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SOME THOUGHTS ON WRITING JUDGMENTS IN, AND FOR, CONTEMPORARY AUSTRALIA

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In this paper, I share some thoughts on judgment writing, asking whether judges are writing for contemporary Australia. Reasons for an exercise of judicial power are a core accountability mechanism, enabling an assessment of how the judicial function has been performed. The length and complexity of many of our judgments can obscure the exercise of judicial power and render judgments inaccessible to many who may wish, or need, to read them. I consider several developments in the United Kingdom, which give priority to accessibility, and efficient discharge of a Court's work. While it will not always be possible, or desirable, to follow the style of these judgments, I consider we can do better in Australia in making our judgments more accessible. Lasting changes will not occur however, until intermediate and ultimate appellate courts are prepared to endorse shorter and more straightforward reasons for judgment.

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I Introduction

Until five years ago, I was entirely a consumer of judgments. I have worn a number of consumer hats at various stages — law student, practitioner, barrister, pretend academic from time to time — and with each hat comes a different approach to a judgment.

Now I am still a consumer of judgments, because I need to read a lot of them in order to write my own decisions. In another way, I am a consumer as the recipient of drafts from my colleagues in the Federal Court's appellate jurisdiction, which may lead to me writing separately, or being a contributor to a final joint judgment. Finally, I am now also an *unwilling* consumer, when there are appellate judgments about my own decisions.

However, it is with my new perspective as a producer, as well as a consumer, of judgments that I would like to share my thoughts on judgment writing. I am now almost five years into my judicial role. Not entirely new anymore, but a long way from being highly experienced. It seems a good point at which to reflect on the discipline of writing judgments. And, as the title suggests, writing them in, and for, contemporary Australia. I added that because, as I hope you will see from other parts of this paper, how judges write reflects the society and period in which they do so. I am not persuaded that we are yet writing for contemporary Australia.

This topic is a personal one. In preparing this paper, it became apparent that judges (and former judges) actually spend a lot of time writing about writing judgments. As with just about everything else judges write, their views differ. I can only offer my own perspective. It is also important to bear in mind that I am speaking as one of 51 judges on a Court with both trial and intermediate appellate functions.[1] For example, judgment writing as a discipline in the High Court imports quite different considerations.[2] So too will judgment writing in a Magistrates' Court, or in a tribunal such as the Victorian Civil and Administrative Tribunal, where different considerations and demands exist.

It is likely that there are judgments I have written which are inconsistent with the factors I identify as desirable in a judgment written for contemporary Australia. I am content to admit to failing to live up to the standards I suggest in this paper, and the fact that I do fail is illustrative that all this is easier said than done.

[1] At the time of writing, the Federal Court has 51 judges.

[2] Justice Susan Kiefel, 'Reasons for Judgment: Objects and Observations' (Speech, Sir Harry Gibbs Law Dinner, University of Queensland, 18 May 2012).

Relevantly to what I say in the rest of this paper, the exercise of judicial power is by the court in the making of its orders not the giving of its reasons.[3] The judge does so only as an officer of that court. The orthodox view of judicial power is that it is institutional, and it is not a power exercised personally. That is one of the reasons for the legal fiction of *persona designata*, the doctrine that allows those who exercise judicial power, such as me, to also exercise, as an individual, a power that is executive: for example, the power to issue a warrant,[4] and the power to determine whether a person is eligible for surrender under the *Extradition Act 1988* (Cth).[5]

Therefore, one of the curious factors to confront in considering how judgments might be written is that they are written to support orders made by the court, as an institution, but they are also written by an individual human being as the person who exercised the power of that institution on that occasion. Striking a balance between reflecting individual reasoning and opinion and ensuring that a judgment still accurately reflects an explanation for an institutional exercise of power is one of the challenges presented to a judge. At an impressionistic level, it seems to me the longer and more complex a judgment, the more difficult it is for the reasons to represent an explanation of the institutional exercise of power, and the more they tend to reflect an individual approach of a judge to an exercise of power.

II The Historical Development of Giving Reasons for Court Orders

It is worthwhile exploring a little of the historical development of the giving of reasons to demonstrate how much attitudes have changed towards this aspect of a court's function. The proposition that judges are obliged to give reasons is of comparatively recent origin. Further, legal history shows that there is no historical or inherent reason that judgments need to be lengthy and complex.

[3] *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45, 64 (Barwick CJ and Kitto J); *Vincent Lee Consulting Services Pty Ltd v Bourne* (2009) 183 IR 413, 417 [25] (Mansfield J).

[4] *Ousley v The Queen* (1997) 192 CLR 69, 80 (Toohey J), 87–91 (Gaudron J), 100–4 (McHugh J), 121 (Gummow J), 145–6 (Kirby J).

[5] *Pasini v United Mexican States* (2002) 209 CLR 246, 254–5 [16]–[18] (Gleeson CJ, Gaudron, McHugh and Gummow JJ), 264–5 [48]–[50] (Kirby J). See also *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 622–7 [16]–[28] (Gleeson CJ), 636 [58] (Gummow and Hayne JJ, Heydon J agreeing), 657–9 [145]–[149] (Kirby J). This power is conferred on State and Territory magistrates, and on judges of the Federal Circuit Court, if they consent: see *Extradition Act 1988* (Cth) ss 45A, 46.

There has been much written on this subject, so in this paper I do no more than select some of the aspects I have found relevant and interesting for my own purposes.

In his series of Clarendon Law Lectures, entitled *The Law's Two Bodies: Some Evidential Problems in English Legal History*, Professor John Baker explores the informal sources of the common law, and encourages the reader to appreciate that what we might now see as a coherent body of fully detailed, written case law was far from the form of the early common law.[6] Professor Baker traces the development of what was called 'common learning': discussion and debate of law and legal principles at universities, in the inns of court, or indeed over what Professor Baker calls a 'good spread' at a tavern near the Old Bailey called 'The Cardinal's Hat',[7] which was, according to a passage in a medieval manuscript quoted by Professor Baker, 'a place accustomed for lerned men in the lawe to comen [ie discuss] maters concernyng the lawe'.[8]

Professor Baker notes the close relationship in the Tudor period between judges and inns of court where barristers were taught, so that some of the law reports from this period freely mix learning exercises with dicta uttered by judges in courts, and it did not matter *where* a judge uttered a statement about the law, so much as *who* the judge was.[9] Sometimes, what mattered was that it was *not* a judge who uttered the statement, but rather the statement was made by a respected advocate and, for that reason, might be given more weight.[10]

It is probably fair to say that current day advocates may wish this were still the situation.

In his third lecture in the Clarendon Law series, Professor Baker traces the change occurring at the end of the 16th century, the era of Coke and Walmsley, where 'common learning' was said to reside in books, rather than in these informal sources.[11] Professor Baker notes that in this period Sir Edward Coke was writing that '[o]ur book cases … are the best proof of what the law is'.[12]

[6] JH Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford University Press, 2001).

[7] Ibid 69.

[8] Ibid 69 n 38, quoting J Silvester Davies (ed), *The Tropenell Cartulary: Being the Contents of an Old Wiltshire Muniment Chest* (Wiltshire Archaeological and Natural History Society, 1908) vol 2, 348.

[9] See Baker (n 6) 75–6.

[10] Ibid.

[11] Ibid 81.

[12] Ibid 82, quoting Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton: Not the Name of the Author Only, But of the Law Itself* (13th rev ed, 1628) bk 3, 254.

Professor Baker notes also that in this period, Plowden's *Comentaries* (first published in 1571) decried the use of discussions as a source of law, instead asserting that in reasoned judicial decisions lay the 'most firmness and surety of law'.[13]

Professor Baker recounts that by a century later, in the late 1600s, Vaughan CJ made a clear statement that the opinion which governs a judicial decision is the best source of the law, rather than what his Honour called an 'extrajudicial opinion'.[14] This, as Professor Baker notes, refers to what we now would call obiter dicta, not something outside a judge's reasons.[15] However, the interesting part, and from my perspective a link forward to the present day, is that the basis identified by Vaughan CJ for the supremacy of the judicial opinion governing a decision is because it was given under judicial oath.[16] The importance of what a judge promises to do, and is obliged to do, as a result of her or his judicial oath is a factor affecting the nature and content of any reasons given.

In their chapter 'Reasoned Decisions and Legal Theory', Professors David Dyzenhaus and Michael Taggart point out that much of the philosophical debate about the common law has assumed judges are under a duty to give reasons for their decision, and always have been.[17] As Professors Dyzenhaus and Taggart demonstrate, as a matter of legal history that is not the case at all.[18] In this chapter, Professors Dyzenhaus and Taggart express their agreement with the spirit of Jeremy Bentham's understanding of legal theory, as they describe it, to 'make law serve best the interests of all those individuals who found themselves subject to it', rather than what they describe as some legal philosophers' 'neglect of practice'.[19]

[13] Baker (n 6) 82–3, quoting Edmund Plowden, *Les Comentaries, ou les Reports de Edmunde Plowden* tr JH Baker (Richardi Totelli, 1571) Prologue.

[14] Baker (n 6) 83.

[15] Ibid 83 n 98.

[16] Ibid, citing *Bole v Horton* (1673) Vaugh 360; 124 ER 1113, 1124 and Sir Matthew Hale, *The History of the Common Law* (4th rev ed, 1779) 67.

[17] David Dyzenhaus and Michael Taggart, 'Reasoned Decisions and Legal Theory' in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press, 2007) 134, 135.

[18] Ibid.

[19] Ibid 137.

Professors Dyzenhaus and Taggart identify the absence in early common law cases of any recognition of an obligation to give reasons, and indeed point to judicial observations emphasising that judicial power could be exercised without doing so.[20]

Expressions of similar opinions can be found in the United States ('US') in the 19th century. *Houston v Williams* is a rather rousing decision on a petition filed by the plaintiff requesting written reasons in an appeal concerning an ejectment action.[21] The plaintiff relied on a Californian statute which in its terms indeed appeared to compel the provision of reasons for appellate decisions.[22] The Supreme Court of California railed against the encroachment of the State legislature into the judiciary's domain of deciding whether or not to give written reasons for decision. Field J began with the following:

> In its own sphere of duties, this Court cannot be trammeled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment.[23]

Having pointed out that Blackstone records that reasons, if any were given, were generally stated orally by the judges, and taken down by the reporters in shorthand, Field J then referred to the reports of Sir Edward Coke in the late 16th and early 17th centuries:

> In the judicial records of the King's Courts, 'the reasons or causes of the judgment,' says Lord Coke, 'are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if Judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence*; and this is also worthy for learned and grave men to imitate'.[24]

[20] Ibid.

[21] 13 Cal 24 (1859) ('*Houston*').

[22] Ibid 25 (Field J).

[23] Ibid.

[24] Ibid 26 (emphasis in original) (citations omitted).

Later in the same decision, Field J held:

> The opinions of the Judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the Court, and should guide litigants; and right-minded Judges, in important cases — when the pressure of other business will permit — will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion the authority of the Court is absolute. The legislative department is incompetent to touch it.[25]

The motion for reasons was, with a few more pages of emphatically expressed opinion, denied.[26]

As in the US, the role of the recorder in early English legal decisions was significant. By the end of the 13th century, anonymous contributors recorded the law in French in the Year Books, but usually by reference to what was argued orally, without setting out the result, or referring to any of the authorities relied on.[27] The Year Books ceased in the early 16th century, and were replaced by private, identified reporters, such as Edmund Plowden in the 1570s.[28]

In England, the principal objective of the recorder was to set out what took place before the judges, and to record the decision, so that some finality attached to the decision and it could be enforced (for an extra fee) if need be.[29] Professors Dyzenhaus and Taggart recount how these records were written in Latin until the early 18th century, and on sheepskin.[30] How the decision was arrived at by the judges was generally not recorded.[31]

[25] Ibid.

[26] Ibid 28.

[27] Dyzenhaus and Taggart (n 17) 138.

[28] Ibid 138–9.

[29] Ibid 138.

[30] Ibid.

[31] Ibid. Even having moved past sheepskin, we should not underestimate the effect of technology on contemporary judgment writing, in terms of the range of sources not only available to be consulted but that a judge feels *ought* to be consulted, as well as the ease of

Thus, the English system of reporters meant it was not the judges themselves who were writing reasons for their decision. Rather, what they said orally was reported by others. Ironic, given the subsequent development of the hearsay rule.

By the late 16th century, as Professors Dyzenhaus and Taggart state, we begin to see reports of references to other cases as the basis for particular outcomes, rather than any reasoning by itself: the beginnings of what would become the doctrine of precedent.[32] As the authors then observe, a generally accepted explanation for the absence of reasoning is the prevalence until the mid-19th century of the jury trial.[33] All fact finding, and reasoning about it, was conducted 'sphinx-like' — as President Michael Kirby (as he was then) put it — by the jury.[34]

The demise of juries (outside the US at least) in the mid-19th century, the rise of the judge-alone trial and, importantly, the evolution of statutory appeals all contributed to substantial increases in the production of reasons for judgment.[35] As we can see from the Californian decision to which I have referred, resistance to providing reasons persisted in US appellate courts well into the mid-19th century.

It is not possible to do more than note the position in the US. Taking the US Supreme Court as an example and bearing in mind that it did not in fact hear a case for the first three terms of its existence, some of the academic commentary of the role of reporters in that Court reveals just how removed the judges were from the reports of their decisions. In describing the role of Alexander J Dallas, the first reporter of the Supreme Court's decisions between 1791 and approximately 1800, Craig Joyce wrote:

> Any careful attempt to ascertain the accuracy of Dallas' accounts of the Justices' opinions, however, raises an even more arresting question: are the opinions in fact the handiwork of the Justices — or of Dallas himself? Not a single formal

producing reasons by electronic means, the ease of amending them, and the potential of the dictaphone to contribute to lengthy judgments.

[32] Ibid 139.

[33] Ibid.

[34] President Michael Kirby, 'On the Writing of Judgments' (1990) 64(11) *Australian Law Journal* 691, 692, quoted in Dyzenhaus and Taggart (n 17) 139–40. In a careful and detailed argument, which repays reading, Professors Dyzenhaus and Taggart set out how the absence of a duty to give reasons until comparatively recently fits with the history of the common law having operated 'in significant respects with a command conception of authority', that is, because of who gives it, not because of the reasons for it: at 165–6.

[35] See Dyzenhaus and Taggart (n 17) 139–40.

> manuscript opinion is known to have survived from the Court's first decade; and few, if any, may ever have existed for Dallas to draw upon. Nor may it be confidently assumed that in all instances Dallas was present in court to take down what the Justices said, or that he was able afterwards to consult any notes they may have kept of the opinions they announced. In one instance, Dallas wrote to Justice Cushing for assistance with a series of cases, only to find that Cushing had not retained his notes in certain of the cases, or had not delivered his opinion from notes in other cases, or had not delivered an opinion at all.[36]

Indeed, Joyce suggests that the decision of Marshall CJ in *Marbury v Madison* in 1903,[37] which was reported by Dallas' successor, William Cranch, may have been reported only from notes, rather than from any written opinion.[38]

Even as the English superior courts developed their supervisory jurisdiction over inferior courts, Professors Dyzenhaus and Taggart note that it did not occur to them to impose on the judges of those inferior courts an obligation to give reasons for their decisions because the superior court judges themselves were not obliged to do so, even if by the time administrative law remedies developed in the 19th century those superior courts were often in fact themselves giving reasons.[39] Hence, the 'record' of an inferior court did not include any reasons for decision. As the authors then note, the introduction of a statutory obligation on administrative decision-makers to give reasons for their decision may well have been the catalyst for judges to 'bring themselves into line with the trend toward legally enforceable reasoned

[36] Craig Joyce, 'The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendency' (1985) 83(5) *Michigan Law Review* 1291, 1304 (citations ommited). In this article, Joyce recounts the history of court reporters leading to the case of *Wheaton v Peters*, 33 US (8 Pet) 591 (1834), where the US Supreme Court held that the individual reporters did not have intellectual property over their reports of its decisions: at 668 [58] (M'Lean J for the Court).

[37] 5 US (1 Cranch) 137 (1803).

[38] Joyce (n 36) 1310 n 110 (emphasis in original) (citations omitted):

> Cranch did, of course, have the benefit of the Court's new practice 'of reducing their opinion to writing, in all cases of difficulty or importance' and he noted explicitly that he had been 'permitted to take copies of those opinions.' … From the experience of his successor, however, it seems highly likely that what Cranch copied were the Justices' *notes*, sometimes polished and sometimes not, of opinions delivered orally, rather than the finished written opinions that the Reporter of Decisions receives today.

See also discussion at 1310–11.

[39] Dyzenhaus and Taggart (n 17) 143.

elaboration'.[40] The authors note that Australian courts were early to declare the duty of judges to give reasons, as 'an incident of the judicial process'.[41]

The earliest Australian decision to state the obligation in a general way appears to have been a Victorian decision in 1922.[42] The Hon Michael Kirby AC CMG has reviewed the development of these authorities in several journal articles, and they are the source of a great deal of interesting history and background.[43] Yet, as President Kirby (as he was then) pointed out, in 1932 and again in 1989 Victorian courts were still refusing to enforce a duty to give reasons, or (sometimes) give reasons themselves, so it could not be said the obligation was uniformly recognised.[44]

In summary, the notion that judges should explain their decisions at all is of recent origin. The recognition of any *obligation* to give reasons is even more recent. It was not seen as a necessary incident of the exercise of judicial power for a long time. I am not suggesting we return to the days of the inscrutable pronouncement. I am suggesting that we reflect on this history as part of deciding whether we currently have the appropriate balance between the need to explain exercises of judicial power, and the way we use judicial time and resources, with its consequential effects on parties, other litigants and the accessibility of judgments for the Australian community. For my own part,

[40] Ibid 145.

[41] Ibid, quoting *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386 (Mahoney JA).

[42] *Donovan v Edwards* [1922] VLR 87. Irvine CJ held that 'in the exercise of their judicial functions, justices are not exempt from the duty which attaches to every judicial officer to state, to the best of his ability, the facts he finds, and the reasons for his decision': at 88.

[43] See, eg, President Michael Kirby, 'Reasons for Judgment: "Always Permissible, Usually Desirable and Often Obligatory"' (1994) 12(2) *Australian Bar Review* 121, 122–5 ('Reasons for Judgment'); President Michael Kirby, 'Ex Tempore Judgments: Reasons on the Run' (1995) 25(2) *Western Australian Law Review* 213, 219–21. See also Michael Taggart, 'Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases?' (1983) 33(1) *University of Toronto Law Journal* 1, 13–18.

[44] President Kirby, 'Reasons for Judgment' (n 43) 122, citing *Brittingham v Williams* [1932] VLR 237 and quoting *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 19 (Gray J). Nevertheless, it is commonplace in intermediate courts of appeal for there to be a statement to the effect that judges are required to give reasons for their decision, and to a certain standard: see *Hunter v Transport Accident Commission* (2005) 43 MVR 130, 136–7 (Nettle JA) ('*Hunter*'); *COZ16 v Minister for Immigration and Border Protection* [2018] FCA 46, [32]–[46] (Griffiths J); *DAO16 v Minister for Immigration and Border Protection* (2018) 353 ALR 641, 655 [47]–[48] (Kenny, Kerr and Perry JJ). However, note also the qualifications referred to by the Full Court of the Federal Court shortly after *Hunter* (n 44) was decided, in *Kovan Engineering (Aust) Pty Ltd v Gold Peg International Pty Ltd* (2006) 234 ALR 241, 249 [45] (Heerey and Weinberg JJ).

I do not consider we have the appropriate balance, and we lean now too far in favour of complexity and length, with the attendant delays those features can cause.

III Who is the Audience?

Of course, the audience for reasons for judgment will differ between courts. Writing in a way that can engage all likely members of the audience is, in my opinion, a desirable aim.

Before turning to the categories of audience, it is worth thinking about the function of courts in our current legal system. Professors Dyzenhaus and Taggart identify two core functions, with which I broadly agree — a dispute settling function and a lawmaking, or what they call a 'law announcing', function.[45] Plainly, the performance of these functions is directed at different, but overlapping, categories of audience.

These twin functions will play out in a proportionally different way depending on the court concerned. The High Court may be said to have more of the second function than the first. A Magistrates' Court may perform more of the first function than the second. A court such as the Federal Court might perform both of those functions in a more even way, although in our appellate jurisdiction, the 'law announcing'/lawmaking function might be more visible.

It is obvious that the practicality of, as well as the need for, reasons for judgment will vary depending on the court and how it is called on to perform these functions.

In a court with a primary dispute resolution function, the parties are the principal audience, especially given they are the ones bound and affected by the orders which the reasons explain. However, even in the dispute resolution function, there are other audience categories: any state authorities charged with enforcing the court's orders, or third parties which are otherwise affected by the court's orders (such as a bank in a freezing order decision). State and federal governments, and their agencies, are likely to be interested in reasons for decision in the performance of both of the courts' functions.

In a court with more of a law revealing or lawmaking role, the parties remain a critical part of the audience. However, they are joined by groups such as other courts who must apply the law as set out: the legal or allied professions advising clients in similar situations and involved in litigation where what is declared has relevance. The academy, likewise, is part of the

[45] Dyzenhaus and Taggart (n 17) 146.

audience, although perhaps with more of a focus on courts with a law revealing or lawmaking function. Members of the academy outside the law will form part of the audience.

Those studying the law (which is a broader group than simply law students) are a further group. The general community is, we should assume, an important part of the audience no matter which function is being performed.

The point of a list like this (without intending it to be exhaustive) is to emphasise the breadth of the audience, a fact we as judges may sometimes overlook. If judgments are more comprehensible to some parts of this audience than to others, then it may be that there is work to be done to better communicate explanations given by judges for their exercises of power.

Justice Daphne Barak-Erez of the Supreme Court of Israel points out that judicial writing is quite different, in function, scope and purpose, to academic writing.[46] Of judges, her Honour notes that we must decide actual disputes between parties, and we must reach an outcome that can be enforced as between the parties.[47] Of the academy, her Honour says:

> In contrast, academics are free to follow their intellectual curiosity and their desire to make original contributions to legal scholarship. They address big questions, but they are not required to solve anything in particular. Legal scholarship is aimed at developing ideas and exploring the broader implications of the law.[48]

Sometimes, it is tempting in a judgment to address the 'big questions'. From my perspective, it is almost always a mistake to try to do so. First, the odds of the High Court saying you got the big question wrong are real. Second, as Justice Barak-Erez notes, our 'law announcing' function is not freestanding. Although a judge might need to develop an idea about a particular legal issue in reasons, the purpose of doing so is to resolve the application of the law to facts existing in a dispute between two or more parties. And the aim is not to talk about the idea, but to identify how it goes towards resolving the dispute.[49]

For my own part, I consider this is an important distinction to bear in mind when approaching judgment writing. There are plenty of textbooks or scholarly articles to be written if a judge has the spare time and energy to do so, but the place for them is not in the law reports.

[46] Justice Daphne Barak-Erez, 'Writing Law: Reflections on Judicial Decisions and Academic Scholarship' (2015) 41(1) *Queen's Law Journal* 255.

[47] Ibid 259, 273; see also at 266–74.

[48] Ibid 273.

[49] Ibid 266, 273.

IV Can Judges Write More Succinctly, and Should They?

The Hon Nicholas Hasluck AM QC (a former judge of the Western Australian Supreme Court and a writer of some note) described the judge's process of embarking on writing reasons for judgment in the following way:

> A judge's obligation to provide reasons for judgment can be accompanied by a twinge of apprehension: will it write? Will a preliminary conclusion succumb to second thoughts in the act of writing? This judicial dilemma, the need for self-examination, reflects the close relationship between preparing reasons and the judge's final decision. The act of writing may take the jurist to another level, a solitary realm with room enough for ingenuity and nuance, a place infused with insights drawn from personal experience and legal history.[50]

This passage, and other parts of Mr Halsuck's article, highlight one of the dilemmas in identifying whether there is a 'right' or 'wrong' way to write judgments. They are written by human beings who, like the human beings whose disputes they resolve, are varied in background and personality, in their intellectual or practical inclinations, in their love of writing or merely having a tolerance for it. The passage also throws up one of the factors not often talked so openly about: does a judge make up her or his mind *as she or he writes*? That is, is the act of writing part of the working out of the arguments?

I consider this is often the case. A number of factors contribute. First, the process of identifying key facts that need to be found, sifting through the evidence, weighing it up — this all comes together when explaining in words why, for example, certain evidence is or is not to be accepted. In formulating the words needed to explain that, an impression is formed: the evidence does not seem as credible as it first appeared; or, once written, the explanation for accepting or rejecting it seems less persausive or less logical. Sometimes, evidence sounds weaker written down in context than it did when given in court. Or it no longer seems rational. Sometimes, as a judge writes, the initial impression is revealed to be incomplete because an aspect of the evidence has been omitted.

So too with legal arguments. Setting out the cases, whether they can be distinguished and why, what the parties each say about an important authority — all this assists in evaluating an authority. The problem is that the judgment then can become not much more than a record of a judge's internal

[50] Nicholas Hasluck, 'A Judicial Dilemma: Will It Write?' (2017) 44(8) *Brief* 34, 34.

(and sequential) reasoning, which is not necessarily helpful to the reader. However, it is a technique that is easy to fall into. And once it is all written — these pages and pages of working carefully through authorities — it is difficult to discard them, even if that might be the best thing to do.

Therefore, while any text or article on judgment writing tells us revision is essential, it is quite a discipline to engage in substantive alterations, especially shortening of a line of reasoning, or an account of a line of authorities. And yet, I suspect (going by my own experience) it is these passages in judgments that are the most difficult to grapple with: the three or four or five pages which recite, one after the other, a series of cases and what they stand for. I doubt they are as necessary as it seems during the drafting process, but by the time they appear in a draft, the amount of resources and energy that has been committed to writing them makes them difficult to amend or, even harder, to discard.

It would be fair to say that most judges strive to write succinct, easily intelligible and accessible reasons for the orders they make. It is, as I have noted, easier said than done. What then are some of the barriers?

First, there is the natural inclination to 'write out' as a judge reasons, which I have discussed above.

Writing in the *Law Quarterly Review* in 2012, the Rt Hon Lady Justice Arden DBE suggested that one reason for longer judgments relates to the use of technology: the move to affidavits rather than oral evidence, the ability to generate and then adduce large documents; the ability to electronically access documents which can be quoted by a cut and paste, as can authorities.[51]

There is no doubt that technology has had these effects. Where, in older cases, a report was cited with a pinpoint, the expectation was that the reader would go to the law report containing the case. Now, there is a tendency to quote the passage in the judgment itself. Sometimes, that is a better technique, because it makes reasons more self-contained. However, it is a technique that needs to be used with restraint. It is also common in intermediate and lower courts to use the 'cut and paste' technique to insert large slabs from pleadings,

[51] Lady Justice Arden, 'Judgment Writing: Are Shorter Judgments Achievable?' (2012) 128 (October) *Law Quarterly Review* 515, 515–16. Although I have, in jest, referred to writing on sheepskin, I am in seriousness less certain about the value of a comparison, such as that made by Lady Justice Arden in her paper, with the number and length of 19th century cases: at 515. Population increase has been significant, as has the pace of development of society generally, especially the nature and extent of legal regulation. Judges are creatures of their times and are called on to deal with these changed circumstances. Changes in appreciation of the need for public accountability also contribute to differences in both quantity and length of judgments from earlier centuries.

notices of appeal, submissions or evidence. Doing so removes the need to summarise, even though for the reader the summary would have been much more digestible. Yet the reader's eyes may tend to glaze over where there are large slabs dumped into a judgment from a notice of appeal, pleadings or submissions.

The same tendency is apparent with references to statutes. Here, I have fewer quarrels, because the primary objective of making the judgment more self-contained is generally achieved when references to legislation are included. However, the structure of a judgment can, again, cause eye-glazing if there are many statutory provisions cited. In our Court, and I think in other courts, one structural method is to have a section headed 'legislative provisions', and to place all the relevant legislative provisions into this section. I am guilty of adopting this method myself from time to time. However, what I prefer to do, and try to discipline myself to do, is to have a discursive section about the statutory provisions, and to make it part of my active findings and reasoning. Again, this takes more time and more effort, which is more difficult with a busy and pressing caseload.

Another factor is the tremendous proliferation of judgments. This no doubt results from the use of technology, the new pace and concerns of modern society where there is more litigation over a wider range of subject matter, and changes in the nature and content of regulation. It is a real challenge in an intermediate court to stay abreast of what my colleagues are writing, and what the Full Court is writing, taking as a given that we all attempt to keep up with what the High Court is writing. Then there are the comparable intermediate courts around the country — the state Supreme Courts and their Courts of Appeal. Then there are the often highly useful comparative jurisdictions to consider. While the latter might be saved for special occasions (again, a combination of the nature of the issue, energy levels and time) the volume of decided cases means where a single case may have previously been cited for a proposition, now several may need to be. Or at least, several will need to be checked before one can be cited. Added to this is the process, either within a jurisdiction, or between comparable ones, of deciding whether to agree with or distinguish other decisions.[52]

A factor Lady Justice Arden identifies as contributing to the length and complexity of judgments is what she calls 'defensive' judgment writing: that

[52] Noting the principle that in Australia, an intermediate appellate court should follow the decision of another intermediate appellate court on, for example, the construction and operation of federal legislation: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

is, writing to cover off on possible appeals.[53] I agree. This, it seems to me, is something capable of change, with appellate leadership. What if trial judges were permitted to address matters summarily, or were not expected to recite every single argument made by parties to demonstrate it had been considered; were not expected to go into great detail about all the evidence before them and instead concentrate on the evidence used to make their findings — in short, what if appellate courts could or would positively encourage trial judges to be robust, succinct and targeted in their judgment writing? I consider we would see quite a change to the length of trial judgments. In turn, those judgments would be more digestible, and more accessible to both parties and to the general community, as well as to appellate courts themselves.

There is no doubt that length and complexity of judgments may lead to inaccessibility.[54] The work of the courts should not be inaccessible: if our current approach to judgment writing has that as a consequence, it needs to change. In his book on the rule of law, Lord Bingham gives an example of a series of tenancy cases,[55] in which rose what could be described in straightforward terms as the following: If a local authority seeks possession of premises that a person had occupied as her or his home but which under domestic tenancy law she or he had no continuing right to occupy because the tenancy had expired, can the person resist eviction, relying on her or his human right to respect for her or his home under art 8 of the *European Convention on Human Rights*,[56] as given effect in the United Kingdom ('UK') by the *Human Rights Act 1998* (UK)?[57]

As Lord Bingham points out, an observer might answer that question with 'yes', 'no' or 'sometimes'.[58] Answers to that question by the UK Court of Appeal and then the House of Lords (this being prior to the establishment of the UK Supreme Court) took more than 500 paragraphs, 180 pages of the law reports and 15 separate reasoned judgments.[59]

[53] Lady Justice Arden (n 51) 516.

[54] Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 42–3.

[55] Ibid 43, citing *Harrow London Borough Council v Qazi* [2004] 1 AC 983; *Kay v Lambeth London Borough Council* [2006] 2 AC 465; *Dohertys v Birmingham City Council* [2008] 3 WLR 636.

[56] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8.

[57] Bingham (n 54) 43.

[58] Ibid.

[59] Ibid 43–4.

At an intermediate appellate court level (recalling I say nothing about the High Court in this paper), there is the additional dilemma of joint versus separate judgments. Sometimes, writing separately can be simply a necessity for a judge, in terms of adhering to principles guiding performance of her or his judicial task. However, danger lurks. Separate appellate judgments can invite a lack of clarity in their discussion of applicable principles, as well as in the application of principle to the particular case. Joint judgments require putting aside judicial ego, accepting differences of style and writing method. It can be a character building exercise. My own view is that it is worth considerable effort to try to achieve a joint judgment. Clarity, accessibility and certainty tend to be enhanced by a single judgment.

Finally, the way courts conduct trials can present a barrier to shorter judgments. Accepting the tender of more documentation than necessary, agreeing too readily to affidavits rather than oral evidence, not placing reasonable limits on the length of trials, and the length of components of trials (such as cross-examination and submissions) can all lead to trial judges having to deal with more evidence than is necessary. Using strategies such as agreed statements of fact, agreed bundles of documents and page limits on submissions can all contribute to a judge having a less onerous amount of material to work through in a judgment, and can aid focus on the real issues in dispute between the parties, which is what a judgment should always strive to focus on.

V Two Contemporary Examples of a Different Approach to Judgment Writing

Ironically, although this paper is about a contemporary approach in Australia, both these examples are from the UK.

In early 2017, the UK Court of Appeal published *BS (Congo) v Secretary of State for the Home Department*.[60] It is an immigration case. The reasons, given by Rafferty LJ, describe the judgment as a 'short form judgment', to be used, at the Court's discretion of course, in cases where the 'appeal raises no issue of law, precedent or other matters of general significance and the relevant facts and documentary material are set out in the judgment under appeal and are not in dispute'.[61] The appeal was heard on 31 January 2017, and the date of judgment was 7 February 2017. The primary judgment consists of 24 very

[60] [2017] 4 WLR 45.

[61] Ibid 45 [1].

short paragraphs, some of only one sentence. The other two judges state their agreement.[62] The language is clear and plain, the parties' arguments are set out in a very summary form, conclusions are expressed about those arguments, and for greater detail, there are cross-references to the decision of the Court under appeal. The key differences, it seems to me, are these:

- The decision under appeal is used as the location for a more detailed recitation of the facts of the case, and the parties' arguments. The cross-reference allows a reader to access that detail if necessary.
- The parties' arguments are reduced to their essentials, as the Court of Appeal sees them.
- The Court's reasoning on the arguments is far more conclusory.

Several observations can be made. This is a form of judgment that will work best where there is an underlying judgment where more details can be found. There are many circumstances where that might be the case, not just within an appellate structure of a single court, but also where there are appeals (at large or limited to questions of law) from tribunals. In judicial review proceedings, there will always be an underlying administrative decision (whether of an individual decision-maker or a tribunal), where more detail may be located. Cross-referencing avoids repetition and is a useful technique. It does mean that the reasons are less self-contained, but on many occasions, I consider this a disadvantage that is worth bearing for much shorter reasons.

I do favour considerable reduction in the recording of parties' arguments, as a general rule. Almost always, the parties' written submissions are publicly accessible if need be. Arguments, both written and oral, vary in quality, and faithfully recording them in reasons can become one of the causes of eyes glazing over. I consider this as one of the areas where judges tend to do one of two things. First, writing defensively — that is, writing for an appeal court, making sure every argument has been recorded so there is no available ground of appeal that an argument has not been considered. This is where intermediate and ultimate appellate courts could play a proactive and robust role in not accepting too readily an argument that a judge has failed to consider an argument. If a judge says she or he has considered the arguments made, then in the absence of a factor in the reasons which obviously contradicts that statement, I do not see why an appeal court would not accept the statement at face value. The second explanation for long recitations of parties'

[62] Ibid 47 [25] (McFarlane LJ), [26] (Hamblen LJ).

arguments can be that it represents the judge working out, as she or he writes, what she or he thinks of those arguments. If that is the explanation, then a judgment could be made a lot shorter with more revision. However, revision takes time, and time can be in short supply.

As for more conclusory reasoning, there are no doubt competing views on how appropriate this is. It should be recalled that the UK Court of Appeal's policy behind these short form judgments is that they are to be used in cases where there is 'no issue of law, precedent or other matters of general significance and the relevant facts and documentary material are set out in the judgment under appeal and are not in dispute'.[63] Yet, rarely are cases as clean as this policy guideline suggests. Assessments will need to be made about which cases will be suitable for a short form judgment, but there is nothing wrong with that. Conclusory reasoning is, after all, already found in the reasons for judgment of many courts, including ultimate appellate and constitutional courts. Where the issues are extremely straightforward, a conclusory rejection or acceptance and no more might suffice. Judicial confidence that compactness and accessibility are valuable needs to be developed and encouraged. What matters is that there is an intelligible explanation; a justification recorded for the acceptance or rejection of a party's case. In some cases, it may only take a sentence or two to set out that explanation or justification. Giving a succinct and tight explanation is generally harder than giving a lengthy one. More intellectual discipline is required. Yet if habits can be formed where that is expected, for my part I consider it a good development. If an appellate court is going to disagree with a lower court's orders and the outcome in a proceeding, the length of the explanation given by the lower court will not be the determining factor. I emphasise this observation: usually, disagreement on appeal will come from the appellate court's views of legal principle and its application, which may not have much at all to do with how the judgment under appeal is written.

The second case may be more controversial, but I consider it to be an interesting example of innovation in judgment writing.

The court involved is the Family Division of the High Court of England and Wales, which exercises an appellate jurisdiction from the Family Court. The decision concerned the custody of and residence of a 14-year-old boy, whom the Court called Sam. The report of the case is anonymised so as to

[63] Ibid 45 [1].

make citation of it of virtually no utility beyond the medium neutral citation, because it is simply called *Re A (A Young Person)*.[64]

The Court made a number of orders about with whom Sam should live, whether his father should be able to take him to Scandinavia and apply for citizenship for him there, when Sam should be able to see his father for holidays and how long the orders should last. The reasons consist of four paragraphs and a letter. They describe the nature of the application and the Court's decisions on how evidence was to be given, due to Sam's age and desire to participate in the hearing. They then describe the process adopted by the Justice to inform the parties of his decision. The substantive explanation for the Court's orders is given in the form of a letter to Sam from the Justice. The reasons record that the Justice handed this letter to Sam's lawyer at the conclusion of the hearing, to be discussed with Sam when he returned from a school trip that had caused him to leave prior to the completion of the hearing.[65] The Justice records his invitation to the parties to agree to the reasons and the letter being published on the British and Irish Legal Information Institute ('BAILII'), amended to protect the parties' identities.[66] That is how we can all come to read the letter from the Justice to Sam.

The letter is in the first person. It is neither excessively formal, nor excessively informal. It is measured in tone, but uses some reasonably colloquial language, such as describing Sam's parents as 'your mum' and 'your dad'. It refers to the governing legislation and invites Sam to find it on Google. It describes the Court's primary consideration in the following way:

> [Y]our welfare is my paramount consideration — more important than anything else. If you look at s 1(3), there is also a list of factors I have to consider, to make sure that everything is taken into account.[67]

The Justice addresses in the letter what was obviously quite a difficult aspect of the trial — Sam's father's hostility to not only his mother and stepfather, but also to the Court, and to the officer from the UK Children and Family Court Advisory and Support Service, who provided evidence to the

[64] [2017] EWFC 48 ('*Re A*').

[65] Ibid: see the third paragraph of the Justice's reasons.

[66] Ibid: see the fourth paragraph of the Justice's reasons.

[67] Ibid: see the letter at the end of the judgment.

Court. The Justice deals with Sam's father's position using the following language:

> When I was appointed as a judge, I took the oath that every judge takes to apply the law in a way that is fair to everybody. Some people will say that this or that decision isn't fair, but that's usually their way of saying that they don't like the decision. People who like decisions don't usually say they are unfair. Here, your father loudly says that Cafcass is biased against fathers and during the hearing it became clear that he doesn't have much confidence in me either. He is entitled to his view, but I can tell you that I found no sign of bias on Gemma's part; on the contrary, I found her someone who had thought very carefully about you and your situation and used her professional experience of many, many family cases to reach an honest view of what would be for the best.[68]

The Justice then sets out the four decisions his Honour told Sam the Court had to make:

> (1) [S]hould you go and live in Scandinavia? (2) should you become a citizen there? (3) if all your parents are living in England, should you spend more time with your dad? (4) if your dad goes to Scandinavia, and you stay here, how often should you see him?[69]

In a series of numbered paragraphs, the Justice then sets out for Sam what his Honour calls the 'main matters' that he took into account in making those decisions. In those 10 paragraphs, his Honour speaks quite plainly about Sam's family, including the following:

> Your parents have very different personalities. There is nothing wrong with that, it's one of the joys of life that people are different. One of your homes is quite conventional, the other very unconventional. There's nothing wrong with that either. What is of concern to me is this. I see your mother and Paul as being content with the life they lead, but I don't see that in your father. He is a man with some great qualities. When he is relaxed, he has charm and intelligence. But underneath that, I see someone who is troubled, not happy. He has not achieved his goals in life — apart of course from having you. Because of his personality style, and the love you feel for him, he has a lot of influence over you. All fathers influence their sons, but your father goes a lot further than that.

[68] Ibid.

[69] Ibid.

> I'm quite clear that if he was happy with the present arrangements, you probably would be too. Because he isn't, you aren't.[70]

The Justice makes some findings that no doubt were difficult for Sam to read, such as 'I believe your father has in some ways lost sight of what is best for you'.[71] His Honour describes in some detail what he considers were the flaws in Sam's father's plan to take him to Scandinavia, and what he thinks of his father's proposed access arrangements. That section of the letter ends with the following:

> It won't surprise you to hear that your dad told me that any outcome like this would be totally unacceptable to him and to you: can I suggest that you do your own thinking and don't let his views drown out yours?[72]

It is not a long document, but it is carefully crafted, by a Justice who has been working in the family law jurisdiction for more than 30 years.

For my own part, I found this an appropriate, innovative and, in its content, moving way of communicating a decision both to the parties and to the wider world. Especially so as a method of communicating the decision to Sam, as the person centrally affected by the decision.[73]

I did not read Jackson J as suggesting this was a form of reasons for judgment he would adopt in every case, nor even every custody case. Obviously, he had had the opportunity of meeting and evaluating Sam as a young person and considered this would be a method of communication that would work with that particular young man. The report discloses that Sam received the letter 'with apparent equanimity',[74] although Sam's father was recorded as being 'vehemently opposed' to the publication of the reasons.[75]

[70] Ibid: see item 4 of his Honour's 'main matters'.

[71] Ibid: see item 6 of his Honour's 'main matters'.

[72] Ibid: see item 10 of his Honour's 'main matters'.

[73] Jackson J has in other judgments shown that he is particularly alive to how to communicate judicial reasoning to the individuals centrally affected by a decision. In *Lancashire County Council v M* [2016] EWFC 9, another proceeding concerning the custody of children (this time involving child protection agencies), Jackson J notes in the opening paragraph that the judgment is 'as short as possible so that the mother and the older children can follow it': at [1]. Then, his Honour succinctly describes an exchange of text messages that is important in the circumstances of the proceeding by including the emojis used in those messages. His Honour writes: 'They found the message and say that the ☺ is winking, meaning that the mother knew they wouldn't be coming back. I don't agree that the ☺ is winking. It is just a ☺.': at [27].

[74] *Re A* (n 64) [4].

[75] Ibid [5].

VI The Relevance of a Judge's Promise and Duty

Professors Dyzenhaus and Taggart speak, in their chapter, about the 'pull of justification that seems to be part of the idea of rule through law', pointing out that the 'pull' includes the proposition that the reasons which justify a decision (and orders) should be *legal* reasons: that is, reasons relying on the resources made available by the law.[76]

When I was appointed to the Federal Court, I took an affirmation to 'do right to all manner of people according to law, without fear or favour, affection or illwill'.[77]

It is commonplace to observe that the performance of this promise and duty must be *seen* to be done, as well as done in fact. Part of that duty being seen to be done is how a court explains the reasons for the orders it makes. It is through that explanation that the legal reasons for the order are exposed, and that those who are affected by the exercise of judicial power — or interested in its exercise (as an observer or as a person affected in some way) — come to understand it.

Reasons published by a court on the making of orders are a core component, in contemporary times at least, of the fulfilment of that judicial promise. They enable assessment by the community generally that the duty has been performed. They are, to use a contemporary phrase, an accountability mechanism.

However, length, complexity, inaccessible or impenetrable language and many inaccessible concepts all contribute to difficulties for members of a judgment's audience in determining whether the judicial promise and obligation has been fulfilled. Long and complex judgments obscure the exercise of judicial power, rather than reveal it. Perhaps it is more comfortable to be hidden in obscurity; nevertheless, we are not in this role to feel comfortable.

I suggest that in reading Jackson J's letter to Sam, we can readily understand why the Court made the orders it did. Critically, Sam, his parents and the community who are interested in how family law courts decide these difficult issues can also readily understand, whether or not they agree.

[76] Dyzenhaus and Taggart (n 17) 159.

[77] *Federal Court of Australia Act 1976* (Cth) s 18Y.

VII Conclusion

It is clear that I am a supporter of some innovations and development in how judges produce reasons for judgment, at least at the level of the judicial hierarchy in which I sit. What innovations and development can occur must conform to the promise made by judges on appointment. Taking that as a necessary premise, lasting changes to the complexity and length of judgments cannot occur until intermediate and ultimate appellate courts are prepared, in their approaches to complaints made on appeals, to give priority to accessible, efficient and straightforward reasons for judgment. I see no particular impediment to those reasons taking a short form, nor being a letter.

To this point, the paper has been rather serious. Sometimes, however, judgments can be at least mildly entertaining. I am yet to write one, but there are those of my current and former colleagues who have quite a talent for it. I am the recipient of the following advice from a confidential source described only as Justice Anon, who penned the following poem (which I have shamelessly put to my own use in this paper):

> *A judgment surely need not bore,*
> *The judge can postulate the Law,*
> *Adjudicate on points of fact,*
> *And do so with finesse and tact.*
> *But still engage in modest fun —*
> *A quip, a joke, a harmless pun.*
> *It's rather nice if judgment draws on*
> *Shakespeare, Pope or Henry Lawson.*
> *And why should critics get all snooty*
> *At metaphor from sport — like footy?*
> *So I don't think that one should curb*
> *Adventurous use of noun and verb.*
> *And why not play up to the gallery?*
> *At least have fun, if not much salary.*[78]

[78] With thanks to Justice Anon, whose talented words, and permission, came through the Hon Peter Heerey AM QC.