

# Judging Justly

An address to the National Public Sector Appeals Conference at  
Brisbane on 5 September 2003 by the  
Honourable Alan Demack AO, Queensland Integrity Commissioner.

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Rockhampton's daily newspaper is The Morning Bulletin. If you take the sensible approach and rank newspapers by the quality of their comic strips, The Morning Bulletin is among the best. It includes that most Australian character, the ageless Ginger Meggs.

On 19 August 2003, Ginger and his mate were strolling down the street. Ginger says, "Video mobiles will never take off! They'll never find Osama Bin Laden! Bank shares are always a safe bet! Bruce Willis' days as a super star are over!"

His mate asks, "How do you know all that kind of good stuff, Ginge?", and receives the reply, "The oldies had friends over for dinner last night and I was allowed to stay up."

In our social conversation we pronounce judgement on a range of topics, guided by prejudice and preconception and with minds uncluttered with relevant facts. Instinctively, we know that the decisions we make in commerce or in government cannot be made like that. As appeals delegates, you have assumed the responsibility of judging justly, and this is a significant burden which you may feel at times is more than you can carry.

Fortunately in Australia we are heirs to many centuries of human experience in the science of judging justly. Today, I want to share some of that experience with you.

It is convenient to begin with Alfred the Great (871-899 CE). He took seriously his obligation to ensure that those who were appointed as judges acted justly. One source

says he offered training to judges. Another source says he ‘caused forty-four justices in one year to be hanged as murderers for their false judgement.’<sup>7</sup>

While some historians doubt this, the stated reasons for the execution of the judges give a clear indication of issues which are still very important today.

The following are some of the issues:-

**Due Process.** Judging is part of a social ritual, and every ritual has its strict procedures which are necessary if the ritual is to be efficacious. So Markes is hanged because he sentenced During to death following the verdict of twelve men who had not been sworn in as jurors. Cadwine was hanged because he had sentenced Hackwy to death after discharging three jurors who wanted to acquit Hackwy and substituting three fresh jurors. However, Cadwine’s error lay, not in substitution the three jurors, but in failing to follow the procedure of putting Hackwy’s life into their hands.

**Defining the issues.** Because judging requires a decision on issues about which the parties to a dispute cannot agree, it is basic to the purpose of judging, to know the exact nature of the dispute. So Rombold was hanged because he sentenced Lischild to death in a case where there was no indictment and no complainant.

**Proof of the issues.** Judging requires a decision about relevant facts. Freburne was hanged because he sentenced Harbin to die, although the jury were in doubt about their verdict.

Although these events make us pleased that we do not live in Saxon England, they also remind us that the desire for just judgements is not new. Our legal history helps us identify the matters which are important to us today. It also helps us see the things which are essential and those which reflect the values which are no longer acceptable. One example of the effect of changing social values is found in the way we require witnesses to commit themselves to telling the truth. Centuries ago this was done by requiring an oath sworn on a Christian Bible. Then Christians who conscientiously

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<sup>7</sup> “The Mirroure of Justices” by Andrew Horn (1903 edition) ch.V. sc. 1, para 108

believed it was wrong to swear such an oath were allowed to affirm the truthfulness of their evidence. Then people of other religious faiths were allowed to follow a ritual consistent with their faith. Then people of no religious faith were allowed to affirm the truthfulness of their evidence.

### **Defining the issues**

The need to define the issues is a useful starting point at which to analyse the things which are essential to judging justly. This is particularly important today when there is so much emphasis on resolving conflicts through mediation. It is essential that the precise nature of the dispute is known before mediation or a hearing begins. No one has yet devised a better way of doing this than by putting the issues down in writing. Even if the legislation under which you function provides for the informal hearing of some matters, it is still necessary for the nature of the dispute to be clearly identified.

This is particularly important when the dispute arises in the workplace over a promotion or a direction. The parties to the dispute may be involved in an ongoing conflict which will not be resolved by any decision about the presenting issue. The only issue you can resolve is the presenting one. The rest is a management problem. You will endeavour to decide the presenting issue in a way that does not inflame the ongoing conflict, and that is best done by ensuring that the presenting issue is clearly identified and fairly decided.

### **Due Process**

There are five obligations that must be met if due process for the hearing of appeals is followed.

1. The legislative provisions which establish the appeal tribunal must be observed. The tribunal cannot give itself jurisdiction which is larger than that given by the legislation.
2. The procedures relating to the institution and hearing of appeals must also be followed. Some of these will be found in legislation, in subordinate legislation and in directives.

3. The legislation, directives and codes of conduct which apply to the issues raised by the appeal must be followed.
4. Each party must be allowed to present the evidence which is permitted by the appeal procedure, and to answer any material or argument presented by the other party/parties.
5. The tribunal should prepare and deliver reasons which provide a rational basis for its decision.

### **Fair Hearing**

It is basic to a tribunal's work that each hearing is conducted in a manner which is fair to all parties. There are three obligations which must be observed if the parties are to leave the hearing with a sense of the tribunal's fairness.

1. The tribunal should begin the hearing with an open mind that is responsive to the material and arguments presented by the parties.
2. The tribunal must listen carefully to the evidence and arguments presented by all parties.
3. The tribunal should disclose to the parties any material or evidence which the parties have not dealt with but which may influence the tribunal's decision.

The second of these obligations is particularly demanding. It is easy to be patient and courteous with people who are also patient and courteous. However, not all parties or witnesses are like that. It is important that patience and courtesy are extended to:

- a) Parties and witnesses with language difficulties. Behind the language barrier there may also be cultural attitudes and perceptions quite different from those of the tribunal members.
- b) Timid parties and witnesses.
- c) Parties and witnesses with physical and/or mental disabilities.
- d) Parties who are unfamiliar with the tribunal's procedures.
- e) Parties who are over familiar with the tribunal's procedures.

- f) Parties whose cultural perceptions about tribunals are different from the way the tribunal actually functions.
- g) Parties who want to use the tribunal as part of the hostilities being waged within an agency.

### **Independence**

One of the hall marks of a free society is that the members of courts and tribunals are not only expected to act independently, but do, in fact, act independently. Four obligations encourage that independence.

1. The tribunal must be committed to intellectual honesty, both in deciding what issues have been proved and in applying the law to those issues. The tribunal member's conscience and mind must not be any one else's property.
2. The tribunal must accept the obligation to reach its own decision, the fundamental duty of a decision maker.
3. Tribunal members must refuse any gifts or favours which would raise the appearance of bias in the mind of a reasonable person.
4. Tribunal members should disclose to the parties any personal interest they have in the issues raised in the appeal and any personal relationship they have with a party, witness or representative involved in the hearing. Generally it is enough to allow the parties to decide if the interest or relationship creates the impression that the hearing may not be impartial. Sometimes a tribunal member may conclude that the interest or relationship is such that the member should not be involved in the hearing and should stand aside.

### **Competence**

All of a tribunal's proceedings should be conducted with dignity. That allows the parties to present their cases without undue pressure. If the tribunal has more than one member, it allows the tribunal members to function as a team. To achieve this, the tribunal members need to display confidence. If the tribunal dithers or raises side issues or appears to listen only to its own voice (voices), dignity is lost and the parties will leave the hearing with a sense of injustice.

Four things are important:-

1. Know the rules and procedures that apply to the hearing. If a record is kept, make certain it is complete and comprehensible.
2. Understand the issues in an appeal and encourage the parties to confine themselves to those issues. This requires firmness and tact. There are some people who become involved in appeals because they cannot grasp the issues which have created a dispute. It is almost impossible to confine such a mind to relevant issues.
3. Use plain English. Do not imagine that everyone appearing before the tribunal has a clear understanding of the relevant legislation or directives, or that they have our much beloved acronyms on the tips of their tongues.
4. Speak sparingly. Francis Bacon included in his essay "Of Judicature" the observation;  
"An over-speaking judge is no well tuned cymbal."  
What was true at the beginning of the seventeenth century is true at the beginning of the twenty-first century.

### **And in conclusion**

Most courts and tribunals adjudicate upon disputes that arise out of past events involving people who no longer have any contact or relationship. Public sector appeals tribunals deal with disputes between people who may well have to continue a relationship in the work place. The way in which the appeal is heard and decided will have a significant impact on any continuing relationship. If all parties leave an appeal hearing believing they have been judged justly they may be able to have a satisfactory relationship in the work place. If there is a sense of injustice arising from the way the appeal was heard, the consequential management problem will be more than the tribunal will want to know about. Although the hearing of the appeal may have concluded, the dispute will not have been concluded.

May all of your conclusions bring contentment and peace.