Judgment Writing Protocol for Intermediate Appellate Court Judges

A. Preamble

Introduction

1. Since 2011, a number of judges of intermediate appellate courts have discussed in telephone meetings the utility of holding a conference for appellate judgment writing. These meetings were held at the suggestion of the NJCA. At the AIJA Appellate Judges' Conference in Brisbane in September 2012, there was general support for a conference dealing with judgment writing.

2. After the Brisbane conference a number of judges met informally and came to the view that a significant amount could be achieved if a small working group of judges met to draft a protocol for circulation to appeal courts and appellate judges in Australasia. Such a group was established and a draft protocol was formulated after discussion.

3. The aim of this protocol is to act as a guide for appellate judges in the efficient despatch of appellate business.

4. The need for and the contents of the protocol are made clearer by this explanatory preamble which not only provides the above context, but also identifies the issues of concern that the protocol seeks to address.

Problems confronting appellate judgment writing and adjudication

5. The processes and facilities of modern word processing, electronic research and electronic publishing have had effects upon judgment writing. These effects come from a number of possible factors. The care needed in the production of all judgments, since they are now available to and searchable by the whole world, is one such factor. The easy ability to find, read and incorporate reference to multiple citations of authority is another. There is a perception of increasing length, detail and density of many appeal judgments. It is not uncommon to see propositions with little doubt attending them supported by multiple references to authorities, which all stem from one seminal authority.

6. A related matter is the elaborate recitation of legal principle, when the case does not strictly call for such analysis. It may be that a judge, for his or her own education in perhaps a new area, has come to grips with a significant body of law. That does not mean that it must be recited if there was no or limited debate about it in argument.

7. Unnecessarily long or unnecessarily legally complicated judgments affect courts and the public. Courts are affected by the imposition on

judge time: not only is significant time taken to write and check a long judgment, but colleagues on a collegiate bench have to master what is written, in order to agree or disagree with it. The following extract from a concurring decision of Circuit Judge Edmondson in the 11th Circuit in *Holsey v Warden of Georgia Diagnostic Prison* (13 September 2012) encapsulates some of the problems flowing from **unnecessarily** long and complex judgments:

> "I stand with Judge Carnes about the correct judgment in this appeal:
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> AFFIRM the District Court's judgment to deny habeas corpus relief to the state prisoner petitioner. I – very respectfully – do not join in Judge Carnes's erudite opinion. I stress that it is not because the opinion says something that I am sure is wrong or I am sure is even likely wrong. I agree with much of the opinion, at least. But the opinion says a lot and says more than I think is absolutely needed.
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> In my experience, longish opinions always present a strong possibility of error lurking somewhere in the text. That the opinion writer is a skilled and careful judge does not eliminate the risk. Furthermore, no one wishes to join in an opinion that they do no understand fully. It is hard, time-consuming, painstaking work for the panel's other judges to check long opinions, line by line, cited cased by cited case. (Of course, always other cases are awaiting decision and also demand the judges' time and attention.)[1]
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> Moreover, long opinions, even if correct in every detail, generally make it harder for readers to separate a holding from dicta (or less than dicta: words only of explication and nothing more). The confusion of holding and dicta makes correctly deciding future cases more difficult, when judges are looking back for precedents.[2] Sometimes, the oddest bits are lifted out of opinions – especially the longer ones (often words as to some peripheral point) – and later quoted flatly as law: as if someone was quoting a

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1. It seems to me that the incidence of long opinions has been on the rise in the last decade or, at least, more are coming across my desk. I should say that I, broadly speaking, do not agree that the length of an opinion necessarily reflects the thought, labor, and care that has been invested by judges in their endeavour to decide the case correctly. The shorter opinions often reflect the greater study and though leading up to the ultimate decision. Mark Twain touched on a related idea: 'If you want me to give you a two-hour presentation, I am ready today. If you want only a five-minute speech, it will take me two weeks to prepare.' Nevertheless, that some cases might truly demand long opinions, I do not doubt. And I believe I understand why Judge Carnes has gone longer in this case.

2 Longer opinions, simply by virtue of their length, burden the Bar whose members try to stay current with the Court's thinking. Also, I worry that long opinions are generally less able to be fully understood by the public than are shorter opinions: some loss in transparency.

statute. So, I feel more comfortable today just focusing briefly on my own view of a vital point."

8. The productivity of the Court is thus affected by the authoring judge taking longer than was necessary to write the judgment and by the length of time needed by colleagues to assess it, or to write their own judgments if that can be done more quickly than analysing a colleague's long reasons. Further, the longer colleagues have to wait for a first draft, the harder their task in returning to the topic, even more so if the reasons include material that is strictly unnecessary or beyond the argument that took place.

9. The profession must also read and analyse the judgment. That takes time. That costs money. If the judgment is only a recitation of accepted principle, it adds nothing to the stock of legal knowledge other than its own mass.

10. The other points made by Circuit Judge Edmondson are also valid.

11. Further, if litigants see a case decided with complex detailed legal references when they did not see the appeal so argued, it may tend to undermine their confidence in the system. They might say to themselves: I thought this was legally straightforward; why did my lawyers not tell me it was so complicated?

12. Unnecessary lengthy judgments may be avoided whilst at the same time fulfilling their usual essential purposes. Those purposes include informing the parties and public of the reasons for the decision, facilitating the losing party's assessment of the prospects of any appeal, and facilitating the disposition of any such appeal: *Why Write Judgments* (1992) 66 ALJ 787 (Sir Frank Kitto).

13. The above should not be seen as a call for less scholarship or a reduction in the quality of appellate writing. There are ample cases in which important legal writing must be done by intermediate courts of appeal. Intermediate courts of appeal are not ciphers in a closed system of self-referential principle. It is important, however, to ascertain with discipline and rigour when detailed legal writing is truly required. This will often, but not always, be reflected in the argument. Sometimes argument is inadequate, but real legal issues arise that require treatment by the court. Sometimes, however, there is no real debated about a principle and yet legal consideration of the uncontested principle occupies a significant portion of a judgment.

14. With these issues in mind the following protocol is suggested for consideration by all intermediate appellate court judges, in civil and criminal appeals.

B. Protocol

Preparation for the appeal

15. How one prepares for an appeal depends on time and resource commitments. Assuming written submissions have been filed, a minimum requirement should be that all members of the bench read the primary judgment, the notice of appeal (and like notices of contention and cross-appeal if relevant) and the written submissions.

16. It is desirable that the bench meet to discuss preliminary views before the hearing. At this meeting, if primary writing responsibility has not been otherwise allocated, that question especially if views are changing form those expressed after court should be addressed.

17. If the matter appears to be one for ex-tempore decision one judge should take responsibility for preparing a preliminary draft.

18. Discussion is essential. This will throw up what views exist.

After the appeal

19. There should be a record made by each of the judges as to the views each judge expressed after the appeal. An immediately dictated outline is very helpful in cementing a framework in the memory, even if provisional, when one may not return to the appeal for a little time, especially if waiting for a first draft from a colleague.

20. As the draft or drafts are being prepared, judges should if possible discuss matters concerning them, especially if views are changing from those expressed after court. This has the advantage of cementing the issues in the memory of those not preparing the first draft and, if views are changing, alerting them to the fact.

21. Whether judgments are better written jointly or individually with concurrence or dissent is a question not suitable for general propositions. Some people write and think well together or with others, some do not. Joint preparation of opinions has the advantage of regular discussion and co-operative contemplation, but it can be slower. It should be considered particularly in difficult or contentious appeals, where the court has conflicting precedents, and where the reasons are clearly divisible.

22. Draft judgments should be circulated as soon as possible; even in difficult cases a period of no more than eight weeks should be the goal for the first draft, with a goal of no more than 12 weeks for publication, provided that the court's resources and listing of appeals allow for such a goal. Colleagues receiving draft judgments should give them priority to the extent that is possible.

Judgments

23. Judgments should be as short as they can appropriately be made.

24. In considering the disposition of any appeal consideration should be given to some fundamental questions: does the disposition of this appeal require the resolution of any debate about governing legal principle? If so, to what extent? What do I really have to write about in terms of law and fact?

25. Once the nature and limits of any dispute about legal principle are identified, any other assumed or uncontentious legal principles can also be identified.

26. The citation of authority to support uncontentious legal principle should either be non-existent or kept to an essential minimum preferably by reference to seminal authority, and its expression should be accompanied by a statement that it was not in contest.

27. Legal principle in dispute should be dealt with to the degree and at the length that the dispute requires.

28. If the disposition of the appeal does not require the resolution of any debate about governing principle, the framework of the judgment should reflect that fact and should omit lengthy statement of the law, being limited to an express statement that such principles were common ground between the parties and not the subject of argument (of course as long as there is no apparent misconception of the law – which should be taken up with the parties).

29. The resolution of factual questions on appeal is often a most time consuming and difficult task. Full recourse to the primary judge's factual analysis should be considered when there is no challenge to it. Whether that involves quotation from the underlying judgment or a re-crafting and re-ordering of unchallenged facts will be a matter of choice. What should be avoided is the immersion into the primary evidence to rewrite "from the ground up" factual matters that were not the subject of challenge. Nevertheless, it should be said that the author of the first draft often has a heavy responsibility in ensuring that all relevant facts for the resolution of the appeal are set out.

30. Much time is often spent presenting the framework or context of the questions to be decided: the background facts, the statutory framework, the approach of the primary judge, the appellant's submissions, the respondent's submissions and, finally, the disposition of the appeal. The disposition may be quite short and the prefatory framework very long. This way of approaching the matter may be brought about by the writing of the judgment in small blocks of time and thereby building a structure. It is, however, to be avoided,

if possible, because it produces judgments that are longer than they need to be.

31. Such framework is often unnecessary. For instance, if the appeal is to fail, there is no need to separately set out the respondent's submissions. After the primary judge's impugned approach and the nature of the appellant's attack are identified, the issue can be disposed of and due reference made to the respondent's submissions in that disposition if necessary.

32. It is often the case that if the author can be clear as to how and why central questions can be decided before he or she starts to express the text of a judgment, the reasons can be shorter in the focusing of ideas and expression. In other cases (often the resolution of factual appeals) it is helpful to "think through the end of the pen"; but even the, when resolution is reached, such a judgment may well be able to be shortened.

33. In particular in cases where there is legal question requiring resolution, the possibility of extempore resolution should be considered. In many cases, it will take only a moment's reflection to realise that an extempore decision is not possible. Other cases, if pared down to essentials, can be resolved extempore or by oral reasons after a short delay of hours, overnight or a day or two. The turning of one's mind to this, as a matter of habit, does tend to increase the use of extempore judgments.

34. If the bench is confident of the outcome (and unanimous), it may be appropriate to make dispositive orders and reserve reasons.

35. Due regard must also be given to what was said by the High Court in *Kuru v New South Wales* [2008] HCA 26; 82 ALJR 1021 at [12] where Gleeson CJ, Gummow, Kirby and Hayne JJ said:

> "…This Court has said on a number of occasions that, although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate court has dealt with all grounds argued and an appeal to this Court succeeds, this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below."

36. What is required is consideration of whether to deal with all grounds of appeal. Many factors will impinge on this consideration, such as: the character of the issue, its complexity, the drain on court resources, the delay to be cause and the quality of argument assistance provided. There will no doubt be others.

Giving effect to this protocol

37. This protocol is to be given effect by independent decisions of each intermediate appeal court judge to apply it as each judge considers appropriate in particular cases. It is expected that compliance with the protocol will be encouraged by peer review, since prompt, succinct and focussed draft judgments prepared in compliance with the protocol would reduce the workload of colleagues.