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# The individual judge

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*This article explores the relationship between judicial independence, individualism and judgment writing. While it is the duty of a judge who disagrees with his or her colleagues to express that disagreement, the issue is more complicated where a judge does agree, but nevertheless deems it necessary to write separately. The current practice of the High Court of Australia encourages the production of joint judgments, without judges having to publish a separate concurrence. Although not suggesting that judges in appeal courts should never write separately from their colleagues, the article considers the reasons for favouring the production of joint judgments, rather than multiple separate judgments.*

I am honoured to present this lecture in memory of Sir Richard Blackburn. Sir Richard had a long and distinguished career as a judge of the Supreme Courts of the Northern Territory and of the Australian Capital Territory (ACT), culminating in his appointment as Chief Justice of the Supreme Court of the ACT. The esteem in which Sir Richard was held is evident from preceding lectures. In one, Sir Gerard Brennan described Sir Richard as an “outstanding judge” and a “helpful colleague who held a high yet humble conceit of the importance of the judicial office”.<sup>1</sup> He was, Sir Gerard said, one of his best judicial colleagues.

There can be little doubt that Sir Richard would have understood the demands of judgment writing. He was also a staunch advocate of judicial independence. His views about the undesirability of the appointment of State Supreme Court judges to head up criminal investigation agencies were well known. Judgment writing, independence and collegiality are the themes for my discussion here.

Judicial independence is usually understood in the context in which Sir Richard spoke – as involving the independence of the courts from the Executive. Since *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, it is sometimes argued in this regard that a statutory provision or executive act is invalid because it impermissibly interferes with the institutional independence of the courts. The courts are comprised of judges. It is therefore necessary that they be able to act independently so as to support the court as an institution.

From time to time, in England as well as in Australia, the view has been expressed that appellate court judges should write separate judgments. On this view, the practice of agreeing, and joining in, with a judgment written by another judge presents a risk to judicial independence itself. So too does collegiate discussion. On this approach, it is necessary to be independent from one’s own colleagues.

This viewpoint appears to equate the notion of a judge’s independence with individualism, in the sense of standing apart from others. It assumes that a judge cannot exercise independence of thought in the act of agreeing with the view of another. This is not a view shared by all. One respected commentator has confidently concluded that the independence expected of judges in the discharge of their judicial function is in no way compromised by the delivery of joint judgments.<sup>2</sup>

Nor has the desire of members of the High Court of Australia to express themselves in separate judgments been met with universal approval. In the Boyer Lectures in 2000, former Chief Justice Murray Gleeson said that one of the most common criticisms made about the way the court went about its business related to the length and the diversity of reasons for judgment and that this was, in part, a consequence of what he described as “the individualistic spirit” of members of the court.<sup>3</sup>

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<sup>1</sup> Brennan G, “Courts, Democracy and the Law” (1991) 65 ALJ 32 at 32.

<sup>2</sup> Campbell E, “Reasons for judgment: Some consumer perspectives” (2003) 77 ALJ 62 at 71.

<sup>3</sup> Gleeson M, *The Rule of Law and the Constitution* (ABC Books, Sydney, 2000) p 89.

Others have spoken of the “institutional responsibility” of judges regarding the court’s judgments,<sup>4</sup> which might require a judge to think of broader and more important considerations than self-expression.

In 2013, Professor Alan Paterson published the second of his reports<sup>5</sup> on how English appellate courts operate. These studies involved many years of research and discussion with the Law Lords and members of the Court of Appeal. The first report was published in 1982.<sup>6</sup> By the time of the second, the Law Lords had become justices of the Supreme Court of the United Kingdom. His work provides considerable insight about how judgments are produced. In large part, this was achieved because judges spoke openly with him and gave their views about joint and separate judgments. No similar exercise has been undertaken in Australia.

As to the interaction between the judges at the different stages of an appeal, Professor Paterson observes that “[s]ometimes the process most resembles five individuals in action; sometimes it is genuinely collaborative; mostly it is somewhere between the two”.<sup>7</sup> I think this would be true of the High Court. In my view it is not possible to state a rule, such as that each judge should write separately in every case. Much depends upon the particular case and the views that the judges form about it. The differences of approach reflect the process of decision-making which each judge chooses to employ. Having said that, I am confident that these days joint judgments form the higher proportion of the judgments of the High Court.

Professor Paterson says<sup>8</sup> that, in the last 40 years, individualists who attached little importance to collectively deciding an appeal have been a small minority of English appellate judges. He notes that, since the Supreme Court was set up in 2009, there has been both a dramatic rise in single majority judgments, as opposed to individual opinions,<sup>9</sup> and more discussion before and after a hearing. It is of interest to note that a court which one would think is now likely to feel a greater sense of institutional independence, having been physically and otherwise separated from the House of Lords, appears to have experienced a surge of collegiality.

This is not to say that opinion in England has not been divided about multiple versus single judgments. However, the trend Professor Paterson notes has for some time been towards more single judgments, which is to say one judgment in which the other judges concur. This tendency was no doubt influenced by there being much criticism of additional speeches, which were said to add nothing and served only to “fudge” the areas of real agreement.<sup>10</sup> Lord Diplock was strongly in favour of having only one judgment in each case, although it is likely that judgment was often his. By the time of his death in 1985, the proportion of single judgments in the House of Lords was 68%, but that figure fell in the 1990s. By mid-2013 single judgments of the Supreme Court were running at 55%.<sup>11</sup>

The history of the High Court since Sir Owen Dixon’s time might reveal a similar ebb and flow. However, it is unlikely that, in relatively modern times, many judges would turn their face completely against the prospect of agreeing with another’s judgment. We call these judgments “joint judgments”, because those agreeing “are joined in”, a practice to which I shall later refer. One might speculate that the regularity with which joint judgments are achieved is a reflection of the personalities of the judges making up the court at particular points in time. At some points the court may be composed of a majority of judges of a similar cast of mind. They may exercise complete independence, but are simply more likely to agree. The point is they choose not to write separate judgments and do so for good reason.

<sup>4</sup> See, eg Mason A, “Reflections on the High Court: Its judges and judgments” (2013) 37 Aust Bar Rev 102 at 110.

<sup>5</sup> Paterson A, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, Oxford, 2013).

<sup>6</sup> Paterson A, *The Law Lords* (University of Toronto Press, Toronto, 1982).

<sup>7</sup> Paterson, n 5, p 131 (footnotes omitted).

<sup>8</sup> Paterson, n 5, p 131.

<sup>9</sup> Paterson, n 5, pp 105-106.

<sup>10</sup> Paterson, n 5, p 100, citing Blom-Cooper L and Drewry G, *Final Appeal* (Clarendon Press, Oxford, 1972) p 93.

<sup>11</sup> Paterson, n 5, pp 100-106.

Judges of the High Court are usually fairly strong-minded people. The references in biographies of former members of the court to the personal differences between judges, and the tensions which resulted, do not suggest a high level of collegiality. It is not possible to discern whether collegiality was something to which judges in earlier times aspired. But it most certainly is today. Civility and courtesy among judges are essential to the discussions that necessarily take place between judicial colleagues. These values enable a joint judgment to be achieved.

Professor Paterson says that, when the Supreme Court came into being in the United Kingdom, there was a discernible groundswell of support for a single majority opinion of the court.<sup>12</sup> The impetus for it had come largely from the Court of Appeal, the members of which complained about wading through five substantive speeches.

Some Australian judges have in the past also suggested that greater self-discipline should be shown by judges when exercising their freedom to deliver separate reasons for judgment.<sup>13</sup> Professor Enid Campbell<sup>14</sup> suggested that the needs of “consumers” of judgments are not met by lengthy and separate reasons. She pointed to<sup>15</sup> the cost to litigants, whose legal advisers must pore over each set of reasons with little corresponding benefit to the client; the time spent by and cost to the publishers of law reports and digests, which must be passed on to consumers; the problems for the compilers of casebooks for students and the authors of legal works; and the task which lengthy and numerous judgments present for journalists.

The reality is that many judgments in one case may discourage what modern courts are seeking to achieve – a proper understanding of what the court is saying. That understanding is only possible if the court is speaking as clearly as the circumstances of the case allow and people are encouraged to read judgments. Many separate judgments may result in their not being read at all, in which case the educative role of the court is not fulfilled.

In a practical sense, our system of justice could not tolerate each judge writing independently in every case. It is expected that courts will deliver judgments in a timely way. In the High Court, the pressure to produce draft judgments is provided by the next sittings, which are usually only two weeks from the conclusion of the last. In that period, not only do judgments have to be written for cases which have been heard, it is also necessary to undertake preparatory reading for the next sittings, which can be extensive. Most appellate courts are subject to the pressures of time.

If judges feel the need to write separately, time must be allowed for them to do so. If a judge has decided that, as a matter of course, he or she will write separately in all cases, two consequences will usually follow. That judge will not be able to contribute much, if at all, by way of first draft judgments because that judge will not be able to produce one promptly, which is a key purpose of a first draft. Of course, a judge who has decided to write separately may not be interested in undertaking the task of a first draft, so this issue may be hypothetical. The second consequence is that the judge will at some point delay the court giving judgment in a matter.

When judgments are published, it is never stated when each set of reasons was produced and circulated to other members of the court. There can be a gap of many months between them, so that when the last judgment is received, those judges who circulated a judgment many months earlier may struggle to recall the details of the matter. And, of course, a delay in judgment is attributed to the court as a whole.

On two occasions, in my experience, all but one judge had agreed in a draft and many months were spent waiting for the outstanding judgment. The consequence of the delay in each case was that the matter settled before judgment was given. The parties could apparently wait no longer. On one such occasion, the chance for the court to produce a collaborative judgment on an important

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<sup>12</sup> Paterson, n 5, p 104.

<sup>13</sup> Doyle J, “Judgment Writing: Are There Needs for Change?” (1999) 73 ALJ 737.

<sup>14</sup> Campbell, n 2.

<sup>15</sup> Campbell, n 2 at 64-67.

development in the law was lost. Outcomes such as these are bad for litigants and bad for the legal system as a whole. They deny the court its role in determining the matter before it and tarnish its reputation.

If a judge does not often write a first draft or cannot produce a draft in a timely way, he or she will not be able to influence colleagues. Professor Paterson suggests that the small minority of individualist judges who regarded joint judgments as inimical to judicial independence considered it illegitimate or pointless to seek to persuade their colleagues to their point of view.<sup>16</sup> It was the experience of Lord Wilberforce<sup>17</sup> that many brilliant judges do not have the ability to persuade their colleagues. However, some judges are both willing and able to influence colleagues. They are most likely to be found among judges who favour joint judgments. What is the vice in seeking to persuade colleagues, one's equals, to one's point of view? It is hardly as if they are unused to efforts of persuasion.

Of course, no one could suggest that it would be consistent with a judge's duty to join in a judgment with which he or she does not agree or to compromise a firmly-held view. It is difficult to conceive that a judge would do so or that a judge of the highest appellate court would feel pressured to agree with another's reasons for judgment. You may not be surprised to hear that, for the most part, judges are not shy, retiring types. Lord Pearce once said<sup>18</sup> that, by the time judges get to the House of Lords, "they are fairly determined people". Sir Anthony Mason has said<sup>19</sup> that, in his long experience, he never encountered a compliant judge on the High Court.

A greater difficulty presented by the practice of joint judgments may arise not from the pressure of colleagues to join in, but from a personal desire to stand out, to have one's own voice and develop one's own reputation. Herein lies a possible tension.

It must be frankly acknowledged that some judges may feel a sense of loss when a judgment they have written is published under the names of all the other judges who have agreed with it, but may not have contributed substantially to it. A judge's loss of identity as author may be exacerbated on occasions when commentators guess, often wrongly, about authorship. A judge whose judgments are more often than not agreed in by his or her colleagues will not necessarily achieve the recognition or reputation of other judges. This may result in a misconception about influence.

The current practice of the High Court regarding judgments results in a greater degree of anonymity of authorship than other courts. This practice requires the author of a judgment to join in any judge who circulates a concurrence with the judgment. The practice is quite unlike that of other appellate courts in Australia, where joinder is more a matter of discretion for the author judge, or the practice of the English courts, where a judge expresses agreement separately, under his or her own name.

I believe the practice of the High Court to be of relatively recent origin, although Sir Anthony Mason<sup>20</sup> suggests something like it may have occurred in Sir Owen Dixon's time, perhaps because Sir Owen felt unable to refuse the requests of his colleagues to join in. Views about the practice may differ. Mine has certainly vacillated. Some commentators regard attribution as important to the individual in establishing a reputation and for the simple pleasure of being acknowledged.<sup>21</sup> Referring to the ghost-writing of judgments by Dixon J for McTiernan and Rich JJ, those commentators point to the need for correct attribution. More generally, it might be said that there should be no secrecy about authorship.

<sup>16</sup> Paterson, n 5, p 131.

<sup>17</sup> Paterson, n 5, p 133.

<sup>18</sup> Paterson, n 6, p 104.

<sup>19</sup> Mason, n 4 at 109.

<sup>20</sup> Mason, n 4 at 104.

<sup>21</sup> Seroussi Y, Smyth R and Zukerman I, "Ghosts from the High Court's Past: Evidence from Computational Linguistics for Dixon Ghosting for McTiernan and Rich" (2011) 34 UNSWLJ 984 at 987.

If joint judgments are a good thing, the advantage of the current practice of the High Court is that it encourages other judges to join in without having to publish a separate concurrence. Experience suggests that many judges find it difficult to say simply “I agree with Justice X”. They feel the need to show that they have an understanding of the issues by writing a separate judgment. Experience also shows that, apart from creating unnecessary reading, the clarity of the ratio of the decision may be affected by their doing so. The disadvantage of the court’s current practice may be that the anonymity which it produces encourages the very thing that it seeks to overcome – the writing of a lengthy separate judgment even if it adds nothing of substance.

Most judges come to the court with a reasonably well-developed sense of self. The Bar, from where most judges are still drawn, tends to reinforce and encourage individualism. Senior barristers in particular develop their own style of advocacy. It is no less so for a judge in writing judgments. However, a judge also learns the virtue of judicial restraint and the need to quell that sense of self on occasions when institutional responsibility requires it.

Dissenting judgments allow the most individualistic style of writing. With dissents, much greater liberty is possible and less care need be taken. A dissenting judgment may therefore be a very agreeable exercise for a judge to undertake. My concern is not with dissenting judgments. It is the duty of a judge who disagrees to express that disagreement. I would merely add that a judge, when he or she knows a judgment will be in dissent, ought to state it shortly. Of present concern is the judge who does agree, but nevertheless deems it necessary to write separately.

The sense of self of which I have spoken must be restrained, to an extent, if one agrees to write a first draft so that other judges may consider it and perhaps agree with it. The first draft judgment is the most time consuming and those that write later have the benefit of it. The first draft involves the unexciting task of summarising the facts necessary for the disposition of the matter, relevant statutory provisions, aspects of the judgments below and the issues raised by the arguments on the appeal, before proceeding to state the relevant legal principles and apply them to resolve the issues. In the latter process, the decision-making path is mapped out. In writing a first draft for others, most judges would make an effort to factor out distinctive features of his or her own style, in order to encourage agreement with the draft. Some find this more difficult than others.

The allocation of a first draft to a particular judge is usually made at the post-hearing meeting. At that meeting, views are exchanged, although it will often be obvious from exchanges occurring during the hearing whether there is a majority view or not. Questions posed and statements made by judges during the hearing of an appeal may be intended for the benefit of their colleagues, as much as the advocates.

Where there is less certainty about the outcome of an appeal, or differing views are held, the post-hearing meeting may be useful to identify those differences and to test the various views. In my experience, most judges appreciate hearing the views of their colleagues and having their own views challenged. Discussion can be an effective way of clarifying one’s own thoughts, but it does not always result in consensus. It may serve to confirm an initial belief that one’s colleagues are clearly mistaken.

If, having read a colleague’s draft judgment, a judge agrees with it, but thinks he or she has something useful to add, it is not regarded as impolite to draft an addition and then ask whether it may be incorporated. A correction might also be suggested. It has even been known for matters of grammar to be the subject of correction. But no judge is obliged to accept a suggestion and sometimes they do not. If there is nothing of substance that a judge wishes to add to the reasoning, what purpose is served by that judge writing another, separate judgment?

There may of course be perfectly valid reasons why a judge will wish to write separately, even if he or she agrees with others in the outcome. It is not possible to be prescriptive about such circumstances. The judge may reason differently and be unpersuaded by a colleague’s reasoning. The judge may not accept the way in which the judgment is expressed. The judge may wish to say something that cannot be added to the colleague’s draft.



In constitutional cases, and other cases of some complexity, there is more of a tendency for judges to write separately. This is in large part because novel questions are presented and it is necessary for a judge to work through them, and that may require writing a complete judgment. But this is not something that is necessary in every case.

The proposition which must necessarily underpin the view that judges should write separate judgments is that a judge cannot determine from something which another judge has written whether the reasoning expressed is reasoning with which the judge agrees.

Agreeing with another judge's draft ought not discourage judges from working through their own reasoning thoroughly. But it is not obvious why it might be considered necessary to write a complete judgment in order to map out one's process of reasoning. Most judges write substantial notes of argument and their thoughts upon it during a hearing and write an outline of a judgment incorporating their reasoning, usually after the benefit of discussion. Even if a judge does feel the need to write a draft, it by no means follows that a separate judgment must be published. It cannot be a satisfactory explanation for doing so, where nothing of substance is added to what has been written by a colleague, that the work has now been done. The question must surely be: what do the separate reasons add?

In some cases, particularly if there is a delay in the promised first draft, other judges may proceed to produce a more or less complete draft of their own. Courtesy would usually require that they hold their draft until the first draft has been circulated. If the judge agrees with the first draft, he or she may decide not to circulate their own – in effect, to tear it up. This is not always easy to do. But it accords with the practice of earlier judges. Sir Robert Menzies believed that Barton J, having written separate reasons for judgment, but hearing Griffith CJ read his in court (as they then did), put his own away and said simply "I concur". He apparently did so because he took the view that to add to the principal judgment might compromise its clarity.<sup>22</sup>

In agreeing with another's judgment, a judge might forgo the opportunity to make a statement about the direction the law might take, a view which his or her colleagues might not share or which they might not think to be appropriate to state in the particular case. However, it cannot be said that the decision not to write separately, so as to suggest a future development of the law, is one lacking independence. It is a reflection of an independent opinion formed by the judge as to whether the statement is important enough to warrant that step, a step which may compromise the clarity of the court's judgment. Certainty and clarity of the judgments of the court should be goals of judges individually.

Sir Frank Kitto was not a great believer in the joint judgment and his views in that regard are often referred to by individualist judges. Yet he also said<sup>23</sup> that the "one great benefit of a joint judgment" is certainty in the law. He stressed that "with several judgments reaching the same ultimate conclusion there is often uncertainty as to whether differences of opinion or emphasis indicate differences of substance".

It is true that Sir Frank Kitto reported Sir Owen Dixon as saying that "he had never agreed in another's judgment without having some cause to regret it afterwards".<sup>24</sup> I think this has happened to most appellate judges at some time – having missed a somewhat nuanced statement in a colleague's draft or a statement which seemed uncontroversial at the time, but assumes importance in a later case. However, Sir Frank went on to say<sup>25</sup> that, nevertheless, Sir Owen "went on agreeing in the judgments of others on occasions, and the advantage of certainty in the law was aided by his doing so".<sup>26</sup>

<sup>22</sup> Mason, n 4 at 103.

<sup>23</sup> Kitto F, "Why Write Judgments" (1992) 66 ALJ 787 at 797.

<sup>24</sup> Kitto, n 23 at 797

<sup>25</sup> Kitto, n 23 at 797.

<sup>26</sup> In the last five years he was on the High Court, between 1959 and 1964, there were 159 reported cases containing joint judgments – of these, Sir Owen sat on 111; there were 34 cases where there was one leading judgment and short concurrences – of these, Sir Owen sat on 30 (research conducted by Heather Anderson, Legal Research Officer of the High Court of Australia (2014)).

Sir Owen Dixon's biographer, Philip Ayres, wrote:

Although in the 1930s he had believed that ideally every judge should write a judgment, he was now reconciled to the need for a large number of joint majority rather than seriatim judgments. It was not just a matter of the load. He now fostered the idea that the Court should write joint majority judgments, having come to believe that it was not always a good thing for the law if one had three or five judgments all approaching the subject slightly differently.<sup>27</sup>

Certainty in the law is a strong reason for limiting the number of judgments in a given case. The opinion has long been held that certainty and clarity are especially important in criminal law. The English Court of Appeal has a general statutory rule in favour of single judgments for criminal appeals.<sup>28</sup> The High Court, likewise conscious of the need for intermediate criminal appellate courts and criminal trial judges to have a clear understanding of the law and to be in a position to apply it with confidence, often endeavours to publish one judgment, that of the court as a whole. Perhaps there should have been greater effort of this kind in cases such as *HML v The Queen* (2008) 235 CLR 334. What that case does point up is that judges are quite capable of expressing their individual viewpoint. It is just that doing so is not always helpful.

Efforts are usually made so that the court speaks with one authoritative voice where considerable controversy surrounds a decision. The court did so when determining a new path for cases under s 92 of the *Constitution* in *Cole v Whitfield* (1988) 165 CLR 360. It also did so in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, when it was necessary to state a test for the circumstances in which the freedom of political communication implied by the *Constitution* is infringed. On both occasions, it did so in the background of a number of cases containing separate judgments which had failed to produce any discernible ratio.

Lord Neuberger, President of the Supreme Court of the United Kingdom, is a proponent of joint judgments. When Master of the Rolls (and perhaps then part of the push, to which Professor Paterson refers,<sup>29</sup> to have the Law Lords write fewer individual judgments), speaking extra judicially, he said:

The desire to write your own judgment, particularly in an interesting and important case, can be quite considerable. The wish is reinforced where, as often happens, you think you can write an even better judgment than the one your colleague has produced. Virtually every appellate judge has been guilty of what might be called a vanity judgment.<sup>30</sup>

He frankly admitted to having been guilty of this; and most of us would have to make the same admission.

In conclusion, collegiality is not compromise. It is, as Professor Paterson suggests,<sup>31</sup> how members of a court work together in the pursuit of a common purpose, namely the pursuit, so far as is reasonably possible, of the "right answer in law". I suggest this is more likely to be achieved by discussion in which thoughts and ideas are challenged, rather than by a solitary exercise where the correctness of an idea becomes entrenched. The production of a judgment in which other members of the court will agree is not always an easy task, not least because it may require, to an extent, the suppression of one's identity in the style and method of expression. Agreeing with another's judgment is as much an act of independence as is the writing of one's own judgment. It may involve greater discipline. While joint judgments are not always possible, for the most part reasonable attempts should be made to reduce the number of judgments in any matter. It is the institutional responsibility of the members of a court to do so, in the pursuit of clarity, certainty and timeliness. A court may be comprised of individual judges, yet the expression of their individualism should on occasions be tempered. I do not suggest that judges should not write separately from their colleagues. I merely suggest that we should ask ourselves: for what reason am I doing so?

<sup>27</sup> Ayres P, *Owen Dixon* (The Miegunyah Press, Carlton, 2003) p 262.

<sup>28</sup> *Senior Courts Act 1981* (UK), s 59; see Lee J, "A Defence of Concurring Speeches" [2009] *Public Law* 305 at 306.

<sup>29</sup> Paterson, n 5, p 104.

<sup>30</sup> Neuberger D, "Open Justice Unbound?", Judicial Studies Board Annual Lecture 2011, 16 March 2011 at [24].

<sup>31</sup> Paterson, n 5, p 142.