

**Supreme Court Oration  
Banco Court, Supreme Court, 16 March 2017**

***"Judicial Methods in the 21st Century"***

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This topic, "Judicial Methods in the 21st Century", was suggested by Justice Glenn Martin. He observed that the High Court appears to deliver its judgments more quickly than in the past. He asked: could it be that the method of producing judgments has changed? In answering that question, I will discuss the processes presently utilised in the High Court and, where possible, compare them with what may have occurred in the past.

I think it true to say that, in the latter part of the 20th century, public sentiment changed from an acceptance of the truth expressed in the aphorism "justice delayed is justice denied" to an expectation that decisions in litigation should be given reasonably promptly. Courts responded by establishing protocols for the timely delivery of judgments and methods of monitoring delay. In the High Court, for example, a list of outstanding judgments is circulated each Monday. It identifies who has and has not produced a judgment in each outstanding matter.

It would have been useful to have had a proper survey of the time taken for the delivery of judgments in the Court in the past, but this was not practicable. The current position may be stated with certainty. French CJ said in the Court's 2015-2016 Annual Report that "[a]ll civil and criminal appeals decided by the Full Court [that year] were decided within 6 months of the hearing of argument". I am prepared to hazard a guess that such a statement is unlikely to have been made at very many points in the Court's history.

Preparation

The process leading to the production of a judgment now starts at the point of preparation for a hearing. Gone are the days when a justice entered the courtroom

unencumbered by any real knowledge of the parties' arguments. Comprehensive written submissions, filed before the hearing, have been required since 1997. They have altered things, possibly irretrievably.

Preparation may involve not just an understanding of the shape and content of the arguments and where issue is joined, but also an understanding of relevant legislation and key cases. The level of preparation will obviously vary according to the nature of the case, the time allowed for it and the individual justice. Lord Neuberger, the President of the Supreme Court of the United Kingdom, divides judges into two categories: judicial Pre-Raphaelites, who read everything; and judicial Impressionists, who read very little. He frankly admitted to being more of an Impressionist. This was later reported in a newspaper article entitled "Lord Neuberger, Britain's most senior judge, admits he doesn't read all the papers in a case" or words to that effect.

I think most High Court justices would prepare as much as time allows and as much as they consider necessary to the particular case. Much depends on how up to date one is with judgments and where one draws the line between continuing to write them and preparing for the next sittings. Preparation enables better engagement with the argument during the hearing and it shortens the time taken for the hearing. A glance at the Commonwealth Law Reports (CLRs) for the number of hearing days in comparable matters in the past confirms this. A justice is also better placed to start writing the judgment than before. Writing can commence soon after the conclusion of oral argument and the conference which follows it.

#### Conferences pre and post hearing

In recent years, the High Court has adopted the practice of holding a short meeting of the justices at the beginning of each sitting week, preparatory to hearings.

Pre-hearing meetings are not uncommon in other common law jurisdictions. Their principal purpose is to identify any procedural issues or matters to which the parties' attention needs to be directed before the hearing. Points of possible importance might be flagged. Sometimes preliminary views are offered, but any substantial discussion is left until the meeting which is held after the conclusion of oral argument.

Methods of conferring differ between jurisdictions. In England it has been the practice that the judges speak in inverse order of seniority, with the most junior offering his or her view first<sup>1</sup>. This tradition was apparently designed to "forestall any tendencies of more junior Law Lords to be overly deferential to more senior and more trenchant colleagues"<sup>2</sup>.

Needless to say, the position in Australia today is rather more informal. It suggests little concern about the possibility of deference. There is a free exchange of views, in no particular order, with the Chief Justice, or the justice who has presided, steering the meeting. There is opportunity for persuasion, for criticism, and for debate. The benefits of the conference should be obvious. Each justice has the benefit of the views of six legal minds which should be amongst the best in Australia. Why would one not listen to them? Even if one does not agree with another point of view, discussion can only assist in refining one's own. The final product is bound to be better.

It is not at all clear that conferences, or conferences of this kind, have been a fixture in the past. This may, in part, be explained by justices not being in a position to have formed views to enable discussion, because they did not have written submissions and had not prepared for the hearing. It may also be explicable by reference to attitudes to such meetings.

Another purpose of the conference is to ascertain if there is a clear majority. This does not involve voting, as it does in some courts, such as the US Supreme Court. There judges speak in descending order of seniority and then vote. Curiously, this is not dissimilar to the process undertaken in some civilian jurisdictions, the main difference between the two being that civilian courts aim for one collective decision; and the US Supreme Court for two – one majority and one dissenting judgment.

There is rarely more than one meeting held post-hearing, largely because once the process of writing a judgment commences, views tend to become entrenched. There is much to be said for a further meeting when the first meeting ends inconclusively as to a majority view or where the justices need more time to reach their conclusions. It

can be useful for them to give the matter some further thought, to work towards a solution and then exchange memos before another meeting is held.

### The first draft

If there is a clear majority, at the end of the meeting, one justice is usually assigned the task of producing a first draft for the others. The allocation may be made on the basis of the issues in the matter being of particular interest to a justice or simply in order to achieve an equitable allocation of work. A system like this works best if all are able to produce judgments to a similar standard and within a similar time.

If there is not a clear majority sometimes a justice nevertheless volunteers to produce a first draft, perhaps hoping to bring his or her colleagues to a point of view. But sometimes judges need to work their way through the problem and writing a judgment is the only way to do it. In this event no allocation is made, but there may be informed discussions later exchanging views and identifying who is writing.

In either case, those who are not assigned a first draft will usually make further detailed notes after the meeting, have further research undertaken, and prepare an outline, or even a draft of their own, in preparation for the receipt of the first draft.

The principal purpose of a first draft is to have those who are of the same view agree with it and thus avoid unnecessary judgments. By "unnecessary" I mean judgments which add nothing of substance to what has already been written. A judgment of this kind is unnecessary for the justice writing it. It is unnecessary for the Court and for those who read the published judgments.

This is not to suggest that there may not be perfectly valid reasons why another justice may find it necessary to write. I shall discuss them later. Even if that be so, a first draft is a valuable resource. It should not be necessary for that justice to set out the facts again, at least not completely. The first draft will also identify the relevant legislative provisions and place them in context, identify the parties' arguments, and discuss the authorities which bear upon the issues. This is why the reader often sees a grateful acknowledgment of another's labours in a later judgment.

There is a method to writing first drafts. They need to be succinct. A long judgment which says more than is necessary is less likely to attract agreement. Neither will a judgment written in the idiosyncratic style of the author, or in florid language from the classics or 19th century literature. It is better to resist the temptation to quote extensively from literature unless the aim is to not have others join in.

### The layout and length of judgments

With respect to both the layout and the length of a judgment, the modern judgment is different from those of the past.

A survey has recently been undertaken of the length of judgments of the High Court in the period from 1903 to 2015<sup>3</sup>. The authors refer to judgments collectively, rather than individually. They found, amongst other things, that the length of judgments was "relatively stable" during the first five or six decades of the Court. That ended in the 1970s when a general, expansive trend followed which resulted in the Brennan and Gleeson Courts producing the lengthiest judgments in the Court's history.

Two observations might be made about those periods. In the first place, there appear to have been many more individual judgments, some of substantial length. And, for a significant part of both periods, a lengthy dissent appears in almost every case. It is said that at the event which marked the publication of Volume 200 of the CLR's, a former justice of the Court remarked to the author of these dissents that, had it not been for them, the celebration would not have taken place for many years.

Some things have clearly changed in relation to the way judgments are written, not the least because writing styles have changed. We no longer write sentences which travel across many pages. We have fullstops, paragraphs and even headings.

One can have too much of a good thing. Lord Bingham, speaking extrajudicially, once said that his heart sank whenever he had to embark upon reading a judgment that set out a table of contents or chapters<sup>4</sup>. That may be so, but I think most would agree

that this method is helpful when judgments are lengthy. The real question is whether judgments need to be so long.

I have always assumed it to be a universally held view that a judgment should be as succinctly stated as the matter allows. That assumption may not be correct. A concern has been expressed<sup>5</sup> that the judgments of the High Court are too short; they do not deal with the subject at length and in as much detail as the intermediate appellate court from which the appeal is brought. Rarely does the High Court need to review the facts; it has the benefit of the findings of the courts below. This may sometimes account for the length of the judgments of those courts. Lengthy dissertations of the law are another matter. It is a question for any appellate court, the High Court included, whether that is necessary in each case.

#### Concurrence and dissent

A first draft judgment is circulated to the other justices in order to ascertain if those of like view will agree with it. Agreement is expressed by the circulation of a judgment which states little, if anything, more than the fact of agreement with the reasons and the orders proposed. That justice is then usually "joined in" to the first draft, with his or her consent. The justice's name appears on the judgment with that of the author. If others agree they too are joined in.

Although a judgment is called the "judgment of the Court" when all justices agree, or a "joint judgment" (or, more controversially, a "judgment of the plurality") when a number agree, it is more often the case that there is only one author. Whilst it is not unusual for suggestions, sometimes substantial in content, to be made to the author of the first draft, it is not often the case that two or more justices will work together to produce a judgment.

Suggested changes to the first draft after its circulation are usually contained in a memorandum, in which an explanation is given for the changes. It would not be usual to suggest a change in its essential reasoning or a substantial re-writing of it, although suggestions may nevertheless be of significance. The author of the first draft is not obliged to accept any proposed changes.

The effect of the High Court's practice of "joining in" is to render the author largely anonymous. Some might argue that a reader should know who the author is, although it is difficult to see what the benefit of that knowledge could be. On occasions a justice might wish the practice was otherwise, when it is felt that he or she has written a particularly good judgment, but it is always understood that if the practice were not followed justices would be encouraged to write separately more often, which is what the practice seeks to avoid.

Even when agreeing, some judges cannot help but say more. A judgment in a criminal law case before the House of Lords reported in 1999 furnishes an example<sup>6</sup>. The Law Lord in question explained that he had been persuaded to concur with the reasons of a colleague because trial judges needed certainty in the particular area of the law. He nevertheless took one and a half pages of the law reports to summarise the reasons he was abandoning.

A judge is at liberty to write separately, to the same result, if he or she chooses. There may be perfectly valid reasons for a judge doing so. There may be something which is considered necessary to be added to what has been written, which could not be accommodated within the first draft. An important qualification may be thought necessary. A judge may not consider that the judgment has been expressed clearly enough or it may be written in a style which they do not wish to be seen to adopt. It may contain statements of principle, or even a footnote, which a judge does not wish to be taken to approve but which the author has declined to remove.

It goes without saying that if a judge cannot agree with the view of the majority, he or she is duty bound to dissent and write accordingly. I would expect that any judge who is considering this course will first have endeavoured to understand the majority view and whether they can accept it as a possible view, not the least because if a number of one's colleagues are persuaded to a point of view, it could just be that one is wrong.

Fewer individual judgments

Most justices are motivated to agree with a first draft written by another if they are of the same view, the reasoning is correct and there is no other obstacle to agreement. They will agree although they may have wished to write themselves. They may even think they might have expressed it somewhat better than their colleague's draft. But they appreciate that there is every good reason to reduce the number of individual judgments which are published in a matter.

In the first place, foregoing writing another judgment to the same effect allows each like-minded justice to focus their attention on other judgments. If all, or most, of the justices adopt this approach there will be a reduction in the time taken to publish judgments. On the other hand, if all, or most, of them are writing in most matters there will almost certainly be delays. There will be delays because justices will have a backlog of judgments.

A single majority judgment is more likely to provide a clear ratio. The reader will not be required to analyse a number of judgments in order to ascertain if there is a ratio and whether the reasoning in each accords with the others. Readers include judges of lower courts, who must apply the Court's decisions, and practitioners. These judges often work under considerable pressure of time. A practitioner's time in reading at length is a cost, sometimes considerable, to their client.

The Supreme Court of the United Kingdom appears recently to have attempted to reduce the number of individual judgments. Lord Neuberger calls judgments which add nothing to what has already been written by a colleague, and effectively say no more than "I have understood this case" or "I think I can express it better", "vanity judgments". He says that they are "at best a waste of time and space, and, at worst, confusion and uncertainty – although they are popular with academics"<sup>7</sup>. He adds that most appellate court judges have been guilty of writing them at some time.

A single judgment of the Court or of the majority carries greater authority, not only for its precedential value. It instils confidence in the Court's decision. This is especially important where it is necessary to give guidance to courts below. So understood, some of the benefits of a single judgment, or fewer individual judgments, are



institutional. The "vanity judgment" of which Lord Neuberger speaks is not the voice of the Court, it is the sound of self.

There are critics of this collegiate approach including a former justice of the High Court<sup>8</sup>. They argue that conferences and agreement with another's judgment compromise the independence of judges. According to this view a judge has a duty to reveal what he or she thinks to the parties and to the public and it is necessary that each judge show that the case has been given the closest personal attention. These obligations are fulfilled by avoiding discourse with other judges and writing separately in each case.

These views may be answered shortly. The opinion of a judge is revealed to the world by the publication of a judgment in his or her name. A judgment written for the purpose of proving that a judge has understood the case is an unnecessary judgment of the kind earlier referred to. It is no part of the duty of a judge to write a judgment in every case. The true duty of a judge is to consider a matter properly before coming to a decision. The fulfilment of that duty is a matter of conscience for a judge. The method by which a judge's opinion is expressed is irrelevant to it.

No appellate judge in Australia would conceive of a judge's duty as being simply to vote on a matter. But, as any judge who has ever concurred in another's judgment knows, it is not necessary to write a judgment to be able to reason to a conclusion. The collegiate method enables a judge not only to give proper consideration to a matter, but to do so promptly. This is because, as earlier explained, it involves preparation, participation at hearing and in conference, and making notes and outlines. The individualist, writing in each matter, will rarely be in this position.

The other concern which is expressed about the collegiate approach is the effect of "excessively dominant judicial personalities". I think most people would be surprised at the suggestion that High Court justices might be overborne by such a personality. I have had no experience of such a person. It is not clear whether those who are concerned about judges conferences have. The examples given are drawn from the

English judiciary of the past, such as Lord Diplock<sup>9</sup>. This might not be thought to provide a strong reason for declining to engage in a dialogue with one's colleagues.

The ability to influence is another thing altogether. It is a fact that some people, judges and lawyers included, are better at persuasion than others. There are methods which may be employed by judges to persuade. Participating in discussion is one. Preparation for it is another. Writing a judgment quickly, when a first draft has not been assigned, is sometimes effective, although it may be overcome simply by another advising colleagues that he or she will be producing another judgment for their consideration.

Lord Neuberger, in response to the criticism of the collegiate approach, identifies another obligation to which a judge is subject. It is "to do her best to ensure that the court of which she is a member produces as clear and coherent a judgment or set of judgments as is consistent with each member's opinion"<sup>10</sup>. I respectfully agree.

The individualistic approach has not been without its critics. In 1984 Professor A W B Simpson wrote<sup>11</sup>:

"[T]he undisciplined individualism of English appellate judges, and their complete lack of any collegiate spirit, reduces much of their work to mere confusion."

Lack of coherence and clarity in the Court's reasoning is one undesirable result of too many separate judgments. Delay is another. The reality is that the timely production of judgments could not be achieved if each justice produced a complete separate judgment in each case. The critics of the collegiate approach do not suggest otherwise. Indeed they do not point to any benefit that might accrue to the Court or those affected by its judgments from the pursuit of individualism.

A delay in publication of judgments may have important consequences for litigants and for the Court. Some years ago I wrote a joint judgment with two colleagues. It was joint in the true sense; each of us wrote a separate part of it. It was to be an

important judgment involving commercial law. I would give the citation for the judgment, but it was never published.

Our joint judgment was circulated. All but one concurred. We waited for that justice's judgment but the justice had a backlog of judgments. The parties waited for the Court's decision. Months passed. Finally the other judgment arrived. We gave notice that we would hand down the Court's decision in a week's time. A few days before that date the parties advised the Court that the matter had been settled. It is not difficult to infer that, as time went on, the parties decided to resolve it for themselves. The Court had let them down.

One solution to the pressure of time might be for individual justices to write draft judgments by the method adopted by judges of the US Supreme Court, which is to delegate that task to his or her clerk. I had thought that great individualist, Antonin Scalia, to have been an exception to this practice. However, in an interview conducted a few years before his death<sup>12</sup>, the judge frankly admitted that he had never written a first draft of his own judgment. I hasten to add that there is no suggestion that this practice might become part of the judicial method of the High Court.

### Conclusion

The answer to Justice Martin's question is that a somewhat different judicial method does appear to have evolved. It started with the introduction of written submissions. The work of a justice shifted from post to pre-hearing. There came to be closer engagement with oral argument and with colleagues in discussions. Judgments are now produced in which a majority combine in agreement. One cannot say that this method is here to stay. Much will depend upon the continued acceptance of the benefits it produces. Views can change and with them judicial methods.

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<sup>1</sup> Lord Neuberger, "Sausages and the Judicial Process: the Limits of Transparency" (Speech delivered at the Annual Conference of the Supreme Court of New South Wales, Sydney, 1 August 2014) at [14].

<sup>2</sup> Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) 84.

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- <sup>3</sup> David Carter, James Brown and Adel Rahmani, "Reading the High Court at a Distance: Topic Modelling the Legal Subject Matter and Judicial Activity of the High Court of Australia, 1903-2015" (2016) 39(4) *University of New South Wales Law Journal* 1300 at 1315.
- <sup>4</sup> Louis Blom-Cooper, "Style of Judgments" in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords: 1876-2009* (Oxford University Press, 2009) 145 at 160.
- <sup>5</sup> The Honourable Justice M Beazley "Judgment Writing in Final and Intermediate Courts of Appeal: 'A dalliance on a Curiosity'" (2015) 27(9) *Judicial Officers' Bulletin* 79.
- <sup>6</sup> *R v Powell* [1999] 1 AC1 per Lord Mustill.
- <sup>7</sup> Lord Neuberger, "Sausages and the Judicial Process: the Limits of Transparency" (Speech delivered at the Annual Conference of the Supreme Court of New South Wales, Sydney, 1 August 2014) at [32].
- <sup>8</sup> J D Heydon, "Threats to Judicial Independence: the Enemy Within" (2013) 129 *Law Quarterly Review* 205 at 215.
- <sup>9</sup> J D Heydon, "Threats to Judicial Independence: the Enemy Within"(2013) 129 *Law Quarterly Review* 205 at 217.
- <sup>10</sup> Lord Neuberger, "Sausages and the Judicial Process: the Limits of Transparency" (Speech delivered at the Annual Conference of the Supreme Court of New South Wales, Sydney, 1 August 2014) at [25].
- <sup>11</sup> AWB Simpson, "Lord Denning as Jurist" in JL Jowell and JB WB McAuslan, *Lord Denning: the Judge and the Law* (London, Sweet & Maxwell, 1984) 441 at 451.
- <sup>12</sup> Jennifer Senior, "In Conversation with Antonin Scalia", *New York Magazine*, 6 October 2013.