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APPELLATE JUDGMENTS – THE NEED FOR CLARITY

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1 I approach this subject with some trepidation born of the following four factors:

(a) an appreciation of the number and standing of the judges who have preceded me in discussing the topic of judicial judgment writing;[1]

(b) an appreciation of the large body of professional work on judgment writing;[2]

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[1] Sir Harry Gibbs "Judgment Writing" (1993) 67 *ALJ* 494; The Hon Michael Kirby "Appellate Reasons" in G Blank & H Selby (eds) *Appellate Practice* (The Federation Press, 2008); The Hon Michael Kirby, "Ex Tempore Judgments - Reasons on the Run" (1995) 25 *UWAL Rev* 213; The Hon Michael Kirby, "Reasons for Judgment: 'Always Permissible, Usually Desirable and Often Obligatory'" (1994) 12 *Aust Bar Rev* 121; The Hon Michael Kirby "On the Writing of Judgments" (1990) 64 *ALJ* 691; The Hon Michael McHugh, "Law Making in an Intermediate Appellate Court: The New South Wales Court of Appeal" (1986-1988) 11 *Sydney Law Rev* 183; Sir Frank Kitto, "Why Write Judgments" (1992) 66 *ALJ* 787; The Hon Chief Justice John Doyle, "Judgment Writing: Are There Needs For Change?" (1999) 73 *ALJ* 737; Sir Lawrence Street, "The Writing of Judgments: A Forum" (1992) 9 *Aust Bar Rev* 139; The Hon Dennis Mahoney, "Judgment Writing: Form and Function" in Ruth Sheard (ed) *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales, 2003); The Hon Dennis Mahoney "The Writing of a Judgment" (1994) 2 *Judicial Review* 61; The Hon C S C Sheller, "Judgement Writing" (1999) 4(2) *Judicial Review* 127; The Hon C S C Sheller, "Good Judgment Writing" (1996) 8(1) *Judicial Officers Bulletin* 3; The Hon Bryan Beaumont, "Contemporary Judgment Writing: The Problem Restated" (1999) 73 *ALJ* 743; The Hon Justice Linda Dessau and the Hon Judge Tom Mack "Seven Steps to Clearer Judgment Writing" in R Sheard (ed) *op cit*; L Mailhot and J Carnwarth *Decisions, Decisions: A Handbook for Judicial Writing* (Editions Yvon Blais, 1998)

[2] E Campbell, "Reasons for Judgment: Some Consumer Perspectives" (2003) 77 *ALJ* 62; M Duckworth, "Clarity and the Rule of Law: The Role of Plain Judicial Language" in R Sheard (ed) *op cit;* R Eagleston, "Judicial Decisions – Acts of Communication" (1994) 6(2) *Judicial Officers Bulletin* 1; E Elms, "Ex Tempore Judgments" in R Sheard (ed) *op cit* ; M Groves and R Smyth, "A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001" (2004) 32 *Fed Law Rev* 255; C Moisidis, "Achieving World's Best Practice in the Writing of Appellate Judgments" (2002) 76(10) *Law Institute Journal* 30; C Moisidis, "Dispelling

(c) a keen appreciation of my own inadequacies in the writing of judgments; and

(d) a recognition of the presumption necessarily involved in commenting on the work of others, even if indirectly.

2 Nevertheless, having been a school teacher for three years in a past life, I am inured to the charge of "do as I say, not as I do" or "those who can, do; those who can't, teach".

3 I will limit my comments to appellate judgment writing – primarily intermediate appellate courts. I propose, however, to say something, by way of "consumer" comment, on ultimate appellate court judgments.

The functional dichotomy of appellate judgment writing

4 At the outset, one must recognise the two incidents of the function of an appeal court (in the exercise of the power of the judicial branch of government):

(a) disposition – by way of correction of error or affirmation of correctness in the judgment below; and

(b) declaration or development of the law – by way of judicial exposition of the general law or the meaning of legislation.[3]

Misconceptions about Appellate Judgments" (2004) 78(12) *Law Institute Journal* 70; and the large volume of work by Prof James Raymond, for example R Goldfarb and J Raymond *Clear Understanding: A Guide to Legal Writing* (Random House, 1957); J Raymond "The Architecture of Argument" (2004) 7 *Judicial Review* 39; J Raymond "Writing to be Read or Why Can't Lawyers Write like Katherine Mansfield?"(1997) 3 *Judicial Review* 153; J Raymond "Legal Writing: an Obstruction to Justice" (1978) 30 *Alabama Law Rev* 1

[3] See M Kirby in G Blank & H Selby (eds) *op cit* at 229; F Kitto (1992) 66 *ALJ* 787; C Moisidis (2002) 76(10) *LIJ* 30

5 This may be an oversimplification and one that is not without its own debate, especially as to (b) above.[4]

6 These functions are common to intermediate and final appellate courts. Intuitively, one can conclude that at the level of intermediate appellate courts the dispositive function outweighs the declaratory or developmental and vice versa at the final appellate level. (Though, if one considers the burden of special leave applications in the High Court and its original jurisdiction, one should not underweight the dispositive function of that court.)

7 Notwithstanding the heavy dispositive function of the intermediate appellate courts, the important role of these courts in the declaration and development of the law should be recognised. A detailed discussion of the freedoms and restraints upon intermediate appellate courts is beyond this paper.[5] It can readily be accepted that many areas of the law lack authoritative statements of principle, whether from *ratio decidendi* or considered *obiter dicta*, of the High Court. There are many legitimate examples of intermediate courts of appeal declaring or restating important areas of the law. When existing principle is clear no such restating is necessary; indeed, it is to be discouraged as mere proliferation of *dicta* away from the original source. Care and rigorous discriminating judgement is called for in deciding whether this task need be undertaken. If it does not need to be, restatement of principle is not only unnecessary, but also potentially dangerous, for the reasons discussed below. Nevertheless, it should be said that it is not always straightforward to determine how far principles should be analysed in respect of their particular application.

[4] See the discussion in M McHugh 11 *Syd Law Rev* at 184

[5] See for example M McHugh 11 *Syd Law Rev* 183 at 188; M Kirby 4 *Aust Bar Review* 51-66; M Kirby in G Blank & H Selby (eds) *op cit* p 229

8 Sometimes, there may not only be a lack of clarity in the expression of principle, but also there may be a lack of binding authority. In such cases an intermediate appellate court has a choice to make as to the content of the relevant legal rule.

9 In my view, it is clear that intermediate appellate courts have declaratory and developmental roles. These are, of course, secondary roles to the final appellate court.

The place of reasons in this functional dichotomy

10 The requirements for, and the necessary content of, reasons depend, of course, upon the context and purpose of the judicial act in question.

11 Common to all contexts and purposes, however, is the role of the court as an arm (the judicial arm) of government to quell controversies.[6] The importance of this fact manifests itself in different ways.

12 In its dispositive function, the court should quell the controversy with as much surety and clarity as possible. If no novel or unusual principle arises, if only facts or otherwise uncontroversial matters attend the resolution of the dispute, the court's governmental role will generally require that no more than the immediate dispute be disposed of. In such cases, the court should be economical and clear in its reasons. The loser should understand simply and directly why he or she has lost. A great equity judge in New South Wales, Mr Justice John Kearney, said at his farewell to the profession on his last sitting day that Sir Robert Megarry had once told him the identity of the most important person in the courtroom – the party (whoever it may be) who was to lose. The clear, coherent, readable and, if possible, brief expression of why the state (through the court) is or

[6] M Kirby in G Blank & H Selby (eds) *op cit* at 227; F Kitto 66 *ALJ* 787 at 789-790; C S C Sheller 4 *Judicial Review* 127 at 129 and 139-140; *Bainton v Rajski* (1992) 29 NSWLR 539. As to the nature of judicial power, see for example: *Huddart Parker & Co Pty Limited v Moorehead* [1909] HCA 36; 8 CLR 330 at 357 (Griffith CJ) and *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; 123 CLR 361 at 390 (Windeyer J)

is not exercising its power for or against him or her is of the utmost importance. This applies as much to appellate courts as to trial courts.

13 This function of the appellate court may often require an attendance to reasons as close in form and structure to an oral delivery as possible. Lord Rodger of Earlsferry in, if I may say, both an entertaining and valuable article,[7] identified the movement away from oral judgments to the written "work" as central to the difficulty and complexity of many modern judgments.

14 At this level of the dispositive function a simple structure shorn of all unnecessary legal pretence may be desirable. If the loser of a case that threw up no question of contested principle cannot understand from a clear accessible judgment why he or she has lost, the dispositive function has miscarried, potentially leaving the loser confused, and thus doubly dissatisfied.

15 Also, if a party, in an otherwise simple case, receives elaborate and adorned reasons, he or she may be distrustful of a process that has hitherto appeared to be simple, but now has elaborate and complex legal discussion as an element of its disposition. A sense of grievance may arise. Further, in such a simple case, the lengthy restatement of what should be implicit foundational material implies that no case is simple, that all cases contain legal complexity, thereby undermining confidence in the practical workability of the system. Yet, it is fair to say, overly simple exposition may tempt a suspicious High Court that not all the authorities have been considered.

16 It may be a valid criticism that this kind of unnecessary restatement of well-known and otherwise unargued principle is far too common. Apart from the dangers above, it slows down disposition; it moves work to

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[7] The Rt Hon Lord Rodger of Earlsferry, "The Form and Language of Judicial Opinions" (2002) 118 *LQR* 226

colleagues to allow for the unnecessary task of restatement of uncontested principle to be undertaken; it litters the law reports and electronic databases with unnecessary citation; and it has the potential for the creation of doctrinal confusion by restating the primary source in different words.

17 When one turns to appellate judgments that do legitimately require some discussion or elaboration of principle, clarity is required for other and additional reasons: the proper expression of the law and the maintenance of the coherence of the fabric of the law.

18 In a common law system, the expression of principle by courts is the law (by declaration or development) – it is not just the terms or basis of the settlement or resolution of a particular dispute.[8]

19 To quote Chief Justice Marshall, though out of context (in that he was concerned with the supremacy of the courts over the legislature in declaring and interpreting the law):[9]

> "It is, emphatically, the province and duty of the judicial department to say what the law is."

20 Within that duty is the responsibility for clarity. The reason for this is simple: if the law is what the courts say it is; and if what the courts say is unclear or opaque; the law is unclear or opaque. As Lord Diplock said in *Merkur Island Shipping Corporation v Laughton*[10] (speaking of the law of industrial relations and of a statute):

> "But what the law is … ought to be plain. … Absence of clarity is destructive of the rule of law; it is unfair to those who wish to

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[8] *Federal Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16; 158 FCR 325; *Jenkins v Robertson* (1966-69) LR 1 Sc 117; *Australian Broadcasting Tribunal v Saatchi and Saatchi Compton (Vic) Pty Ltd* (1985) 10 FCR 1

[9] *Marbury v Madison* 5 US 137 (1803) at 111

[10] [1983] 2 AC 570 at 612; see also C S C Sheller 4 *Jud Rev* 127 at 129-130

> preserve the rule of law; it encourages those who wish to undermine it."

The social and economic significance of clear reasons

21 Not only is the clear expression of principle important to the integrity of the law itself, it has wider social and economic importance.

22 The time and uncertainty involved in the ascertainment of the legal position of the citizen, corporate or human, is a significant economic and social cost. Money spent on lawyers' fees that need not be so spent is money that could have been invested in society in more productive ways. Regulation by complex and lengthy statutes is a modern burden – taxation, superannuation and securities regulation is of a linguistic complexity far beyond the age-old concepts involved (contract, property, debt, income, capital, duties and rights). At times, the impenetrability of the language in these statutes makes one ask oneself whether the Act in question is truly a law of the Parliament.

23 The courts bear their own responsibility in this regard. Life in 1970 was not so different to 2009. Technologies have changed and developed; society is, to a degree, more complex. However, doctrine (as a matter of policy choice) has grown more complex. For instance, in the 1970s and 1980s in most common law jurisdictions a choice was made to permit the recovery of economic loss beyond that immediately consequent upon physical loss. I do not question that doctrinal shift. What must be recognised, however, is that whatever social benefit has been derived from the wider compensation available to some plaintiffs, the change has led to an increase in uncertainty as to the nature and application of the operative

rule. This has diverted large sums of money away from productive investment and into legal advice and litigation.

24 The length and complexity of reasons also cost money. The longer a judgment takes to be understood and the more vague a judgment is multiplies exponentially the cost of "translation" into advice.

25 As an international trading and commercial nation heavily dependent upon, and integrated with, the rest of the world, Australian must ensure that its law has both clarity and a resonance with international standards and practice. This is not a call to follow or adopt slavishly whatever England, Europe or the United States does. Rather, it involves the proposition that as a participant in international commercial and social intercourse our legal rules and procedures should be such as to reflect the elements of common, or generally accepted, international standards or content. To do otherwise risks self-imposed provincial marginalisation. In the development of the general law, this requires clarity of exposition of doctrine, whether that doctrine be simple or complex. If Australian law is unclear or opaque, it will be less likely that it will act as a reference point for courts of other countries, thereby diminishing the standing of the jurisprudence of this country.

26 At the level of education, academics and students can be left to struggle if there is a lack of clearly expressed doctrinal leadership by the courts. Without such leadership, students may be trained in an environment of muddy or vague principles and with a sense that those principles are compromised and relative. This denies them a clear foundation or vision of the legal structure of society, or at least Australian society.

27 An examination of the Commonwealth Law Reports of the last 25 years undertaken in order to ascertain the relevant principles in the ascertainment of a duty of care, its scope and content, the place of foreseeability therein and breach of duty will yield a task for study of significant proportions. This is not said critically; the law has undergone

important policy and doctrinal shifts about which views of justices have varied. Accepting that, my only point is that such basic and fundamental principles must be accessible through clear exposition. Such has not always been the case in this body of cases. It has led to legislatures stepping in to make statutory codification of variable consistency and success. That statutory "reform" was undertaken, at least in part, because of a perception (correct or not) that the courts were unable to enunciate rules with a clarity and workability to allow society and important economic structures within it such as the insurance markets to operate satisfactorily. This was a failure of the common law.

28 On the other hand, causation is a topic capable of engaging the philosopher and the theorist for a lifetime's work. Yet in one emphatic, clear and short judgment[11] the High Court settled a workable coherent framework of the law capable of being understood and implemented at all levels of judicial disposition.

Pressures and forces tending to complexity and obscure expression

"Environmental" pressures

29 Modern life and technology as they have affected the practice of the law, including the judicial task, have brought significant changes. In years past, the process of legal exposition and legal development was undertaken by reference to a relatively small proportion of judgments, hand-picked by editors of law reports for their place in understanding an existing taxonomical scheme, which was explained by well-known legal encyclopaedias: Blackstone in the 18th century and Halsbury in the 19th and 20th centuries. Being part of a vertical hierarchy with one imperial court at its apex also simplified the system.

[11] *March v E & M H Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506

30 The modern task is the development of an independent Australian common law in an era in which the electronic legal resources make available, without discrimination, the totality of legal expression by courts at first instance and on appeal, in Australia and in many sophisticated legal centres. The precedential value of reported over unreported decisions has all but disappeared. The challenges in this task should be recognised and not underestimated.

31 Thus, any intermediate appellate court, in the absence of a binding rule expressed by the High Court is faced with the immediate task of reconciling what has been said by it and by co-ordinate courts on the relevant topic.

32 It is also faced with the available welter of persuasive foreign authority also electronically available.

33 This has led to an exponential growth in citation of cases. The use of tools such as Casebase and like proprietary aids is now seriously compromised by the sheer number of citations.

Imposed pressures

34 The requirement for reasons has grown more stringent in the last 40 years.[12] The giving of reasons is an incident of the judicial process.[13] The essential requirement is to reveal the grounds and basis of the decision including, where necessary, factual findings out of contested evidence.

35 I am not, for one moment, questioning the desirability of courts giving full and adequate reasons to explain the acts of government that they perform.

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[12] *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Public Service Board of New South Wales v Osmond* [1986] HCA 7; 159 CLR 656; and see generally Kirby 12 *Aust Bar Rev* 121; and Beaumont 73 *ALJ* 743

[13] *Tatmar* at 386

There may, however, be room for more thorough investigation as to the circumstances in which courts are able, with statutory authority, to provide shorter reasons in circumstances where the nature of the controversy does not call for more than summary expression. The modern approach to the case management of litigation has at its foundation the need appropriately to marshal public and private resources in the most efficient way having regard to the nature and demands of the controversy in question.

36 I am not suggesting that some litigants are entitled to a second class service. What I am suggesting is that with statutory backing court should be freer to provide summary form reasons in hearings where this is appropriate.

37 Under the *Supreme Court Act 1970* (NSW), s 45(4) and the *Uniform Civil Procedure Rules* Part 51 Rule 51.55 the Court of Appeal in dismissing an appeal may in accordance with the rules give reasons for its decision in short form if it is of the unanimous opinion that the appeal does not raise any question of general principle. I have rarely seen this used. A search has indicated 17 examples in the Court of Appeal since 1998. It should be used in appropriate cases. We may be being too timid. In *Collins v Tabart*[14] Kirby J, with whom Gleeson CJ, Hayne, Crennan and Kiefel JJ agreed, in a short judgment, revoked special leave in an appeal where there had been a complaint that the Court of Appeal had not conducted a rehearing. The Court of Appeal had given its reasons in short form. The High Court said the Court of Appeal had recognised its duty to conduct an appeal by way of rehearing under s 75A but was entitled to give its reasons in short form under s 45(4).

[14] [2008] HCA 23; 246 ALR 460

38 The requirement for reasons in the above manner, and with the above detail, is compounded by the obligation in Australian intermediate courts to provide an appeal by way of rehearing.[15]

39 There has been much discussion at the level of the High Court and in the intermediate courts of appeal as to the meaning and content of an appeal by way of rehearing and the relationship between the court reaching its own view of the facts and the essential task of the appellate function in this respect of the correction of error.[16]

40 Not being courts of error, it is insufficient for intermediate appeal courts to examine first instance judgments at a level of generality requiring the clear demonstration of error before engaging the analysis of the facts. A full rehearing is required, nevertheless with the aim of the identification of error.

41 It is beyond this paper to discuss this process at any length and the fault lines at which the tension between a full rehearing and the correction of error manifests itself. For present purposes it need only be recognised that the responsibility for a full rehearing places on the appeal court a necessity, subject to submissions of the parties, to re-examine the record and within the confines of the notice of appeal, engage in a factual weighing analysis of a kind not dissimilar in extent of demands of time to

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[15] *Supreme Court 1970* (NSW), s 75A; *Supreme Court Act 1979* (NT), s 54; *Uniform Civil Procedure Rules 1999* (Qld), r 765; *Supreme Court Civil Rules 2006* (SA) r 292; *Supreme Court Civil Procedure Act* (Tas), s 46; *Supreme Court (Court of Appeal) Rules 2005* (WA), r 25. In Victoria, the *Supreme Court Act 1986* and *Supreme Court (General Civil Procedure) Rules 2005* (Vic) are silent as to whether an appeal to the Court of Appeal is by way of rehearing; however the power of the Court of Appeal to receive further evidence under O 64 r 22(3) contemplates rehearing: see *Freeman v Rabinov* [1981] VR 539 at 547-548

[16] See for example *Costa v Public Trustee of NSW* [2008] NSWCA 223; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424; *CDJ v VAJ* [1998] HCA 67; 197 CLR 172 at 201-202 [111] (McHugh, Gummow and Callinan JJ); *Allesch v Maunz* [2000] HCA 40; 203 CLR 172 at 180 [22] (Gaudron, McHugh, Gummow and Hayne JJ); *Coal & Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194 at 203-204 [14] (Gleeson CJ, Gaudron and Hayne JJ); *Crampton v R* [2000] HCA 60; 206 CLR 161 at 213 [147] (Hayne J); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* [1931] HCA 34; 46 CLR 73 at 109 (Dixon J)

that conducted by the primary judge. Of course, the primary judge may have a position of advantage from seeing witnesses and the like.[17]

42 This task of rehearing requires reasons which display a careful analysis of the facts. Clarity of expression in this task does not necessarily equate with brevity. The most demanding part of intermediate appellate practice is the analysis of factual material. The lean, clipped and brief expression of primary facts in a complex factual dispute may lead to the view by the parties that the intermediate appellate court has not fully engaged with the factual debate and issues in the same way as the primary judge may have done.

43 One can say immediately, of course, that brevity of expression does not reflect a lack of attention to detail. Only someone unfamiliar with the legal system might think that. Nevertheless, I had experience at the Bar of a thoroughly correct primary judgment expressed in the most elegant, lean and brief terms being overturned, quite wrongly, by an appeal court, in part, I was convinced at the time, because the appeal court did not have in the primary judge's reasons an exhaustive examination of the evidence. Such would have taken the judge significantly longer to draft; but it might have beaten off an appeal court which misunderstood the facts, and saved the cost of a High Court appeal that completely vindicated the primary judge. Trade-offs in cost and time are obviously involved.

44 Likewise on appeal, if an appeal court does not, in an organised and comprehensive manner, examine the evidence relevant to the dispute, an applicant may be given an unjustified advantage in an application for special leave to appeal; it may also sow a suspicion in the High Court that the facts have not been attended to with the requisite care, when in fact they have been, albeit briefly.

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[17] *Abalos v Australian Postal Commission* [1990] HCA 47; 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472; and *State Rail Authority (NSW) v Earthline Constructions Pty Ltd* [1999] HCA 3; 73 ALJR 306; 160 ALR 588

45 A further consideration in relation to the imposed requirements upon intermediate courts of appeal comes from cases in the High Court such as *Kuru v NSW*.[18] In *Kuru*, the High Court expressed the view that it was desirable for an intermediate appellate court to decide all matters in controversy on the appeal, not merely those that it thinks sufficient to dispose of the appeal. This concern first arose in a number of patent cases originating in the Federal Court.[19] These patent cases involved a dispute about a public register. The Court returned to the matter in the context of the criminal law in *Cornwell v The Queen* (2007) 231 CLR 260. In a civil damages suit in *Kuru,* the following was said at [12] by Gleeson CJ, Gummow, Kirby and Hayne JJ:

> "This Court has said on a number of occasions, that although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate Court has dealt with all grounds argued and an appeal to this Court succeeds this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below …"

46 It is to be noted that the Court said that it was important for intermediate court of appeal to **consider whether to deal with all grounds of appeal.**

47 The Court of Appeal of New South Wales has expressed, on at least two occasions, considered views that it would not, in the interests of justice, deal with all the issues raised on the appeal.[20] In these cases, the Court indicated that it approached the matter by reference to considerations

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[18] [2008] HCA 26; 236 CLR 1; see the Hon Justice Ronald Sackville, "Intermediate Appellate Courts: The Multiple Issues Dilemma" (2008) 82 *ALJ* 650

[19] *Kimberly-Clark Australia Pty Limited v Arico Trading International Pty Limited* [2001] HCA 8; 207 CLR 1 at 19-20 [34], *Aktiebolaget Hässle v Alphapharm Pty Limited* [2002] HCA 59; 212 CLR 411 and *Lockwood Security Products Pty Limited v Doric Products Pty Limited* [2004] HCA 58; 217 CLR 274

[20] *Rebenta Pty Ltd v Wise* [2009] NSWCA 212 at [9]-[12] (Basten JA with whom Ipp JA and Sackville AJA agreed) and *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206; 252 ALR 659 at 795-797 [824]-[833] (Ipp JA with whom Giles JA and Hodgson JA agreed)

such as the need to use judicial resources in a discriminating rather than undiscriminating fashion, the interests of the general administration of justice and the lack of desirability of flooding the legal system with unnecessary *obiter dicta*.

48 Applying *Kuru* can lead to the expression of *obiter dicta* that would not otherwise be expressed. This, of itself, can lead to judgments of greater length than need be written.

What can be done to promote clarity?

Teaching: structure, approach and style

49 It is beyond this paper to survey the material already on the record about judgment writing and its teaching. Prominent in the field in this respect all around the world, including in Australia, is Professor James Raymond. His work is known to many and he has conducted training courses for judges and magistrates at all levels in this country and overseas. This coming October there was to be a two day appellate judges' seminar and workshop in Melbourne at which he was to attend. Unfortunately, it will not be proceeding because of lack of sufficient appeal judges wishing to attend.

50 It is undoubted that all writers (appellate judges included) can profit from critical analysis of their style and approach. It is also undoubted that judges burdened with a heavy responsibility for writing and armed with dictaphones and word processors can sometimes be less precise than they might be.

51 It is also undoubted that a clear approach to structure and organisation is critical to the production of clearly expressed well ordered thoughts and reasons.

52 All of us are, however, individuals. We all express ourselves differently. It should also not be forgotten that the process of writing and composition has an essential place in thinking.[21] Reasons for judgment are not a literary work in the sense of a work of the imagination. They are the construction of a body of reasons explaining an act of government.

53 Some elementary procedures must of course be followed. There must be a logical organisation and structure. The reasons should not be merely a stream of consciousness without a logical framework. There should be a beginning, a middle and an end. That said people approach their work differently. Some think, write a structure and dictate. Some write and as they are writing think. Some dictate. Some type. The process of coming to terms with a problem which may be a sprawling factual debate laced with difficult legal questions to which complex, sometimes repetitive and overlapping arguments have been directed is not straightforward. Very often the very process of writing the judgment is a process of unravelling the complexity and thinking about the case towards a result.

54 Further, few judges have the luxury of the immediate availability of required time to write a complete judgment shortly after a hearing. To the extent that time is available immediately after the hearing it should be, and often is, used productively to sketch a structure. Nevertheless, the productive use of time in broken blocks over a period which may be weeks or months may require the progressive development and organisation of important aspects of the background material. One often sees the comment that it is preferable to distil pleadings and arguments rather than set them out. That may be true, but it may be far quicker and more

[21] See the insightful discussion by F Kitto in 66 *ALJ* at 796

convenient to piece together elements of the structure of a judgment over time, rather than synthesise a product in one block of time.

55 The workman-like construction of a judgment also aids the writer upon return to the partly-built structure. As the edifice grows through the identification of the issues from the pleadings, the arguments of the parties and the primary fact the returning craftsman is able quickly to put himself or herself back in place to continue the work.

56 This process can lead to less than elegant structure and prose, but it may be the most efficient use of time in the formulation of the work, especially given other pressures of time.

57 Of course, upon completion the whole edifice can be reviewed, elements removed, elements synthesised and a considerable shortening process undertaken. In a perfect world that would always be done. It is not a perfect world. After the construction of any detailed judgment which has taken some days over a period of weeks the task of remodelling and editing of that kind can take up a day or the best part of a day. This is time that could be used for another hearing or to advance the reserved judgments of other waiting litigants. A value judgement must be made: is the expenditure of time worth it?

58 In any busy intermediate appellate court, these questions of time rationing become critical. Chief Justice Spigelman, when discussing with me my move to the Court of Appeal, evoked with his customary clarity this kind of time rationing and its effect on judgment writing when he said to me not to try to be too elegant, as elegance was difficult to maintain when drinking out of a fire hose. This has been my experience.

59 Nevertheless, in many cases it is essential and critical, as opposed to discretionary, to re-edit and re-evaluate a judgment once “finished”. For instance, in deciding a question of law or practice for a specialist tribunal reliant upon the intermediate court of appeal for clear expression of

principle, it is absolutely essential that clarity of thought, clarity of expression and brevity are the hallmarks of the judgments to guide such tribunals and their practitioners.

60 There are some practical aspects of approach which may assist intermediate appellate court judges in the production of judgments. First, there should be, at the outset, a rigorous consideration of what reasons are required in the appeal: is the appeal simply dispositive or is there required some declaration or discussion of principle? If this rigorous self-questioning is undertaken in each appeal, careful consideration can then be given to what aspects, if any, require detailed treatment of legal principle.

61 To the extent that principle is required to be expressed, there should be a rigorous consideration of what is not disputed (which need only be dealt with by, at most, the most authoritative case) and what is disputed (which may need to be analysed in detail).

62 To the extent that detailed analysis of High Court or intermediate appellate authority needs to be undertaken, an autodidactic approach should, if possible, be avoided and a clear analytical path for the reader should be chosen. This may require significant additional time after research and analysis is complete. For instance, it may well be that because of the requirement to discuss principle a chronological, case by case approach to the analysis of governing relevant authority is necessary to illuminate for the judge in his or her thought and decision-making processes how the law has developed and what its current state is. This very often requires the step by step, year by year, analysis of cases, the growth of principle and its current content. That does not mean that all this research should be set out in the reasons. Reasons are not a research bank or the explanation as to how the judge has come to master the subject. Once one has undertaken such a necessary, and often difficult and laborious, task the expression of reasons should be encapsulated in principled

structured expression in a "top down" fashion rather than left in a form reflecting the intellectual journey from "the bottom up".

Collegiality, individuality and coherence

63 I have had the good fortune to be a member of two superior courts. On the Federal Court of Australia I sat at both first instance and on appeal for seven years. On the Court of Appeal I have undertaken only appellate work for somewhat over a year. There are many points of similarity and comparison that may be worth discussing on an appropriate occasion in respect of the conduct of the two courts' business. For present purposes, I wish to make some comments upon the operation of the NSW Court of Appeal insofar as such operation touches and concerns the subject of this paper.

64 The Court of Appeal is a busy court. It only sits as a civil court of appeal. It has, at present, 10 full-time members (including the President). In addition, the Chief Justice and the Chief Judges of the Common Law and Equity Divisions also sit, though not full-time. There are also, at present, two acting judges of appeal. From time to time divisional judges sit but this generally only occurs when the case is from a lower court or tribunal and there is a shortage of available judges.

65 Judges of Appeal also sit on criminal appeals up to 4 or 5 weeks a year. Criminal appeals in the Supreme Court are heard by the Court of Criminal Appeal which is under the control of the Chief Justice and Chief Judge at Common Law. In this Court, the Chief Justice, Chief Judge at Common Law or a Court of Appeal Judge will generally preside over a court otherwise comprised of Common Law Division judges who, as part of their daily work, preside over criminal trials.

66 The filings and disposals of the Court of Appeal are a matter of public record. They have varied over the years, but with the decline in common

law work the average level of filings and dispositions has been in the order of 400 per year.

67 The workload of the Court of Appeal is organised by the President. Historically judges sat four to five days a week. This was essential in an era where a large body of appeals, often damages appeals, meant that the Court was required to dispose of over 700 cases a year.

68 With the decline of the simple damages appeal, few appeals are easy and few amenable to *extempore* judgments. The proportion of *extempore* judgments is now in the order of 15%. This year I have sought to sit judges no more than three days per week, ensuring that the days they sit contain a full day hearing whether of one or more cases. The idea behind this was to provide as much uninterrupted judgment writing time as possible. Four days per week with broken time does not permit a partly written judgment to be revisited for any length of time.

69 It is no secret that the Court of Appeal operates by a star system, with primary first draft writing responsibilities given to one of the judges of the bench nominated to sit. In order that I have an understanding of the work distribution on the Court, the star is allocated by the President.

70 This means that each week a judge can expect at least one star and either two or three non-star appeals. The lengths of appeals vary. Most are a half-day to a day, but accompanied by full written submissions. The rule of thumb is the star judge generally receives time out of court immediately after the star appeal of equivalent of time to the case. Thus, if the case is up to one day the judge receives the next day out of court. If the star case is two days, two days out of court etc.

71 Judges invariably meet the morning of an appeal having pre-read written submissions, judgment and sometimes parts of the evidence. Detailed discussion will take place during and after the appeal in order to reach a

common consensus as to what ought to occur. The star judge then produces the first draft.

72 In my experience at the Court, the non-star judges put considerable effort into pre-reading and into the debate at the hearing, as much as the star judge. I think counsel (as I used to) often suspect that the heavy questioning is coming from the star judge. Indeed, it is often to the contrary, because the non-star judges wish to have clearly in their brain the detail and the architecture of the case, and their preferred view of the proper result before finishing it. This is so because they may have to wait a period of time to obtain a draft judgment from the star judge.

73 My experience is also that considerable effort and detailed attention is given to the draft when received by the non-star judges. On many occasions, I have experienced probing analysis by carefully thought out questions and comments which have led to significant revision of a judgment but without any request for a joint judgment. In my experience, the parties undoubtedly get three judges on appeal.

74 This process does produce single judgments in the Court with short concurrences. From time to time one will find joint judgments and judgments of the Court. One also finds, though reasonably rarely, full concurring judgments of some length. Once again, in my experience, the process of joint writing is a salutary one that inevitably improves both content and style. It is my personal view that when faced with the work on a busy court such as the Court of Appeal, if it is at all possible, and if it suits the temperament of the individual judges, writing in a team of two can be very productive.

75 Nevertheless, it is hard to marshal time in two chambers to work together in this way. Bearing in mind the reality of the press of business and the need to deal with one's own stars and promptly, but thoroughly, deal with drafts coming from colleagues, it is not always easy to find the time to reduce and polish judgments.

76 One aspect of the production of judgments for such a busy court is that one can find oneself writing for colleagues. By this I mean that the draft will be written in a way that most easily enables a judicial colleague to bring back and consider an appeal heard sometime previously. By this method it may be necessary to include in the draft significant amounts of primary factual material and significant aspects of discussion of case law which is by way of explanation of thought processes as much as giving reasons. This process is a very helpful one in the collegiate work of the court, but it may also lead to a certain unnecessary length in judgments. It may not be necessary in final reasons to set out at the same length all the background material that is helpful in bringing a colleague back to the problem. Once again, if this occurs reduction of the reasons to a briefer more succinct state requires the expenditure of time.

Conclusion

77 There are many competing forces that promote judgment length and judgment complexity.

78 It is essential, however, to recall at all times that the governmental act undertaken both by trial courts and appeal courts is one that is both the exercise of power and the explanation for that exercise of power. Part of that responsibility is the clear communication of the reasons for the exercise of power.

79 In an age of the electronic dissemination of all judicial utterances it has become imperative to exercise restraint in relation to the expression of view as to principle. How such restraint fits with the injunction of the High Court in *Kuru* is a matter for careful consideration by the court on each occasion.

80 Notwithstanding the pressures of time, care and effort should be taken to examine rigorously what should be expressed and to enunciate with clarity

what is expressed. In an era of undifferentiated electronic resources, it is not an exaggeration to say that the cohesion of the common law system depends on the clarity of organisation and expression of appellate reasoning and a degree of moderation in what is expressed.

Perth 19 September 2009