Judgment Writing: Get Smart

The Hon Justice Robert Beech-Jones[1]

On the evening of 30 November 1983, a hitherto unknown organisation bearing the name the "Australian Secret Intelligence Service" announced its existence to a bewildered Australian public by conducting a "training exercise" at the Sheraton Hotel on Spring Street, here in Melbourne.

The "training exercise" was a role-play of a hostage rescue. Things got a little out of hand when the "secret agents" used a sledgehammer to break open a hotel room door on the floor in which the "hostage" was being held. When the hotel manager went to investigate he was met by one of the "secret agents", who was wearing a mask. They jostled one another in the lift as they made their way back down to the Hotel's entrance. Other agents wearing masks emerged from the lift on the ground floor and startled the staff and guests by parading weapons including two sub-machine guns through the foyer.[2]

The Victorian police were less-than-impressed and asked the Commonwealth government to reveal the identities of the agents so they could charge the agents with a smorgasbord of offences. The agents sought an injunction in the High Court of Australia to stop that happening. They failed. The facts I have just recounted found their way into the stated case.

In a flourish, Sir Anthony Mason commenced his judgment by describing the stated case as having "the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart".[3]

As I (ironically) prevaricated over what to say in this speech, I was thinking of Maxwell Smart. One thing I wondered was whether I was so old that the generation of judges who would be attending this conference wouldn't know who Max Smart was. For those of you who don't, he was the main character of a television show entitled *Get Smart* that debuted in 1965. Max Smart was a well-groomed but bumbling secret agent who left a trail of disastrous accidents in his wake. The show was a slapstick spoof of the

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1 Justice of the High Court of Australia. This is an edited version of a speech delivered to the Judicial College of Victoria program "The Art of Judgment Writing" (20 February 2025).

2 *A v Hayden* (1984) 156 CLR 532 at 533–534.

3 *A v Hayden* (1984) 156 CLR 532 at 550.

CIA and the FBI that was endlessly replayed on Australian TV throughout the 1970s and '80s. At the time it was first released *Get Smart* was seen by some as subversive. To my generation, it was funny and harmless, although the program's portrayal of Max Smart's intelligent, resourceful, and massively underappreciated female sidekick, Agent 99, remains ahead of its time.

Now this speech is getting quite meta because I have already broken one rule about judgment writing by embarking on a long and rambling opening. Anyway, the reason I was thinking of Max Smart was that he would often infuriate his poor boss known as the Chief (insert the name of your head of jurisdiction here) by having a dialogue about the relationship between what, when, how, why and who. For example:[4]

Maxwell Smart:

> Yes. Well, what you're saying, Chief, is that now that we know how, all we have to do is find out who, when and where.

Chief:

> No, forget about where. When we find out how, we'll know where.

...

Maxwell Smart:

> Yes, I understand, Chief, but I don't think I quite agree with you. You see, all you've told me is that we know how, but we don't know who, when or where. So that tells us that we don't know anything.

Chief:

> [blinks] What?

Maxwell Smart:

> Well, we know who, and that doesn't tell us when, so why should how tell us where?

And on it went.

When it comes to judgment writing, as the Chief said, we can forget about the where. Provided you keep it confidential, write judgments where it works for you. Instead, I

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[4] 'Shipment to Beirut' (Season 1, Episode 29), *Get Smart* (Paramount Studios, 1966) at 0:03:17–0:03:56.

am going to talk about the when, what, how and who, sometimes together, sometimes separately, and hopefully make a little more sense than Max did.

Like many speeches on this topic, what follows is a collection of the idiosyncratic, the anecdotal, and the impressionistic, and I deliver it having googled most of you to discover that you come from an impressively broad array of jurisdictions. So, to paraphrase a jury charge: please feel free to accept or reject what I say; the weight you give to it is a matter for you and you alone. Feel free to ignore anything I say, particularly if it contradicts what you are told in the substantive sessions of this conference.

Why, when and how to deliver an ex temp judgment?

Why deliver an ex-temp judgment? Now, what I mean by an "ex temp" (ex tempore) judgment is oral reasons delivered either immediately after argument or after a short delay.

Some of you from the Magistrates Courts might be asking: is there any other kind of judgment? Is there a world in which judges really get time to prepare their decisions? For the rest of you, the benefits of "ex temping" will no doubt be obvious. If a judge sitting at first instance reserves every decision, especially every interlocutory decision, they will sink under the weight of their reserved judgments. If you are in a hearing or a trial and are repeatedly reserving interlocutory decisions, you will spend every night writing the decisions while you try to keep the trial moving, or the trial will come to a halt while you go away and think for a few days. At the Bar I had an experience with a judge who adjourned a long hearing for a week and half to write a treatise on expert evidence that did not actually resolve the objections. After this happened a couple of times, the wheels had well and truly fallen off and the estimate of the hearing quadrupled.

There are of course reasons not to deliver an ex temp judgment; you can get it wrong and, although there is scope to clean up the wording, you cannot alter the reasoning.[5] Most importantly there are some cases where, even if the issue is simple and the answer straightforward, the interests of justice may warrant the parties having the

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[5] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329 at 344 [30]–345 [31].

assurance that the judge reflected on the submissions and the outcome before making a decision. I struggled to articulate the features of that type of case, but you will develop a feel for the importance of the outcome of the case to the parties and what they seek in having a court determine the issue. For example, the answer to a dispute between a heavily-invested individual and the State may be straightforward, but there might be a reason to delay giving a negative answer to the individual compared with a ruling against the State. On the other hand, two companies squaring off against each other will likely welcome an immediate answer to a single-issue dispute.

So, when to deliver an ex temp judgment? I have already mentioned Magistrates Courts where, in my admittedly rusty experience, magistrates usually have little choice but to deliver decisions immediately or almost immediately. And, of course, some trial rulings don't require reasons so we can put them aside.

Otherwise, for first instance judges the decision when to deliver an ex temp judgment mostly reduces to the statement, "ex temp the small stuff". Not all interlocutory rulings can be "ex temped"; some are tricky and the outcome may sometimes be crucial for the rest of the trial, such as applications to amend the pleadings or to adduce tendency evidence. You might be able to deliver answers to those applications with reasons to come if you need the trial to keep moving but, as I said, if you do that too often, the judgments will pile up.

It's not just rulings during a trial or a hearing that can be delivered ex temp. Many of you will hear numerous applications or even final hearings on topics where the principle is clear and you are familiar with the area of law; for example, motions for particulars, statutory demands or even appeals on errors of law especially when the appeal looks and feels like an attack on the facts.

You may have a firm idea in advance of the hearing that you will deliver your decision ex temp, but always be prepared to change your mind. In my third year at the Bar, I ran a short case before one of New South Wales' most experienced equity judges. After submissions finished that judge duly embarked on delivering an ex tempore judgment. He got halfway through, stopped and said "no, I am going to reserve". He looked a little embarrassed. In hindsight it was excellent judging to have the courage to stop even at the risk of embarrassment. The performative function of our role is of far less significance than doing substantive justice.

How to "ex temp"? Well, it's a bit like advocacy. The way to start doing it is to start doing it and most of us are not very good at it when we first start. If I can suggest one strategy—start with a common type of judgment you will deliver and sketch out in advance a general template to be followed, such as: (i) what the motion / application is about; (ii) the nature of the proceedings; (iii) the background to the motion; (iv) the applicable rule and principle; (v) the parties' arguments; and (vi) the application of the rule. No doubt there are similar structures for summary hearings of criminal charges or reinstatement decisions. As you receive material or hear submissions you can place a number on the document or in your notes as to what section of the structure that document or submission relates to.

If you don't have a jury and you need to adjourn for an hour or two after the argument before you hand down your decision, specify a time when you will come back that day to deliver the reasons. Go back to chambers, close the door and write down the missing bits from the template. Many of these types of judgments will not get better with time.

When do you start writing a reserved judgment?

As a hearing or an appeal unfolds it's natural to start thinking about the judgment. This is especially so with those cases that, due to their size, subject matter or the lack of assistance from counsel, you feel that rising sense of panic in your stomach telling you that writing this judgment will be a nightmare. Try to banish that thought from your mind during the hearing because it can distract you from following the evidence. Just as you start plotting out a wonderful structure of your groundbreaking judgment on the rule in *Cherry v Boultbee*[6] and its relationship with equitable set off you might miss that point of the cross examination where the witness completely falls in a heap and concedes they concocted a critical document.

There may be some courts where the usual practice is that a judge hears the case and is then given enough time out of court to write it up immediately. If that is the case; well, lucky you. For everybody else it's a bad idea to let the hearing finish, put the pile of materials in the corner and only first think about the judgment when you pull it out of the queue sometime later. The amount of time you need to read back into the case

6 (1839) 4 Myl & Cr 442; 41 ER 171.

will be directly proportional to the time since you put it on the shelf and inversely proportional to the amount of time you invested during and immediately after the hearing in preparing to write or actually writing the judgment.

There are two things that I suggest you consider doing during the trial or hearing that can help with judgment writing.

The first is mundane. If a witness is taken to a document then during the hearing annotate your copy of the document with at least the name of the witness, whether it was in chief, cross-examination or re-examination, the day of the hearing and the time. If you later get a transcript, the day and time will help you find the transcript reference to the document. You can enhance this by formulating a numbered list of topics and issues for the case and including that number on the annotation.[7] If you do this, then when you later come across the document in writing your judgment you will know which witnesses, if any, were taken to the document and what the document related to. You will also either have a shorthand record of what happened or at least a way of easily finding out what happened in the transcript. The same approach can be adopted with oral submissions that refer to the documents.

The second bit of advice concerns what I call the "precious 45" and this is a case of do as I say, not as I do. The "precious 45" is that 45-minute period that immediately follows the conclusion of the hearing for the day. When that happens most of us, including me, have an overwhelming compulsion to (1) get coffee; (2) check our phones; (3) pay a bill, book a restaurant or order football tickets; (4) wander into a colleague's room to break his or her train of thought or (5) all the above. What happens during the precious 45 is that your focussed understanding of the evidence and submissions in granular detail dissipates from your mind. By around an hour later you are left with just a fuzzy understanding of how the day went.

So, instead, it will be invaluable if you can come out of court and write an immediate brain dump of the intricate points that are either fresh in your head or in your notes, but with additional context and some exhibit or case references that will help explain to your later self what that brain dump means. It's even better if you can also work on, and then refine as you go, at least the structure of the judgment noting where and how

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[7] See Justice Jayne Jagot, 'Notes on Judging' (Speech, National Judicial College of Australia Conference 2023, 26 March 2023) at 5.

those points fit into that structure. The likelihood is that by the end of the hearing you will have a judgment structure with the critical points made during the hearing already slotted in.

So, when do you <u>not</u> finish that judgment?

I know that question sounds strange but there are some judges who can be too quick. The single greatest concern for most judges is their number of outstanding judgments. For a minority of judges getting that judgment written immediately following the hearing becomes an obsession or at least an ironclad habit. If you are one of those judges then I salute your discipline. However, leaving aside urgent cases, it might be a good idea once you have finished to put the judgment down, let it simmer for a few days or even a week, then pick it up again and see if it has truly engaged with the cases put by the parties.

One sign that this might be a good approach is if you find yourself continually concluding that the losing party did not just deserve to come second but that their case was hopeless. I think most of us become confident in the decision we have reached, and it is true that some cases are hopeless. However, the chance that a judge is only allocated easy cases is very low. If you are continually concluding that the unsuccessful party's case was worthless it might be that, in your rush to publish a judgment, you are rushing to judgment.

Who am I writing to?[8]

A common bit of advice given to judges in civil cases is that judges give reasons to explain to the loser why they lost. That advice is useful in that it reminds us that the unsuccessful litigant will not be happy but will at least know that they were heard. The advice provides some guidance for the content and style of a judgment such as the need to address the case a party makes and the avoidance of harsh findings including findings on credit or fraud unless they are necessary.

However, the advice is incomplete. One reason it is incomplete is because it does not tell us much about the actual or hypothetical losing party reading that judgment. Who are they? Is it a discerning reader of legal reasoning or someone else? A former Chief Justice of Western Australia wrote that judgments "must be coherent and

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[8] Or, more correctly, "To whom am I writing?"

comprehensible to the average reader without legal training".[9] Anecdotally I have heard some appellate judges describe their target reader as an Arts graduate; not someone learned in the law or conducting a critique of the decision but able to engage with and follow the logic of a reasoned judgment. I think that approach is a good guide, although whom a particular decision should be pitched to varies with the type of decision being made.

In some areas, such as those involving children, judges rightly work hard to explain their reasons to a less-sophisticated reader[10] and, as I will come to, in crime, words can be bullets. In other, mostly technical areas, the terminology and concepts are so baked-in that there are dangers in translating them to hit a particular target; I welcome anyone trying to convey all the nuances of the word "jurisdiction" in plain English. Sir Anthony Mason observed that some judgments are written for the legal community rather than for the parties and the community at large.[11] All up, horses for courses.

For those of us who are lucky enough to have associates, then like me I suspect you find their CVs intimidating. They are a great resource not just to edit or proof judgments but to review and engage with them. I don't think that associates are there to argue their point of view about how a case should be decided. Equally I also don't think their function is simply to agree with us. They are an incredibly useful sounding board for assessing the readability and logic of a judgment, as well as telling us how people who are neither judges nor even old might digest the reasons. The short point is that if your associates can't follow the reasoning in your judgment, then that's your problem not theirs.

Another reason why the advice to explain to the loser why they lost is incomplete is that judgments are not just written for the parties. They are an exercise of public power. As judges, we are accountable for our work; we do it in public and we provide our decisions to the public, even if for good reason not everyone has time to read them. Ironically, the categories of judgments that best illustrate that judges exercise public

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[9] Chief Justice Wayne Martin in Ginger Briggs (ed), *Judicial Decisions: Crafting Clear Reasons* (National Judicial College of Australia, 2008) at 66.

[10] See the example given Mortimer J (as her Honour then was) in 'Some Thoughts on Writing Judgments in, and for, Contemporary Australia' (2018) 42(1) *Melbourne University Law Review* 274 at 292–295.

[11] Sir Anthony Mason, 'The Courts as Community Institutions' (1998) 9(2) *Public Law Review* 83 at 85–86.

power, and which often have the widest and most disparate audiences, are those where the judge has the least amount of time to prepare them, namely sentencing and bail judgments.

I will leave bail judgments for another day, but I will say something about sentencing judgments. My experience is mostly with New South Wales and the Commonwealth, but I think it's also true of Victoria and most other States and Territories that the statutory sentencing regimes impose onerous obligations on what sentencing judges must do or not do and consequently must say or not say. One increasingly important feature of the sentencing landscape has been the delivery of victim impact statements during sentencing hearings.[12] They are commonly described in sentencing judgments.[13] Another feature of sentencing judgments is that they produce an outcome that most members of the public either do, or if asked can, form an opinion about. If you asked someone in the street how they felt about the rule against perpetuities and its recent application by the Supreme Court then I doubt that it would elicit a response. However, if you ask them whether a 19-year-old with no criminal record who stole two cars should be given a custodial sentence then I expect they will answer, and those answers will vary.

Sentencing judgments potentially speak to a very wide audience: the offender, the prosecutor, the victim, the police, the Court of Appeal, the tabloid media, talkback radio, the rest of the media and ultimately the public. Sentencing judgments document a wrong, describe an offender's life, bear witness to suffering, identify the legal principles and then attempt to resolve all that and conflicting sentencing objectives in a single outcome. Many judges who sit in crime will deliver hundreds of sentences and sentencing judgments during their career. Most of those judgments will not be read by anyone other than the parties but every now and then, and often when one least expects it, a sentencing judgment or at least a sentence will go viral. In the balance of this speech, I have a few suggestions that might be useful for those of you who sit in crime. At this point I just note that the limited time available to prepare sentencing

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[12] See, for example, in Victoria: *Sentencing Act 1991* (Vic), Pt 3 Div 1C; *Victims' Charter Act 2006* (Vic), s 13; *Children, Youth and Families Act 2005* (Vic), ss 358, 359, 359A. See, for example, in New South Wales: *Crimes (Sentencing Procedure) Act 1999* (NSW), Pt 3 Div 2; *Crimes (Sentencing Procedure) Regulation 2024* (NSW), Pt 2 Div 2.

[13] See, for example, *DPP v Riley* [2024] VSC 777.

judgments reinforces the importance of at least having an established but not inflexible structure for the reasons settled in advance.

Lastly, in some cases one person that you are writing to is yourself. The necessity to write reasons for our decisions restrains our resort to instinct or gut feeling. The preparation of reasons can, or at least should, expose and clean out any reliance on subjective factors that are irrelevant to the case or modes of analysis that we might hold onto that are simply wrong. Justice McHugh often described a process whereby he thought a particular outcome of a High Court appeal was correct but, when it came down to it, the judgment "will not 'write'"; that is, that outcome could not be reconciled with the existing law and the facts of the case.[14]

Up until this point in my speech, I have been a fairly content-free zone, but I will suggest one thing for you to consider including in all judgments, no matter how small or large. In stating why reasons are essential to the common law judicial method, Justice McHugh stated the "reasons must declare and apply a principle or rule at a level of generality that transcends the facts of the case and enables other courts to decide other cases, identical in principle but not in detail, in the same way."[15] That statement was applicable to the High Court but, translated to other courts, it emphasises the importance of stating the applicable general principle independent of the facts of the case. To state the principle being applied in that way, even in ex temp and sentencing judgments, reinforces to those reading and listening, and at some point there will be people reading or listening, that the decision is not an idiosyncratic exercise of power by you but the application of a principle that binds everyone. This might prove repetitive but it will only be repetitive for you and not the litigants who will hopefully only see you once. As an example, for a sentencing judgment, the relevant principle might involve no more than restating that sentencing involves a weighing of the objective circumstances of a crime and the subjective circumstances of an offender within the framework of the legislation.[16]

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[14] Justice M H McHugh AC, 'Working as a High Court Justice' (Speech, Women Lawyers Association of New South Wales and the Law Society of Newcastle, 17 August 2005) at 14.

[15] Justice M H McHugh AC, 'The Judicial Method' (1999) 73(1) *Australian Law Journal* 37 at 37–38.

[16] See, especially, *Markarian v The Queen* (2005) 228 CLR 357 at 374–375.

How do I start?

I have seen from your program that you have a session on writer's block, but I will mention a few points for you to consider.

The first is to keep writing. Don't stop even to clean up. Just persist and write it out. Editing even the worst judgment you have written is far easier than crafting a perfect judgment from scratch.[17]

The second is to never underestimate the value of a good finding of fact. There were some complex cases that had lots of permutations as to their outcome that used to do my head in. I found myself going over and over the structure of the judgment, which would then become a block to starting writing. That was especially so if I did not really know what the answer was or where I was going when I started writing. So, if you're stumped, then maybe start first with a chronological set of facts. If you do that, you will identify the contested factual disputes that you have to resolve, which will be the next part of your judgment. After you resolved them, write a brief summary of each party's case. If you get to this point, then you are at the pointy bit of the judgment but hopefully you will find that many of the permutations that worried you have simply fallen away.

The third is this: don't delay writing the body of the judgment by obsessing over a pithy opening. It is a good idea to start a judgment with a short statement of what the case is about and the major issue the court must decide; for example, "this is an application for leave to appeal from a conviction for armed robbery. The principal issue is whether the trial judge erred in directing the jury about the evidence given by eyewitnesses identifying the applicant". However, the best time for you to crystalise the real issue in the case is when you have written the body of the judgment. By then no one will know the case as well as you and no one will be able to state the issues in the case with clarity like you can.

What do I say?

Well, that's what the rest of this workshop is for. Again, I will make only a few brief suggestions .

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[17] See Jagot (n 7) at 5–6. Brandeis J is reported as having said “[t]here is no such thing as good writing. There is only good rewriting.”: Sir Harry Gibbs, ‘Judgment Writing’ (1993) 67(7) *Australian Law Journal* 494 at 496.

First, do not underestimate how important it is to the readability of a judgment to provide a *concise* summary or overview of a party's case. Some judgments do not refer to the case a party seeks to make at all, and others regurgitate the parties' respective cases in mind numbing detail in a long section of the judgment no one will read. A happy medium is to set out one or two paragraphs summarising a party's case and then deal with the important points they raise on particular topics as you majestically work through the various issues you have to decide.

Second, do not be afraid to say that the resolution of a particular factual issue is hard or finely balanced. Let's face it: some issues are just hard. It can be liberating to express that because you might stop beating yourself up for not being able to resolve it easily.

Third, do not be afraid to "kill your babies"[18]. We have all drafted what we think is an erudite paragraph brimming with wisdom and insight that we believe will take the reader's breath away. However, when we write the judgment that little pearl often finds itself marooned with no place in the structure. Sometimes the kindest thing is to put it down gently and move on.

Fourth, try to avoid taking out your frustration with the parties or their lawyers in your judgment. Some judgments convey a tone that both parties were unreasonable in how they behaved or how they stubbornly refused to settle. Judgments like that sometimes convey an underlying vibe of resentment on the part of the judge about having to write the judgment. But writing decisions is, after all, an important part of our job.

Lastly, try to avoid jokes and one-line zingers in judgments.[19] As the opening part of this speech indicates, sometimes popular culture references don't age well either. Sir Anthony Mason got away with it, but he is a once-in-a-federation judge. Humour, sometimes black humour, is essential for us to get through the job of judging while keeping our feet on the ground. But the impact of our decisions on litigants is too serious to indulge ourselves at their expense.

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[18] Figuratively.
[19] See Jagot (n 7) at 7.

Final Word

Many years ago, two judges sat next to each other at a Bar dinner. One judge was known for being fair to counsel but was very slow in delivering judgments. The other judge was known for cutting counsel off but was very quick in producing high quality reasons. The barrister speaking at the dinner pointed to both and said it was nice to see Judge X who conducted hearings without judgments sitting next to Judge Y who delivered judgments without hearings. The fate of the barrister after that night is unclear.

I am sure you will all be the best combination of Judge X and Judge Y.

Thank you for listening.