JUDGEMENT WRITING IN AN AGE OF CHANGE

LAW & LITERATURE CONFERENCE

THE UNIVERSITY OF SYDNEY

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If I shut my eyes twenty or thirty years roll away. I am in this part of the University where, at the feet of Thelma Herring, Professor Wilkes and other members of the English Department, I learned of poetry, literature, and good writing. I enjoyed that time. I should have taken the hint and pursued a lifetime in academia in English. Perhaps if that had happened I would have been sitting here on the other side of this stage and looking at the issue of writing judgments from quite a different perspective. It is perhaps a commentary on the University in those days that Justice Meagher and I, both former Fellows of the Senate of this University, have never before this day stepped inside this building. In those far-off days this was the Engineering School where there was no fascination (at least so far as we were aware) with poetry, literature and the realm of words with which lawyers and judges deal every day of their lives.

This morning, whilst all of you were celebrating the issues and cerebrating the issues that are before this conference, I was at the Law Courts busily burrowing away, writing judgments. That is the starting-point of this consideration. It is the reality of life that the judges, furiously working away, do not have a great deal of time to stand back (as this conference affords us the opportunity to do) to reflect upon a craft or skill or even the purpose of what we are seeking to do. Sir Laurence Street, an absolute master of the oral *ex tempore* judgment and rightly chosen as our chairman to-day, said that there is a controversy as to the audience for whom judges are writing judgments. Is it the disappointed litigant? Is it litigants in

general? Is it the community? Is it your judicial peers? Your colleagues? Are you addressing the professional audience? Are you offering your words for the benefit of the appellate court to ensure against reversal? What is the audience? Is the audience all or some of those that have been mentioned? Is the ultimate audience one's own conscience?

Well, we furiously burrow away without perhaps asking that question sufficiently for ourselves. But in the time, even that I have been sitting on the Court of Appeal there have been a number of changes in judgment writing style. It is relevant to collect some of these. For example, we are seeing now, both in the decisions of the High Court and in the Court of Appeal and other courts, the greater use of headings and other means of dividing judgments into logical sections. *Pace* Justice Meagher we are seeing fewer Latinisms. We are seeing a reduction of the use of 'sexist' language which otherwise so infuses our tongue. The judges of the High Court of Australia are very careful nowadays (with Justice Gaudron close at hand to remind them) to say 'he or she' and to formulate their words in a way that does not necessarily confine them to male subjects.

If, as Professor Chesterman urges and I entirely agree, judges are to be more candid in the writing of their judgments, so that they reflect honestly the way in which from precedent to precedent (as Tennyson says), we move in the development ultimately of concepts, then the price of that honesty is that there will be more candid and frank discussion of issues of legal policy in judicial reasons. We see more clearly to-day than in earlier times, that where there is an ambiguity in a statute or where there us an uncertainty in the common law, judges have choices. The identification of the choices and the specification of why one choice rather than another is preferred requires elaboration. It would be nice if everything could be

brief. But if we are really to be candid about reasons, then brevity may be a virtue that has to be foregone. Since the beginning of this century there has been a tremendous burgeoning of the common law. In the far gone early days it was relatively simple for an Australian judge to find the controlling English case, apply it and that produced the result. But now there are so many appellate courts. There are so many sources of legal authority, both binding and persuasive. English decisions are now no more powerful or binding on us than those of any other foreign court. They are merely comparative law material. Accordingly, if we the judges are to do justice to the arguments which we receive in the court, then we have to deal with them and deal with them expressly. There are different views about this. But for myself I feel it is not entirely intellectually honest to have counsel address you at length on their arguments and then, if they are relevant, to ignore what they have said and not specifically to address yourself at least to their main submissions. Yet doing this sometimes takes time, and extends the length of judgments.

The chief difference that I have sought to introduce into judgments for my own part is something I learned in those far-off days to which Sir Laurence Street referred. He referred to my time in the Law Reform Commission. If, in those years, I learnt anything beyond what I had learnt at Law School and as a legal practitioner it was to look for the 'concept' of the case. A judge loses an opportunity if he or she does not, at the outset of the judgment, clearly indicate what the concept in issue really is. One can do this with force if one is trying to make a point. Heavy-handed humour or irony should be avoided. In a recent judgment where Justice Meagher swept aside, as I thought, a decade of decisions of the Court of Appeal I was able to say in the introduction of my reasons that what was at stake in the case was the fidelity of the Court of Appeal to its holdings over more than a decade. His Honour

did not feel bound by the decisions or obliged to distinguish them. He contented himself with castigating them and declining to persist in their perceived error. But a judge can, at the beginning of the judgment, get a little point over, effectively. That case showed how it can be done: mixing irony with criticism of each other's views in language at once temperate yet cutting.

There are so many things one could talk of in this session. No doubt we will do so in the session that follows. I have prepared a paper which says what I want to say. But it is too long. Perhaps it will be available to you later.[1]

Just me just say that judges, and all of them, are individuals. All of them have their own writing styles. It is the essence of our free society and of our independent judiciary that each judicial officer will do his or her thing as he or she thinks fit. Each will write judgments in a way that comes naturally. Each will be influenced, in this regard, by his or her background. Each will display different skills of communication and different approaches to the judicial art. That diversity is both the essence and the strength of the independent judiciary: the last empire of individualists.

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[1] See now M.D. Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691. See also by the same author 'Reasons on the Run' in (1991) 3 *Judicial Officers' Bulletin*; and 'Ex tempore Reasons' in (1991) 7 *Australian Bar Review* (forthcoming).