SUPREME COURT
OF QUEENSLAND

Sir Buri Kidu Lecture
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Port Moresby, Papua New Guinea

PERSUASION, REASONS, RESTRAINT AND REASONABLE APPREHENSIONS

(or … what you (as lawyers) can do to assist judicial decision-making and what you (as judicial officers) should say, what you shouldn't, and why it *might* matter)

Chief Justice Helen Bowskill[1]

It is a great honour to have been invited to deliver this year's lecture in the series dedicated to the memory of Sir Buri Kidu, the first national Chief Justice of Papua New Guinea, who served for thirteen years, from 1980 to 1993. Previous lectures have been presented by an intimidatingly impressive range of speakers who have addressed a wide variety of topics. Conscious of the broad range of the audience – comprising judges, magistrates, practising and academic lawyers, law students and court administrators – I have chosen to speak to you today about practical matters affecting our "day jobs" as lawyers and judges – of persuasion, and the role of lawyers in facilitating the work of judicial decision-making; of the obligation to give reasons for judicial decisions and the importance of our conduct and behaviour to the integrity of the justice system.

Persuasion – the role of the lawyer

It may seem like a startling statement to begin with, and I know it is hard to believe, but … judges are human beings. No matter how high functioning their brains might appear to be, they are not machines. Their cognitive abilities are not infinite. They are overloaded by information and often time poor. A judge conducting a trial is

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[1] With thanks to my research assistant, Ms Alicia George, for her assistance with research for this lecture. With thanks also to Justice Berna Collier of the Federal Court of Australia for presenting this lecture on my behalf due to my last-minute inability to be in Port Moresby on the day.

focussed on ensuring the trial proceeds according to law and on their obligation to give a decision, or write a judgment, at the end of the trial – balanced against the rest of their workload, which might include a number of other outstanding judgments. They are not interested in showmanship or sneak attacks or tricky "ah ha!", "gotcha" moments. What judges want from the lawyers that appear before them is help, to decide the case fairly, efficiently and correctly. To do that, the judge needs to understand what the case is about – what the real issues are; and what the applicable legal principles are – right from the beginning.

In that regard, I would adopt the observation that "judges value advocacy that helps them easily reach their own decision" and that "the most effective advocacy is helpful, clear, brief, thorough, reliable, principled and compelling".[2]

That is why submissions (oral and written) are so important. Good submissions should assist the judge to write a better – and quicker – judgment.

In a recent article published in an online satirical journal in Australia called *Justinian* it was said that "delay in the delivery of judgments is a curse of the justice system": it causes parties to suffer extended anxiety; lawyers are left in a quandary; court deadlines are trashed; discipline is eroded; and process is abused. All of that is true. Indeed, the Honourable Pat Keane AC KC, former Justice of the High Court of Australia, has said that:

> "… the timely delivery of coherent and compelling judgments is essential to the judicial function. We are not writing for the ages, but to solve a problem in the here and now. If our decisions are not given promptly, the parties are left in a legal no-man's land. There is a real sense of satisfaction in getting well-reasoned judgments out in a timely way".[3]

And, in a speech given last year, Justice Jayne Jagot, a current Justice of the High Court, said:

> "… there is little point in issuing a purportedly perfect judicial decision well after the match is over, the lights in the stadium have gone off, and everyone has gone home. An untimely judicial decision is deeply imperfect. Irrespective of its content, it is flawed and unjust. It may be legally right, but it is also, always, judicially wrong."[4]

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2 In an article entitled "A barrister's rhetorical flourishes can be seductive, but eventually they become an irritating distraction", Legal Cheek, 7 December 2012.

3 Presentation given to the NJCA judgment writing program, 19 March 2014.

4 Justice Jayne Jagot, "Notes on Judging", speech given at an NJCA Conference, March 2023.

The responsibility for delivering judgments in a timely way rests of course with the judges themselves. But you as lawyers can assist – by the manner in which you conduct the case, including your submissions.

The focus of the observations that follow is on written submissions; although they can be adapted just as easily to oral submissions. Well written and considered submissions are a powerful tool in the armoury of an advocate. It is all about persuasion.[5] Surprisingly, they are not provided as frequently as you might expect.

***First impressions count*:** your written submissions, if filed before the hearing starts, may be the first thing the judge reads about the case. They will almost certainly be the last thing the judge reads as well, before finalising their judgment. The written submissions are your opportunity to do two things: one, introduce the judge to your client's case; and, two, persuade them to accept it. Do not squander that opportunity.

In a recent presentation on the topic of "Issue Framing in Submissions", Justice Peter Applegarth, quoting an expert on legal writing, Professor Bryan Garner, said that any piece of persuasive or analytical writing must deliver three things: the question, the answer and the reasons for that answer. The aim is to lead the reader to have those things in mind within 60 seconds of picking up the document – whether it is an outline of submissions, a legal opinion or a judge's reasons for decision. To do this, the work has to open with a factually specific issue that captures the essence of the problem. This is called "issue framing".

So, to borrow Justice Applegarth's words again, in the first few minutes, or in the first paragraph, don't tell the judge everything you know about the facts of the case or the law – just tell the judge "who did what to whom; why you are here; what the rule (or law) is; and what the issue is that you want the judge to decide".

Submissions should be issue-based *(because judgments should be issue-based)*:[6]

- Understand what a judge has to do: findings of fact have to be made; upon those findings, issues are determined; upon those issues, orders are made. Try to assist the judge by giving them all those things:
    - Identify (frame) the issue – with precision.
    - Identify the relevant facts (and the evidence that supports a finding of those facts) – including those that do not help your case.

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5 Justice Glenn Martin AM, Senior Judge Administrator, Supreme Court of Queensland, "The Art of Written Submissions", Hearsay (Bar Association of Queensland Online Journal), Issue 88, June 2022.

6 Ibid, n 5.

7 Justice Peter Applegarth, "Issue Framing in Submissions", paper presented to Legal Aid Queensland on 27 February 2024.

- Identify the relevant rule or principle (of law).
- Identify the result that you contend for.
- State why that result is justified by applying the rule to the facts.
- State why you say the other side's arguments are not persuasive.[7]

- Remember: question – answer – reason.
- Make it simple: To quote the Honourable Pat Keane again:

> "One of the most misleading clichés which you will hear about advocacy is the phrase: 'Keep it simple, stupid'. The reason for having [advocates] at all is that it is not simple. The task is not to keep it simple; **but to make it simple**. And that is hard. But it is your job."

***Good writing counts*:** Some of the elements of "good writing" in this context are:

- **Brevity** – a shorter document is easier to comprehend than a longer document. Some ways to keep your submissions shorter are:
  - Identify the issues that matter – and address those in as clear and short a way as possible.
  - Avoid the "kitchen sink" approach – use judgment; have the courage to discard weak points.
  - Get to the point – don't leave a judge sitting there saying "I wonder what this is about?" Do this in a clear and obvious way – "a submission is not a mystery novel".[8]
  - Avoid unnecessary detail.
  - Quote sparingly (avoid quoting lengthy slabs from cases or transcripts of evidence – ask yourself what does this quote add to what I am writing?).
- **Clarity**:
  - Use clear, everyday language – avoid using latin phrases, legal jargon or archaic language; avoid unnecessarily "defining" things or using acronyms that make the reader feel they need a glossary or a dictionary.

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7 Justice Peter Applegarth, "Issue Framing in Submissions", paper presented to Legal Aid Queensland on 27 February 2024.

8 Ibid, n 5

    - Use the parties' names (rather than party descriptions – eg third defendant).
    - Do not use a long word if a short one will do.
    - If it is possible to cut a word out, always cut it out.
    - Likewise, be sparing about references to case authority – do not refer to 10 if one will do.

- **Structure and space –** use paragraph numbers and headings that are logical and consistent with the issues; shorter paragraphs and sentences are better; white space on the page is good; larger font and line spacing makes for a [more] "readable" document. You might think I am being pedantic about this but I recently walked into the chambers of one of my colleagues to find her trying to read a table in written submissions using a magnifying glass – whilst wearing her reading glasses!

- **Courtesy and candour:**
    - avoid "overheated, emotional-laden invective" or "purple prose" – "a coolly written demolition of the other side's evidence and case is likely to be more effective than an emotional and personalised attack on the other party and its lawyers";[9]
    - avoid "over-egging" your own case: "Candour is a powerful weapon of advocacy. If you display candour you give the judge a reason to trust what you say."[10]

- **Courage** – have the courage to face the weak points in your case, to deal with inconvenient facts, and to make concessions where that is appropriate.

- **Accuracy** – always edit and correct. Typos and other errors (for example, in references to evidence or citations of case authorities) are frustrating and do not encourage confidence in the document or its author.

Detailed preparation is essential

- You must be a master of the evidence – which means you must be on top of all the evidence in the case (good and bad).

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9 Ibid, n 7.

10 Justice Philip Morrison, "Better submissions – better judgments – how effective submissions result in better judgments", paper presented at the Pasefika Lawyers Collective Conference, July 2023, Samoa.

- You must also be a master of the law that applies – to those facts.

- Only in this way can you accurately identify the issues, and present coherent, concise, accurate and persuasive submissions.

Now over to the judicial officer – the obligation to give reasons

The requirement to give reasons is acknowledged as an incident of the judicial function and process: whether it is expressed in a written law,[11] or not, it is generally accepted that courts and tribunals have a duty to give reasons.[12]

At its most fundamental, the rationale for the obligation to give reasons is because the parties (and the public) have a right to know why the decision was made. The duty to give reasons is also often linked to the availability of appeal rights.[13] But there is a wider rationale – including:[14]

- it **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;

- it also promotes general **acceptability** of judicial decisions – by the community;

- 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;

- it is an expression of the **open court principle**, which is an essential incident of the judicial function;[15]

- it promotes **consistency** of decision-making and enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future;[16] and

- it may in some cases assist in the **identification of the relevant law** – particularly decisions of higher courts.[17]

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11 For example, the *District Courts Act 1973 (PNG),* ss 24(1) and 59(4). See also the PNG Magistrates Manual chapter 25, section 25.4.

12 *Res 1 v Medical Board of Queensland* [2008] QCA 152 at [14]; see also *Wainohu v New South Wales* (2011) 243 CLR 181 at [54]-[58] per French CJ and Kiefel J.

13 See *Drew v Makita (Australia) Pty Ltd* [2009] QCA 66; 2 Qd R 219 at [58].

14 *Wainohu v New South Wales* (2011) 243 CLR 181 at [54]-[58].

15 *Wainohu* at [58].

16 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279.

17 See again, the PNG Magistrates Manual, at section 25.4.2.

It is also part of the principle of **natural justice** (or procedural fairness) – adopted by s 59 of the *Constitution of the Independent State of Papua New Guinea* – namely, the duty to act fairly and to be seen to act fairly.[18]

The obligation to give reasons does not apply to every procedural or interim decision, no matter how minor. Whether reasons are required "depends on the importance of the point involved and its likely effect on the outcome of the case".[19] If the decision constitutes what is in fact, or in substance, a final order, reasons must be given. But at the other end of the spectrum, reasons may not be required for a merely procedural or interim decision.

But even where there is an obligation to give reasons, the *content* of the duty – that is, the content and detail of the reasons required to be given – will vary according to the nature of the jurisdiction which the court is exercising and the particular matter which is the subject of the decision.[20] Depending on the circumstances, oral reasons will frequently be sufficient – whether given on the spot, or a day or two later. If a "record" of the reasons is required, you could request the transcript of the oral reasons.

For example, in the District and Supreme Courts of Queensland, almost all sentencing decisions are done on the spot, with judges delivering oral (or ex tempore) sentencing remarks. We always give reasons for our sentencing decisions. But there would be significant inefficiencies and delay if we reserved all our sentencing decisions, and delivered written reasons later. That is to be contrasted with a civil trial, occupying a number of days' hearing. Such a decision would usually be reserved, with a written judgment delivered later.

Nothing that I say today is intended to suggest to you that you should reserve cases, which you otherwise would not. There are some cases which you just have to reserve. But many others, you can deal with straight away, or after a short adjournment to collect your thoughts, and all of the various interests – the parties, the public, the court's and your own – are benefited by swift, but fair and reasoned disposition of cases.

There is a balancing exercise involved. Giving overly elaborate (let alone delayed) reasons can undermine public confidence in the judiciary just as insufficient reasons can.[21]

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18 *Ombudsman Commission v Yama* (2004) SC747; *Amet v Yama* (2010) SC1064 at [9].

19 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279.

20 *Wainohu v New South Wales* (2011) 243 CLR 181 at [56].

21 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 444.

Failure to provide reasons, where the obligation arises, is an error of law.[22] Here in Papua New Guinea, the principle has been articulated as – where no reasons are provided, the law deems there to be no good reason for the decision and the decision may be set aside.[23]

A recent example in which an appeal succeeded on this ground – as well as others – is *Koribiseni v The State* (2022) SC2296. That was an application for review of sentences. It was held that the trial judge erred in not giving reasons as to why he considered a sentence of 15 years was appropriate for one of the offences and why each sentence was ordered to be served cumulatively on the previous sentences. Although counsel had cited several cases as comparative decisions, the Supreme Court justices observed that the trial judge made no reference to these cases, or any other case authorities – merely referring to the seriousness of the offences, the other complaints of sexual abuse by the applicant and his prior conviction before pronouncing a higher term of imprisonment than even the prosecutor had contended for and making a cumulative order. For that, and other reasons, the decision was set aside.

An example from a civil case is *Kumul Petroleum Holdings Ltd v Alina* (2022) SC2253. The respondents commenced proceedings in the National Court against the appellant. The appellant applied to dismiss the proceeding. Detailed written and oral submissions were made by both sides. The primary judge refused the application, without giving any reasons. The appeal was successful. As Hartshorn J (with whom Yagi and Bona JJ agreed in this respect) said:

> "11. This court on numerous occasions has stated that a Court or a Judge must give reasons for the decisions and orders made or given. A failure to give reasons is fatal to the decision as such a decision may be set aside or quashed….
>
> 15. By not giving reasons for refusing the dismissal motion, it may be inferred that the primary judge did not consider the submissions which were made on the various issues and thus, he has no good reasons to give."[24]

Another example, in the context of an appeal against conviction and sentence for wilful murder, is *David v The State* (2006) SC881. In this case, there were a number of complaints, including that the trial judge had failed to mention the elements of the

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22 *Amet v Yama* (2010) SC1064 at [9]-[12]; *Kumul Petroleum Holdings Ltd v Alina* (2022) SC2253 at [11] and [15]; *Koribiseni v The State* (2022) SC2296 at [22].

23 *Ombudsman Commission v Peter Yama* (2004) SC747; *Asiki v Manasupe Zurenuoc, Provisional Administrator* (2005) SC797, cited in *Koribiseni v The State* (2022) SC2296 in relation to a judicial decision.

24 See also *Paul Paraka Lawyers v Public Officers Superannuation Fund Board* (2014) SC1363 at [67]-[72].

offence and had made no findings of fact. As the Supreme Court (Salika, Cannings and Gabi JJ) observed, at [115]-[116]:

> "When trial judges in PNG pronounce the verdict they must give reasons for their decisions; and those reasons must disclose that they have given themselves proper directions.
>
> In the present case the trial judge's judgment contained no mention of the elements of the offence. The verdict was given in a legal vacuum and therefore was infected by an error of law."

Their Honours went on to say, at [127]:

> "By giving reasons a Judge makes himself or herself accountable. If no reasons are given or they are expressed in a vague or scanty way, it is reasonably to be inferred that there are no good reasons to give. This is a principle that has been applied increasingly in judicial review of administrative action. We believe the same principle must apply when a higher court is hearing a review or appeal of a lower court's decision."

It is important to keep in mind that adequacy of reasons refers to their sufficiency in content and form, and not to their validity or correctness.[25] As I will mention shortly, in an excellent speech about "judging" given in 2023, Jagot J made the point that "a good judge's decisions are more often right than wrong". As her Honour explained, that is because inevitably, given the number of decisions that we have to make on a day to day basis, no matter how hard you try you will get some of those decisions wrong. As Jagot J says, "a judge who has never been wrong is just a judge who hasn't made enough decisions or enough tough decisions". If we are wrong, there is an appeal process to correct that. The focus of my observations today is not on the substance of our reasons, but rather on the content of the duty to provide reasons, and some practical tips about how to do that.

The starting point, I think, is to keep in mind that reasons are exactly that – **your reasons for making the order(s)** that you make, in the wide variety of matters that you have to deal with in the exercise of your jurisdiction.

The next point that is useful to keep in mind is that, first and foremost, you are **explaining your reasons to the parties** – in particular, explaining to **the losing party** why they have lost.[26]

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25 *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462 at 482.

26 *Drew v Makita (Australia) Pty Ltd* [2009] QCA 66; 2 Qd R 219 at [58].

Your reasons **do not need to be elaborate or lengthy**. Without suggesting there is any rigid rule or mechanical formula to be applied, in most cases, your reasons will be adequate and sufficient if you:

1. Identify the **issues** you have to determine.

2. Set out briefly your understanding of **the relevant law** in relation to the issue(s), including:

   (a) the standard of proof that applies;

   (b) the relevant legislation;

   (c) the relevant legal principles that apply to the issue you have to determine (unless there is a controversy you need to resolve by reference to different cases, you only need to refer to the main case for any particular principle, not other cases that are just examples of the application of the principle);

   (d) in a criminal case, this will include the elements of the offence(s).[27]

3. Set out any **material findings of fact** in relation to the issue(s) – that is, findings of fact on which your conclusions depend (especially where those facts have been in dispute). In this regard:

   (a) whilst you are required to *consider* all of the evidence in reaching your decision, you do not need to refer to all the evidence and the arguments before you in your reasons;

   (b) but you are obliged to deal with evidence, and arguments, **on central or critical issues**, in order to explain how a case has been decided in a particular way[28] (if you do not, it may be inferred on appeal that you overlooked it);

   (c) where conflicting evidence of a significant nature is given, you should refer to both sets of evidence, and explain how you resolved the conflict;[29]

   (d) express your findings clearly, by reference to the standard of proof that applies (avoid saying things like "I tend to believe.." or "I am inclined to believe…").

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27 For a case in which the trial judge had failed to do this, which gave rise to a successful appeal, see *David v The State* (2006) SC881 at [115].

28 *Camden v McKenzie* [2007] QCA 136; [2008] 1 Qd R 39 at [35] and [38] per Keane JA.

29 *Camden v McKenzie* at [29] per Keane JA; see also *Res 1 v Medical Board of Queensland* [2008] QCA 152 at [14]. See also *Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd* [2022] QCA 266 at [103]. See also *David v The State* (2006) SC881 at [154].

4. Set out your **reasoning process**: that is, provide your **reasons** for making those findings of fact, and your conclusions, and your reasons in applying the law to the facts you have found.[30] A **basic explanation of the fundamental reasons which led you to your conclusions is sufficient** – there is "no requirement … that reasons must incorporate an extended intellectual dissertation upon the chain of reasoning which authorises the judgment which is given".[31]

There is no need to set out a detailed "procedural history" of the case (unless it matters to an issue) and no need to generally summarise all the evidence in the case or each party's submissions – it is preferable to refer to the evidence, when you are making findings relevant to each issue you need to determine, and refer to the arguments in that context also.

Ultimately, what is most important is that you **make a decision**, explain your reasons for that decision, get the judgment out and move on. To encourage myself to do that, I have two mantras:

- "Perfect is good; done is better", which was advice given to me early on by a very good friend and colleague, although I'm not sure who first said it; and

- "The Ship Must Sail" – which comes from a judgment writing paper written by now retired Justice Pat Keane (quoting one of his friends).

Another good mantra is … "just start writing"![32]

A few further practical tips

Evidence and arguments

As already noted, you do not need to refer to *all* the evidence and arguments made by the parties. But your reasons need to demonstrate that you have "grappled with the case as presented by each party",[33] and you are obliged to deal with evidence, and arguments, on central or critical issues, to explain why the case has been decided in a particular way.

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30 *Drew v Makita (Australia) Pty Ltd* [2009] QCA 66; 2 Qd R 219 at [62]-[64] per Muir JA (Holmes JA and Daubney J agreeing), referring, inter alia, to *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443-444 per Meagher JA. See also *Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd* [2022] QCA 266 at [104].

31 See *Drew v Makita (Australia) Pty Ltd* [2009] QCA 66; 2 Qd R 219 at [61], referring to *Strbak v Newton*, an unreported decision of the New South Wales Court of Appeal.

32 Justice Jayne Jagot, "Notes on Judging", speech given at the NJCA Conference, March 2023.

33 *Cidneo Pty Ltd v Chief Executive, Department of Transport and Main Roads* (2014) 201 LGERA 395 at [50] per Peter Lyons J; (reversed, in part, in *Chief Executive Department of Transport and Main Roads v Cidneo Pty Ltd* [2015] QCA 96).

You should deal with evidence which is significant, in the sense that, unless disposed of, it stands in the way of the court's conclusions.[34] You should not ignore evidence which is critical to an issue in the case and which is contrary to an assertion of fact made by one party and accepted by you.[35]

It is not enough to just say "I have considered all the evidence" or to refer to "the state of the evidence", without analysis[36] – your reasons must reveal that you actually have.

As the Supreme Court of PNG said, in *David v The State* (2006) SC881 at [127] "[g]iving reasons for believing one version of events rather than another is an important part of the judicial decision making process"; and, at [128]:

> "It is one thing for a trial judge to say that he or she has considered all the evidence. It is another thing to actually do it; and another still to disclose through a reasoned judgment (whether oral or written or both) that it has actually been done. In the present case, we consider, with respect, that his Honour has failed to disclose through a clearly expressed process of reasoning why he drew the conclusions he did…"

The obligation also requires more than simply saying you adopt the submissions of one party, a course described by Keane JA in *Camden v McKenzie* at [36] as one "distinctly apt to give an impression to the losing party that the case has been decided without proper consideration".

Credibility

Even where the resolution of the case depends *entirely* on credibility – that is, the case is simply one of "word against word" as between two parties – I suggest it is not sufficient for the judicial officer simply to say they believed one witness in preference to another.[37] You ought to articulate ***why*** you prefer the evidence of one witness to another – you must have a reason(s), so fairness means you should articulate what those reason(s) are. But it is, I would suggest, a rare case where it is purely a case of "word against word". Frequently, there will be other evidence (whether of other witnesses, or documents) and probabilities, to be considered. As Keane JA observed in *Camden v McKenzie* at [34]:

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34 *Camden v McKenzie* [2007] QCA 136; [2008] 1 Qd R 39 at [35] per Keane JA, referring to *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2*) [2002] VSCA 189*;* (2002) 6 VR 1 at 43 [157].

35 *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728 per Samuels JA.

36 See *Commissioner of Police v Stehbens* [2013] QCA 81 at [36]: "[m]erely referring to 'the state of the evidence' before the [Magistrate], without any analysis of that evidence, did not satisfy his Honour's obligation to give reasons…". See also *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259.

37 Cf *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280.

> "Usually, the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation."

His Honour also adopted the following from another case:[38]

> "It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the end of the evidence simply by the judge saying: 'I believe Mr X but not Mr Y and judgment follows accordingly'. That is not the way in which our legal system operates…'"

In a recent speech, Beech-Jones J, a justice of the High Court of Australia, counselled new judges "never to call a witness a liar unless you have to", in the context of reminding judges that our role is to resolve disputes, not create them. Although in some cases, especially if fraud or something like that is involved, such a finding cannot be avoided, his Honour observed that, in most cases a finding that the evidence of witness X was unreliable in various respects and the evidence of witness Y is preferred for various reasons is more than sufficient.[39]

As to the role of **demeanour** in the assessment of a witness' evidence, judges are frequently reminded to exercise caution in assessing the credibility or reliability of a witness, solely or mainly from how they appear when giving evidence.[40] Judges are encouraged to "limit their reliance on the appearance of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events".[41]

Once again, explaining your reservations about the credibility of a witness simply by adopting the submissions of the opposing party, is not appropriate.[42]

The same observations apply in relation to expert evidence – a judicial officer should be "explicit in giving reasons", to explain why they prefer one case over the other.[43]

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38 *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186 at 191-192.

39 Justice Robert Beech-Jones, "Seven Random Points About Judging", speech given to NJCA conference, March 2024.

40 See *Fox v Percy* (2003) 214 CLR 118 at [30] and [31].

41 Ibid. See also the decision of McMeekin J in *Souz v CC Pty Ltd* [2018] QSC 36 at [97], where his Honour sets out a summary of the authorities on the assessment of credibility of witnesses, by reference to objective facts and probabilities.

42 *Camden v McKenzie* [2007] QCA 136; [2008] 1 Qd R 39 at [36] per Keane JA.

43 See *Drew v Makita (Australia) Pty Ltd* [2009] QCA 66; 2 Qd R 219 at [65].

And in judgments, just as in written submissions, good writing matters – make it simple, understandable, accessible.

I conclude this part of the paper by reiterating that the essential requirement is that a judge's reasons disclose the underlying intellectual process which has given rise to the conclusion you have reached.[44] You are not expected to be perfect, and a court on appeal can be expected not to scrutinise your reasons "with an eye keenly attuned to the identification of error". Hopefully, the lawyers will have provided you with helpful submissions, of the kind I have outlined at the outset, which will assist you the judicial officers in the discharge of this important obligation.

So having dealt with what you should say, I turn to what, in my respectful view, you should not, and why it *might* matter. On the way to that topic, I mention that in a speech given in 2023, at the start of a judicial orientation program for new judges, Jagot J, a justice of the High Court of Australia, identified the following as the characteristics of a "good judge", which I gratefully adopt:

- A good judge is fair.
- A good judge listens – or at least listens more than they talk.
- A good judge is civil.
- A good judge makes decisions which are timely.
- A good judge's decisions are more often right than wrong.

Restraint and Reasonable Apprehensions

I once read an article in the news, about the secrets of a long and happy marriage. One of those "secrets" was that it hinges on the five things a day that you do **not** say. You might wonder whether there could really be **five** such things in a happy marriage – but in any event, the analogy is an apt one for a long and happy judicial career.

Once again I begin with the startling admission that, despite the perception of some media outlets, and perhaps some within the community, judicial officers are human beings. We get annoyed, frustrated, impatient, or sometimes even outraged, by things said or done in hearings before us.

But restraint in a judicial officer is important. There are at least two aspects to this. One is the importance of addressing what might be described as judicial rudeness or bullying. That is an important topic which could be the subject of a standalone presentation. The courtroom is a unique working environment: hierarchical, adversarial and stressful. Judicial bullying – which may include intimidation, abuse,

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44 *Gartner v Brennan* [2016] WASC 89 at [58].

humiliation, sarcasm, rudeness, shouting and belittling (in short, a lack of respect) – can undermine a practitioner's confidence and capacity to work and diminishes public trust in the integrity of the judicial system.[45]

Another aspect of the importance of judicial restraint is concerned with avoiding saying things that might give rise to a reasonable apprehension that you might not bring an impartial mind to your task.

There is an inevitable overlap between these two things. But for today's purposes, my focus is on the notion of apprehended bias.

We as judicial officers have a duty to sit and hear cases. That is our job. We should ensure that we do not do things, or place ourselves in a position, that might prevent us from doing that. I include in this, saying or doing things that might, objectively, give rise to an apprehension of bias. Where there is, on appeal, a finding of apprehended bias, the whole decision is vitiated, and must be set aside. That is a profound waste of resources. It also diminishes confidence in the court and the judiciary.

As Gavara-Nanu J said in *Independent State of Papua New Guinea v Transferees* (2015) SC1451 at [49], "a fundamental principle that should guide a judge or a judicial officer in deciding whether to disqualify himself, is that the parties to litigation must have full confidence in the integrity and impartiality of the court to administer justice".

The apprehension of bias principle, in Australia, is that "a judge is disqualified if a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the resolution of the question the judge is required to decide".[46]

That principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal.

The "double might" in the statement of the principle serves to emphasise that the criterion is concerned with "possibility (real and not remote), not probability.[47]

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45 Kate Eastman AM SC, '*Judicial Bullying: let's have a conversation',* Judicial Commission of New South Wales, Judicial Quarterly Review, Vol 1, Issue 3, February 2024.

46 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6]; *Charisteas v Charisteas* (2021) 273 CLR 289 at 296 [11].

47 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* (2023) 409 ALR 65 at [37] per Kiefel CJ and Gageler J.

The same test applies here in Papua New Guinea.[48] In the *PNG Pipes* case, decided in 1998,[49] the Supreme Court (Amet CJ, Kapi DCJ and Los J) referred with approval to the following statement, from an earlier decision of the Supreme Court:

> "Would a 'reasonable and fair-minded person sitting in a court and' knowing all the relevant facts have a 'reasonable suspicion that a fair trial for' the appellant 'was not possible'?"

Their Honours went on to say:

> "In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. **The court looks at the impression which would be given to other people.** Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.
>
> The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'
>
> Before an appellate court can be persuaded that a reasonable apprehension of bias has been 'firmly established' as required by the authorities, it must be satisfied, upon an examination of the surrounding facts, that an **objective observer** would be **left with an apprehension, not a conviction**, that the judicial officer was predisposed, by matters extraneous to a proper adjudication, to reach a particular conclusion."

Application of the principle involves three steps:[50]

1. identification of the factor which it is said might lead a judge to resolve the question other than on its legal or factual merits;

2. articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and

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48 See, for example, *Tzen Pacific Ltd v Innovest Ltd* (2012) N4713 at [7] and *Electoral Commission of Papua New Guinea v Kaku* (2020) SC1950; and *Independent State of PNG v Transferees* (2015) SC1451 at [48] per Gavara-Nanu J.

49 *PNG Pipes Pty Ltd and Sankaran Venugopal v Mujo Sefa, Globes Pty Ltd and Romy Macaset* (1998) SC592.

50 *Charisteas v Charisteas* at [11]; *QYFM v Minister* at [38].

3. assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.[51]

There may be aspects of a judge's private life, or conduct outside of court, that could raise matters that have the capacity to affect adversely the public perception of a judge's impartiality.[52] The judge's conduct in court may also raise matters relevant to impartiality.

It is that second aspect that I am addressing here. It is important that we as judicial officers are conscious of what we say in court, and how we say it, so that we do not create any basis for a perception of affection, preference or enmity towards a party or lawyer involved in a case, or a perception of pre-judgment of the case; let alone an actuality of any of those things. The rule against bias is a core element of our judicial oath and part of the principle of procedural fairness, a principle "intended to ensure that the process is, and appears to a fair minded lay observer to be, a fair process.[53]

May I suggest that a useful starting point is the Council of Chief Justices' Guide to Judicial Conduct, published by the Australian Institute of Judicial Administration, which includes the following, in chapter 4 in relation to conduct in court (at 4.1):

> "It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. The trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness. Indeed it sometimes relieves tension and thereby assists the trial process.
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> Nevertheless, the entitlement of everyone who comes to court – counsel, litigants and witnesses alike – to be treated in a way that respects their

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51 The "fair minded lay observer" is a hypothetical person – not an actual person from whom you should expect evidence to be called. Cf *Maliso v Ombudsman Commission of Papua New Guinea* (2022) N9723 at [19].

52 *Charisteas v Charisteas,* for example, concerned private and social communications between a trial judge and counsel for one of the parties in a family court proceeding. Another recent example, albeit in the slightly different context of a Commission of Inquiry, is *Drumgold v Board of Inquiry & Ors (No 3)* [2024] ACTSC 58, in which contact and communications between the Commissioner and a journalist lead to the conclusion that a fair-minded observer might reasonably have apprehended that the Commissioner might not bring an impartial mind to their task. Some other examples are referred to in *Independent State of Papua New Guinea v Transferees* (2015) SC1451 at [50]-[52].

53 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [19] per Kiefel CJ and Gageler J.

> dignity should be constantly borne in mind. Bullying by the judge is unacceptable…"

The Guide also includes the following, in relation to critical comments (at 4.12):

> "Particular care should be taken to avoid causing unnecessary hurt in the exercise of the judicial function. This includes taking care about comments made in court (see 4.1 above) and observations made in reasons for judgment or in remarks on sentence."

In a Queensland case in which a Magistrate's decision not to disqualify themselves, following exchanges between the Magistrate and defence counsel, about his client, and then with the defendant himself, was set aside, the former Queensland Chief Justice the Honourable Paul de Jersey observed that:

> "Judicial officers are human beings and not expected to be paragons of restraint, but … the expectation (relevantly for the present, of the 'fair-minded lay observer') is they will come close to that ideal."[54]

So in our quest to become paragons of restraint, where is the line drawn?

There is some assistance to be gained from a Federal Court decision of *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 102 at [81], where Kenny J made the following observations as to what would **not** constitute a reasonable apprehension of bias:

- **occasional** displays of impatience and irritation, whether justified or not, will not amount to disqualifying bias;
- while sustained ill-temper can give rise to a reasonable apprehension of bias, **momentary** outbursts and misunderstandings in the often stressful world of adjudication may be tolerated, so long as they pass and do not affect the functions of the adjudicator;[55]
- a judicial officer who is sarcastic, mocking or rude, fails to act in conformity with proper standards, but this conduct will not **of itself** constitute disqualifying bias; and
- **mere** insensitivity to an applicant, whether about their personal situation or otherwise, will also not amount to such error."[56]

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54 *Leisemann v Cornack* [2011] QSC 410 at [9], [17] and [35].

55 Referring to *Minister for Immigration and Multicultural Affairs; Ex parte AB* (2000) 177 ALR 225 at 230 per Kirby J.

56 See also *AZAEY v Minister for Immigration and Border Protection* [2015] FCAFC 193; (2015) 238 FCR 341 at [20]-[22].

But it is important that those words – occasional, momentary, of itself and mere – are emphasised.[57]

In the *VFAB* case, Kenny J described the Tribunal member as having "overstepped the boundary" in the manner in which she questioned the applicant (at [82]). Her Honour said the vice was not that the Member had an adverse opinion about the applicant's claim before the hearing began or that she put adverse matters to him in the course of the hearing. The vice in this case was that by the Member's conduct during the hearing, "a fair-minded observer might well infer that there was nothing the applicant could give by way of evidence or submit by way of argument that might change her mind about his claim… As well as repeated expressions of disbelief, there were her constant adverse comments on his evidence; and **numerous displays of irritation, impatience, frustration and, sometimes, sarcasm**."[58]

That passage highlights another important point. We are expected to have open minds, not empty minds. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion.[59]

The dialogue that takes place between the judicial officer and legal representatives (or unrepresented persons) has regularly been acknowledged to be helpful in the identification of the real issues and real problems in a case. We know that from our daily experience.[60]

What is important, however, is that those views are not fixed, and that "the importance of actual and apparent fairness, and the need for actual and apparent abstention from prejudgment are repeatedly stressed".[61]

A more recent example is *Gindy v Capital Lawyers Pty Ltd* [2022] ACTCA 66, in which a majority of the ACT Court of Appeal set aside the decision below, and ordered a re-trial, on the basis that the decision was affected by apprehended bias, having regard to the "outward conduct of the trial judge", including hostility and sarcasm, which would be understood by a fair minded lay observer as an indication that the trial judge harboured feelings of intense personal disdain for one of the parties. This was said to be demonstrated not only in the conduct of the hearing, but also in comments made by the judge in her reasons for judgment.

Similarly, in *Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 41, the Full Court of the Federal Court set aside a

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57 *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [100].

58 Emphasis added.

59 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [71] per Gleeson CJ and Gummow J.

60 *Johnson v Johnson* (2000) 201 CLR 488 at [13].

61 *Antoun v R* (2006) 224 ALR 51 at [81] per Callinan J.

Tribunal's decision, on the ground of apprehended bias, finding that the Tribunal member had "crossed the line". The circumstances giving rise to that conclusion included that at various points in the hearing, the Tribunal member's tone and manner in questioning the appellant was loud, aggressive and interrupting; he often raised his voice and was impatient and sometimes rude; he was scornful or incredulous as to the appellant's evidence, and tended to show disinterest in evidence which might tend to show the appellant's incorrect answer in a visa application was not purposefully false (suggesting a prejudgment as to deliberate dishonesty) (at [49]). The Full Court made the point that whilst "robust and forthright" testing of the appellant's claims would not of itself sustain a finding of apprehended bias, and nor would occasional displays of impatience or irritation or occasional sarcasm or rudeness – in some cases, such behaviour *may* show bias or give rise to a reasonable apprehension of bias (at [50]), as it did in that case. As the Court said, at [59], in addressing one of the many complaints (that the Tribunal member refused to permit the appellant to have the assistance of an interpreter):

> "The vice in this part of the Tribunal member's conduct was not so much that he might appear to have had an adverse opinion about the appellant's claim before the hearing began, but that he had that opinion and then at various further points in the hearing his conduct was such that a fair-minded observer might well infer that **there was nothing the appellant could say that might change the member's mind**. As we further explain, at various points in the hearing the member's impatience, interruptions, tone, questioning, and comments about the implausibility of the appellant not understanding the meaning of 'conviction', might lead a fair-minded observer to consider that the member might not be open to persuasion."

Circling back to the obligation to give reasons, and considering that aspect of the principle of procedural fairness together with the rule against bias, the case of *Antoun v R* (2006) 224 ALR 51 is a stark example of a failure on both accounts. In that case, the appellants were jointly charged with demanding money with menaces. A trial was conducted in the District Court of New South Wales, before a judge sitting without a jury. The appellants were convicted. They appealed unsuccessfully to the Court of Criminal Appeal. The sole ground of appeal to the High Court was that two aspects of the trial judge's conduct gave rise to a reasonable apprehension of bias, in the form of prejudgment.

The first aspect was an exchange which took place at the end of the Crown case, when counsel for one of the accused foreshadowed he would make a no case submission the following day, and counsel for the other accused said he would join in the submission. Without even hearing any submissions, the judge said:

> "I see, well that application will be refused. So how long then will the defence case take?"

When defence counsel protested, asking how the judge could come to that view, without having heard "one word" of submissions from either defence counsel, the judge doubled down, saying:

> "I'm simply telling you the application will be refused. I perceive what's in the Crown case, I perceive there's a case to answer."

An application for the judge to disqualify himself was made the following morning, which was refused. Before actually hearing the no case submission the trial judge said:

> "I simply point out in relation to whatever application is about to be made in relation to a no case that I have a very, very firm view that as a matter of law … an application for a no case cannot succeed in this particular trial …"[62]

A second application for the judge to disqualify himself was made, and again refused.

The no case submission was then made, in writing. It was refused.

The case proceeded. The second aspect of the judge's conduct occurred after one of the accused had given evidence in his defence but before the defence case had closed. The trial judge said he had formed:

> "… a very strong preliminary view in this case, very, very strong, to a stage where I am considering, indeed have almost made up my mind of my own motion, to revoke bail."[63]

Defence counsel strongly argued against that. Unsuccessfully.[64]

Although the appeal to the Court of Criminal Appeal was unsuccessful, the High Court (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) held that the trial judge's conduct presented an appearance of prejudgment (in Callinan J's words, an unmistakable one).

Gleeson CJ said that the judge's "peremptory announcement, as soon as the application was mentioned, that he would dismiss it, was a departure from the standards of fairness and detachment required of a trial judge" (at [21]). Further, at [22], Gleeson CJ noted that judicial officers "do not have to devote unlimited time to listening to unmeritorious arguments", but at least a brief hearing is required; and although a judicial officer might feel indignant about the conduct disclosed by the evidence, or about the tactics adopted by a party, they must not allow that to compromise the appearance of impartiality that is required of judges.

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62 *Antoun v R* at [70].

63 *Antoun v R* at [73].

64 *Antoun v R* at [74].

Kirby J endorsed the view that judicial indignation may on occasion be understandable. His Honour also said, at [27]:

> "For centuries in courts of our tradition, judges have been telling parties and their lawyers, sometimes in quite robust terms, that they consider that a particular submission or course of action is hopeless, a waste of the court's time or doomed to fail. I would not want to say anything that needlessly mollycoddled candid judicial speech addressed to trained advocates."

But, as Kirby J went on to say, at [29]:

> "A line is drawn between forthright and robust indications of a trial judge's tentative views on a point of importance in a trial and an impermissible indication of prejudgment that has the effect of disqualifying the judge from further conduct of the proceedings. Sometimes, that line will be hard to discern. But, in this case, I agree with the other members of this court that the trial judge crossed it."

The exercise of reasonable restraint, whilst not diminishing the importance of candid judicial indications, is perhaps as sure a guide as any that you will stay on the right side of the line, and avoid what might reasonably be perceived otherwise.

Concluding remarks

As I conclude today, I acknowledge the important role that everyone in this room has to play in the administration of justice: those setting out on the path to become lawyers, and those who have devoted their professional careers to teaching them; the lawyers working hard on a daily basis to assist their clients and the courts; and the dedicated judicial officers at all levels of courts.

May I leave you all with a quote, which is attributed to Aristotle (although it has more recently been revived by its use in the movie, Legally Blonde):

> "The law is reason, free from passion."

What I hope to have imparted to you today, my fellow **judicial officers**, is the significance in our role of administering justice according to law, of fair, impartial and reasoned, decision-making, free from the passion that paragons of less restraint may have the liberty to display; and to you, the **lawyers** who appear before us, the importance of your role, in making helpful, clear, brief, thorough, reliable, principled and compelling submissions, which will assist us to give better, and quicker, judgments.