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ON THE WRITING OF JUDGMENTS

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AN EMPIRE OF INDIVIDUALISTS

Who would be so bold as to write on the writing of judgments? As many lawyers as there are, so many opinions and more exist about what makes a good judgment. No primer on the way to do it, this essay is, instead, a reflection on some of the features of judgment writing in Australia today. It begins with a few practical considerations to be kept in mind in assessing particular judgments. It proceeds to a consideration of the old controversy about whom a judgment is written for. It acknowledges the different characteristics of judges and their writing, before embarking on the illustration of some of the stable and some of the changing features of judgment writing in that empire of individualists. It closes with a reflection on brevity, simplicity and clarity - the blessed trinity of good judgment style. Where I refer to 'judges' I mean, of course, judicial officers of every rank. Doubtless many others who labour away in the numberless tribunals which are

now such a feature of the modern administration of justice are equally involved. And where I use "judgment" I mean not the formal order which is the judgment properly so called, but the reasons for judgment - what United States lawyers call the "opinion": the explanations given by the judge for the order finally proposed or made.

The daily experience of the courts demonstrates the differing skills of advocates and judges in oral communication. It also demonstrates that on some days the most brilliant advocate is tongue-tied and the sharpest judicial mind, listless or distracted. It should therefore not surprise the reader of judgments that some who write them are better than others, or that the quality of the same pen varies over time and even changes from day to day.

The second practical consideration with which I preface these remarks is pressure. Pressure upon modern judges - at first instance and on appeal - is, in most instances, much greater than it was in the case of their forebears. True, the High Court of Australia can now, by the requirement of special leave, control its workload. But for most judges, there is much less control. The backlog increases. Community and institutional pressure for speedier justice is relentless.¹ The time for reflection, for careful planning, thoughtful research and for polishing prose, is strictly limited. And diminishing. It is in this world of unprecedented stress and pressure that most judges, today, complete their judgments.

A third practical consideration is the change in the mode of trial and in the modern understanding of the judicial obligation to give reasons. Even when I was young in the law, jury trial was far the commonest means of resolving factual disputes at common law. The skill of the advocate, and of most trial judges, lay in communicating with juries: in addressing or instructing them. Juries were then abolished in motor vehicle accident cases, and, later in a wider range of cases.² Now, there are proposals for an even more radical reduction in the role of the jury. These changes have imposed upon judges at first instance an increasing obligation of fact-finding. Combined with the growing insistence upon the giving of reasons by judicial officers,³ the burden of judgment writing for trial judges has increased. What could once be left safely to the sphinx-like jury⁴ must now be attempted by the first instance judge. He or she must find facts, record any relevant findings on credibility and provide at least sufficient exposition of the applicable law to permit a disappointed litigant to consider and if so advised, exercise any rights of appeal for which the law provides.

The functions of judgment writing at first instance and on appeal differ. There are, of course, common elements. Furthermore, appellate courts sometimes sit in a trial function, as when the Court of Appeal hears proceedings for contempt or for the removal of the name of a legal practitioner from the roll of practitioners. Some appeals

are limited to points of law. Some, substantially to points of law or rulings on evidence.⁵ But increasingly appeals are by way of rehearing, requiring the appellate court to review not only findings of law, but findings of fact as well.⁶ Appellate courts today are rarely confined to consideration of short questions of law. They must typically sift the facts. Proper sifting may add to the length of judgments and to their complexity. That is the price of providing a second look at the facts.

Judgments, at least of judges of superior courts, can establish binding precedents of legal authority. Even in courts lower in the hierarchy, the specialised nature of the jurisdiction and conventions of judicial comity may make it useful to study earlier decisions, to guide judges and legal practitioners or other repeat players towards the proper resolution of like cases. This said, an important distinction between judgments of an appellate court and of a trial judge lies in the fact that it is more likely that the holding of an appellate court will not only dispose of the appeal before it but establish a binding legal principle. This is not necessarily so. Many decisions of the Court of Appeal involve no question of principle (eg damages appeals) or no novel application of legal rules (eg disputes over motor vehicle negligence). Yet many do. These are more likely to be reported than judgments at first instance. In a time of rapid change in both statute and common law, many novel points arise for judgment. The reasons given by the

judge must therefore serve many purposes.

THE READERS OF JUDGMENTS

The litigants: It is interesting to reflect upon the fact that, despite the seven century tradition of the common law, there is no agreement upon the audience for whom a judge writes his or her judgment. The losing party is frequently said to be a primary focus of concern. The winner will often have little interest in the reason for success, usually being convinced of the rightness of the cause anyway. But in closely fought and expensive litigation, the loser is entitled to have from the judge a candid explanation of the reasons for the decision. This is not only for the exercise of any appeal rights that may exist. It is also to uphold the intellectual integrity of our system of law which must daily demonstrate, by its performance in particular cases, its adherence to the law, attentiveness to argument, impartiality and logical reasoning. True, some disappointed litigants will not bother to read the laboured reasons of the judge. Moreover, successful appellants have their own entitlement to the judge's candid reasons, for these may immure the judgment against unwarranted appeal or even reversal on grounds abandoned at first instance. Clearly, then, the parties, as the principal players in the drama of litigation, are entitled to the judge's reasons. This affects the way in which a judgment at first instance, or at the first level of appeal, should be written.

Legal profession: The judgment is also written for the

legal representatives of the parties and for the profession generally. Even if the parties themselves do not persist and read the lengthy exposition of the facts, their lawyers will usually do so, if only to test the judgment for the accuracy and fairness of its fact-finding. Even if the litigants do not fully understand the analysis of legal precedent and the exposition of legal principles, their lawyers are entitled to have it demonstrated that the judge had the correct principles in mind and properly applied them. The legal profession is entitled to examine the body of judgments for the learning and precedents that they provide and for the reassurance of the quality of the judiciary which is still the centrepiece of our administration of justice. It does not take long for the profession to come to know, including through the written pages of published judgments, the lazy judge, the judge prone to errors of fact-finding, the judge without understanding of the laws of evidence or the judge who has difficulties with complex propositions of law. These reputational considerations are important for the exercise of appellate rights, for the judge's own self-discipline, for attempts at improvement and for the maintenance of the integrity and quality of our judiciary. It is principally through the pages of written judgments that that quality may be assessed.

Other judges: Then judgments are certainly written for other judicial officers. At first instance they may be written for judicial officers lower in the hierarchy facing

common legal problems. They may be written for judges in the same specialised court. An important point may be decided which will not be taken on appeal because of the obvious correctness of the decision or because the parties cannot afford it. No judge of a superior court can approach his or her functions without an awareness that a judgment may be reported and that it may establish a legal principle, binding until set aside by an appellate court. The opportunities of creativity and exposition of legal principle are by no means confined to appellate courts in banc. Knowledge of this fact imposes a discipline and quality control upon all judges, but especially judges of the superior courts. In the appellate courts, judges are writing for other judges. If they are subject to review or the possibility of appeal, a judgment must be written with this possibility in mind. That is not to say that an intellectually dishonest attempt should be made, eg by formulae on the credibility of witnesses, to render a judgment "appeal-proof". The best judges perform their reasoning function honestly and to the best of their ability without undue concern that an appellate court may find error or reach a different conclusion. Nevertheless, it is obviously desirable that sufficient should be stated in the judgment to ensure that it does not fall victim on appeal to an issue that was abandoned or otherwise not litigated before the court in question.⁷

That consideration apart, the legal duty of a judge who is subject to appeal, to state his or her reasons in

deference the right of appeal is not now in doubt in Australia. The judge must state explicitly and concisely the facts as they are found and the reasons for the decision. The duty is not confined to cases where an appeal lies. It may arise as an incident of the nature of the decision in question. But it takes on a particular force where there is an appeal - whether by right or by leave. There are exceptions to the duty as where a decision is "too plain for argument". Or where a procedural decision is made and the reasons for it are clear from the context or from the preceding exchanges with the parties on their representatives. However, the failure of a trial judge to state findings and reasons, and of any judge to state reasons, amounts to derogation from the right to appeal and in abdication of the judicial function. Such a failure makes it impossible for the appellate court to give effect to the appellate right and so to carry out its functions.

All of this was said in a series of decisions which came together in the New South Wales Court of Appeal in Pettitt v Dunkley.^e Justice Asprey there explained important legal functions which are fulfilled by the reasons which support judicial orders:

"The rights of appeal are statutory rights granted by the legislature to the parties and the failure of a trial judge in the appropriate case to state his findings and reasons amounts, in my view, to an encroachment upon those rights. The omission of the trial judge makes it impossible for an appellate court to give effect to those rights, either for one party to the appeal or another, and so carry out its own appellate functions. It is unnecessary to

stress the prime importance to a party to an appeal, whether he be appellant or respondent, of the findings and reasons at first instance and this is not limited to the acceptance or rejection of evidence on the basis of demeanour for, in arriving at his conclusions, the trial judge may simply have preferred one possible view of the primary facts to another as being in his opinion the more probable, or he may have preferred the evidence of one witness to another for a variety of reasons, although both were considered by him to be telling the truth as they may have observed the facts to be. ... Just as it is impossible to confine the grounds upon which an appellate court will order a new trial within rigid categories ... so the ambit of the difficulties confronting parties to an appeal will place the appellate court to which they look for the exercise of their statutory rights in many cases in a position which may prevent the court from giving effect to the paramount consideration of obviating a miscarriage of justice.

In my respectful opinion the authorities to which I have referred and the other decisions which are therein mentioned establish that where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose.

Judges reversed: Appellate courts must also keep in mind the fact that the judges appealed from will usually read their judgments. At least, they will usually do so

where the appeal is upheld. The appellate court has, inescapably, an educative function which it performs through its written judgments. The expression of error detected can be frank without that hurtfulness which will cause unnecessary offence. The history of different conclusions upon the same legal point, as famous cases proceed through the judicial hierarchy, offers sufficient proof of the fact that even highly talented lawyers will quite often reach quite different conclusions, and for different reasons, upon the same question. Upon some matters a simple mistake may be detected. A basic error of law may be demonstrated, perhaps a statute overlooked. Most judges will readily acknowledge such mistakes when they are pointed out, however embarrassing they may be. Often, they will be entitled to blame counsel for failing to direct them to the point. However, on many matters of legal principle, minds simply differ.⁹ On others, the law is obscure or is expressed in terms of such generality that different results may quite readily be derived from its application to particular facts. The realisation of these inescapable features of our legal system provides a balm for the sting of appellate reversal. It also provides to appellate courts a reason for intellectual modesty and the avoidance of arrogance or insensitivity of expression.

Test of conscience: Finally, a judgment is ultimately

written for the judge who writes it. It must have integrity and carry with its words the evidence of the manifest impartiality and intellectual honesty of the writer. Judges, at least in Australia, are members of an independent branch of government. They are uncorrupted and enjoy high public standing. They are protected from removal from office by constitutional and statutory guarantees and by the common law.¹⁰ Out of self regard for the privilege of membership of this elite band with its ancient lineage and high responsibilities, judges of our tradition should always strive to perform their functions with lawfulness, neutrality and dispassion. These are our traditions. Written judgments provide the opportunity for each judicial officer to demonstrate to his or her own conscience a worthiness to be a participant in such a high tradition of moral integrity and social utility.

CATEGORIES OF JUDGES

Various attempts have been made to classify judges according to their differing approaches to the writing of judgments. In 1979, Lord Justice Templeman, as he then was, in a BBC interview said:

"Judges and their judgments - I think you can divide into three categories; there are the philosophers, the scientists and the advocates. The present Lord Chancellor, Lord Hailsham, I would put in the category of philosopher; Lord Wilberforce and Lord Diplock I would put into the scientific vein and Lord Denning is one of the advocates. And in common with those other judges whose judgments are feats of advocacy, you can see some traces of the eloquence in the advocacy which they used when they were at the

Bar, and these three elements are all there in Lord Denning's judgments."¹¹

There are difficulties in this, or any such, classification. Indeed, this is acknowledged in the final comment that Lord Denning's judgments show evidence of all three "categories". So do those of most judges. A judgment in one case may involve the predominance of one of the qualities identified. Care must be taken to avoid stereotyping judges, any more than other subgroups of the community.

Yet it is probably true that different judges show different proportions of the three qualities which Lord Justice Templeman has selected as criteria. Bringing the classifications closer to home, one might say that Justice Windeyer in the High Court of Australia evidenced a bias to a philosophical approach. Certainly, his profound knowledge of, an interest in, legal history turned his attention to fundamental concepts of the common law where he felt most at home. Chief Justice Dixon was probably our greatest "scientist", espousing as he did "complete legalism" and believing that the law would lose its meaning if it were not the limited function of the judge to find the pre-existing law and to declare it.¹² Amongst the chief "advocates" one might name Chief Justice Isaacs, Chief Justice Barwick and Justice Murphy. Yet none of them - philosopher, scientist or advocate - could wholly escape his background of training and professional experience in the law. No Australian judge has entered upon office without

such training and background. The functions of Australian judges, deprived of a Bill of Rights or the Charter of their Canadian counterparts, are more limited. Their work is less likely to take Australian judges into the byways of philosophy, sociology and economics. Yet all of these disciplines can be relevant, from time to time, to common law reasoning and to the interpretation of statutes.

Judgments of the Supreme Court of the United States have been analysed according to the recorded influence of great philosophers and writers upon the thinking of the justices.¹³ Thus between 1790 and 1986 the 71 members of the Supreme Court referred to the writings of Plato in 9 opinions, to Locke in 11, to Montesquieu in 27 and to the Federalist Papers in no fewer than 317 judgments. Shakespeare was mentioned in 24 opinions. Surprisingly, even Sigmund Freud was referred to in 4.¹⁴ It is mainly in the elaboration of the fundamental rights in the Bill of Rights that references to literature and philosophy appear. Thus in the United States v Loud Hawk¹⁵ Justice Powell, citing Homer's Odyssey in a case involving the claim to speedy trial alluded to Penelope's promise that she would not choose a husband until the shroud she was weaving was finished. Her technique involved working on it in the day but then secretly unravelling it at night. Justice Powell suggested that the defendants were up to Penelope's trick:

"At the same time defendants were making a record of claims in the District Court for speedy trial they consumed 6 months by filing indisputably frivolous petitions for rehearing

and for certiorari ... [and] filled the District Court's docket with repetitive and unsuccessful motions."

Only a judge with wide reading, an imaginative research staff or whose experience has taken him or her outside the law will have the intellectual capital to draw upon such philosophical and literary allusions. Even if the judge has such experience, the legal tradition (and concern about the reaction of the profession or of other judges) may still the pen that moves to a literary allusion. Alternatively, such references may fall victim to the blue pencil and disappear into oblivion in the penultimate draft by the miracle of word processing. No Penelopes appeared in the recent expositions in the High Court of Australia about speedy trial.¹⁶ Yet it is not unknown to see literary allusion; though more frequently in the judgments of English judges than of Australian.¹⁷

STABLE AND CHANGING FEATURES

The basic format: There are some stable and some changing features of judgment writing. The stable features derive from the very nature and purpose of a reasoned judgment. Fundamentally, this is to explain an order formally entered by the Court as an enforceable rule between the parties in the litigation before it. For that purpose, a judgment will typically begin with a statement of the relevant facts. It will follow with an exposition of the principles of law perceived to be applicable. In the manner

of the logical syllogism, it will then express conclusions derived from the application of the law as expounded to the facts as found.¹⁸

Literature and humour: Within this basic format, there is much room for variation and indeed variety. I have already referred to allusions to literature and learning beyond the law books. Humour is also sometimes evident. There are some authors who suggest that it has no place at all in judgment writing, the issues between the parties being too serious. "For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he is down".¹⁹ Others, to the contrary, suggest that humour has a proper place in enlivening the prose and communicating the ideas of a judge. Just as humour can be effective in the ordinary communications of life so, it is urged, it has a place (although necessarily limited) in judicial communication.²⁰ Justice Wallach of the Supreme Court of New York put it this way:

"It must immediately be conceded that the place of judicial opinions is rather low in the literary pantheon; as an art form they probably rank slightly above a political speech and just below a sermon... Despite all this I would urge that a touch of humour, carefully controlled, can properly find a place in judicial writing. At best, it can be useful in deflating the overblown argument; at worst (provided it is not nasty and therefore not humorous at all) it is probably harmless. And at least I can attest that over my fourteen years of judicial opinionating it has relieved the tedium of the writer. Whether it will ever relieve the tedium of the reader can [only] be tested by time."²¹

On the other hand, some United States judges have clearly gone too far in their indulgence in humour. Thus in Fisher v Lowe²² a Judge Gillis dealt with the claim by the owner of a tree who sued the driver and owner of a car who had crashed into it, in the following way:

"We thought that we would never see
A suit to compensate a tree
A suit whose claim in tort is press'd
Upon a mangled tree's behest;
A tree whose battered trunk was pressed
Against a Chevy's crumpled chest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care
Flora lovers though we three,
We must uphold the Court's decree."

There are many other attempts at opinions in verse in the United States. Some of them have resulted in disciplinary action against the judge involved, when deemed to have gone too far even for the tolerant taste of American lawyers.²³

In Australia humour is definitely confined to the minor key. Doubtless, this is because most Australian judges share Prosser's view that "the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig".²⁴ Nevertheless, attempts at humour occasionally appear.²⁵

Views will doubtless differ about the suitability of judicial humour in the record of a judgment and at the expense of parties or their legal representatives or

witnesses. Clearly a judge, tempted by such humour must consider the permanency of the record, the potential harm to reputation of the subject of the humour, the difficulty of affording an adequate answer or correction and the attention thereby given to the comment, precisely because of its pithy humorous expression indeed. Yet judges are supremely individuals. Their expression is, in part, a reflection of their personalities and individual values.

Dangers of irony: Irony is more common in judgment writing of our tradition than other forms of humour. Perhaps irony, a more restrained form of humour, is thought to be more in keeping with the sober purposes of the judiciary. Perhaps it simply reflects the characteristics of the English personalities who left their indelible mark upon our image of what a good judge is. Just the same, irony, being frequently hurtful, can get the judicial writer into difficulties.

Perhaps the best known instance of this danger is Lord Atkin's allusion to Lewis Carrol in his notable dissent in Liversidge v Sir John Anderson & Anor. After a vigorous but dispassionate dissection of the opinion of the majority, his Lordship's speech reached its stinging point:

"I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in a rather scornful voice, 'it means just what I choose it to mean, neither more nor less'. 'The question is,' said Alice, 'whether you can make words mean so many different things'. 'The question is,' said Humpty Dumpty, 'which is to be master - that's all'" ("Through the Looking Glass", c.VI). After all this long discussion

the question is whether the words "if a man has" can mean "if a man thinks he has". I am of the opinion that they cannot, and that the case should be decided accordingly."²⁶

It is now known that, as a result of this passage, Lord Atkin was sent to a judicial Coventry by the other Law Lords. They refused to meet him or to eat with him. At one point they even refused to speak to him. Before the speech was delivered, the Lord Chancellor (Lord Simon), who had not participated in the case, put great pressure upon Atkin to change the tone, if not the content of his judgment. Atkin refused. Lord Maugham, who had presided made a bizarre attack upon Atkin in the legislative session of the House of Lords. The opinion has been expressed that Lord Atkin never really recovered from this treatment before his death in 1944.²⁷ He did not live long enough to see his opinion of the law vindicated.²⁸ Indeed, it cannot be denied that the vigorous expression of his point of view helped to capture the attention of law commentators and judges. Perhaps it thereby contributed to the ultimate ascendancy of the important legal concepts which Atkin was espousing. The power of vivid language to do this should never be underestimated.

Another instance of the use of judicial irony (and of literary allusions) which caused no end of trouble for the judicial officer employing them can be seen in the case of Justice Staples of the Australian Conciliation and Arbitration Commission. Justice Staples, from his days as a

barrister, was given to the use of vivid prose unusual in the grey and detailed area of industrial decision-making to which he was appointed. In an important case, a recommendation by him to the Broken Hill Pty Company Limited and a union for the settlement of a long-standing maritime dispute was rejected by the company. Justice Staples wrote:

"Let them, then, twist slowly, slowly in the wind, dead and despised, as a warning to the Commission of the limits of the persuasion of a public authority upon those who zealously uphold the privileges of property and who exercise the prerogatives of the master over those of our citizens whose lot falls to be their employees."²⁹

The company regarded this use of language as insulting to it. It was one of the matters which led to the removal of Justice Staples by the President of the Commission from his panel in charge of the maritime industry. His ultimate isolation and final removal from judicial duties, even judicial office, followed a further ironic reference, this time to a novel about the shearing industry in resolving an industrial dispute concerning shearers. Perhaps the fate of Justice Staples stands as a warning of the dangers to judges in Australia of what may happen to those who use excessively florid prose and irony found hurtful by the powerful interests on the receiving end.³⁰

Nonetheless, subtle irony, detectable only by the cognoscenti can certainly be useful in conveying a key point in the reasoning of a judge. It is a legitimate technique of argumentation if properly used. Thus, Justice Meagher is

most faithful to the doctrine of precedent and stare decisis (the principle that earlier judicial decisions of high authority provide a rule binding on later judges who are bound to apply it). He is probably closer to the "scientific" ideal of Chief Justice Dixon than many modern judges. Yet, in a recent case, he was able to reach a conclusion which appeared to two of his colleagues (Justice Clarke and myself) to fly in the face of a series of settled decisions of the Court of Appeal. It therefore gave me more than a little satisfaction to begin my reasons in the case with reference to the settled procedure by which authority of the Court might later be overruled by it:³¹

"This motion tests the Court's fidelity to its own earlier holdings and to the procedure which it has laid down for the overruling of earlier determinations of questions of law, when they are subsequently challenged: (see Proctor v Jetway Aviation Pty Limited [1984] 1 NSWLR 166 at 171, 185.) It also raises the approach which the Court takes to the construction of legislation. Is it to be strict and literalist, taking words in isolation, out of their context and apart from their clearly intended operation? Or is it to be purposive, so that the meaning is given to the words in order to effect their intended purpose? The latter is the approach now required by Parliament itself ... It is increasingly that adopted by the courts of common law both in this country and elsewhere."

Not daunted, Justice Meagher expressed his view succinctly and with force:

"The result, startling and inconvenient though it may be, in my opinion is that leave is required for an appeal from any decision on a separate issue, whether that decision be final or interlocutory. I am not deterred from this

conclusion by the circumstance that in the past the Court of Appeal has stumbled into the opposite conclusion in four cases, in none of which the present point was really argued."³²

CHANGES IN JUDGMENT STYLE

Opening words: The foregoing passages illustrate some of several changes in judgment writing style which have begun to emerge in Australian judgments in recent years.

It is not now uncommon to see in the opening words of a judgment an expression of the key issues which fall to be decided. In a sense this passage provides a headline to the judgment. Its purpose is to invite readers to an interest in the issues discussed by capturing their attention at the outset. This has long been a common technique in the writing of judicial opinions in the United States. Indeed, it is recommended in a standard text on judicial opinion writing in that country.³³ It has not been common in Australia where, as in England, judgments have commonly begun with those tedious words: "This is an appeal ..." or "This is an action ...". If only to avoid such cliché expressions, such dull phrases should never be used. The writer who loses the opportunity to state clearly at the outset the issue in hand (as he or she sees it) has lost a vital chance to communicate effectively with the potential audience and to grasp its interest and favour. Today there is so much to read that the effective communicator, bidding for attention to his or her ideas, will work at the task of ensnaring the busy, distracted reader. There is no reason why legal prose should

be tedious and boring, whatever the writing style adopted.

Judge Learned Hand expressed the ideal:

"I like to think that the work of a judge is an art ... After all why isn't it in the nature of an art? It's a bit of craftsmanship, isn't it? It is what a poet does, it is what a sculptor does. He has something vague, he has some vague purposes and he has an indefinite number of what you might call frames of preference amongst which he may choose; for choose he has to, and he does."³⁴

Sub-headings: A second change that is occurring in Australian judgments is the introduction of headings in reasons both at first instance and on appeal. Once it was rare in Australia to see a heading interrupt an appellate judgment. It is still comparatively rare in England. But in the New South Wales Court of Appeal, a number of judges have introduced headings or clear division of their texts. I did so from the outset, following the conventions brought with me from the Law Reform Commission.³⁵ Justice McHugh experimented at first with divisional sections of judgments. Later he too introduced headings in his judgments in the Court of Appeal. He has followed the same technique since his appointment to the High Court of Australia.³⁶

Subheadings provide an especially useful means of taking the reader efficiently to that section of the judgment which he or she wishes to find. It is a common method of communication in written texts in other disciplines. It would be unthinkable in commercial and economic material today to provide a dense unbroken text without such simple

keys to unlocking the meaning and reasoning of the author. Presentation to the reader of unbroken passages of judicial prose, unrelieved by the merest symbol and uninterrupted by headings which provide the guideposts for the journey displays in my opinion a want of real concern about the processes of communication. It may even sometimes hide a lack of structure or plan. Disclosure of headings reveals, even to the most cursory reader, the plan followed by the judicial writer. Headings also provide an opportunity for the writer to convey key ideas. Tedious, elementary headings such as "The facts" and "The law" should certainly be avoided. But the opportunity should be used to display the logical progression of the reasoning of the judgment and to do so, if possible, with words which add to the process of persuasion.

Exit Latin: A third change is the gradual abandonment of Latin and the virtual elimination of Greek in judicial texts. Once it was necessary in Australia (as it still is in South Africa) to be trained in Latin to secure entrance to the law school. Latin was considered essential for an understanding of Roman Law, usually the sole intruding example of comparative law to disturb the self-contained universe of the common law. But now Roman Law is not compulsory. A diminishing number of law students has studied Latin at school. The proportion in the community at large is smaller still. If the purpose of reasons for judgment is to communicate effectively with the various audiences

identified, it is highly desirable that Latin expressions should be dropped - or where still useful, at least translated. Otherwise a barrier is placed between legal expression and an important section of the audience for whom the judgment is written. Such barriers serve only to alienate judges and lawyers from the community they serve. The flourish of Latin as an illustration of classical learning is unnecessary. Learning can quite readily be demonstrated, by those anxious to do so, in other ways.

Gender neutrality: The avoidance of gender specific language, unwarranted by the context, is a fourth feature of recent times. In the High Court of Australia sensitivity on this score has followed the appointment to the Court of Justice Mary Gaudron.³⁷ It is now perfectly normal to find in the text of High Court judgments care in avoiding the single personal pronoun "he". Instead, "he or she" is now typically used.³⁸ Other expedients are sometimes adopted (such as the use of the plural) to secure a gender neutral expression. As this technique of legal expression has now reached the statute book and reflects a matter keenly felt in some circles in the community, it is desirable that judges should wherever possible avoid discrimination in the language they use. Hidden away in language may be a world of inappropriate attitudes and prejudice. The use of gender neutral language tends to evidence a gender neutral attitude to legal tasks.

There is an increasing number of women judges

appointed in Australia. Yet there is still confusion as to whether they should be called "Miss Justice", "Mrs Justice", "Madam Justice" or simply "Justice". At least in this country we do not have the problem, as elsewhere throughout the Commonwealth of Nations, of titling a woman judge "My Lord". Nor do we need to approach the eccentricity of the English in the Court of Appeal where Dame Elizabeth Butler-Sloss is styled "Her Ladyship, Lord Justice Butler-Sloss". Nearly a decade ago I proposed that all judges of superior courts in Australia - male and female - should, as in South Australia following the appointment of Justice Roma Mitchell, adopt the simple style "Justice".³⁹ Sadly, when Dame Roma retired, the Judges of the Supreme Court of South Australia who had given such a worthy lead reverted to "Mr Justice". The High Court, following the appointment of Justice Gaudron, changed the title of the Justices by dropping "Mr" in every case. However, in the Supreme Courts and in the Federal Court confusion reigns. In due course, it may be expected that the solution of the High Court will be adopted throughout the Australian judiciary. Meantime, in their daily expression, individual judges should also follow the High Court's lead and avoid "sexist" pronouns and expressions.

Schedules and footnotes: A fifth recent innovation in Australian judgment writing is the increasing tendency of judges to use appended schedules of cases or other material relied upon and to use footnotes. Such techniques are

commonplace in the opinions of United States judges.⁴⁰ They occasionally appear in judgments of the High Court of Australia. Thus, in Barwick CJ's very useful synthesis of case law on the jurisdiction of a court summarily to terminate an action in General Steel Industries Inc v Commissioner for Railways (NSW) & Ors⁴¹ his Honour appended a list of the case law which he had "examined on the subject" in coming to his conclusions. The appendix comprises 16 cases, some only of which are referred to in the reasons.⁴² In the New South Wales Court of Appeal, the use of appendices and footnotes has so far largely been confined to the reasons of Justice Priestley.⁴⁴ Because unusual in this country, the judicial footnote can be a way of making a telling point strictly peripheral to the issues in hand but important in the writer's process of reasoning and perhaps for the future. In the United States, footnotes have sometimes played a very important function in digesting a body of law or in synthesising an opinion in a way that is highly influential upon later decisions.⁴⁴ Many American texts appeal for restraint in the use of footnotes⁴⁵; just as local observers urge that citations should likewise be confined.

Summary and index: Sixthly, another technique of increasing use to be mentioned in this context is the summary and index to help readers through a particularly long judgment. The judgment of the High Court of Australia in the Tasmanian Dams Case⁴⁶ was a decision of high controversy.

It involved consideration of many separate arguments in the seven separate reasons of the judges. In that case, a statement was issued by the Court, at the time judgment was delivered, summarising the effect of the decision of the Court reached in relation to each question by a majority of the judges. That statement is reproduced in the authorized report.⁴⁷ So is the table of contents which refers to the subdivisions of each separate judgment.⁴⁸ Such subdivisions have also been used in the New South Wales Law Reports, eg in the Spycatcher litigation.⁴⁹

BREVITY, SIMPLICITY AND CLARITY

Judicial trinity: Brevity, simplicity and clarity. These are the hallmarks of good judgment writing. But the greatest of these is clarity. Of course, some people see the world as exceedingly simple. There are some lawyers and not a few judges of this persuasion. They are blind to the complexities that lie hidden in facts or the subtleties of the law and the ambiguities of language in statutes and other documents. Still others, perfectly aware of such subtleties, have mastered a writing style notable for simplicity of expression. To avoid invidious local examples but to illustrate the point, it is useful to compare⁵⁰ the writing styles of Justice Megarry and Lord Denning MR in describing the same facts in In re Vandervell's Trusts [No 2]⁵¹. Justice Megarry wrote:

"An important consideration was that under the articles the VP Company could distribute its profits as dividends among the ordinary shares,

the "A" shares or the "B" shares, or to any one or two of these classes to the exclusion of the others or other, as the Company determined in general meetings; and in practice this meant that Mr Vandervell had complete control over whether or not any dividends were paid on any of these shares."⁵²

Lord Denning expressed the same facts in these words:

"In 1949, he set up a trust for his children. He did it by forming Vandervell Trustees Limited - the trustee company, as I will call it. He put three of his friends and advisers in control of it. They were the sole shareholders and directors of the trustee company. Two were chartered accountants. The other was his solicitor."⁵³

The Megarry passage comprises one sentence of approximately 75 words. The Denning passage comprises 6 sentences, 57 words in all.

Writing style: It might be said that the appellate judge, with the benefit of the trial judge's exposition to work on, can reduce the relevant facts to those necessary to illustrate the legal concepts thought to govern the case. But every lawyer knows that out of the choice of facts will frequently emerge the applicable legal rule. And appellate second sight does not explain so radical a change of style. Lord Denning's is the style of the evangelist, the advocate. Some writers disapprove of the staccato of his short sentences.⁵⁴ Others do not find his style to be as effective as the Megarry exposition.⁵⁵ They fear that "simple syntax may reflect over-simplification and ... a failure to distinguish the more important [facts] from the

less important".⁵⁶ Writing, including judicial writing, has been analysed for indications of a tendency to absolute expression as against recognition that things are usually more complex and thus in need qualification. By this measure, Lord Denning's style places him in the category of absolute writers. Justice Megarry's places him amongst the qualifiers.⁵⁷ In Lord Denning's prose, many are the adverbs of intensification, such as "very", "extremely", "only", "really" and so on. Justice Megarry, on the other hand, is more prone to use qualified determiners ("most" of the facts of the case are undisputed but some are in issue" It was Mr Robbins who in many of the matters ... acted almost as Mr Vandervell's alter ego"). Analysis such as this simply catalogues writing as we tend, in everyday life, to categorize human personalities along a "confident" or "cautious" spectrum.

It should not surprise us that writing, with its tendency to reflect the complex, diverse personalities about us should exhibit features as varied as is human personality itself. Yet there are common features evident. Its very diversity is clearly a strength of the common law judicial system. Judges, with gifts of communication, writing in a simple, straightforward and "magisterial"⁵⁸ style tend to have the greatest influence because of their clarity of expression. Yet, on the other hand, rhetoric and the use of vivid phrases play an important part in persuasion. In this way such language may come to have a disproportionate impact

on the development of the law. Benjamin Cardozo once pointed out:

"The [appellate] opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the tenseness and tang of the proverb and the maxim. Neglect the help of these allies, and it may never win its way."⁵⁹

From the legal profession and academic lawyers (and not a few judges) come constant calls for brevity of appellate court reasons. The same appeals usually include, if possible, a request for a single reason stating a clear holding. I entirely agree that these are ideals to be pursued wherever possible and appropriate. There are few tasks more unrewarding than searching amongst the wreckage of multiple judicial opinions, offering different reasons, for a binding rule which can be readily applied in the hectic activities of a work-a-day court. A notable illustration of the inconvenience of multiple opinions, where a clear and simple rule is imperative (or at least highly desirable) is the current authority of the High Court of Australia on forum non conveniens.⁶⁰

Single opinions: In the United States of America, recognising the key role in government played by the Supreme Court there has, virtually from the start, been a tradition of a single majority and (where applicable) a single minority opinion.⁶¹ The Australian judicial hierarchy saw an extreme version of this thirst for clarity in the rule followed almost to its dying days by the Judicial Committee

of the Privy Council, in tendering but one opinion to the Crown.⁶² This extreme example of the magisterial style, was doubtless influenced by early attitudes in Downing Street to the laws of the colonies, available time of the Law Lords and their legislative function. To this day, Privy Council decisions are admirably brief. Yet they can sometimes be expressed in language of power and even emotion.⁶³ Dissents are still rare. Many Australian lawyers, surveying the increasing length of the opinions of appellate courts, yearn for a return to the certitudes of the Privy Council style and the similar style of the early days of the High Court of Australia. Various expedients have been suggested to produce brevity including writing judgments by longhand (Justice Kitto) whilst standing up (Chief Justice Dixon) and with pen and inkwell (Justice Meagher).

Perhaps in response to these calls, a slight movement can recently be detected towards single or joint judgments in Australia's appellate courts, thereby reversing the trend of the heyday of judicial individualism. The latter probably reached its apogee in the 1980s. Yet against these considerations it is important to bear in mind the pressures which tug in the opposite direction. The growing body of binding authority, including of the High Court of Australia itself, intellectual honesty in response to counsel's arguments and the demonstration of appropriate judicial neutrality may today require a more detailed review of binding decisions than was earlier the case. The facility of

reference to a wider range of extrinsic aids to construction also adds to the length of oral hearings, written submissions and judgments. Yet this may be a price willingly paid for the escape from the rigidities of a strictly textual interpretation.⁶⁴ Increasing candour in the acknowledgment of judicial choices⁶⁵ invites a more candid discussion of questions of principle and policy than would have been common, even a decade ago. This will also have a price for the length of opinions. It may be a price worth paying, in preference to a return to the "fairytale" of completely value-free judicial decision-making.

Concurrent opinions: There is another consideration. It is in the variety of judicial opinions that the pool of ideas is provided from which the common law system draws its vitality and strength. The diversity actually symbolises the independence of the judiciary, and all its members. It permits the light and shade of reasoning, even where a common conclusion is achieved. Justice Kitto revealed that Chief Justice Dixon once told him that he never agreed in the judgment of another judge "without having some cause to regret it afterwards".⁶⁶ Even if collectively judges of appellate courts wish to reduce the length and complexity of their judgments, it is a characteristic of the people appointed to such courts, and of their training, that they will rarely be willing to forsake their own unique opinions in the name of an institutional ideal. They will continue to perform their duties in their own way. Save for the

impermissible exclusion of particular judges from the exercise of their commissions or the organisation of sitting arrangements to avoid the embarrassing expression of individual opinions, there is nothing much that courts or their presiding judges can do about the individualism of judges; except by persuasion and example.

Dissenting opinions: The most acute form of individual opinion is the dissent. Some famous judges, including Lord Reid, have expressed the view that the writing of dissenting judgments should be conserved to very important points of principle. I do not agree. A judge is duty bound to offer his or her reasons for the order that is made by the Court. If, in a collegiate court, those reasons differ in any matter of substance, the judge must identify the difference. The statistics demonstrate that dissenting opinions in Australian courts are much lower in number and proportion than in equivalent courts of the United States.⁶⁷ Perhaps this is a reflection of different traditions and different judicial functions of the judiciary in each country. The dissent must be disregarded for extracting from the decision of a court its binding rule.⁶⁸ But that does not mean that the dissent has no value for the long-term development of the law. In the United States, dissents have played a very important part in the development of constitutional law. Thus, Justice Harlan's dissent in Plessy v Ferguson⁶⁹ concerning the doctrine of "separate but equal" treatment of "coloured"

people on trains came, in time, to sustain the Court's switch of opinion in Brown et al v Board of Education of Topeka et al.⁷⁰ Similarly the dissent of Justices Black, Douglas and Murphy in Betts v Brady, Warden⁷¹ provided the intellectual foundation for the Court's later holding in Gideon v Wainright⁷² that a poor person facing a serious criminal charge had a right to counsel. There have been many similar instances in Australian legal history. The passage of time, changes in the membership of a court and even the ascendancy of the dissenter can explain the shift of legal authority.⁷³

A dissent expressed within the institutions of the law provides a legitimate means of protest against opinions which are, at the moment, in the minority.⁷⁴ They help to reflect the diversity of contemporary society, of which a diverse judiciary is but a muted reflection. They appeal to the present generations of lawyers, and to the future. Hence, Chief Justice Hughes' perception that the dissent appeals to the "brooding spirit" of the common law;⁷⁵ Justice Cardozo expressed the same thought:

"The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years. Read some of the great dissents ... and feel after the cooling time of the better part of a century, the flow and fire of a faith that was content to bide its hour. The prophet and martyr do not see the hooting throng. Their eyes are fixed on the eternities."⁷⁶

Even those who will not accord such high ambitions to the

typical dissent in Australian judgments, may be willing to acknowledge their social value as "one of the processes that aids the development as the law meets and solves new situations".⁷⁷

CONCLUSIONS

Courts are public theatres in which many of the human dramas of society are played out in an abbreviated and somewhat stylized fashion. In the necessarily artificial circumstances of a courtroom and judicial technique it is impossible entirely to suppress the human drama. Judgments and legal opinions record some of these performances. They therefore provide opportunities for skilful writing. But it is writing always under the constraint imposed by the purpose at hand, to detail the refinements of fact and law that need to be dealt with for that purpose and form of decision-making. The characteristics of the judicial opinion at first instance and on appeal are different. Yet they enjoy many common features. There are many practical constraints which inhibit creative writing by a judge. Some of these have been identified.

It is important to keep in mind the audience for whom the reasons are written. Yet there is no unanimity of opinion as to who that audience should be. To some extent a basic structure of opinion-writing is stamped on judicial reasons by their fundamental purpose. Yet within that structure there is much room for individual variance: to exhibit skills of communication, a familiarity with the great

writings of literature and of philosophy, the deft use of irony and even, occasionally, restrained humour.

Styles of judicial writing are constantly changing. Some of the changes have been collected. The use of headings. The demise of Latinisms and legal cliches. The avoidance of words or expressions showing gender-bias. The occasional use of footnotes, appendices and other aids to communication. Clearly, there are more changes still to come. Yet it is more remarkable to note the familiarity of a judgment two centuries old than to mark the changes that have lately crept in, almost imperceptibly to their expression.

Brevity, simplicity and clarity are the watchwords for effective judicial writing. However, a number of constraints on brevity have been acknowledged. Brevity at the price of a return to a mechanistic view of the law would be unacceptable to many judges today. The use of extrinsic aids to construction and the candid acknowledgment of policy choices which must be made tend to add to the length of judicial reasons. At a price worth paying, most would say. And on conditions, such as the general availability of the extrinsic "aids", others would add.⁷⁸

Individual opinion-writing and the dissenting judgment are the hallmarks of a system of justice which truly respects the independence of its judges and acknowledges the judge's only masters to be the law and conscience. Diversity of opinion - and one might add of judgment writing style - is a great strength of the common law judicial tradition. It

provides a never-ending stream of ideas and of ways to communicate them. Ideas are the most powerful engines for change and progress. Continuity amidst constant change of substantive law and orthodoxy amidst experimental variety in its exposition have helped to develop the law of a rural society of feudal England to the formidable body of the common law today. It is a body of law laid down by the succeeding centuries of judicial opinion-writing. It is this happy mixture of stability and movement which explains why that most lasting institutional legacy of the British Empire - the common law - continues to flourish in every corner of the world and to serve in these fast changing times the legal needs of a third of humanity. It is the privilege of each succeeding generation of judges of the common law to nurture and advance this precious legacy.

* Text of a paper on which was based a lecture to the First Australian Conference on Literature and the Law held at the University of Sydney, April 20-22, 1990 on the initiative of the Department of English in the University of Sydney and the Faculty of Law of Monash University, Melbourne.

** President of the New South Wales Court of Appeal. Personal opinions.

1. Even in the courts themselves, this is acknowledged. See eg Gaudron J in Jago v District Court of New South Wales (1989) 63 ALJR 640, 662.
2. See Pambula District Hospital v Herriman (1988) 14 NSWLR 387 where the history of these developments is

set out.

3. See Public Service Board of New South Wales v Osmond (1986) 159 CLR 656; Pettitt v Dunkley [1971] 1 NSWLR 376. See below.
4. In Ward v James [1966] 1 QB 273 at 301 Lord Denning MR described the jury's verdict to be "as inscrutable as the sphynx". See Quinn v Rocla Concrete Pipes Ltd (1986) 6 NSWLR 586.
5. Land and Environment Court Act 1979, (NSW) s 57(1); Cf Compensation Court Act 1984, (NSW) s 32.
6. Warren v Coombes (1979) 142 CLR 531. See also Viscount de L'Isle v Times Newspapers Ltd [1988] 1 WLR 49, 62, (CA).
7. Coulton & Ors v Holcombe & Ors (1986) 162 CLR 1; Water Board v Moustakas (1988) 62 ALJR 209 and Banque Commercial SA en Liq v Akhil Holdings Limited (1990) 64 ALJR 244.
8. [1971] 1 NSWLR 376 (CA). The passage from the judgment of Asprey JA appears at 381-382. The decision has been applied in numerous cases, see eg Housing Commission of New South Wales v Tatmar Pastoral Co [1983] 3 NSWLR 378; Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247. It has been accepted in other States of Australia. See eg Watson v Anderson 1976) 13 SASR 329. It has been followed in the Federal Court of Australia. See eg Australian Timber Workers Unions v Monaro Sawmills Pty Ltd (1980) 42 FLR 369, 374, 380.

- It was accepted as the law in New Zealand. See R v Awatere [1982] 2 NZLR 644, 648 (CA); R v MacPherson [1982] 1 NZLR 650. In the High Court of Australia it appears to have been accepted as stating the law. See obiter remarks of Gibbs CJ in Public Service Board of New South Wales v Osmond (1986) 159 CLR 656, 666-7.
9. A glaring example is Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 165 CLR 197.
 10. See Macrae & Ors v Attorney-General for New South Wales (1987) 9 NSWLR 268; Quin v Attorney General for New South Wales (1988) 16 ALD 550. But see now Attorney General for New South Wales v Quin (unreported, High Court of Australia, 7 June 1990. Cf M D Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) 31 Jl Indl Rels 334.
 11. Interviewed by H Young, Talking Law, BBC, 16 September 1979, 3 cited in M D Kirby, The Judges, Boyer Lectures, 1983, ABC, 41. A good example of Lord Denning's style is Beswick v Beswick [1966] Ch 538. His judgment begins: "Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights..." ibid, 549.
 12. O Dixon, "Concerning Judicial Method" in Woinarski (ed) Jesting Pilate, 1965, 155.
 13. F Snyder, "The Great Authors and Their Influence on the Supreme Court", 7 Leg Ref Services Q 285 (1987).
 14. See eg Boutilier v Immigration and Naturalisation

- Service 387 US 118, 130 (1967) (per Douglas J, dissenting).
15. 474 US 302 (1986) (per Powell J). See Snyder, 288.
16. Jago n 1 above.
17. See eg Russell LJ in Sydall v Castings Limited [1967] 1 QB 302 at 321: "I may perhaps be forgiven for saying that it appears to me that Lord Denning MR has acceded to the appeal of Bassanio in the Merchant of Venice ... 'To do a great right, do a little wrong'. But Portia retorted: ... 'It must not be; ...'. I am a Portia man". On the other hand Judge [later Justice] Cardozo counselled caution: ... "In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed". Law and Literature and Other Address Essays and Addresses, Harcourt Beach and Co, NY, 1931, 29.
18. See Kitto J in R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Limited (1970) 123 CLR 361 at 374-5. Applied New South Wales Bar Association v Muirhead (1988) 14 NSWLR 173, 197.
19. G R Smith, "A Primer of Opinion-Writing for Four New Judges" in G R Winters, Handbook for Judges, American Judicature Soc, 1975, 123, 137. See also W Prosser, "The Judicial Humorist", 1952, vii; "Judicial humor is a dreadful thing".

20. A Jordan, "Imagery, Humor, and the Judicial Opinion" in 41 Uni Miami L Rev 693 (1987).
21. R Wallach, "Let's Have a Little Humor" [1984] NYLJ 2, Col 3.
22. 122 Mich App 418, 333 N W 2d 67 (1983). The headnote was also written in lyrics.
23. In re Inquiry relating to Rome 218 Kan 198; 542 P 2d 676 (1975). In that case a Kansas State Court trial judge placed a prostitute on probation for soliciting an undercover policeman. He expressed his reasons in an opinion written in verse which led to an inquiry into alleged improper judicial conduct. See Jordan, 702. Lord Mansfield tried poetry in The King v Shipley (1784) 4 Dougl 73; 99 ER 774.
24. Prosser, above n 19.
25. See eg G & J Shopfittings & Refrigeration Pty Limited (In Liq) v Lombard Insurance Company (Aust) Limited (1989) 16 NSWLR 363 at 377.
26. [1942] AC 206 at 245. Lord Denning frequently used irony to good effect. See eg In re Vandervell's Trusts [No 2] [1974] Ch 269 when he said at 321: "Even a court of equity would not allow him to do something so inequitable and unjust".
27. See R Stevens, "The Law and Politics: The House of Lords as a Judicial Body 1800-1976", 1979, 287.
28. See eg Nakkuda Ali v M F De S Jayaratne [1951] AC 66, 76 (PC); Salemi v MacKellar [No 2] (1977) 137 CLR 397.

29. The Broken Hill Pty Co Ltd v Seamans' Union of Australia (BHP Case) (1975) 171 CAR 711. See also Federated Storemen and Packers Union of Australia v Albany Woolstores Pty Ltd (1979) 231, CAR 388, where Staples J concluded his decision with an allusion to Joseph Furphy's book about the wool trade by declaring the way in which he had fixed the figures he arrived at: "I shall simply select a figure as Tom Collins selected a day from his diary and we shall see what turns up. Such is life".
30. See discussion M D Kirby, "The Removal of Justice Staples - Contrived Nonsense or Matter of Principle?" in (1990) 6 Aust Bar Rev 1.
31. National Employers' Mutual General Insurance Association Limited v Manufacturers' Mutual Insurance Limited (1988) 17 NSWLR 223, 225.
32. ibid, 242.
33. J J George, Judicial Opinion Writing Handbook, (2nd ed), Hein & Co, Buffalo, 1986.
34. L Hand, quoted in Jordan, above n 20, 693.
35. In the first reported judgment in the Court of Appeal following appointment, headings appear. See Brian Cassidy Electrical Industries Pty Limited (In Prov Liq) and Anor v Attalex Pty Ltd [1984] 3 NSWLR 52, 54. See also in the judgment of McHugh JA, then also recently appointed. See 73.
36. See judgment of McHugh J eg Chan v Minister for

- Immigration and Ethnic Affairs (1989) 63 ALJR 561, 576 ff. Other Justices have now increasingly adopted the same style. See eg Gaudron J loc cit, Brennan J in South Australia v Tanner (1989) 63 ALJR 149, 154. Toohey and Gaudron JJ in Mickelberg v The Queen (1989) 63 ALJR 481, 495 ff.
37. See eg Mason CJ and Toohey J in Mills v Meeking (1990) 64 ALJR 190, 194 ("One would expect such a person to remain in the company of the member or officer until he or she has furnished a sample of breath for analysis ...") However, the practice is not universal. Thus Dawson J in the same case (loc cit 195) refers to "a person" as "he". So does McHugh J (at 202), although he is elsewhere at pains to repeat the noun to avoid gender designation.
38. See eg the extract from the judgment of Mason CJ and Wilson, Dawson and Toohey JJ in Federated Insurance Limited v Wasson (1987) 163 CLR 303 at 313 extracted in n 75 below.
39. See M D Kirby, The Judges, above n 11, 13.
40. Probably the most famous footnote in United States legal authority is footnote 4 to the opinion of Stone J in United States v Carolene Products Co, 304 US 144 (1938). The history of this footnote, the correspondence between Hughes CJ and Stone J about it and editorial comments on it are found in W F Murphy, J Fleming and W F Harris, American Constitutional

Interpretation, Foundation Press, NY, 1986, 482ff.

41. (1964) 112 CLR 125.
42. Ibid at 129.
43. Appendix at 138. See also the schedule to the reasons of Priestley JA in Silovi Pty Ltd v Barbaro & Ors (1988) 13 NSWLR 466, 476. Powell J annexed an appendix of books on security and intelligence matters tendered in evidence to his judgment in Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Limited & Anor (1987) 8 NSWLR 341 at 386-7.
44. See eg Priestley JA in Commissioner for Motor Transport v Kirkpatrick (1988) 13 NSWLR 368, 392-3.
45. Note discussion in G R Smith above n 19, 137.
46. Tasmania v The Commonwealth; The Tasmanian Dams Case (1983) 158 CLR 1.
47. ibid 58-9.
48. id, 56-8.
49. Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Limited & Anor (1987) 10 NSWLR 86 at 91 (Street CJ).
50. This is done in D R Klinck, "Style, Meaning and Knowing: Megarry J and Denning MR" in (1987) 37 Uni Toronto L J 358.
51. [1974] Ch 269.
52. Ibid 273-4.
53. id, 316.
54. J A G Griffith, Book Review (The Discipline of the Law)

- in (1979) 42 Mod L Rev 348. See discussion M D Kirby, "Lord Denning: An Antipodean Appreciation" in [1986] Denning LJ 103, 107.
55. Klinck, above n 50, 367.
56. ibid, 370.
57. id, 385.
58. R Weisberg, "How Judges Speak: Some Lessons on Adjudication in Billy Budd; Sailor with an Application to Justice Rehnquist", 57 NY Uni L Rev 1, 49 (1982). See also analysis by B Cardozo, Law and Literature above n 17, 342: "It eschews ornament. It is meager in illustration and analogy. If it argues, it does so with a downward crush and overwhelming conviction of the syllogism and seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned".
59. Cardozo, loc cit.
- 60 See Fay above n 9. See also Voth v Manildra Flour Mills Pty Limited (1989) 15 NSWLR 513 and notes at (1987) 103 LQR 398 and (1989) 64 ALJ 219 and (1989) 13 NZ Uni L Rev 337, 357f.
61. The calls for single opinions are by no means confined to Australia. Douglas J of the Supreme Court of the United States alluded to the pressure when he wrote: "All of us in recent years have heard and read many criticisms of dissenting ... opinions. Separate opinions have often been deplored. Courts have been

- criticised for tolerating them". See W Douglas cited in J L Campbell, "The Spirit of Dissent" 66 Judicature 305, 312 (1983).
62. See discussion J Crawford, Australian Courts of Law, Oxford, Melbourne, 1982, 169 ff.
63. See eg Jeyaretnam v Goh Chok Tong [1989] 1 WLR 1109 (PC).
64. See eg McHugh JA in Kingston v Keprese Pty Limited (1987) 11 NSWLR 404, 421 ff and the cases there cited.
65. See Lord Reid, "The Judge as Lawmaker" in (1972) 12 Journal of Public Teachers of Law, 22. For useful discussion of Realpolitik in the present context see W Sadurski, "It All Comes Out in the End : Judicial Rhetorics and The Strategy of Reassurance" (1987) 7 Oxford J Legal Stud 258 and J Goldsworthy, "Realism about the High Court" (1989) 18 Fed L Rev 27.
66. F Kitto in Law Foundation (NSW) Judicial Essays, 9.
67. For discussion see S S Ulmer, "Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger" in S Coldman and C M Lamb, Judicial Conflict and Consensus: Behavioural Studies of American Appellate Courts, Uni Kentucky, 1982, 53. There has been no equivalent analysis of dissent patterns in appellate courts in Australia. For figures on dissents in the NSW Court of Appeal see Annual Review 1986, 53 where the highest rate of dissent was Mahoney JA (14) followed by Kirby P (13); Samuels JA

- (7); McHugh JA (6); Priestley JA (2); Glass JA (1) and Hope JA (nil). The 1987 statistics were Kirby P (18); Mahoney and Samuels JJA (5); McHugh JA (2) and Priestley and Glass JJA (1). Hope JA was again nil. See Annual Review 1987, 38. For 1988 the figures were Mahoney JA (16), Kirby P (13); McHugh JA (10); Samuels JA (3); Clarke JA (3) and Street CJ, Hope JA and Priestley JA 1 each. See Annual Review 1988, 29.
68. See Dickinson's Arcade Pty Limited v Tasmania (1974) 130 CLR 177, 188.
69. 163 US 537 (1896).
70. 347 US 483 (1954).
71. 316 US 455 (1942).
72. 372 US 335 (1963).
73. See eg the apparent influence of the earlier dissenting opinions about the meaning of s 92 of the Australian Constitution upon the unanimous opinion of the High Court in Cole v Whitfield (1988) 165 CLR 360.
74. Campbell, above n 61, 307.
75. Hughes CJ as quoted in J Edwards, "Dissenting opinions of Mr Justice Smith", 34 U Det L J 82 (1956). The expression was used by the High Court of Australia by Mason CJ, Wilson, Dawson and Toohy JJ in Federation Insurance Limited v Wasson & Ors (1987) 63 CLR 303 at 314 ("A dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its

wisdom").

76. B Cardozo, Law and Literature above n 17, 36. See also W Douglas cited in Campbell above n 61, 311.
77. J Simmons, "Use and Abuse of Dissenting Opinions" 16 L.A. L Rev 498 (1956). See also E McWhinney, "Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals" (1953) 31 Canadian Bar Rev 609.
78. See eg Fothergill v Monarch Airlines Limited [1981] AC 251, 278 (HL).