



**Excellence in Decision-Making
Seminar for the Migration Review Tribunal and the
Refugee Review Tribunal**

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**The Hon. Justice Garry Downes AM
President of the Administrative Appeals Tribunal**

Best Practice in Drafting

**How to draft reasons for decision as efficiently and effectively
as possible – techniques for structure, organisation and
coverage of essential issues**

INTRODUCTION

Over the last few years I have written quite a few papers about administrative decision-making and writing reasons for decisions. Much of what I have said is applicable to all administrative decision-making. Today, however, I am conscious of the fact that I am talking to a specialised group whose decision-making involves some unique and special characteristics. I propose, accordingly, to tailor my remarks to the particular circumstances in which members of the Migration Review Tribunal and the Refugee Review Tribunal (the Migration tribunals) find themselves.

I can immediately think of five characteristics which distinguish the role of Migration tribunals' members from most other reviewing decision-makers. First, the Minister, in whose name the decision under review was made, is not

represented. There is no contradictor. The applicant may be unrepresented. Secondly, a number of special statutory requirements govern the procedure and, particularly, matters which would otherwise be determined in accordance with the rules of procedural fairness. Thirdly, fact finding can be very difficult because the outcome may depend on whether the applicant's account is believed and that account may not be corroborated and will not be tested by an opponent. Fourthly, the difficult task of assessing general information relating to political conditions in foreign countries may be important to outcomes, particularly in RRT matters. Fifthly, a decision is required to be given promptly, so that the time for reflection, available in courts and some other tribunals, is not present.

These factors invariably make the task of Migration tribunals' members procedurally more onerous than the role of judges and members of some other tribunals. Yet they must still find the facts accurately and apply the law correctly. All these matters have an impact on the process of writing reasons for decision. I will try, in this paper, to address these problems.

There are, nevertheless, many similarities in the process of writing reasons for judgment or decision. Judgments of the High Court of Australia relating to a refugee case bear more relationship to the reasons for decision of the RRT under review than they do to any newspaper article which reports the case. There are lessons to be learned about writing reasons which apply just as much to judges of the High Court as to members of the Migration tribunals.

I accordingly propose to divide this paper into three sections. The first section will be about writing in general. To some extent what I will say may be relevant to a novelist or journalist as well as a tribunal member. But I will try to direct what I say to methods which I think improve the quality of reasons although they may eschew, quite deliberately, some techniques which can improve the quality of general writing. The second section will address writing reasons for decision. This section will apply equally to what a Federal Court judge may write as to what you may write. The final section will deal with the special role of your tribunals. I hope to grapple with the assistance which can

be gained from templates and some of the problems they can create. I will talk about oral decisions which, in addition to making decision-making more immediate, can also make it easier. I will also deal with fact finding at the macro level (country information) and at the micro level (applicant's claims) and I will deal with the pressures and problems posed by the rigid statutory rules you must work under, including time constraints. I hope we can have an interactive session on these matters.

GOOD WRITING GENERALLY

Two distinguished novelists

Fifty years ago next year I was an English I student at Sydney University. I remember well my first essay, although I do not remember what it was about. What I do remember was that it was returned to me with uncomplimentary remarks about my writing style. The marker, I think it was Professor Gerald Wilkes (as he became), wrote that I should read a book by Robert Graves (*I, Claudius*) and Alan Hodge called *The Reader over your Shoulder*. I still have the 1965 edition. That sent me on a path of constantly trying to improve the quality of my writing as well as the quality of its content. I am still pursuing this goal.

What are some examples of good general writing. I thought I would see what I could find in Australian writing with links to migration.

Here is Thomas Kenneally's take on a "boat journey" to Australia:

The first Fleet's prodigious journey began in darkness at 3 a.m. on Sunday 3 May 1787. Phillip's instructions were to punctuate the voyage with calls at the Canary Islands, at Rio de Janeiro, his old home base, and then at Cape Town. The run down the English Channel took three days, with great suffering amongst the women on the convict deck of the Lady Penrhyn, the new-built ship whose timbers were still howling and settling and whose master, William Sever, was unfamiliar with her. Uncontrollable seasickness filled the prison's low-roofed deck and its acid, gut-unsettling stench. And, of course, no one could stand up, as the roof hung low, even between the beams. The unrecorded but certain anguish of the adolescent country girl Sarah Bellamy was matched by that of the teenager Mary Brenham, who at the age of fourteen had stolen clothing while babysitting.

(Thomas Kenneally, *Australians : Origins to Eureka* (2009) at p.65).

Ned Kelly, through Peter Carey, tells his daughter about his father's coming to Australia:

Your grandfather were a quiet and secret man he had been ripped from his home in Tipperary and transported to the prisons of Van Diemen's Land I do not know what was done to him he never spoke of it. When they had finished with their tortures they set him free and he crossed the sea to the colony of Victoria. He were by this time 30 yr. of age red headed and freckled with his eyes always slitted against the sun.

(Peter Carey, *True History of the Kelly Gang* (2000) at p.5).

Earlier, he told us about Oscar's migration to Australia, with Lucinda, in a little more comfort:

The saloons and cabins of the Leviathan were lofty and ornate. There was carving, scrollwork, plush. The grand saloon, in which Lucinda Leplastrier stood, quite alone, was almost three times her height, was sixty-two feet long and thirty-six feet wide. Two great funnels passed through this room but were covered with eight panels, four larger ones, which were mirrors, and four smaller ones, ornamented with paintings of children and emblems of the sea.

(Peter Carey, *Oscar and Lucinda* (1988) at p.207)

There is another delightful passage in *Oscar and Lucinda*:

The stool had three legs and stood against the sloping, flaking white wall of the attic in which Oscar slept. It was a sparsely furnished room, with just an iron cot, a rag rug, and a small spirit lamp. But it was a dry room, too, and it had a sweet, sappy smell which emanated from its ancient aromatic timbers. The stool was made from Devon oak and, while generally dark, was polished to a honey colour at its knees, the point at which two hundred years of hands had picked it up, swung it, set it down, always within this one cottage.

(Peter Carey, *Oscar and Lucinda* at p.25).

Peter Carey won the Booker Prize for both works. Thomas Kenneally is also a Booker Prize winner (*Schindler's Ark* (1982)). The passages are all easy to read and readily understandable, but more than that, they have style. Carey

uses an odd style of running sentences together with some errors of grammar to give Ned Kelly's account authenticity, but it is still easy to read. The pressure of administrative decision-making does not require, or even permit, the luxury of prose worthy of the Booker Prize. But reading well written prose is a joy, especially if it is your own.

Some Points of Style

It seems to me that the style of English writing which reads best in reasons for decision can be described in an alliterative string. The quotes illustrate all of them. It must be

Clear
Comprehensible
Concise
Cogent
Complete

One might substitute logical for cogent, but cogent adds a little more. Simplicity is also a characteristic of conciseness although simplicity itself is often a mark of good writing. That is not to say that complexity does not have its place – think of James Joyce's *Ulysses* – but simplicity is more often the hallmark of good reasons than is complexity.

I suggest that when we are writing our reasons we do keep an eye on how they will read and seek to write in a style that is easy and pleasant to read. In the end, I do not think it involves much more effort.

WRITING REASONS FOR DECISION GENERALLY

Recent Developments

The way reasons for decision are written in Australia has undergone a substantial change in the last decade or so. For a hundred years or more prior to that there was very little change. The model for most of my time in practice was a text written in continuous paragraphs, without headings. The

reasons began with a statement of the generic nature of the case. This might tell you that it was, for example, an action for damages for personal injuries or an application for a visa under s 65 of the *Migration Act*, 1958. The reasons would then record the history of the matter, when it was commenced, for example. Then would follow an account of the evidence, followed by an analysis of the law. Finally these two topics would be brought together in a conclusion.

The main problem with this model is that it does not serve its readers very well. It is generally not the legal category, or the precise section of the relevant act of Parliament, which most readers want to know first. What readers first want to know, is what the case is about and that is not, usually, what section or cause of action is involved.

The first response to this problem was the use of headings in judgments. They allowed readers relatively quickly to find what they wanted to know in the judgment. Traditionally, this problem had been solved by adding catch phrases at the very top of the reasons and by adding head notes in published reports. The point in a personal injury case might be a medical one relating to the prognosis for someone with a particular injury, or it might be who has standing to apply under a statute. These issues could be discovered from headings.

What this process did was to turn peoples minds to what it really is about court and tribunal proceedings that readers want to know. That turns out to be the issues in the case. These vary considerably between cases of the same category. Indeed, there may be similar issues arising in different categories of cases. Questions of causation, for example, can range over a wide variety of claims.

The advent of internet publishing of cases, however, made headings and even catch phrases less satisfactory. It is not so easy to flip through the pages on a screen. It is harder to find the headings.

Some must have asked why, if the issues are the most important matters of concern in a proceeding, they are not set out at the beginning. In response, nowadays, you will often find the issues in a case set out in the first few paragraphs of the reasons.

The new thinking has become so important that courses and seminars on writing reasons for decision, like this one, have become common. Professor James Raymond, a professor of English literature and rhetoric from the United States, has conducted courses on decision-writing throughout Australia and, indeed, the world. He has given his courses to judges of the Federal and Family Courts, to the Administrative Appeals Tribunal and to a range of other courts and tribunals through courses conducted by the National Judicial College of Australia and the Council of Australasian Tribunals. For those of you interested, an insight into some of Professor Raymond's ideas can be found in his article *The Architecture of Argument* (2004) 7 *The Judicial Review* 39.

Identify the Issues

The first step in decision writing and its companion decision-making should now be identifying the issues. This may have been done in the hearing, but even if it has, noting down the essential issues in your own way, in your reasons, is always essential.

The issues should be identified at the beginning of the reasons. There are two good reasons for this. First, this informs the reader what will be found in the balance of the reasons. Secondly, it sets the pattern for the reasons. If the right questions are asked at the outset of the reasons the balance of the reasons will logically deal with them. The issues should not be stated in a complex form but stated as simply as possible. The issues might be, for example, whether a person holds particular religious beliefs and, if that is so, whether the person has a well founded fear of persecution because of those beliefs. The first issue depends upon the beliefs and conduct of the applicant and the second on the conditions in the person's country of origin.

Set out the essence of the case at the start

At an earlier point in the reasons than where the issues are isolated it seems to me that there is another important matter to address. It will be addressed first in the reasons, but it will not necessarily be written first. The opening paragraph of the reasons should tell the reader what is the essence of the case. It should do this in a way which is comprehensible by the ordinary reader. It will give a snapshot of the facts and the issues, both of law and fact. It may state the result.

An example, from a recent decision of mine relating to HMAS Adelaide, is as follows:

The frigate HMAS Adelaide was decommissioned in 2008. The Commonwealth of Australia gave her to the State of New South Wales to be used as an artificial reef. The State was granted a permit under s 19 of the Environment Protection (Sea Dumping) Act 1981 (Cth) for the scuttling and placement of the ship as an artificial reef off Avoca Beach near Terrigal in New South Wales. The No Ship Action Group Inc. has sought review of the decision to grant a permit. The case against the artificial reef proposal was ultimately based principally upon concerns relating to potential harmful effects from red lead based paint in the ship and copper based anti-fouling on her hull. Our decision is to allow the scuttling of the ship to proceed, but to vary the decision by imposing additional conditions to avoid possible harmful impacts on human health and the marine environment.

The new approach to the opening paragraph of a decision takes part of its inspiration from Lord Denning MR, whose opening lines have become legendary:

“It happened on April 19, 1964. It was bluebell time in Kent.” (*Hinz v Berry* [1970] 2 QB 40)

“Old Peter Beswick was a coal merchant in Eccles, Lancashire.” (*Beswick v Beswick* [1966] Ch 538)

“In summertime village cricket is the delight to everyone.” (*Miller v Jackson* [1977] QB 966)

“In Bognor Regis there was years ago a rubbish tip.” (*Dutton v Bognor Regis UDC* [1972] 1 QB 373)

“This is the case of the barmaid who was badly bitten by a big dog.”
(*Cummings v Granger* [1977] QB 397)

“There is a ‘pop’ group of four or five musicians called ‘Fleetwood Mac’.” (*Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 WLR 61).

Lord Denning wrote in the old form of judgment writing – no headings, for example. So his decisions do not quite distil all the issues in one or two paragraphs. However, it is worth looking at the opening of the case containing his most famous first line (*Hinz v Berry* [1970] 2QB 40 at p.42):

It happened on April 19, 1964. It was bluebell time in Kent. Mr and Mrs Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.

On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr Hinz, was at the back of the Dormobile making the tea. Mrs Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr Hinz and his children. Mr Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs Hinz, hearing the crash, turned round and saw this disaster. She ran across the road and did all should could. Her husband was beyond recall. But the children recovered.

An action has been brought on her behalf and on behalf of the children for damages against Mr Berry, the defendant. The injuries to the children has been settled by various sums being paid. The pecuniary loss to Mrs Hinz by reason of the loss of her husband has been found by the judge to be some £15,000; but there remains the question of the damages payable to her for her nervous shock – the shock which she suffered by seeing her husband lying in the road dying, and the children strewn about.

The law at one time said that there could not be damages for nervous shock: but for these last 25 years, it has been settled that damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative. Very few of these cases have come before the courts to assess the amount of damages. O’Connor J fixed the

damages at the sum of £4,000 for nervous shock. The defendant appeals, saying that the sum is too high.

Writing style for Reasons for Decision

Lord Denning's opening lines are not a perfect example of the new way of writing. They contain irrelevant material, which, as we will see, is the very thing which must now be excluded. However, one can see why Lord Denning put it in. He did not want the reader to underestimate the sympathy he had for the Hinz family. What the paragraphs do, however, is give an account of the essential facts and explain the legal question which arises in a way that any intelligent reader could understand. And he writes it all in what is, to me, elegant prose. There are no long sentences, or their companion, qualifying thoughts in parenthesis. There are no long words. The words are mostly Anglo-Saxon, not French words taken into English during the Middle Ages. Most importantly, the whole reads easily. The simplicity and comprehensibility of the style makes it a beautiful example of English writing adapted to the writing of reasons for judgment.

I would not wish you to think that long and complicated sentences are anathema to reasons for decision. Sometimes they are essential and can be written to read easily if the logic flows with the prose. But we all know the paragraph-long sentence in which the English is going forward but the logic is going backwards, or jumping about. Two or three readings are required to understand the thought process.

The first principles, and the most important, are therefore, an opening paragraph which distils the essence of the case, followed by a paragraph or paragraphs which identify the issues. The rest of the decision addresses the issues in sequence.

Facts, not Narrative

An unavoidable distinction which is at the heart of writing reasons is the distinction between fact finding, on the one hand, and analysing the law, on the other, and then putting the two together. This division lies at the heart of

the old form of decision writing. It remains a vital division. But the old form of writing very often fell into chronological fact finding which did not fully address the issues. This form of decision writing contains a narrative of the evidence which often reflects the adjudicators notes of the evidence. This is undoubtedly a relatively easy way of writing reasons – recounting all the evidence, relevant or not. But it is not the most helpful way of writing reasons. Remember the words of Pascal (*Lettres provinciales*, letter 16):

This letter would not be so long had I had the leisure to make it shorter.

Like all Tribunals, the Migration tribunals are required, by statute, to set out their “findings on any material question of fact” (*Migration Act 1958* (Cth) ss 368 and 430). Findings of fact relate to issues, not to chronology.

Appellate courts have recently taken to criticising accounts of evidence in reasons for decision because it can be difficult to identify what are the findings of fact unless the adjudicator has peppered the account of the evidence with statements whether the evidence is accepted or not. A good example is the decision of the New South Wales Court of Appeal in *Digi-Tech (Australia Ltd v Brand* [2004] NSWCA 58 (61 IPR 184). They ask for:

A succinct analysis of the issues and their sequential determination, involving a clear and ordered statement of the facts found...

Nothing Irrelevant

If making decisions more accessible to readers, whether parties, appellate courts, administrators, lawyers and the general public, is the main object of the new method for decision writing, reducing written decisions to their essential elements is one aspect of this goal. Parties want the result and the shortest, clearest exposition of why. Appellate courts want the essence – they do not want the additional preparatory task of working out what was decided and why. Administrators want to know quickly whether a decision should alter the way they go about their work. Incidentally, this normative effect of tribunal decision-making is one of its most important functions. But

public servants will spend just so much time wading through each of the many decided cases which may be relevant to a task in hand before moving on. Lawyers looking for help in other cases want to know quickly whether the case assists them.

For tribunal decision-making there are two lessons. First, omit anything not relevant. The age of an applicant may be relevant. If it is not, there is no point in putting it in “for good measure”. When an application was commenced will almost certainly be irrelevant. Secondly, legal analysis should be kept to a minimum. Text books on law can be left to the High Court and courts of appeal.

Dealing with the Law

We should not, however, be carried away with the idea that we must always try to find a decided case to support any proposition of law we must address, particularly the meaning of a statutory provision. The High Court recently said this in *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286 at 311-312:

As this Court has so often emphasised in recent years, [they cited 6 cases] questions presented by the application of legislation can be answered only by first giving close attention to the relevant provisions. Reference to decided cases or other secondary material must not be permitted to distract attention from the language of the applicable statute or statutes. Expressions used in decided cases to explain the operation of commonly encountered statutory provisions and their application to the facts and circumstances of a particular case may serve only to mask the nature of the task that is presented when those provisions must be applied in another case. That masking effect occurs because attention is focused upon the expression used in the decided cases, not upon the relevant statutory provisions.

Kirby J made similar observations in *Shi* at [25]. These passages reflect a statement made a little earlier by Callinan and Heydon JJ in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45: (2006) 228 CLR 423 at 468 [131], when speaking of the application of freedom of information

provisions. See also *Australian Securities and Investments Commission v PTLZ* [2008] FCAFC 164; 48 AAR 559, at 566 [34].

By contrast we must always carefully isolate what is the question posed by a statute for the facts of the case before us. This, to my mind, is the most important trap for administrative decision-makers. In *Australian Postal Corporation v Barry* (2006) 44 AAR 186 at 190; [2006] FCA 1751 at [25] the Federal Court said this):

I observe incidentally that it is a salutary discipline for every statutory decision-maker to refer to the terms of the relevant statutory provisions and to identify each element of the statutory cause of action. Had the Tribunal in this case set out or paraphrased in its reasons for decision the terms of s 16 and s 19 [of the Safety, Rehabilitation and Compensation Act 1988 (Cth)] it is unlikely that it would have overlooked their critical elements.

The Critical Paragraph : Why? Because

There is one more test of the quality of reasons which applies to all decisions of all courts and tribunals. It comes from the very essence of what reasons for decision are. To be reasons for decision there must somewhere be the posing of the question “Why?” which is then answered with a passage or passages directed to that task. I call these the “because” paragraphs. There may be a number of subsidiary “because” paragraphs leading to a concluding “because” paragraph.

To my mind these paragraphs are the most interesting to write. This is where you persuade the parties, if you can ever persuade a loser, that you are right. More importantly, perhaps, it is where you persuade an appellate court that you are right. But above all it is where you can put your own name on a decision. “Because” paragraphs are not always easy to find in reasons for decision. Partly this is because so much reasoning in decision-making is syllogistic

All men are mortal

Socrates is a man

Socrates is mortal

There is little room for “because” paragraphs when logic is in play. Reasons for decision often reflect the syllogism and no more. But the difficult question in the syllogisms we deal with is not generally whether the argument is valid, but whether the minor premise is true. The issue we are constantly grappling with is whether Socrates is a man, or, more accurately, whether NQZL is Hazara. Our answers to these questions and our reasons, will appear in the “because” paragraphs.

Reasons for Decision in the Migration Tribunals

Although I spend most of my time in the Administrative Appeals Tribunal I do also sit on appeals in the Federal Court. I have sat on a number of appeals from the Federal Magistrates Court dealing with decisions of the Migration tribunals. In this way, on a number of occasions, I have sat on 10 or more appeals in a week. I accordingly understand something of the time pressures under which you work and the problem, peculiar to migration cases, particularly refugee cases, that it can be difficult to always keep the facts of very similar cases separate in your mind. Four cases in a row relating to Falun Gong membership is a good example.

Immediate Decisions

When hearing refugee appeals in the Federal Court I try to give oral decisions. If you give a decision immediately after a hearing the problem of confusing the facts of different cases does not arise.

Oral decisions are always desirable when the complexity of the case does not require reflection and there is no further material to refer to. They do, however, require some preparation in advance. Remember, however, that although we must go into a hearing with an open mind we do not have to have a blank mind.

Giving oral decisions is a skill that develops with experience. There must, however, be a start, and I encourage you to take it. In your case oral decisions as such may not be appropriate but you can always prepare and finalise a decision immediately after a hearing.

It is a mistake to try to write out a decision in advance. You are sure to miss out something that arises when you are hearing from the applicant. What is best is a list of topics and sub-topics to remind you of the issues. Simple sentences are appropriate. Complexity and parenthesis can get you lost. Logic is everything, but you still need your “because” paragraphs.

Templates

I know that you make extensive use of templates in your decision-making. Templates have much to commend them. They save time in dealing with identical matters which arise in every case. The definition of a refugee is a good example. However, they do have their problems. They work when the issue is identical, not when it is similar. Then the result may be that a relevant consideration is left unaddressed, or, worse, that everything from the template is included, whether relevant or not, and even then they may miss the way a point arises in the particular case. Decisions which contain a lot of irrelevant material taken from a template do not appeal to appellate judges. They also tell the judge, and any other reader, that this is not a section of the decision which the tribunal member has actually considered.

I hope we can discuss templates when I finish my formal presentation in a minute. To my mind templates should not get in the way of achieving most of the goals I have been describing. It may, however, be appropriate for consideration to be given to the templates used in the Migration tribunals I suspect that the ones in current use have been written in accordance with the old style of decision writing. Perhaps a new style for templates can be adopted which will result in reasons for decision which are more useful to applicants and appellate courts alike.

I would not, for example, begin my reasons with the phrase “This is an application for review of...” I do not think I ever have. Apart from the fact that it may be slightly boring to the reader, it directs attention, in the first paragraph, to the sort of material that I think can be dealt with later in a

decision. It rarely tells the reader what the case is about even if it does tell the reader what type of application it is.

There may, however, be good reasons for this approach. I would like to hear them.

I said I would also deal with fact finding. To my mind what is important is just that, fact finding, rather than recounting a narrative or history. When you find a fact, say so. The most difficult issue with fact finding is the process. I have a lot of sympathy with your task. Identifying the cases where applicants may not be telling the truth is a very difficult task. So is gleaning the relevant truth from what appears in country information. But those difficult topics, fortunately are outside the scope of my paper. I have, however, written about this topic. My papers are available on the website of the Administrative Appeals Tribunal.

CONCLUSION

I hope these thoughts have not been too controversial. The Migration tribunals do a very important job very well. If you continue in the future exactly as you have until now you will serve Australia very well. I hope, however, some of my thoughts may stimulate your thinking. Whether the process confirms you in your current thinking or causes you to make some changes does not really matter. I will have achieved my goal by getting you thinking for yourselves about decision writing and where you might improve.