THE HIGH COURT OF AUSTRALIA – REFLECTIONS ON JUDGES AND JUDGMENTS

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I INTRODUCTION

It was in August 1972 that I heard my first case as a Justice of the High Court. It was a first instance case. The Court then had a flourishing original jurisdiction list and Chief Justice Barwick decreed that junior judges should cut their teeth on these cases. This case was heard in an old traditional criminal court adjacent to the High Court, Darlinghurst, Sydney. The courtroom was known to the profession as 'Siberia' on account of its size and intense cold.

A police constable was to make the usual public announcement that the High Court was sitting. He, like me, was new to the job. When I took my seat he pulled out a card on which the announcement was printed. Unfortunately it was the wrong card and he announced, with great authority, that the court would immediately adjourn until 10.30 am the following day. It was not an auspicious start to a High Court career that was to last 23 years. Perhaps the constable thought that I was not up to the job and an adjournment might bring in a more experienced judge.

Of course, by 1972, I knew the High Court well. As early as 1946 as a law student, with my friend Bob Ellicott, I attended sittings of the Court. Members of the profession told me that the High Court tipstaves were the finest body of men in the country. And so they were – they were decorated war veterans. By comparison the Justices looked old and frail. They then included Sir John Latham who was 69 and retired six years later, Sir George Rich who was 83 and retired in 1950 and Sir Hayden Starke who was 75 and retired four years later. Thereafter as counsel I appeared before the Court not infrequently and more so after my appointment as Solicitor-General in 1964. And then as a member of the NSW Court of Appeal I had the purifying experience of being overruled by the High Court.

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II The Early Justices – The Delivery of Separate Judgments

Any reflections about the Court must take account of its early history, notably the difference of opinion on constitutional interpretation between the three foundation Justices led by Griffith CJ, and their successors, particularly Isaacs and Higgins JJ. Griffith CJ, formerly Chief Justice of Queensland was an outstanding lawyer with a commanding knowledge of the law. He wrote most of the judgments, with which his colleagues generally agreed. They, especially O'Connor J, were lawyers of ability and reputation but the Chief Justice was largely responsible for establishing, in a very short time, the status, high authority and international reputation of the Court.

Sir Robert Menzies said of Barton:

> I have reason to believe that Barton wrote separate reasons for judgment and then, on the Bench, having heard Griffith read his, put his own away and said 'I concur'.[1]

It seems that Barton, like Sir George Rich a little later, took the view that to add to the principal judgment might compromise its clarity. In 1916 Rich was to say in *Hoyts v Spencer*:[2]

> it is inexpedient to add, and I refrain from adding, collateral matter which at best merely paraphrases and often blurs the clearness of the main judgments, and so increases the difficulty of the profession in interpreting the decision of the Court.

According to Sir Robert Menzies, Rich was inclined to indolence.[3] This may account for the shortness of his judgments and the frequency of his concurrences. Sir Owen Dixon records that he helped Rich with his judgments, as did Clyne J on an appeal from a judgment of Clyne.[4]

In *Baxter v Commissioners of Taxation (NSW)*[5] the Court strongly upheld its authority and jurisdiction under s 74 of the *Constitution* to determine *inter se* questions as to the limits of the legislative powers of the Commonwealth and the States by refusing to follow the Privy Council decision in *Webb v Outtrim.*[6] The reasoning of the High Court was vastly superior to the Privy Council delivered by the Earl of Halsbury. In a letter, Barton said:

> Old man Halsbury's judgment …. is fatuous and beneath consideration …. But

1 Foreword to 1st ed, 1948 of J Reynolds, *Edmund Barton* (Angus & Robertson, 2nd ed, 1979) xiii; see also G Fricke, *Judges of the High Court* (Hutchinson Aust, 1928) 28.
2 (1919) 27 CLR 133, 148.
3 *Oxford Companion to the High Court of Australia* 606.
4 Ibid; P Ayres, *Owen Dixon* (Miegunyah Press, 2003) 56–7, 93–4, 320, 326.
5 (1907) 4 CLR 1087.
6 [1907] AC 81.

> the old pig wants to hurt the new federation and does not much care how he does it.[7]

The pattern of separate judgments continued with the arrival of Isaacs and Higgins JJ who dissented in a number of the constitutional cases before they were ultimately vindicated in the *Engineers Case*.[8]

A *The move to joint judgments with Chief Justice Knox*

Isaacs J became a dominating influence in the Court, an influence that continued under Chief Justice Knox, while Higgins J's judgments are today more highly regarded than they were in his day. With the arrival of Sir Adrian Knox as Chief Justice there was a notable move to joint judgments, despite the tensions that then existed between individual justices.[9] Critics have, however, asserted that the joint judgments were not generally of high quality.

B *The return to separate judgments with Chief Justices Gavan Duffy and Latham*

There was a reversion to separate judgments when Sir Frank Gavan Duffy became Chief Justice, though there were joint judgments from time to time. Sir Frank was noted for the brevity of his judgments. In one case his judgment was simply 'I say nothing'[10] and in another case when, as Chief Justice announcing the result, he said 'although I do not dissent from that view, I do not wish to state my formal adherence to it'.[11] He was a master of judicial economy. His judgments rarely exceeded three pages.[12] His longest was, I think, his dissenting judgment in the *Engineers Case*.[13] It was five and one-half pages.

Separate judgments continued to prevail after Sir John Latham became Chief Justice. As the Dixon diaries and the Ayres biography of Sir Owen Dixon reveal, the personality clashes between the judges were an obstacle to the delivery of joint judgments. Nevertheless there were joint judgments, mainly written by Dixon, involving Rich, Evatt and McTiernan JJ. Dixon's influence on these Justices was a matter of complaint by Starke J to Latham CJ. Latham considered that Dixon did not encourage the others to join with

7 *Oxford Companion to the High Court of Australia*, 55.
8 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
9 Of approximately 500 reported judgments, more than half featured joint judgments of a majority of the Court: see *Oxford Companion to the High Court of Australia*, 402.
10 *R v Murray & Cormie ex parte Commonwealth* (1916) 22 CLR 437, 441.
11 *McNamara v Langford* (1931) 45 CLR 267, 271.
12 *Oxford Companion to the High Court of Australia*, 298.
13 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

him. Starke disagreed.[14] Be that as it may, Dixon did not attempt to dominate his colleagues. It seems that they wanted to join his judgments or agree with them and he found it difficult to refuse their requests to join in.

C *The return of joint judgments with Sir Owen Dixon as Chief Justice*

When Sir Owen Dixon became Chief Justice there was a return to joint majority judgments. This development was surprising because it was at odds with Dixon J's earlier view that ideally every judge should write a judgment in every case in which he sat, except in some areas of the law, such as certain criminal cases, where it was desirable for the Court to speak with a single voice in order to avoid confusion at trial level.[15] The new practice was also at odds with the well-known view of Sir Frank Kitto who favoured individual judgments. He considered that a judge could not satisfy his judicial duty unless he thought his way through in detail to a conclusion by writing his own judgment.[16] The new practice introduced by Dixon was based on the need for more certainty and the desirability of identifying a ratio decidendi in a majority joint judgment. The introduction of the new practice was explicable only by reference to his intellectual pre-eminence and the respect accorded to him by his colleagues.

III Sir Garfield as Chief Justice

When I joined the Court led by Chief Justice Barwick only two members of the Dixon Court remained, namely McTiernan and Menzies JJ. The Chief Justice had been an outstanding advocate and lawyer – he was the leader of the Australian Bar and Attorney-General for the Commonwealth. Having appeared with and against him as a junior counsel, I would say that he then had no superior as an appellate advocate. Despite that, he had not been an influential Chief Justice in the old Court (the Court in which he first presided). He was unfortunate in that the long shadow of Sir Owen Dixon hovered over the old Court whose members regarded themselves as the custodians of his legacy. Of the new Court, Walsh and Gibbs JJ were of a similar mould to the members of the Dixon Court although Sir Harry demonstrated in his earlier days his independence of mind by dissenting in several constitutional cases.[17] And, unlike Sir Owen when Chief Justice, Sir Garfield found himself in dissent.

14 Ayres, above n 4, 78–9.
15 Ibid 238.
16 Sir Frank Kitto, 'Why write judgments?' (1992) 66 *Australian Law Journal* 787.
17 See for example, *Kotsis v Kotsis* (1970) 122 CLR 69; *The Queen v Phillips* (1970) 125 CLR 93.

Sir Douglas Menzies, who acted as a bridge between Sir Garfield and the younger members of the Court, was described by Sir Owen Dixon as a 'dazzling advocate', as indeed he was. I heard his argument in *Armstrong v Victoria (No 2)*,[18] a s 92 road tax maintenance case, as I was appearing in a following case. He was engaging, agile of mind, witty and urbane, with a mastery of the case law relating to the case in hand. He was, I thought, the model that counsel should aspire to be.

It is said that Dixon considered that Menzies would never quite make the grade as a High Court Justice.[19] Menzies did not enjoy good health when he was on the Court and maybe, in Dixon's view, there were not many who did make the grade as a High Court Justice. On the Court, Menzies was noted for asking questions 'out of left field' which often threw light on the question under debate. Barwick, who was greatly attached to him, would say of him 'Young Doug has an unusual perspective on the law'.[20] And so he had. The distinctions which he made in a succession of cases on s 90,[21] distinctions which eluded his colleagues, were eloquent testimony to the correctness of Barwick's comment on his good friend. It was Menzies who had arranged for me to meet Sir Owen Dixon after I was appointed Solicitor-General. What impressed me then was Menzies' respect for and deference to Dixon.

When I joined the Court and for a long time thereafter, the practice of the Court, as it had been in the NSW Court of Appeal when I was a Judge of Appeal, was to deliver separate individual judgments according to the earlier tradition. There was no judicial conference and there was not much discussion among the judges. The Court was an itinerant court moving between State capitals, with not less than 50 per cent of its work in Sydney. Joint judgments were generally the outcome of amendments suggested to the author of a draft and agreed to by him. A considered unanimous judgment of the Court was relatively uncommon.

At the time I was told that the practice of separate judgments was the one initially favoured by Sir Owen Dixon. But, as already noted, his view changed after he became Chief Justice. His later view in favour of joint judgments led

18 (1957) 99 CLR 28.

19 Ayres, above n 4, 267.

20 'Young Doug' was a surprising reference. Menzies was only four years younger than Barwick and even more surprising in conversation with me as Menzies was 18 years older than I was. It may be that Barwick was simply repeating a reference that Sir Robert Menzies made to his younger cousin Douglas Menzies.

21 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; *Western Australia v Hamersley Iron Pty Ltd* (No1) (1969) 120 CLR 42; *Western Australia v MGKailis* (1962) Pty Ltd (1974) 130 CLR 245.

to the introduction of a judicial conference at the end of the day with the Chief Justice inviting a Justice to write a draft with a view to agreement by others.[22]

So what happened to that practice when Sir Garfield became Chief Justice? Everything suggests that he would have wanted to maintain it. But it was not maintained. Sir Frank Kitto, author of the essay entitled 'Why write judgments?',[23] would have favoured individual judgments, in conformity with the early Dixon view. No doubt that view was shared by other members of the Court. That was certainly the view of Walsh and Gibbs JJ and the practice of separate judgments continued while Sir Harry Gibbs was Chief Justice, though there were some case conferences and joint judgments in that time.

Up to this time I had subscribed to the separate judgment practice much for the reasons advanced by Sir Owen. In addition, I recalled the unsatisfactory outcome in the one case where Sir Garfield scheduled a judicial conference. It was *The Queen v Bull*[24] decided two years after I joined the Court.

In that case the defendants had been convicted in the Supreme Court of the Northern Territory of assembling for the purpose of preventing seizure of prohibited imports on a ship then situated within three miles of the coast of the Territory.[25] The issues were complex, including issues relating to the existence of jurisdiction, whether it was ordinary or admiralty jurisdiction and whether there was importation. Sir Garfield convened a conference at which he and Sir Douglas, who in earlier days had been opposing counsel in the High Court and the Privy Council, engaged in a long debate on the issues, without reaching any agreement. It was like a re-enactment of the Battle of Waterloo, without a victor. The rest of us were largely bystanders. The outcome was seven separate judgments, offering a variety of opinions. If you look at the headnote you will see that Sir Douglas then won the debate. He was on the majority side of most issues, whereas Sir Garfield was on the losing side.

Barwick was an efficient administrator, perhaps because he did not spend much time consulting his colleagues. The High Court building in Canberra is a tribute to his energy and influence. I doubt that anyone else would have succeeded in bringing it about. His input into the Court building was considerable, so much so that the profession called it 'Gar's Mahal'.

22 It has also been suggested that Dixon CJ instituted a practice of holding a preliminary conference – see Fricke, above n 1, 119.

23 (1992) 66 *Australian Law Journal* 787.

24 (1974) 131 CLR 203.

25 The crew threw suitcases containing cannabis overboard when they saw a helicopter following them and a vessel (with customs officers) approaching.

IV Chief Justice Gibbs and the Court

After Sir Harry Gibbs became Chief Justice there was greater discussion among the justices about the cases, though regular case conferences did not take place. Although my impression was that Sir Harry still generally subscribed to the practice of delivering separate judgments, this did not inhibit him from participating in joint judgments from time to time so that they became more frequent. I recall Sir Harry saying to me on several occasions after I had circulated a draft 'That is an interesting judgment'. Eventually I concluded that it was a harbinger of disagreement.

V The Court in My Time as Chief Justice

After I became Chief Justice in 1987, the move towards joint judgments gained some momentum as a result of stronger views within and outside the Court in favour of joint judgments. By then there was growing criticism of the proliferation of separate judgments, some saying much the same thing, if not entirely the same thing.[26] We introduced the practice of holding a regular conference at each fortnightly sitting about the cases and allocated the writing of a draft to one of our number in the hope that this would promote majority joint judgments. There were informal discussions during adjournments and additional discussions between individual Justices. The number of joint judgments did increase but not to the extent that we had hoped. There was no formal pre-hearing conference and our post-hearing conference consisted of an exchange of views only. Members of the Court did not engage in argument with each other.

Justice Scalia once told me that, much to his regret, this was also the case at judicial conferences of the United States Supreme Court. He would have preferred 'no holds barred argument'. This would have given him the opportunity of sinking his fangs into the views of his colleagues. These are my words, not his.

Cole v Whitfield[27] on s 92 was the result of an intensive collective effort by the Court to produce a unanimous judgment. But that effort was expensive in terms of time and effort. It was not an effort that could readily be repeated.

My recollection is that Kirby J once said that when he joined the Court (shortly after my retirement) the Court did not confer about judgments. I do

26 For a more recent criticism of unnecessary and prolix judgments, see Professor Enid Campbell, 'Reasons for judgment: some consumer perspectives' (2003) 77 *Australian Law Journal* 62, esp 68–71.

27 (1988) 165 CLR 360.

not think that statement can be correct. Perhaps the conference was not as comprehensive or as thorough as he would have liked.

Why did we not succeed in producing as many joint judgments as we had hoped? One reason was that a number of issues were very controversial. Another was lack of consensus as to the role of the Court, as for example, in departing from precedent. Yet another was the existence of deep-seated divisions within the Court over such matters as constitutional implications, the interpretation of s 90, the external affairs power, the juristic foundation for judicial review in administrative law and the concept of proximity in the tort of negligence. Even so, it must be acknowledged that there were instances of judgments which seemed to say the same thing but in different language, leaving the reader to ask the question 'is there a difference and, if so, what is it?'

Looking back at our practice when I was Chief Justice, it is fairly clear that the right of a Justice to deliver his own judgment in order to do justice to his own independent and impartial opinion was one important reason why we did not succeed in producing as many joint judgments as we had hoped. The desire to deliver a joint majority judgment was not carried to the point where there was an expectation that a Justice would participate in a joint judgment or where there was pressure on him to do so. There was therefore no threat to judicial independence and no risk of compromising a judge's intellectual integrity.

In my experience, and that of others, a judge who circulates a draft and well-written judgment promptly and indicates a willingness to consider suggested amendments is likely to attract adherents.[28] Conversely, the judge who circulates a draft at the heel of the hunt is unlikely to induce others to change their mind, though that can happen.

The presence on the High Court of persistent dissenters, such as Murphy, Kirby and Heydon JJ, indicated the existence of divisions within the Court. Just what those divisions are will vary from time to time and this is not the occasion to explore them.

28 See Fricke, above n 1, 119 (citing Sir Douglas Menzies as a source).

VI The Argument Against Joint Judgments

Justice Heydon in his recent article 'Threats to Judicial Independence: the enemy within',[29] supports Sir Owen Dixon's earlier view and that of Kitto J in favour of separate judgments. Justice Heydon points to the risks involved in adopting a practice of delivering joint judgments. There is the dominating judge who insists on imposing his view on weaker brethren, Lord Diplock being cited as the exemplar of this judicial species. Then there are the 'herd-like' compliant judges who, without proper consideration of the issues, just go along with a judgment which seemingly disposes of the case adequately. According to the author, the risks are magnified by the holding of pre-hearing and post-hearing judicial conferences and by the allocation of the primary responsibility for writing a draft which is intended to be the judgment of the Court or a majority of it.

The author also suggests that separate judgments are more likely to result in development of the law and give notice to the legal community of what the future might hold in this respect. This is because the author of the separate judgment will express his views unconstrained by any difference with the views of his colleagues. The joint judgment, on the other hand, may well be a lowest common denominator production, confined to the matters on which a consensus can be reached. A comparison of Privy Council and House of Lords decisions appears to support this claim. In general, the House of Lords judgments are superior and more extensive in their reasoning. There may, however, be other reasons contributing to the outcome of this comparison.

A *Assessing the argument against joint judgments*

Although I agree to some extent that the risks identified by the author do exist, they are not, in my view, as great as he suggests. In my experience as a judge, sitting on two Australian courts, two Pacific Island courts and the Hong Kong Court of Final Appeal – a judicial career spanning 45 years (18 years of it part-time) – I have never encountered a dominating judge of the kind depicted by the author, though I suspect one or two might have had aspirations to become so. Nor have I encountered a 'compliant' judge on the High Court. On the other hand, one suspects that Isaacs J may have been a dominating judge of the kind depicted by Heydon J and that in Isaacs era there may have been compliant judges.

Sir Garfield Barwick had a dominating personality but in discussion with him when he was Chief Justice, he recognised that I might take a different view, however misguided it might be. He never left you in doubt about what his

29 [2013] LQR 205.

view was and that it was clearly correct. And with all the other judges with whom I have worked, they have respected the right of every judge to reach and express his own view in a separate judgment.

Sir Garfield, however, could be a confronting judge during argument, sometimes destroying an argument before it had been developed to best advantage, just as Isaacs J is reputed to have done in his day. My strong impression was that in Sir Garfield's case, this was a tactic designed to influence his colleagues. As it took place in open court, it was a tactic to be distinguished from the influence that a dominating judge might bring to bear in a judicial conference.

Regular formal pre-trial conferences can lead to the risks identified by Heydon J, even the adoption of a mindset that is maintained, even defended, during the course of oral argument. I can recall one judge who circulated a draft judgment in advance of the hearing. The draft was flawed and played no part in the decision of the case. The judge was reminded that judgment is the product, not the precursor, of argument. On the other hand, informal exchange of first impressions before the hearing is inevitable, even if only to ascertain whether the issues have been formulated adequately. If not, it may then be necessary to confer to consider what possible action might be taken.

The delivery of individual judgments does not prevent compliant judges from simply agreeing with the judgments of colleagues. Because the fact of mere agreement is thereby made public, it is possible that compliant judges would favour joint judgments which conceal any lack of contribution on their part. It is often possible to identify the principal author of a joint judgment by reference to literary style – or lack of it. Identifying the principal author does not, however, exclude the possibility that other members of the 'plurality', to use a detestable word, have contributed to its content.

The circulation of a draft as a basis for a joint judgment ordinarily invites others to join it or to propose amendments to it. But there may come a point in its development where, because it has attracted a number of adherents, an uncommitted judge may think that it is better to deliver his own judgment rather than risk fracturing the consensus that has already been established.

VII The Argument For Joint Judgments

The justification for the practice of delivering joint judgments is

(a) that it is the collective or institutional responsibility of the Court to deliver its decision and a joint judgment best reflects that responsibility, where possible, and
(b) that it clarifies the ratio decidendi and provides more certainty for the legal community and a wider readership

so long as it is clearly understood

(i) that each judge is under no pressure to participate in a joint judgment and is free to write his own judgment;
(ii) that under no circumstances should a judge fail to give expression to his true view of the law for the sake of creating a false sense of unanimity or collective solidarity; in other words, compromise must not be allowed to triumph at the expense of judicial independence.

What I have just said reflects the Court's institutional responsibility to clarify the law. It is this responsibility which is the justification for the existence of a second-tier appellate structure. The requirement for a grant of special leave to bring an appeal to the High Court is in itself a recognition of this responsibility. Its significance is inefficiently appreciated.

Constitutional cases stand in a different position as they frequently come to the Court otherwise than by way of appeal. But the requirement for clarity and certainty is no less pressing; if anything, it is more compelling. Parliament and the Executive as well as the community, are entitled to expect that the Court will exercise its utmost endeavours to arrive at clear and certain interpretations of constitutional provisions, in particular those which relate to governmental powers. The rule of law and the considerations which inform the principle of legal certainty in its application to statutes support this view of the Court's responsibility not only in constitutional cases but also in matters of general law.

A *The relationship of a separate judgment to a joint judgment in a particular case*

While a judge is entitled to write a separate judgment, good sense underlies the remarks of Rich J in H*oyts Ltd v Spencer*.[30] A separate judgment which in substance is similar to a joint judgment serves only to show that the author has done his homework. A judge delivering a separate judgment should endeavour, as far as possible, to identify the aspects of a judgment, whether a

30 (1919) 27 CLR 133, 148.

joint judgment or not, with which he disagrees and the precise qualifications or reservations which he wants to make. Otherwise the reader may have difficulty in determining what the case stands for. What I have suggested can be difficult to achieve, as I have found from experience. A judge may well consider that in a particular case, the exercise is problematic and too time-consuming and all the more so for a judge who has circulated a separate judgment before the circulation of a joint judgment.

B *The importance of full participation by all justices*

I assume, of course, that a Justice of the High Court will scrutinise closely and examine carefully any draft judgment before he joins or agrees with it. And I acknowledge that some draft judgments are beguiling. They require very close examination, as indeed do all draft judgments.

The assumption I have just made is related to another assumption I make, namely that a Justice of the High Court has a comprehensive understanding of the relevant materials, including the facts and the law and a willingness to subject a colleague's draft judgment to a critical scrutiny. That means a sustained, rather than a cursory, scrutiny. The fact that the author of the draft has a high, even a towering, reputation in the relevant field of law does not release another Justice from his obligation to subject the draft to critical scrutiny. The point is that the quality of the Court's judgments depends on every member of the Court bringing to bear on each case the full range of his or her capacities, whatever form the judgment or judgments may take.

C *The Hong Kong experience*

At this point I should mention my Hong Kong experience. It has been the practice of the Hong Kong Court of Final Appeal (the CFA) of which I am a Non-Permanent Judge, if possible, to arrive at an agreed judgment, whether it takes the form of a joint judgment or an individual judgment agreed to by others. At first, I had difficulty in adjusting myself to a practice which seemed to me more rigid than that of the High Court. But I adjusted to the practice, partly because it involves more continuous discussion between the judges than occurred in the High Court.

The normal composition of the CFA involves the four Permanent Judges sitting with a different overseas Non-Permanent Judge every month. So the sittings are listed on a monthly basis with the expectation that the judgments in the cases listed for hearing in the particular month will be finalised in that month before the departure of the overseas Non-Permanent Judge. The need for prompt circulation of judgments means that judgment writing is generally

shared with a particular judge taking responsibility for a particular case, though that allocation may change during or after the hearing. In long and complex cases the work on a particular judgment has been divided between two or more judges.

I found that a morning-tea break – the High Court does not take one – provides a very good opportunity for discussion – at that time no other commitments or distractions intrude. There is a case conference at the conclusion of argument when each judge will indicate his preliminary view and a judge will undertake to write the principal judgment. There may be an additional conference or conferences to deal with any difficulties that arise in the course of preparing the judgment. There is, of course, a clear understanding that every judge has a choice whether to participate in an agreed judgment or deliver a separate judgment. Indeed, in a recent sitting, because I did not entirely agree with a draft judgment that had been circulated, I delivered a separate judgment, expressing qualified agreement with the draft judgment and setting out my own reasons.

There are, of course, strong reasons for endeavouring to arrive at an agreed judgment in Hong Kong, not only in constitutional cases (where dissent has occurred from time to time) and criminal cases but also in civil cases. One reason is that younger Hong Kong judges largely replaced the old Colonial Office judges after the resumption of sovereignty over Hong Kong by the People's Republic of China on 1 July 1997. So it was important that the CFA should state the law authoritatively and clearly. The Court has, in my view, achieved these objectives.

To that end, when the judges have broadly agreed that a particular draft is to be the basis of the joint or principal judgment to be delivered, they consider it page by page with each judge putting forward suggestions for amendment, mainly for the purpose of clarification of expression but extending also to matters of substance. The suggestions are then dealt with. Collegiality in the High Court did not extend so far in my time. On reflection I consider that the Hong Kong practice has a lot to commend it. In terms of clarity, comparison between the CFA judgments with those of the High Court is by no means unfavourable to the Hong Kong Court. CFA judgments could not be mistaken for a law journal article.

VIII The Personal Dynamics of the Court

The way in which a court works depends in large measure on the personalities of, and the relationship between, its members. The dynamics of that relationship vary considerably and can change dramatically in an enclosed community like the High Court. To give one example. The replacement of Menzies by Justice Lionel Murphy created a tension that did not previously exist, particularly between Sir Garfield and Lionel Murphy. At the same time it affected the relationship between Sir Garfield and other members of the Court because Menzies, who had been a valuable link, was no longer there. However inconvenient it may be, every Justice has a responsibility to endeavour to establish a working relationship with colleagues. Generally speaking, the fewer the number of the judges, the easier it is to develop a spirit of collegiality and informality. Difficulty increases as you move from a court of three to a court of five judges and even more so with a court of seven.

IX The High Court's Achievement

Despite changes in work practices and at times difficult personal relationships, the Court has, by its interpretation, enabled the *Constitution* to apply to changes in our conditions and circumstances and, in doing so, has adapted itself to changes in the nature of its role and its jurisdiction. The foundation Justices had favoured an interpretive approach restrictive of Commonwealth powers, such as the doctrine of 'reserved powers' which was overthrown in the *Engineers Case*.[31] This decision and subsequent decisions have led commentators to say that we have an unbalanced federation dominated by the Commonwealth. This may be so. There are, however, two other contributing factors. Inherent in the financial arrangements made by the *Constitution* was a vertical and horizontal fiscal imbalance.[32] As Alfred Deakin foresaw, the States would become financially dependent on the Commonwealth,[33] a situation accentuated by s 105A. And there was s 109 which ensured the paramountcy of a Commonwealth law over an inconsistent State law.

Looking back to-day we can see that the Court interpreted the *Constitution* so that it accommodated itself to the substantial change in the character of an initial Australia consisting of State-based communities and economies to an Australia with a national identity and a national economy.[34] We can also see

31 (1920) 28 CLR 129.

32 RL Mathews, *Revenue Sharing in Federal Systems* (Centre for Research in Federal Financial Relations, ANU, Research Monograph No 31, 1980).

33 According to Deakin, the *Constitution* left the states 'legally free but bound to the chariot wheels of the central government'; see La Nauze, *Alfred Deakin* (Melbourne University Press, 1965) 359.

34 See *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J).

that over the intervening years the nature of the Court's constitutional work has changed. For most of its history the Court was engaged in resolving *inter se* questions as to the limits of Commonwealth and State powers, industrial relations cases being the main battleground. Cases concerning inter-State trade and commerce (s 51(1) and s 92) and s 90 were common. Nowadays these cases are relatively uncommon. The rise of the corporations power together with the *Cole v Whitfield* reinterpretation of s 92, has consigned, until recently s 51(1) and s 92 to virtual irrelevance.

Chapter III has always generated work for the Court; it seems to be teeming with implications, notably s 75(V), and even more so in recent times. The recent implications in *Kable v DPP (NSW)*[35] and *Kirk v Industrial Commission of NSW*[36] were large ones. And the executive power (s 61) has attracted both attention and controversy.[37] Migration, due process, cases concerning the external affairs power and cases on the implied freedom of communication now occupy the space formerly occupied by industrial relations work. This change, excepting perhaps the cases on the external affairs power, indicates that the emphasis has now shifted to contests between individuals and government rather than contests between governments despite the absence of a national entrenched or statutory bill of rights.

The High Court has also, over the years, been responsible for the development of an Australian common law, sometimes under the influence of constitutional considerations, to meet changed circumstances and to elucidate matters of principle. The recent decisions on private international law illustrate the point.[38]

With respect to the general law, there has been a large increase in cases turning on statutory interpretation. As you would expect, administrative law has occupied much more of the Court's time in the last 50 years. The Court is now in the process of meeting the challenges that exist in developing what is now known as the constitutional writs (s 75(v) of the *Constitution*) without preserving archaic and arbitrary aspects of the prerogative writs.

35 (1996) 189 CLR 51.
36 (2010) 239 CLR 531.
37 *Pape v Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23; *Williams v Commonwealth* (2012) 288 ALR 410; [2012] HCA 23.
38 See, for example, *Pfeiffer v Stevens* (2001) 209 CLR 57; *Regie Nationale des Usines Renault SA* (2002) 210 CLR 491.

A *Changes in the Court's status and jurisdiction*

The Court's status and jurisdiction have been altered. One was the elimination of appeals from the High Court and State courts to the Privy Council thereby ensuring that the High Court is the final court of appeal for Australia.[39] And there were the reforms designed to relieve the High Court of much of its original jurisdiction, thereby enabling it to concentrate on its general appellate and constitutional work.

B *Special leave applications and their importance*

One element in these reforms was the elimination of appeals of right and the requirement that appeals should be conditional on the grant of special leave.[40] This requirement reflects the view, accepted in the common law world, that the only justification for a second appeal is the existence of some matter of public or general importance. Such a matter may be an important issue of law, whether it be clarification of a general principle or a question of statutory interpretation, the existence of conflicting decisions, or some irregularity that amounts to a matter of public or general importance.

A litigant is not entitled automatically to two levels of appeal – an appeal from a primary decision and then a further appeal from an appellate decision to the High Court. The requirement for a grant of special leave ensures that the Court is considering important matters and is not re-hearing an appeal simply because it is thought that the intermediate appellate court has, or may have arrived, at the wrong result.

In the last year the number of special leave applications in the High Court has fallen[41] and that has resulted in a slight decrease in the number of applications granted.[42] If the present trend continues, it may have consequences for the Court's workload. It may enable the Court to grant leave with a view to clarifying important questions of law, even if there is a question about the arguability of the outcome.

There have been procedural changes. There is more reliance on written submissions, both in special leave applications and appeals. Time limits have been imposed, notably in special leave applications, while lengthy reading

39 *Australia Act 1986* (Cth); *Australia (Request & Consent) Act 1986* (Cth).

40 *Judiciary Act 1903* (Cth) s 35.

41 The number of special leave applications filed in the 5 financial years ended 30 June 2012 were successively 809, 575, 562, 494 & 487. The corresponding figures for appeals were 59, 54, 60, 76 & 48.

42 The number of such applications granted in the 5 financial years ended 30 June 2012 were successively 58, 71, 62, 82 & 59.

from authorities is a thing of the past – largely as a result of Barwick CJ's influence. And we have televised hearings of special leave applications.

One drawback of our judicial system is that, to secure a determination by the High Court of a doubtful question of law, we have to wait until a case is taken to the High Court. That may take a very long time. At one time I toyed with the idea of using a refusal of a special leave application as a vehicle for making a statement about a contentious question of law. The problem is, however, that a refusal of a special leave application is not a precedent binding on courts below because such an application is not itself an appeal[43] in which full argument is considered and it is heard by less than a majority of the Court.

The problem is well-illustrated by the Court's refusal of special leave in *Western Export Services Inc. v Jireh International Pty Ltd*[44] where the applicant argued that ambiguity was no longer required before a court may resort to surrounding circumstances in the interpretation of a contract. On one view, my judgment in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*[45] was an obstacle to the acceptance of that argument. But in *Franklins Pty Ltd v Metcash Trading Ltd*[46] the NSW Court of Appeal had decided that ambiguity was not a pre-condition to the use of extrinsic evidence and that decision is consistent with modern English authority.

In refusing leave in *Jireh*, three Justices (Gummow, Heydon and Bell JJ), said that acceptance of the applicant's submission:

> clearly would require reconsideration by this Court of what was said in [*Codelfa*] by Mason J, with the concurrence of Stephen J and Wilson J to be the 'true rule' as to the admission of evidence of surrounding circumstances. Until this Court embarks on that exercise and disapproves or revises what was said in *Codelfa*, intermediate courts are bound to follow that precedent.[47]

The Court pointed out that the binding status of *Codelfa* had been affirmed in *Royal Botanic Gardens & Domain Trust v South Sydney City Council*[48] and said 'it would not have been necessary to reiterate the point here'.[49]

The point has been made that the Court's statement does not resolve the questions whether the *Codelfa* judgment refers to patent or latent ambiguity,

43 *Collins v The Queen* (1975) 133 CLR 120, 122.
44 (2011) 86 ALJR 1; [2011] HCA 45.
45 (1982) 149 CLR 337.
46 (2009) 76 NSWLR 603.
47 [2011] HCA 45, [3].
48 (2002) 240 CLR 45.
49 [2011] HCA 45, [4].

whether it is inconsistent with Lord Hoffmann's judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[50] and, if so, whether *Codelfa* should be followed and whether extrinsic evidence can contradict the plain meaning of the contractual words.[51]

In the face of the non-binding nature of what was said by three Justices in *Jireh* what should courts below the High Court do? Should they follow *Metcash*? They might regard the *Jireh* remarks as *dicta* but not *dicta* uttered by the Full Court after consideration of full argument. On the other hand, the *dicta* in *Royal Botanic Gardens* stand in a different position and the remarks in *Jireh* are explicable on the basis that they do no more than call attention to the earlier *dicta.*

X An Argument Against Judicial Minimalism

For present purposes there are two important points. The first is that there are considerable difficulties in using a special leave application as a vehicle for clarifying a contested and important question of law. Secondly, the case indicates a reluctance to determine such a question when the opportunity to do so arose. Although I acknowledge that there is strong support among some, perhaps many, judges for what I call judicial minimalism, it is my view that the courts should do what they can, after hearing full argument, to answer contentious and important questions of law, especially those affecting commercial, administrative and property law. As there is now a reduction in the volume of cases brought to the Court there may be a greater opportunity to hear and determine contentious questions of law.

As a critic of the *Boilermakers Case*,[52] I should also express my agreement with the comments made by Kirby J (in dissent) in *North Ganalanja Aboriginal Corporation v Queensland*.[53] In that case his Honour said:

> The judicial function is not frozen in time. This Court should remain alert to developments in judicial procedures which further, in proper ways, the defence of the rule of law. So far as is compatible with the judicial function, courts should endeavour to be constructive and useful to parties in dispute. If courts do not adopt this attitude, those parties will look to other means, rely on their power or be left unrequited by their expensive visits to the courts.

50 [1998] 1 All ER 98, 114–15.

51 D Wong and B Michael, 'W*estern Export Services & Jireh International*; "Ambiguity as the gateway to surrounding circumstances"' (2012) 86 ALJ 57.

52 *Attorney-General v The Queen* (1957) 95 CLR 529 affirming *R v Kirby ex parte Boilermakers Society* (1956) 94 CLR 254.

53 (1996) 185 CLR 595, 666.

His Honour's remarks were made in the course of taking issue with the majority view that the Court should refrain from deciding questions of law argued by the parties when, by reason of Ch lll and the restricted concept of 'matter', the questions did not arise for decision in consequence of the Court's conclusion on an antecedent point.

It is important that the Court should treat the *Constitution* as a framework of government the object of which is to promote efficient government by the three arms of government (including the judiciary) and that the Court should be cautious about imposing restrictions arising only from theoretical doctrine on its capacity to answer important questions of law. The Court should endeavour to answer important questions of law once raised and argued by the parties in proceedings.

XI Concluding Comments

Although the Court has made great use of comparative law, the High Court's jurisprudence has, with exception of a period in the 1980s and 1990s not been policy oriented. In this respect, the High Court's jurisprudence is to be contrasted with that of other jurisdictions whose jurisprudence is influenced by the interpretation of entrenched or statutory bills of rights. This difference may affect the Court's future use of comparative precedents and judicial reasoning.

But, at the end of 100 years, it can be said that, with the exception of the early Court and Dixon's Chief Justiceship, the Court's record over 100 years is one of strong individualism.