simple to answer. First, what is the test for deciding whether a person lacks the mental capacity to conduct legal proceedings on her own behalf (in which case the Civil Procedure Rules require that she have a litigation friend to conduct the proceedings for her)? Second, what happens if legal proceedings are settled or compromised without it being recognised that one of the parties lacked that capacity (so that she did not have the benefit of a litigation friend and the settlement was not approved by the court as also required by the Civil Procedure Rules)? Can matters be re-opened long after the event or does the normal rule of English law apply, which is that a contract made by a person who lacks capacity is valid unless the other party to the contract knew or ought to have known that she lacked that capacity in which case it is voidable (the rule in *Imperial Loan Co v Stone*).

The law

- “ state decisive legal principles
- “ selectively quote from decisions
- “ refer to leading authority/authorities
- “ do not cite cases to show what you have read, unless it is relevant to discuss the case in the decision
- “ paraphrase where possible
- “ avoid overly formal language

Headings

Beware generic headings:

“ they may contribute to repetition in the decision

Use specific headings:

“ they will highlight the issues that are the focus of the decision

Different types of headings

“ question: “Is the backpacker accommodation a boarding house?”

“ argument: “Backpacker accommodation is not a boarding house”

“ topic: “The backpacker accommodation”

Conclusion

The conclusion to the decision:

- “ reflects the introduction
- “ contains no surprises
- “ is the result of the logical disposal of all the issues

The decision reveals the path to the conclusion by transparent reasoning

Tips for writing clear, logical and concise decisions Part I

- “ plan for the decision
- “ identify the issues early in the decision
- “ use the issues to give structure to your decision
- “ discipline yourself to ascertain the real issues before the end of the hearing
- “ say it once in the decision – avoid repetition
- “ if appropriate, summarise the law rather than quoting at length from the cases

Tips for writing clear, logical and concise decisions Part II

- “ if feasible, use the names of the parties rather than their designations
- “ where possible, use case specific headings
- “ use simple language and short sentences
- “ address all arguments of the losing party
- “ link resolution of the issues to the conclusion
- “ timeliness of decisions is as important as readability