

SUPREME COURT OF WESTERN AUSTRALIA
DISTRICT COURT OF WESTERN AUSTRALIA
JUDGES' SEMINAR, PERTH, 23 OCTOBER 2007
APPELLATE REASONS*

The Hon Justice Michael Kirby AC CMG**

CRAFT OF INDIVIDUALISTS

Independence is essential to the office of a judge. It is required by the common law¹. It is a fundamental human right belonging to the parties². Judicial independence includes independence from extraneous pressures and influences but also independence from the judge's judicial

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¹ *Smits v Roach* (2006) 227 CLR 423 at 459-460 [104]. A constitutional foundation is suggested in *Smits* (2006) 227 CLR 423 at 461 [111], referring to *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362-363 [79]-[82], 372-373 [115]-[117].

² *International Covenant on Civil and Political Rights*, art 14.1. See also *Universal Declaration of Human Rights*, art 10; *European Convention on Human Rights*, art 6(1); *American Convention on Human Rights*, art 8(1); and *African Charter on Human and Peoples' Rights*, art 7(1)(b).

colleagues where that is necessary to the proper discharge of the judicial functions³.

Amongst such a group of individualists it would be a mistake to attempt to lay down a settled way of writing reasons. In any case, some individuals, because of genetic gifts, have special talents for expressing themselves clearly and persuasively. Advocates who can do this are prized. Talent in oral communication does not always translate into skills in written exposition.

Judges display distinctive personal traits in expressing their reasons for decision. Some are minimalists, given to perceiving legal problems as requiring no more than analysis of critical words in a legislative text or reasons expressed in past judicial decisions. This approach was more common in the days when textual interpretation was viewed as generally requiring no more than the identification of the literal meaning of the disputed words. Now that purpose, context, policy and extrinsic materials may be taken into account, interpretation has become a more complex exercise. Giving that, reasons for decisions involving interpretation will now often require a more detailed explanation than reliance upon a dictionary or two⁴. Depending upon inclination and

³ *Rees v Crane* [1994] 2 AC 173 at 187-188 (PC); cf *Fingleton v The Queen* (2005) 227 CLR 166 at 229-230 [187]-[191].

⁴ Dictionaries can sometimes still be useful. See *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 235 [146]; *Dalton v NSW Crime Commission* (2006) 227 CLR 490 at 527 [112]-[116] and *Carr v Western Australia* [2007] HCA 47 at [120]-[121].

3.

perceptions of a particular case, judges may provide shorter or longer reasons for reaching their conclusions⁵. Perhaps the hard wiring of some brains is more complicated than others. Some judges perceive more nuances, subtle arguments and legal choices than others do.

The inclination to explain differences from the opinions of colleagues, past and present, differs according to judicial personality and temperament. Some judges rarely, if ever, criticise (or even mention) the opinions of colleagues or highlight points of principle where they differ from them. Others, because they see refinement of difference as an attribute of transparent reasoning, or perhaps because of more combative personalities, seek to explain, differentiate and justify, the distinctive elements in their reasons.

The opening point in this essay on appellate reasons is, therefore, that the judiciary is (and basically should be) an empire of individualists. Reasons must always have integrity. They need to reflect the conscientious opinion of the particular judge. Judicial handbooks may provide model instructions for juries in criminal trials, so as to reduce the risks of oversight or the mis-statement of important legal principles. Tribunals (such as the Refugee Review Tribunal) may have a template for their reasons containing *pro forma* paragraphs that encapsulate the basic law that the tribunal is bound to apply. However, for the most part,

⁵ *Chang v Laidley Shire Council* [2007] HCA 37 at 97. Contrast [34] and [122].

judicial reasons in Australia cannot be reduced to a rigid formula. The facts of cases are almost infinitely varied. The applicable law is often complex and constantly changing. The application of the law to the facts calls for individual judgments. These invite different ways of expressing even comparatively routine and simple reasons for decision.

Over the decades, judicial writing styles change. Individual techniques alter. Those familiar with their writing styles may agree or disagree when I suggest that, in the High Court of Australia, certain judges can be categorised as observing the "magisterial" style of judicial exposition (Griffith, Mason, Brennan); a "dense analytical" style (Dixon, Fullagar, Kitto); a "didactic" style (Isaacs, Evatt, Windeyer, Deane); and an "assertive" style (Taylor, Murphy). At different times, and even in different reasons, the same judge might reflect attributes of each of the foregoing styles or none of them or different styles altogether. I omit to classify the present Justices of the High Court, lest they retaliate.

I therefore begin with an acknowledgment of the right and duty of each judge, whether of trial or in appellate courts, to express reasons for decision in a way that feels most comfortable and true to the judge's opinions in the case. In September 2007, Lord Phillips of MatraVERS, the Lord Chief Justice of England, told the Commonwealth Law Conference in Nairobi, Kenya, that the vocation of judge is like none other in society. It is a privilege for a lawyer of mature years to participate in an institution of government, to decide varied conflicts according to techniques that both control what is being done and acknowledge leeways for choice.

True, it can sometimes be burdensome. But nothing I will say about appellate reasons will propose a dampening of the individuality of judicial expression. That is an inescapable and precious feature of the creative element in the judicial role. The judge of the common law is not a faceless government bureaucrat.

Different techniques are deployed when reasons are given *ex tempore*, at the conclusion of, or shortly after, argument in a case. I have suggested some approaches for the provision of such reasons⁶. *Ex tempore* reasons⁷, disposing of appeals and proceedings in the original jurisdiction of the High Court of Australia, are comparatively rare⁸. However, short *ex tempore* reasons are commonly given in rejecting hundreds of special leave applications every year, whether by disposition on the papers⁹ or following an oral hearing. Occasionally, such reasons will be more elaborate. They may reflect the differences of view that have emerged as a result of argument¹⁰. *Ex tempore* reasons

⁶ M D Kirby, "Ex tempore Reasons" (1992) 9 *Australian Bar Review* 91.

⁷ Examples include *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203 and *Teori Tau v The Commonwealth* (1969) 119 CLR 564.

⁸ M D Kirby, "Ex tempore Judgments", in A Blackshield, M Coper and G Williams, *The Oxford Companion to the High Court of Australia* (2001), Oxford, 262.

⁹ High Court Rules (2004), rr 41.10.5, 41.11.1.

¹⁰ *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management* (1998) 72 ALJR 837 at 838-840; 154 ALR 405 at 407-410; cf *DPP (SA) v B* (1998) 194 CLR 566 at 593 [50]. See also *Muir v The Queen* (2004) 78 ALJR 780; 206 ALR 189.

are commonly briefer than reserved reasons. Some are later edited (without substantive changes) and form useful precedents, particularly on matters of practice and procedure¹¹. However, such reasons are not the focus of this essay. It addresses reserved reasons and mainly by reference to appellate courts, which is where I have mainly worked as a judge. It will deal with the basic legal obligations; some changing features of recent times; comment on the basic structure of appellate reasons; reflect on how such reasons may be written; and suggest a few developments likely to occur in the future.

THE BASIC OBLIGATIONS

Governing principles: The starting point is to understand the legal principle that governs judicial officers in the giving of reasons. In *Pettitt v Dunkley*¹², the New South Wales Court of Appeal, in an influential decision, held that "an obligation concerning the giving of reasons, lies on any court, including an intermediate court of appeal, so far as it is necessary to enable the case properly and sufficiently to be laid before the higher appellate court". Obviously, this justification for judicial reasons cannot be a complete statement of the governing rule.

¹¹ In intermediate courts, this is common. See eg *Dousi v Colgate-Palmolive Pty Ltd* (1987) 9 NSWLR 374.

¹² [1971] 1 NSWLR 376 at 388, 390; cf *Carlson v King* (1947) 64 WN (NSW) 65 at 66 per Jordan CJ. See also *De Iacovo v Lacanale* [1957] VR 553 at 558-559 per Monahan J (Fair Rent Board constituted by magistrate).

Otherwise, a legal obligation to express reasons would not apply to the High Court of Australia because, now, no further appeal lies from its decisions. Yet no one would doubt the obligation of the High Court judges, like judicial officers in all other Australian courts, to express reasons for most of their judicial decisions.

In *Housing Commission (NSW) v Tatmar Pastoral Co*¹³, Mahoney JA, in the New South Wales Court of Appeal, described the judicial requirement to give reasons as "an incident of the judicial process, but subject to the qualification that it is a normal but not a universal incident". Thus the duty may not apply to administrative decisions. Moreover, the provision of formal reasons may not be essential in the case of routine interlocutory rulings or procedural determinations, especially where the reasons that explain such dispositions are sufficiently clear from the exchanges between the judge and the parties or their representatives¹⁴.

This said, in *Public Service Board of NSW v Osmond*¹⁵, Gibbs CJ accepted Mahoney JA's formulation in *Tatmar*. In the stage we have now reached in Australia, the judicial obligation to give reasons is ordinarily an attribute of the judicial process itself. For any order,

¹³ [1983] 3 NSWLR 378 at 386; cf *R v Awatere* [1982] 1 NZLR 644 at 649 per Woodhouse P.

¹⁴ *Wiki v Atlantis Relocations (NSW) Pty Ltd* (2004) 60 NSWLR 127 at 136 [59]. (It is not normally necessary to refer to all of the evidence in the proceedings)

¹⁵ (1986) 159 CLR 656 at 667.

decision or ruling of substance, affecting the rights of parties, courts are now ordinarily expected to give meaningful reasons¹⁶.

In *Soulemezis v Dudley (Holdings) Pty Ltd*¹⁷, Mahoney JA, McHugh JA and I described the history of the emergence of the judicial obligation to give reasons; the reasons of principle that support the obligation¹⁸; and the circumstances in which formal reasons or extensive elaboration will not be legally required¹⁹. The reasoning in *Soulemezis* has been applied, or referred to, on several occasions by the High Court²⁰. Because, in appellate courts, more attention is typically paid to considerations of legal principle and legal policy, the provision of proper reasons is more likely to promote transparency in the legal process and thus in the exercise of judicial power²¹.

¹⁶ *Evans v The Queen* (2006) 164 A Crim R 489 at 522 [272].

¹⁷ (1987) 10 NSWLR 247. See also *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 442 per Meagher JA.

¹⁸ (1987) 10 NSWLR 247 at 279 per McHugh J citing D L Shapiro, "In Defense of Judicial Candor" 100 *Harvard Law Review* 731 at 737 (1987).

¹⁹ (1987) 10 NSWLR 247 at 280 per McHugh JA citing *R v Associated Northern Collieries* (1910) 11 CLR 738 at 740; *Iveagh (Earl) v Minister for Housing and Local Government* [1964] 1 QB 395 at 410.

²⁰ *CDJ v VAJ* (1998) 197 CLR 172 at 236; *Fleming v The Queen* (1998) 197 CLR 250 at 252 [2], 260 [22]; *Dinsdale v The Queen* (2000) 202 CLR 321 at 326 [9], 329 [21], 342 [66]; *Roy Morgan Pty Ltd v State Revenue (Vict)* (2001) 209 CLR 72 at 83-84 [26]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Palmer* (2003) 216 CLR 212 at 224 [46], 249-250 [126].

²¹ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 573 [160].

Apart from judicial statements in cases many judges, in extra-judicial remarks, have elaborated their understanding of the reason for reasons²². Commonly, these elaborations have laid emphasis on the different audiences to whom judicial reasons are typically addressed. Repeatedly, such commentaries have made the point that judicial reasons represent public documents. Potentially, they touch the lives of persons other than the immediate parties to the decision. Being explanations for the deployment of governmental power in a country such as Australia, they must ordinarily be sufficiently detailed and understandable so that they can be accepted, followed and criticised if need be by the ordinary citizen, just as other governmental acts can be. This is a normal feature of accountable institutions of a modern democracy.

Trial judges: The duties of trial judges to find the facts relevant to their decisions, necessary to appellate review and reconsideration of such decisions, are well established²³. Conventionally, trial judges

²² See eg F W Kitto, "Why Write Judgments?" (1992) 66 ALJ 787; B Dickson, Address to Canadian Institute for Administration of Justice, Seminar on Judgment-Writing, 2 July 1981 cited in D Lloyd, "How to Develop Effective Judgment-Writing" (2007) 19 *Judicial Officers' Bulletin* (NSW), 42 at 43; Sir Vincent Floissac, Orientation Programme for New Judges (2002) cited *loc cit.* See also Judicial Service Commission of NSW, *A Matter of Judgment - Judicial decision-making and judgment writing* (Ed R Sheard), 2003.

²³ *Deakin v Webb* (1904) 1 CLR 585 at 604-605; *Osmond* (1986) 159 CLR 656 at 666; *Jacobs v London County Council* [1950] AC 361 at 369.

should also record their findings and impressions concerning the credibility of witnesses. In recent times, caution has intruded into the judicial inclination to differentiate truth from falsehood on the basis of witnesses' appearances in the artificial conditions of a courtroom²⁴.

In important interlocutory rulings, the need to record reasons, however briefly, is generally enforced with common sense. With the modern facility of nearly instantaneous transcripts of important addresses and argument, such exchanges may sometimes be sufficient, without more, to fulfil the judicial obligation to afford reasons. An important measure of the trial judge's duty is to be found in the common statutory provision for appeals. Such provisions should be facilitated and not frustrated²⁵.

Appellate judges: In appellate courts, the giving of reasons serves at least two functions. It explains the appellate decision in the particular case and it expounds, clarifies and (in appropriate cases) develops and re-expresses the applicable law. The latter function is important not only for the guidance of the courts within the hierarchy of the appellate court concerned. It is also a contribution by that court to the development of the law throughout Australia. This is so because of the essential unity of

²⁴ *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322; 160 ALR 588 at 609; *Fox v Percy* (2003) 214 CLR 118 at 126-127 [24]-[25].

²⁵ *Pettitt* [1971] 1 NSWLR 376 at 388.

the Judicature provided by the Constitution and because of the instruction that the High Court has given on the normal requirement to observe rulings made on identical points elsewhere in the nation by courts of higher or equivalent status²⁶.

Because the High Court can itself dispose of only a small number of appeals each year, there is necessarily a large scope for the development, extension and restatement of legal principles by intermediate courts, when deciding the appeals that come before them²⁷. Having said this, once the High Court has spoken on the precise legal issue, proper observance of the *ratio decidendi* of a High Court decision is the duty of all courts throughout Australia²⁸. Yet identifying a binding rule is a technical exercise. It is not the case that everything said by every Justice of the High Court on every topic in every case is binding on other courts²⁹.

Once it is appreciated that appellate reasons fulfil the dual functions mentioned, and inescapably contribute to establishing the law

²⁶ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

²⁷ *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-269.

²⁸ *Rabenor Overseas Inc v Redhead* (1998) 72 ALJR 671 at 672 per Brennan CJ; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17] per Gaudron, McHugh, Gummow and Hayne JJ.

²⁹ *Garcia* (1998) 194 CLR 395 at 417-418 [395]; M D Kirby, "Precedent Law, Practice and Trends in Australia " (2007) 28 *Australian Bar Review* 243.

binding on persons throughout the nation, consequences follow that have not always been observed. The point was made recently by Ms Hilary Penfold QC, formerly First Parliamentary Counsel for the Commonwealth³⁰. Responding to occasional judicial criticism of statutory drafting, she got her own back³¹:

"The difficulties of extracting clear reasons for a decision from several separate judgments, written in several different styles by judges whose positions as members of the majority or minority might shift in the course of a single judgment from issue to issue (and who often do not even address the same issues in the same order or even under the same names) affect most lawyers, not only legislative drafters. Drafters, however, may find these difficulties more frustrating than other lawyers do. Now that it is generally accepted that judges make law, questions about the form in which judges make law cannot be ignored. Presumably, it would not be acceptable for drafting offices to produce two or three or even seven different versions of each Bill, drafted by different drafters, which could all be enacted by the Parliament and which, *taken together*, would form the law on the particular subject. Should it remain acceptable for judges to make law in this fashion?"

This is a fair comment. Its consequences have somehow to be reconciled with the principles of judicial independence and the impossibility of demanding agreement upon one or more explanations of an outcome, contrary to the true convictions of the judge(s) concerned. Nevertheless, within the High Court, and in the other appellate courts

³⁰ H Penfold, "Legislative Drafting and Statutory Interpretation" in T Gotsis (ed), Judicial Commission of NSW, *Statutory Interpretation - Principles and Pragmatism for a New Age* (2007), 81. Contrast *Brodome v Cassell* [1972] AC 1027 at 1084-1085 per Lord Reid.

³¹ *Ibid*, 103.

with which I am familiar, arrangements of varying degrees of formality are observed in an endeavour to reconcile the competing obligations that are at work. Normally, this involves discussion amongst the judges; candid exchange of views; informal explorations of the degree of any agreement; and subsequent negotiations over textual suggestions.

One point concerning the duty of intermediate courts should be noted. It relates to the desirability (and sometimes the necessity) of disposing of all grounds of appeal that might, upon a further appeal, become relevant to a later disposition of the case. In criminal appeals, in particular, where a prisoner may be serving a sentence of imprisonment and where timely disposition of all questions should therefore have priority, it will usually be essential for a Court of Criminal Appeal to indicate its opinions on the several grounds in the appeal³². Where this is not done, it has sometimes necessitated further remitter with consequential further delay that may be unjust to the prisoner.

Another requirement which the law imposes on appellate courts is that they must identify and demonstrate error before allowing an appeal. It is a fundamental mistake for an appellate court to substitute different orders simply because they appear more appropriate or just. The authority to disturb decisions in an appellate court, is only derived if error is shown. Any such error must be clearly spelt out before the appellate

³² *Jones v The Queen* (1989) 166 CLR 409 at 411; *Cornwell v The Queen* (2007) 81 ALJR 840 at 866 [113]; 872 [144].

court may proceed to provide its own orders³³. A failure to proceed in this way or to demonstrate that it has taken into account essential considerations in reaching its disposition will constitute error on the part of the appellate court³⁴. It will attract the risk of intervention by the High Court.

Length of reasons: A comparison of appellate reasons in the nineteenth century and early in the twentieth century with those today demonstrates a marked contrast, especially in their length. A paper for the recent celebration of the eightieth anniversary of the *Australian Law Journal* makes it clear that the aggregate annual number of appeals disposed of by Australia's highest court has remained remarkably stable throughout the life of the Journal³⁵. The number of cases concluded with full reasons (including, initially, Privy Council appeals from the High Court) has varied between about 70 and 80 each year. However, the same table shows a significant increase in the length of reasons. The comparison is imperfect because, in its early years, the ALJ contented itself with summaries and extracts from those reasons³⁶.

³³ *AMS v AIF* (1999) 199 CLR 160 at 222-223 [183]-[187].

³⁴ See eg *Lowndes v The Queen* (1998) 195 CLR 665 at 679 [390]; *McGarry v The Queen* (2001) 207 CLR 121 at 146-147 [74]-[77]; *Strong v The Queen* (2005) 224 CLR 1 at 9 [11], 15 [30], 26 [66].

³⁵ M D Kirby, "Australian Law Journal at 80: Past, Present and Future" (2007) 81 ALJ 529 at 533, Table 4. Cf G Drewry *et al* (eds), *The Court of Appeal* (Hart, London, 2007), 129-131.

³⁶ See *ibid*, 5, 533. See also the Table in the article by Justice K E Lindgren, "Is the Australian Law Journal an Australian law journal?" (2007) 81 ALJ 652 at 656.

The increase in the length of reasons reflects three developments in particular: (1) the great expansion in the content and complexity of the law, especially in the form of legislation and relevant judicial precedents; (2) the increase in reference to contextual considerations and extrinsic materials, often now encouraged by legislation and judicial authority; and (3) the increasing need for judges to address arguments addressed to legal principle and legal policy which were once ignored, at least in open discourse, but which are now accepted as sometimes important for the ascertainment of the legal rule applicable to the case³⁷.

Features of reasons: During the past century remarkable changes have occurred in the general media of communications. Mass circulation newspapers have banished advertisements from their front pages. Facsimile photographs, maps, charts and graphs are now common. Colour reproduction is unremarkable. To some extent, both for good and ill, the print media have been affected by the techniques of presenting information developed by the electronic media. Not all of these techniques have been copied in judicial reasons or are now reflected in the published reports of such reasons. However, certain changes in the style of presentation of judicial reasons have become quite common in Australia over the past two decades. They include:

³⁷ *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 563; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347; *Harriton v Stephens* (2006) 226 CLR 52 at 58-59 [7].

- *Paragraphing:* There is far less dense prose than was typically the case as recently as the middle of the twentieth century. If the decision of the High Court in the *Communist Party Case*³⁸ is taken as an illustration, there are many pages in the report of that case that comprise a single paragraph, uninterrupted by a break in the prose. To say the least, this makes the reading of the reasons, arduous³⁹. It demands sustained and unwavering concentration that is given to few mortals;
- *Headings:* Headings and subheadings have entered judicial reasons in recent years so that they are now virtually standard, at least in reasons that proceed over more than a couple of pages. Both Heydon J and I have gone further . We have introduced subheadings, on the line, to indicate the subtopics to be dealt with. This may be a product of Heydon J's experience as a distinguished legal scholar and as the writer of leading legal textbooks. In my own case, it is doubtless influenced by my decade as chairman of the Australian Law Reform Commission, where reports commonly utilize these features. Subheadings enhance efficiency in communication. The hard-pressed reader can scan such subheadings and proceed directly to any that

³⁸ (1951) 82 CLR 1.

³⁹ *Ibid*, pp 143, 157, 160, 163 (Latham CJ); 177, 184, 193, 195 (Dixon J); 208, 212 (McTiernan J); 222, 224, 226, 229, 231 (Williams J); 244 (Webb J); 250, 254-258, 260, 270 (Fullagar J); 274 (Kitto J).

appear relevant to the purpose in hand. Moreover, such subheadings make clear the structure of the reasons. To put it bluntly, they require that there *be* a structure rather than a record of a judge's meandering stream of consciousness;

- *Dot points:* In addition to the headings and subheadings, judicial reasons are now, in other ways, more user-friendly. There is more white space on the typical page. Indentation of sub-arguments; the use of dot points; the numbering of subordinate propositions and other techniques have been introduced to enhance communication with the reader. There is no essential reason why reading appellate reasons should be an ordeal. Judges can learn from the modern techniques of communication that are commonly regarded as successful. Some legal publishing houses are better in layout and presentation of legal taxonomies than others. They tend to set the gold standard. Being valued by many readers and popular in the market, that style is now being copied by judges;
- *Illustrations:* The introduction of maps and charts into judicial reasons is also a comparatively new development. Part of the folklore of the High Court records Justice Evatt's battles with the publishers of the *CLR*s in the 1930s to reproduce his reasons in particular ways, including variations in typeface size for indented quotations. (He won). I had much less difficulty when I requested the colour reproduction in the *CLR*s of the zone of cooperation for petroleum exploration annexed to the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 (Cth)*. This was referred

to in my reasons in *The Commonwealth v WMC Resources Ltd*⁴⁰. As it seemed to me, the map made clear the compromises inherent in the statute and the treaty to which it gave effect. Similarly, on the principle that a picture is worth a thousand words, Callinan J annexed to his reasons in the defamation case of *Roberts v Bass*⁴¹ a reproduction of the pages of the matters complained of. I attempted this once in the Court of Appeal. However, the then editor of the *New South Wales Reports*, Mr J D Heydon, was quite unyielding; probably with justification. Courts have to be careful not needlessly to repeat (and immortalise) the defamatory imputations⁴²;

- *Graphs*: Encouraged by Justice Callinan's innovations in *ASIC v Forge*⁴³, I engaged the new facilities of computer technology to convert into graphical form raw data concerning the use of acting judges in the courts of New South Wales. I considered that the graphs more vividly made the point that I was attempting to make by prose (namely that the appointments of acting judges had expanded from *ad hoc* expedients to settled institutional

⁴⁰ (1998) 194 CLR 1 at 88.

⁴¹ (2002) 212 CLR 1 at 86-88. See also the advertisements reproduced by Callinan J in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 466-468 [432]-[436].

⁴² The case was *Ettingshausen v Australian Consolidated Press Ltd* (1995) 38 NSWLR 404.

⁴³ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 98 [137] and on pp 99 (Fig 1), 102 (Fig 2), 109.

arrangements). I do not doubt that we will see more use of such information technology in illustration and support of persuasion;

- *Electronic links:* Although it has not yet been attempted, I see no reason why, in the future, the electronic versions of appellate reasons (and the reasons of trial judges) could not provide the recipient with an optional (or included) link to the in-court film record of the key testimony of particular witnesses. Of course, the economical presentation of reasons (which can only ever contain an outline of the main considerations that sustain the judge's conclusions) will always require discernment, selection and economy. Nevertheless, in the courtroom of the future, electronic reproduction of primary evidence and argument will be commonplace. Reasons for judgment have already leapt into the World Wide Web. They are much more readily available to those interested than they have ever been before. I suspect that we have only seen the beginning of the impact of electronics on the form and content of judicial reasons.

THE BASIC STRUCTURE

Syllogistic structure: The individuality of the presentation of reasons for judgment means that it is somewhat presumptuous to propose a basic structure. However, the syllogistic nature of the basic exercise in which judges are involved in deciding appeals and other cases stamps a degree of order on the presentation of the reasons for

most decisions. That structure suggests a logical sequence that will contain:

- (1) An introduction;
- (2) The facts;
- (3) The legislation (if any);
- (4) The issues;
- (5) A discussion and resolution of each issue;
- (6) Conclusions; and
- (7) Orders.

Within this structure there remains plenty of room for manoeuvre, innovation and surprise.

Take for example the *Introduction*. In his reasons, McHugh J normally considered it essential, in the opening paragraphs, to state what the case was about, how he would resolve it and basically why. This is often a sensible technique. I agree with Professor James Raymond's instruction that the opening of judicial reasons should not be wasted on some procedural, routine, boring or mundane point. As he puts it⁴⁴:

⁴⁴ J C Raymond, "Five Ways to Improve your Judgment-Writing" (2007) 19 *Judicial Officers' Bulletin* 43.

"A good beginning indicates who did what to whom, or who was arguing about what, before anyone set foot in court. Give an overview, not a detailed narration of the facts. Avoid cluttering this overview with parenthetical aliases ... or with citations that serve no purpose at this point ... Don't waste your first paragraph on uncontested matters or procedural history that is no longer relevant".

Not all judges have the rhetorical gifts of Lord Denning. He had a skill, beloved of many law students of my generation, in choosing vivid opening words for his reasons. One cannot doubt that he laboured mightily to get those words just right, for the effect he was trying to achieve:

- "This case reminds me of the story of David and Goliath, with a difference ...⁴⁵"
- "David Emlyn James is a lawyer who has gone astray"⁴⁶,
- "A woman's hair is her crowning glory, so it is said"⁴⁷;
- "This case will be of interest to those in the civil service - and elsewhere - who are approaching retirement age. Unlike me!"⁴⁸;
- "In 1962 life was peaceful in Buckinghamshire"⁴⁹,

⁴⁵ *Post Office v Crouch* [1976] 1 WLR 766 at 770; [1976] 3 All ER 90 at 92.

⁴⁶ *In re James* [1977] Ch 41 at 58.

⁴⁷ *Ministry of Defence v Jeremiah* [1980] QB 87 at 96.

⁴⁸ *Howard v Department of National Savings* [1981] 1 WLR 542 at 543.

⁴⁹ *Myers v Milton Keynes Development Corporation* [1974] 1WLR 696 at 699; [1974] 2 All ER 1096 at 1098.

- "In summertime village cricket is the delight of everyone ..." ⁵⁰.

In my Court of Appeal days I occasionally tried to venture upon a picturesque opener, watered down somewhat for the more sceptical local readership⁵¹. At least, I would try to include headings which gave some idea of the drama of the case⁵². I occasionally ventured into this territory in the High Court, as in my under-appreciated citation from the 91st Psalm in *Johnson v American Home Assurance*⁵³ or my reference to Ovid's *Metamorphoses* in *Povey v Qantas Airways Ltd*⁵⁴. Occasionally, I will begin my reasons with a quotation from a judicial text that has caught my eye in thinking about the case, and which I feel encapsulates the essence of the problem for decision⁵⁵.

⁵⁰ *Miller v Jackson* [1977] QB 966 at 976.

⁵¹ *David Syme & Co Ltd v Lloyd* (1985) 1 NSWLR 416 at 416; *Ackroyd v Whitehouse* (1985) 2 NSWLR 239 at 241; Lord Denning's style is discussed in Cameron Harvey, "It All Started With Gunner James" [1986] *Denning Law Journal* 67 at 82 where more such opening gambits are collected.

⁵² See eg *Riley v Parole Board of NSW* (1985) 3 NSWLR 606 at 608; *Kilgannon v Sharpe Bros Pty Ltd* (1986) 4 NSWLR 600 at 602; *Jackamarra v Krakouer* (1998) 195 CLR 516 at 532 [45]; *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 and *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 353 at 557.

⁵³ (1998) 192 CLR 266 at 268 [5]. See also *Pearce v The Queen* (1998) 194 CLR 610 at 613 [74].

⁵⁴ (2005) 223 CLR 189 at 219 [88].

⁵⁵ See eg *Moran v McMahon* (1985) 3 NSWLR 700 at 702; *Fejo v Northern Territory* (1998) 195 CLR 96 at 132 [60]; *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 148 at 191 [14]; *Zonieff v The Queen* (2000) 200 CLR 247; *Air Link Pty Ltd v Paterson* (2005) 223 CLR 283 at 300 [34]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 414 [255].

However, the change in mood of the High Court in recent years has made such ventures seem a little out of place - jarring even - by contrast with the writing styles of my colleagues. So I have tamed my more creative openings. Generally I have stuck to a brief outline of the main questions for decision (sometimes adding the way I would decide them)⁵⁶.

By and large, most lawyers today have become more conservative in expression than they were in Lord Denning's time. There is an element of truth in the aphorism that if judges want to be persuasive to the serious generations of lawyers at work in Australia today, they need to "grey the text" and to avoid overly colourful language. In the manner of these things, the days of creative openings and vivid phrases will return. But not yet.

As to *Facts and Legislation*, it has been the style in the High Court commonly to cite the statute once in italics and then to provide an abbreviated description of that Act in Roman text. I have gone along with this; although I do not quite know why. Usually it will be sufficient, where there is only one statute in issue simply to describe it as "the Act".

⁵⁶ See eg *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 68-69 [208]-[209]; *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180 at 197-198 [46]-[48]; *Brighton und Redfern Plaster Pty Ltd v Boardman* (2006) 225 CLR 402 at 408 [16]-[19].

Moreover, where colleagues have set out the facts and the legislation adequately, there is no reason to repeat them.

When I arrived in the High Court of Australia, I had been accustomed for more than a decade in the New South Wales Court of Appeal to recount the facts and the legislation. At that stage, there were no agreed arrangements in the High Court as to who would write the first draft. More often than not, my early drafts in the High Court contained the facts and legislation necessary to the disposition. Frequently they were circulated first. To my surprise, other reasons were then circulated which repeated the facts and legislation. I came to realise that this was because others wanted their reasons to become the principal reasons of the Court in the particular case, for which an account of the facts and legislation might be thought necessary. In the Court of Appeal, if a colleague had set out the basic materials, we rarely, if ever, repeated them. We simply cross-referred to them. We were far too busy for needless repetition. Such cross-referencing is an efficient course for appellate courts to adopt. However, it means that reasons may not be able to stand on their own as an account of what has happened, to whom, and how it should be resolved by the law.

Today, if others set out or repeat the facts, and I write separately, I either delete my version of the facts from my reasons or confine myself to emphasising a few details, adding those important to my reasons that have been omitted by others and providing cross-references to the relevant paragraphs of other reasons.

Needless repetition of facts and legislation is boring. It should be discouraged. All appellate courts should have (as we enjoyed in the Court of Appeal of New South Wales) a clear, fair and properly respected method for sharing the opinion-writing amongst all of the judges. Whilst in some respects the arrangements for discussion, identification of writing obligations and sharing of burdens has improved in the High Court, there remains much room for further improvement. The distribution is random, uneven, somewhat haphazard and not always respected by the participants. After a century, it is hard, it seems, to introduce a settled methodology into college of such individualists. A particular kind of leadership, harmonious personalities and institutional loyalty are required.

The statement of the *Issues* can sometimes require a clarification of matters that are not in issue (or issues that have fallen away from earlier stages of the litigation) and identification of common ground between the parties. It is useful to collect (and often relevant to state) concessions that have been made by the parties below or during argument of the appeal that narrow the issues for decision. Without these, a reader might not understand the course that the appellate reasons have taken - especially if they are different from the reasons of the earlier court.

The statement of the issues then naturally leads to the subdivision of the remainder of the appellate opinion. If the issues have been clearly

identified, they will often lend themselves to a classification of the questions that fall for decision. This is the heart of the appellate court's reasoning. It requires analysis of any legislation that governs each point. Such analysis should take priority over the citation of judicial *dicta* from earlier times, sometimes on earlier legislation, considered for different purposes. Increasingly, decisions of all courts involve the analysis of legislation. The starting point for such analysis is always the legislation itself⁵⁷.

Obviously, questions of jurisdiction, justiciability, standing and procedural problems need to be addressed at the threshold. Professor Raymond recommends that they be saved up for consideration in the heart of the court's reasons and not intrude into the *Introduction*. It is true that they often constitute preliminary points that lie in the path of a substantive consideration of the case. However, it is usually necessary to set out at least something about the factual background and any applicable legislation before coming to grips with such questions.

The citation of large extracts from earlier authority is much less common in the High Court of Australia today than it was previously. This may be a consequence of the proliferation of judicial authority. Economy

⁵⁷ *Combet v The Commonwealth* (2005) 224 CLR 494 at 567 [135] and cases there cited; cf M S R Palmer, "A Perspective on Balance and the Role of Law" in D Carter and M Farmer (eds), *Essays in Honour of Sir Ivor Richardson, Roles and Perspectives in the Law*, (VUW Press, 2002), 1 at 20.

in quotations from previous decisions is to be encouraged. What is required is the identification of any relevant binding authority; a signification that it has been considered and applied; and an encapsulation of the legal rule to which the court gives effect. Deriving, and then expressing, the *ratio decidendi* of a case is sometimes a difficult task. As I know from my time in the Court of Appeal, it tends to be a more pressing obligation in an intermediate court. It provides shape and order to the work of such courts. In a way, it makes the work of such courts simpler than that of the final court where applications are sometimes made to re-express and change established authority⁵⁸. Yet the starting point for any consideration of the re-expression of authority is a clear statement of what that authority holds and why it needs to be reformulated⁵⁹.

The statement of *Conclusions* can generally be quite brief. Well written reasons will ordinarily have already indicated why the stated conclusions follow as a matter of logic from the premises in the resolution of the issues. On the other hand, I agree with Professor Raymond that the conclusion section of appellate reasons⁶⁰:

⁵⁸ See eg *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 549 [79], 591 [203].

⁵⁹ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56].

⁶⁰ Raymond, above n 44.

"... is a good place to bolster your findings and arguments from consequence - that is by mentioning all the bad effects that would flow from a contrary judgment".

A judge can also use the conclusions to recapitulate, briefly, the main lines of reasoning; to afford a clear summary of the legal rules that are being endorsed; and to demonstrate why the outcome is both a lawful and (if this be the case) a just resolution of the matters in contest.

Because media coverage of appellate decisions in Australia is generally so poor, conclusions can also sometimes afford the public media a useful quotation or two that will explain, in the judge's own language, the outcome and the significance of the case. Courts should not disdain the effective communication of their decisions to the public. The public has a right to know. Better that the public be informed in the language of the judges themselves than that it be misinformed by untrained, distracted journalists, working to deadlines, who do not know where to look in the mass of a lengthy text for clues about what is important and what is not. In the manner of the times, "readers [are] likely to skip the body of the judgment"⁶¹. That is why the statement of conclusions is specially important both in the principal reasons of the court and in any dissenting reasons.

Paradoxically enough, the most important item in any judicial reasons is to be found in the *Orders*. This is where the enforceable rule

⁶¹ *Ibid.*

binding on the parties is to be found. The Australian Constitution describes the dispositions of courts giving rise to appeals as the "judgments, decrees, orders and sentences"⁶² of the courts appealed from. These constitutional words indicate why I always differentiate between judicial reasons (or "opinions") and the "judgments" etc that such reasons explain and sustain. Great care is needed in the formulation of orders. Once entered in the records of the court, they speak to the world and not only to the parties. They can rarely, if ever, be reopened⁶³. In the High Court, in advance of the publication of dispositions, the proposed orders are distributed to all members of the Court, including those in the minority, to check before they are made. They are separately published after the publication of reasons. Great care needs to be paid to their form and content⁶⁴.

DRAFTING REASONS

The medium used: In previous times, most judges wrote their reasons longhand. Oliver Wendell Holmes Jnr reportedly did so standing up. The view has been expressed that such physical restraints

⁶² Constitution, s 73.

⁶³ *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 302; *DeL v Director-General (NSW Department of Community Services) [No 2]* 1997 150 CLR 207 at 215; *Ruddock v Taylor* (2005) 222 CLR 612 at 660 [174].

⁶⁴ See eg *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 354-362 [44]-[65]; cf at 373-374 [95]-[98].

have a tendency to encourage brevity. Other judges tape record their drafts. It is then typed and corrected before distribution. Younger judges, and virtually all law students, now have typing skills. In effect, they help their thinking by typing. It is as if there is a link between their fingers and their brains.

Associates have said to me that they could not conceive of composing a sustained text, such as judicial reasons, beginning to end, by dictating them without the facility of instant recapitulation and editing that is available with electronic systems. Those for whom the electronic system came late in their careers, may jump the typing hurdle by use of voice recognition. However, without a running transcript of draft reasons, a judge needs to plan the structure of the reasons and to conceptualise and remember the entire opinion, so that the mind progresses logically from one idea to the next.

Preparing a structure: Soon after my arrival in the Court of Appeal, I noticed that Justice Dennis Mahoney was writing during the argument, on loose pages, what seemed to be notes for use in preparing future reasons. Because of the pressure of the work, I soon realised that the burden would be intolerable if I simply sat there during argument allowing the fascinating advocacy to wash over me.

True, listening to argument can often be an interesting and pleasurable experience. In effect, one can watch one's own mind moving with the flow of submissions. However, I learned from Justice

Mahoney, and the other experienced judges with whom I sat in the Court of Appeal, that court time is working time. An efficient appellate judge must use the time in court not only to question, and test propositions and clarify evidence and argument but also to plan his or her reasons.

Portraitists commonly say that they leave the last brush stroke to God. Judges cannot be so presumptuous. They may leave the final conclusion to a later time when they employ the silent hours to reflect upon argument and to see where it takes them⁶⁵. Or they may do so when walking to work or eating breakfast. A judge will sometimes leave the oral hearing convinced that a party must lose or win. Yet when the facts are studied more closely; when the authorities are reviewed; when the language of the legislation is reviewed and seen in a new light; or when the considerations of legal principle and policy bear down, the judge may find that the initial opinion "will not write"⁶⁶. It must then be changed. Going to the trouble of expressing one's own reasons and committing them to formal reasons is a discipline for the mind. Until that discipline is accepted, a judge may not be absolutely sure where he or she would end up if put to the rigorous obligation of stating reasons.

⁶⁵ M D Kirby, "Judging: Reflections on the Moment of Decision" (1999) 18 *Australian Bar Review* 4.

⁶⁶ G La Forest, "Some Impressions on Judging" (1986) 35 *University of New Brunswick Law Journal* 145 at 150.

There is another danger of failing to use the hearing time efficiently. That danger is that the benefits of oral argument and persuasion may be lost. Concessions may be overlooked. Submissions may be misunderstood. Mistakes can happen.

That is why I generally spend the time, whilst listening to argument, sketching an outline of the issues and collecting the arguments of the opposing parties on each of the emerging issues. In my own case, I do this in the form of a tree diagram. It is a mode of summarising complex material that I have used since university days. If, at first, I cannot see clearly an overall structure for the issues that require decision, I will at least begin the task of disciplining my mind by listing the major points for and against the arguments of the parties. In due course these will reshape themselves into sub issues and provide an eventual structure for any reasons that I have to write.

Coaxing the mind: It is of the nature of the minds of older people (and most judges fall into this class) that they would probably prefer to journey in the realm of generalities rather than to focus specifically on complex issues, such as statutory interpretation or to extract the binding rule of earlier cases. Coaxing the mind to do what it would prefer to postpone or evade, is a requirement that judges cannot avoid and must not delay.

Most decision-makers, of the age of appellate judges, have bright young assistants to whom they could theoretically delegate their

functions. In Australia, in most cases at least, the judges do not do so. Most judges of my acquaintance still prepare their own first drafts.

The rebellious judicial mind needs, and deserves, rewards for endless hours of focussed concentration. Different judges reward the mind for its hard work in different ways. Thus, Justice James Wood indulged in marathon running, doubtless for the endorphins it stimulated. Justice George Palmer, like the conductor Gustav Mahler a century earlier, interrupts his professional duties in the small hours with musical composition. Justice Michael McHugh was known to divert his mind with horse racing. Some judges resort to prayer. In my own case, the reward I offer the brain is sugar, usually in the form of fruit cake. Everyone has special techniques. However, the starting point for preparing judicial reasons should be to use argument during sitting time efficiently.

Apart from everything else, doing this assists the judge to keep awake and to plant in the unconscious memory the ideas about the case that will work away in relation to each other only to re-emerge, partly formed in an opinion, when the time comes to reach a conclusion and to express the reasons that support it.

Editing reasons: There are normally many stages between the rough tree-charts, penned during argument, and the final reasons:

- The courtroom charts will accompany me in a reading of the transcript of argument; a re-reading of the written submissions and the special leave transcript; and a consideration of any additional research that I have asked my staff to perform;
- Whilst reading these materials, I will generally prepare new handwritten charts with a more detailed and logical outline of the structure of the reasons that is emerging in my mind;
- I will then either write (if short) or dictate onto tape (if longer) the first draft of the reasons;
- My personal assistant (Janet Saleh) then provides a first typed draft;
- Often, in addition to the draft, I will dictate a note to myself including items that require further research or references read subsequently that can be inserted or footnoted as appropriate;
- The draft is then subjected by me to about four or five or more redrafts. Often these are substantial. Sometimes they are purely verbal and relatively minor;
- The draft is then assigned to one of my two associates. He or she is encouraged to pick it apart; to identify any suggested inconsistencies; to note perceived illogicalities; and to highlight any departures from authority. The checking of the drafts at this stage is a most painstaking procedure. Finally, after discussion and consideration of memoranda from the relevant associate and any textual changes they incorporate, a semi-final draft is prepared. This is then scrutinised by the High Court's editing officers. They correct infelicities and inaccurate or inappropriate

citations. They also call attention to any mistaken or inapt use of authority;

- Where concurrences are negotiated with other reasons, there is, in my case, normally a full exchange on additions and changes that I propose to secure a mutually acceptable text. Commonly I make many suggestions. I have to say that, in the High Court at present, there is usually a positive spirit in accepting proposed changes or in suggesting alternative ways by which an accommodation might be reached. In the past I have known appellate judges who would not agree to alter so much as a semi-colon;
- Cases have arisen where memoranda from associates have identified mistakes in my draft, obliging significant redrafts. I cannot recollect an occasion where the actual disposition was changed; but it may have happened. Within chambers there is an open-minded attitude. All comments and criticisms are welcomed and considered. Everyone works very hard. In the end, the draft of any separate reasons is sent to be incorporated in the Court's pamphlet. The proposed orders are announced and the reasons are published on judgment day. From the full draft, there are countless alterations, edits, corrections and reformatting of sections in the reasons. Cross-references to paragraphs in other reasons are inserted by an associate at the end stage. It is all too easy when outlining the introduction, stating the facts or explaining the legislation to incorporate argument that is better placed later in the core of the reasons that sets out the resolution of the issues

requiring decision. When this defect is noticed it requires shifting the passages within the reasons.

Judicial candour. Judge Richard Posner has suggested that, in providing reasons for their decision⁶⁷:

"[Judges] rarely level with the public and not always with themselves - concerning the seamier side of the judicial process ... This is the side that includes unprincipled compromises and petty jealousies and rivalries that accompany collegial decision-making, [and] the indolence and apathy that life tenure can induce".

No doubt, there is a limit to judicial candour, including in the writing of an essay such as this. In judicial reasons, it would generally be inappropriate and unproductive to dig over-deeply into psychological and biological influences on reasoning, assuming that those who are subject to such influences are aware of them and capable of accurately identifying their impact. The antidotes to the perils of which Judge Posner warns include subjection of oneself to the discipline of expressing reasons as honestly and persuasively as one can.

In a collegial setting, decision-making sometimes requires compromises designed to respond to the admonition of Hilary Penfold, noted above. However, in my experience, most appellate judges in

⁶⁷ R Posner, *The Problem of Jurisprudence* (Harvard, Cambridge, 1999), 190 quoted in S Elias, "Reflections on Appellate Leadership" in Carter and Palmer (eds) above n 57 at 652.

Australia are neither indolent nor apathetic. Some are less energetic than others. Some think it is a positive contribution on their part to clarity in the law for them to write less, or not to write much at all. If a judge in a collegiate court manifests laziness, indifference or similar weaknesses of skill or character, it soon becomes widely known.

By definition, all appellate judges work in a small community. In the nature of things, most members of that community have strong personalities and a vigilant regard for their own independence and abilities. Over time, they learn, as I have, that if they demand space for their own opinions, they must accord it to the opinions of others. Observing the changes that occur in the law over the decades of one's professional service an important lesson is learnt - few things in the law are final and unchangeable. Today's heresy may become tomorrow's orthodoxy and vice-versa. Judges must remain open-minded and self-critical in the face of such possibilities.

THE FUTURE

Links to evidence and submissions: I have already hinted at some changes that may come about in the content and style of judicial reasons in Australia, including in appellate courts. There are no technical reasons why incorporation of actual evidence, or access to more than the typed transcript of testimony, could not be provided in the appellate reasons of the future. Whether this would be a cost effective increment is doubtful.

Multi-media presentations of judicial reasons are likely to be a feature of the craft in the future. There is no essential reason why judicial reasons must be expressed only in written text. It is far from unlikely that, in future generations, particular judges or other officials will be authorised to explain orally, in the electronic media, the essence of court reasons and to answer questions, just as members of the other branches of government regularly do.

Party prepared reasons: Years ago, I suggested that, at least in identified (mainly simple) matters, appellate courts could enlarge their output by inviting (or requiring) the parties themselves to submit draft reasons for decision, favourable to their interest. This suggestion was sharply criticised at the time. No doubt there are risks that it could lead to a too ready endorsement of drafts prepared by partisan or inexperienced drafters. Doubtless, any such technique would gloss over the subtleties of decision-making. It might put a premium on anodyne statements about which there could be no possible dispute.

Yet unless something is done to enhance the capacity of appellate decision-making by courts, there is a prospect that more work will drift from the courts to mediation, arbitration and other non-court determinations. Or that more barriers of leave to appeal or special leave will be imposed to stem the time of proceedings requiring decision. Or that parties with justifiable grievances will be forced to accept, potentially unlawful and unjust conclusions because the institutions of decision-

making cannot cope with the demands placed upon them. Such developments would have disadvantages for the less powerful and vulnerable in society. The annual caseload of the High Court of Australia, of between 70 and 80 full decisions, is fairly standard for a final national court. However, objectively, it is very small when measured against all the legal disputes jockeying for consideration.

New officials: A different solution to increase the output of appellate courts would be the adoption of institutional procedures modelled on those adopted in some of the courts of Europe. I refer to the introduction of an office like that of the Advocate-General of the European Court of Justice⁶⁸. This independent office-holder can present the court with conclusions that may become the foundation for the court's own decision. This has not been part of the tradition of common law countries.

Behind the scenes, especially in courts of criminal appeal, appellate courts of our tradition have sometimes enjoyed assistance from court officials or the prosecution service providing available drafts setting out the facts and issues in an appeal to facilitate *ex tempore* dispositions. However, this type of help falls far short of the institutional

⁶⁸ N Burrows and R Greaves, *The Advocate General and EC Law*, (OUP, 2007); cf A A Dashwood, "The Advocate General in the Court of Justice of the European Communities" (1982) 2 *Legal Studies* 202. The office is modelled on the *commissaire du gouvernement* in the French *Conseil d'Etat*.

role performed by the Advocate-General in Europe. Such an innovation deserves explanation, given the relatively tiny numbers of cases that are accorded the opportunity of a full judicial hearing on appeal under current arrangements.

Peremptory dispositions: Another innovation was recently suggested by Justice Thomas Gault, then President of the New Zealand Court of Appeal, in a reflection on the appellate rearrangements in that country⁶⁹. Writing on "Whose Day in Court is it Anyway?", Justice Gault suggested that the tradition of preparing full reasons for judgment, in appeals involving no more than the application to the facts of well established legal principles, was of "questionable value". He argued that such reasons "are of no interest beyond the immediate parties". He suggested that they "frequently ... just restate reasons given in the lower courts"; that they are "time consuming and expensive to produce"; and that they "end up clogging libraries to be cited in the future in spite of having no precedent value"⁷⁰.

In the United States, peremptory disposal of appeals is sometimes authorised by statute. In Australia, we have tended to prefer a public facility for leave or special leave as affording a more convincing and accountable gateway to appellate hearings and disposition. As the High

⁶⁹ T Gault in D Carter and M Palmer (eds), above n 67, 644.

⁷⁰ *Ibid*, 644-645.

Court shifts to disposition on the papers of approximately half of its special leave applications, thereby dispensing with any oral hearing in those cases, it seems likely that more appeals in the future may be determined in this way⁷¹. The key will be to provide means that ensure that experienced appellate judges give actual attention to whatever merits there are in an application and that the process remains judicial and is not reduced to bureaucratic formularies.

Role of clerks: The least appealing of the changes that have occurred elsewhere, affecting appellate dispositions, has been the reported enlargement of the functions of clerks to the judges in the United States judiciary. Recent books published in the United States⁷², have described the transformation of the institution of judicial clerks that occurred in the Supreme Court of that country under the Chief Justiceship of Warren Burger. According to these books, most but not all of the Justices now rely on clerks to provide them with first drafts. This change has led, in turn, to the recruitment of clerks with prior clerking service, mostly in the federal courts. That shift reflects the greater responsibilities.

⁷¹ See High Court Rules 2004, rr 41.10.5 (unrepresented applicants) and 41.11.1 (represented applicants).

⁷² A Ward and D L Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (NYU, 2006); T C Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*, (Stanford, 2006).

In fairness, the huge numbers of cases in which engagement of the Supreme Court's jurisdiction is sought and the presentation of many urgent (often capital) cases doubtless obliged internal changes. It would not be humanly possible for the Justices to read all of the papers filed in that Court. However, disclosures about the role now played by clerks has led to demands that new and different office-holders be appointed to fulfil the clerks' responsibilities as they have evolved. Or that clerks should themselves come under a form of Senate scrutiny, given the substantial powers they now actually wield⁷³.

In the High Court of Australia, a special assistant to the Chief Justice (Mr Ben Wickham), previously a legal research officer in the Library of the Court, and for a time an Assistant Registrar, has been engaged to help with administrative tasks in processing the rapidly growing numbers of applications for special leave to appeal coming before the High Court (many of them brought by litigants without legal representation and many concerned with applications for protection visas claiming refugee status). However, nothing that the special assistant does (or as far as is known that any of the associates to the High Court Justices perform within chambers) comes close to the developments that have occurred in the United States. Nor is it likely that they would do so in the foreseeable future.

⁷³ P B Rutledge, "Clerks", 74 *Uni of Chicago Law Review* 369 at 400-401 (2007).

Thinking freshly. There are many frustrations, stresses and upsets in the life of a judge, including one working in an appellate court⁷⁴ specialising in appeals. Yet if we are honest we will acknowledge that there are also many advantages and satisfactions. Of its nature, the work is unrelenting. Clearing the desk of one set of appeals merely makes space for the successors. There is a constant stream awaiting hearing and decision. Yet the work is intellectually stimulating and otherwise rewarding: it is a life involving endless resolution of puzzles.

The inefficiencies and imperfections of the work methods of appellate courts in Australia deserve constant reconsideration. Because attempts by other branches of government would often be resisted as an intrusion into the independence of the courts, for the most part, change can only be secured by the judiciary itself. That is why today's appellate judges must think freshly about the role of their courts; the organisation of their work; the matters warranting their attention and those that do not; and the way reasons for decision should be given that fulfil the central purposes of appellate decision-making. In the future, doubtless, some features of appellate judging will remain the same. But others will change, and need to change. The challenge is to know the difference.

⁷⁴ M D Kirby, "Judicial Stress" (1995) 13 *Australian Bar Review* 101 at 113-114; M D Kirby, "Judicial Stress - An Update" (1997) 71 ALJ 774 at 779-780; 791. Complaints about overburdening of appellate courts is not new. See Lord Justice (C SC) Bowen's complaints in (1996) 5 *Law Quarterly Review* 1; G Drewry, L Blom-Cooper and C Blake, *The Court of Appeal* (2007) at 45.

We can take comfort from the perceptive words of that great American appellate judge Benjamin Cardozo⁷⁵:

"What is good in [law] endures. What is erroneous or petty is sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast out in the laboratory of the years".

⁷⁵ B Cardozo, *The Nature of the Judicial Process* (Yale UP, New Haven, 1921) 178-179 cited in S Elias, "Reflections", see n 58, above.

**SUPREME COURT OF WESTERN AUSTRALIA
DISTRICT COURT OF WESTERN AUSTRALIA
JUDGES' SEMINAR, PERTH, 23 OCTOBER 2007
APPELLATE REASONS**

The Hon Justice Michael Kirby AC CMG