Collective Decision-making – the Current Australian Debate

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The 2013 publication of Professor Alan Paterson's *Final Judgment – The Last Law Lords and the Supreme Court*,[1] has coincided – and indeed, directly informed some contributions to – a rather surprising judicial discussion in Australia about the role and internal independence of judges on a multimember court.[2] There are a number of reasons why this 'debate' – occurring fairly indirectly, it must be admitted, through speeches and articles over the last two years – is unusual. First, it is rare for serving Justices to reflect upon the practices of collective decision-making on the High Court of Australia, the country's final court of last resort, in so substantial and candid a fashion as has occurred. Second, it is also rare, at least in Australia, for expositions on the collegial aspects of the judicial role to be offered in such close temporal proximity to each other and in a way which makes plain the different positions and practices of their respective contributors. Third, these different accounts are being offered at a time when regular empirical studies of the High Court's decision-making are now firmly in place, allowing some corroboration of the claims made by individual judges about their adherence to any particular approach.

In this essay, I briefly set the scene upon which this spate of judicial reflection has flared, before considering the substantive arguments and diverse perspectives of the chief contributors. The central theme is a familiar one of the tension between individual judicial independence and collective decision-making processes on the bench of an appellate court. This is, of course, at the heart of much of Paterson's research over his long and distinguished career. It dominates the account in *Final Judgment* of the House of Lords' final years under Lord Bingham and the deliberate choices made at the establishment of the Supreme Court to adopt practices more conducive to effective internal dialogue. But it was also one of the most fascinating aspects of his magisterial and ground-breaking study 1982 book *The Law Lords*.[3]

What we take away from Paterson's books (and the many diverse judicial viewpoints that they synthesise) is not that this tension is flatly irreconcilable. In a personal sense that is clearly not so since each judge manages to arrive at an accommodation between the individual and collegial aspects of their role as he or she sees appropriate. But nevertheless, the fact that the approaches *are* so highly personalised means that the tension is likely to persist for courts as institutions. While this does not thwart a court in fulfilling its constitutional functions, it certainly impacts on the way in which it does so. In particular,

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[1] Alan Paterson, *Final Judgment – The Last Law Lords and the Supreme Court* (Hart Publishing, 2013).

[2] Justice JD Heydon, 'Threats to Judicial Independence: the Enemy Within' (2013) 129 *Law Quarterly Review* 205; Sir Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102, 112; Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189; Justice Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 544.

[3] Alan Paterson, *The Law Lords* (Macmillan, 1982).

different conceptions of the endeavour of judging in a multimember setting will affect efforts to implement and maintain processes which are attuned to the collective personality of the institution. And of course, the strength of the group-orientation amongst the Justices is as fluid as the court's membership itself. The departure of one Justice and his or her replacement by another can effectuate a profound shift in the internal dynamic. Paterson's interviews over the years further demonstrate clear judicial oscillation between the attractions of unanimity and multiple opinions.[4]

Consequently, the pendulum can never really come to a rest and we continue to see even the most established courts swing back and forth over time between a tendency to express reasons with either near-monolithic unanimity or disparate individualism. Interestingly, in *Final Judgment* Paterson appears to suggest that the current conception of the Supreme Court as a 'team' is not simply the prevailing judicial attitude, but is intimately connected to, and actively influencing, the establishment of institutional practices in the Court's formative years. Accordingly, it may come to pass that judicial shifts between the individual versus collective approach to decision-making will be less pronounced in that court than they were in the House of Lords and often are elsewhere. Even if that transpires, how individual judges interact with colleagues in the determination of court orders, let alone the reasons that are given for those orders, will remain a matter as subject to variation as the membership of the bench itself. What is perhaps most intriguing about judicial attention to this dynamic, including the recent Australian examples, is the suggestion that it may ever be the subject of clear consensus.

Lifting the Veil on the High Court of Australia

A signature feature of Paterson's research methodology has been his remarkable access to first the Law Lords and now the Justices of the United Kingdom's top court. A resulting strength of both his major studies has been the presentation of focused and *contemporaneous* judicial responses to the issues of multimember court dynamics. There is a substantial longitudinal dimension as well obviously, but the books present very well-rounded pictures of the two institutions, taking in the views of all participants at key points in time. Paterson relies on many other sources besides – judgments, speeches and media interviews by judges and, especially useful and accessed for the first time in *Final Judgment*, the judicial notebooks of two senior Law Lords, Reid and Bingham. Additionally, he presents data to illuminate relevant points on the practices and decision patterns of their Lordships – which is especially handy as a corrective to the occasional tendency of judicial impressions on some matters to not square with what is happening in actual fact.[5] Paterson's capacity to so seamlessly employ this diverse range of qualitative and quantitative empirical methods and his simultaneous authority with legal materials is what distinguishes his work in this genre.

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4 This is hardly an unfamiliar concern in the Australian jurisdiction. See: Michael Coper et al, *Multiple Opinions Project – Report*, ANU College of Law and National Judicial College of Australia; For longitudinal statistic on the High Court, see Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001' (2004) 32 *Federal Law Review* 255, 266-73.

5 Paterson, above n 1, 8.

Alas, no comparable research has been conducted in respect of the High Court of Australia. There have been two insightful accounts of the institution from political scientists, but neither relied on interviews with the judges nor much in the way of quantitative analysis.[6] Reflecting their authors' expertise and interest, both books focused on the Court's place within the Australian political landscape rather than an exploration of how it functioned as a legal decision-making institution. Surprisingly, there have been two more recent studies of the High Court by American political scientists. Jason Pierce's 2006 *Inside the Mason Court Revolution*[7] was strongly based on unattributed interviews with many past and serving members of the Australian judiciary, as well as leading practitioners. The sheer novelty of that approach in this jurisdiction led to the book garnering a great deal of attention on publication. Likened by one newspaper columnist to 'a transcript of bugged conversations from a sweaty judicial locker room',[8] the study prompted some to claim the existence of a judicial culture deeply divided over the political limits of the final court's power and role.[9] Pierce did also resort to statistical information about decision-making but, as with the local political science treatments, his interest lay in the Court's changing role relative to the political arms of government. That same focus was made plain by the title of the second book by authors from the United States: *Judicialization of Politics: The Interplay of Institutional Structure, Legal Doctrine and Politics on the High Court of Australia*.[10] This slim study was based upon secondary sources and some peculiarly coded data.[11] Of all four books it is those by Patapan and Pierce which most illuminate the internal dynamics behind the Court's shifting institutional position – but none of them can be fairly described as directly concerned with understanding the form and variety of dialogue between Justices. Thus they may be contrasted sharply with *Final Judgment* which manages to fully explore the latter, while still offering a detailed appreciation of the Supreme Court's place in the 'new' British constitutional order.[12]

In fact, the internal processes of the High Court of Australia have traditionally been towards the opaque end of the spectrum when compared to other final courts of last resort. Never mind the sizable proportion of the general public who very likely have next to no perception

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6 Brian Galligan, *Politics of the High Court – A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) and Haig Patapan, Judging Democracy: The New Politics of the High Court of Australia (Cambridge University Press, 2000).

7 Jason Pierce, *Inside the Mason Court Revolution – The High Court of Australia Transformed* (Carolina Academic Press, 2006). For my review of this book, see Andrew Lynch, 'The Once and Future Court? - Jason L Pierce's '*Inside the Mason Court Revolution: The High Court of Australia Transformed*' Carolina Academic Press, 2006' (2007) 35 *Federal Law Review* 145.

8 Janet Albrechtsen, 'Inside judges' secret world' *The Australian*, 14 July 2007.

9 This was later rejected by the author: Jason Pierce, 'Reactions to the Mason Court: What are Australia's Judges Thinking?', Paper presented at Gilbert + Tobin Constitutional Law Conference, Sydney, 8 February 2008 available at: <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/351_JasonPierce.pdf>, accessed 28 November 2013.

10 Reginald S Sheehan et al, *Judicialization of Politics: The Interplay of Institutional Structure, Legal Doctrine and Politics on the High Court of Australia* (Carolina Academic Press, 2012).

11 For my full review of this book, see Andrew Lynch, '*Judicialization of Politics: The Interplay of Institutional Structure, Legal Doctrine and Politics on the High Court of Australia* by Reginald S Sheehan et al, Carolina Academic Press, 2012' (2013) 34(2) *Adelaide Law Review* 465.

12 See Vernon Bogdanor, *The New British Constitution* (Hart Publishing, 2009).

of the Court and its work at all.[13] Even for those who spend their professional lives interacting with or observing the institution – practising lawyers, government, academics and the media – the question of how its judges go about resolving the controversies that reach the Court is one that has been all too dependent on impression or anecdote.

This has been due to a number of factors – many of which can be most easily conveyed by reflecting on the High Court in contradistinction to the United States Supreme Court (about which it is sometimes tempting to think rather too much is known). Unlike the latter body, for much of its life the High Court of Australia has not been the focus of sustained attention from even a modest section of the political science community; there seems to have been a deep reluctance to subject its decisions to empirical analysis; very few judicial biographies have been published in Australia and there has certainly been nothing remotely akin to a tell-all 'Brethren-style' expose on the machinations of the Justices. Its judges are appointed without fanfare, having been selected by the Attorney-General and approved by Cabinet in a process that is shrouded in secrecy and lacks any formal stated criteria whatsoever beyond bare eligibility.

The apparently low public interest in the Court doubtless reflects, at least in part, the unusual circumstance that Australia is a country without a national human rights instrument giving rise to judicial review. Additionally, it must be said, past experiences with open political hostility have ensured that keeping a low profile is an attractive option for the Court.[14] To that end, the rhetoric of legalism has, by and large, endured in the Court's presentation of itself to the political branches of government and the public more generally.[15] To the extent, information has been available about decision-making on the Court, specifically how its individuals work with each other in a collective sense, judicial candour has been unsatisfyingly sparse and fragmented.

That is, as already noted, until very recently. The catalyst for a spate of judicial reflections on collective decision-making in the Australian context was an extraordinary speech, on any measure, given by Justice Dyson Heydon at the outset of his final year on the High Court on 'threats to judicial independence'. The speech was made only before United Kingdom audiences and only attracted real attention in Australia upon publication as a *Law Quarterly Review* article on the eve of Heydon's retirement from the Court in early 2013. It is prefaced by the faintly incredible caveat that he 'must not be taken to be speaking about the actual behaviour of any particular court of which the author has been a member'.[16] Those who have followed in Heydon's wake – some directly responding to his concerns, others discussing the topic more tangentially – have not done so with a similar disclaimer. It has

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[13] Although it has been a generation since polling was conducted on the state of Australian civics understanding, the results were distinctly underwhelming and there is little to suggest any reason for better knowledge of such matters today. See George Williams, 'The High Court and the People' in Hugh Selby (ed) *Tomorrow's Law* (Federation Press, 2995) 271, 288.

[14] See Patapan, above n 6, 166-68; Pierce, above n 7, 261-67 and George Williams and Andrew Lynch, 'The High Court on Constitutional Law: The 2010 Term' (2011) 34 *University of New South Wales Law Journal* 1006, 1006-1007 and 1027.

[15] See the various extracts discussed in George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law & Theory – Commentary & Materials* (Federation Pres, 6th ed, 2014) 170-181.

[16] Heydon, above n 2, 205.

been very clear that the topic of collective decision-making is not being broached in the abstract but in the specific context of the High Court.

Judicial Independence – from 'excessively dominant personalities' and the herd

Heydon's remarks were a sustained reflection on the ways in which the internal dynamic of an appellate court may weaken the intellectual independence of its members, the transparency of its decision-making, and the quality of its judgments. His wariness about the appropriate limits on processes geared towards facilitating internal dialogue was apparent in his claim that, in contrast to the practices of the political arms of government, 'compromise is alien to the process of doing justice according to law'.[17] Heydon expressed concern with the various institutional processes that facilitated the ability of 'excessively dominant judicial personalities'[18] to exert influence over their colleagues. In pursuit of the goal of having the Court give unanimous guidance or speak with one institutional voice:

> Guileful blandishments could be employed—charm, flattery, humour and elaborate but insincere displays of courtesy. The message might be transmitted that those who disagree should say they agree. That is, polite or jovial invitations might be made to tell lies.[19]

Heydon reported that the presence of these forceful personalities 'in conjunction with judicial herd behaviour can cause grave dangers to arise from the now fashionable judicial conferences'.[20] They are the 'enemy within' of his title, threatening the judicial independence of each of the Court's members. Interestingly it was not simply the use of formal practices that troubled Heydon, but instead the capacity of some judges to wield influence through what, to other eyes, might seem to come with what Paterson describes as 'social leadership'.[21]

These alarming warnings about the risks which inhere in the collaborative dynamic of a multimember court are ones which find almost no parallel in Paterson's studies on the United Kingdom's final court. The exception is the role played by Lord Diplock in the late 1970s and early 1980s. Lord Wilberforce once remarked that Lord Diplock possessed 'the quality of persuading his colleagues to the extreme … [it] almost got to the stage of a mesmeric quality'.[22] This was borne out by the House of Lords' movement towards a very high proportion of cases decided by a single opinion over this period. Heydon himself offered Lord Diplock as one of those 'conscious of their own forcefulness, and prepared to exert it... exemplify[ing] the "authoritarian personality"'.[23] But Lord Diplock aside, Heydon's remarks could not jar more sharply with the sentiments expressed by many of the current members of the United Kingdom Supreme Court about collective decision-making. In particular, there is nothing to suggest that any of Paterson's interviewees share Heydon J's fundamental concerns about judicial conferences (both pre- and post-hearing) and the

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17 Ibid 221.
18 Ibid 215.
19 Ibid 209.
20 Ibid 217.
21 Paterson, above n 1, 156-58.
22 Lord Wilberforce quoted in Gary Sturgess and Philip Chubb, *Judging the World – Law and Politics in the World's Leading Courts* (Sydney: Butterworths, 1988), 275.
23 Heydon, above n 2, 216.

allocation of responsibility for composition of a draft judgment for the court or a majority of its members. On the contrary, these practices are all ones which have been refined in the new Supreme Court and are pivotal to understanding how its decisions are reached. Yet consider, for example, Heydon J's description of post-hearing conferences as 'antithetical to the common law adversary tradition, according to which all judicial work except the solitary composition of reserved judgments is conducted in public'.[24] In arguing the case for judicial independence, he essentially attacked the legitimacy of a conception of the judicial role which possesses even the mildest degree of group-orientation:

> The function of independent judges is to concentrate on their personal views of what constitutes a just outcome according to law after full argument from counsel. Post-hearing conferences weaken that concentration.[25]

Even those within what Paterson describes as 'a small minority of individualists who attached only peripheral importance to the attribute of group membership'[26] over the last 40 years of the House of Lords would seem unlikely to have embraced Heydon J's especially hard-edged perception of the 'threat' posed by collegial interaction. And while there will always be some who tend 'largely to plough their own furrow',[27] those judges would almost certainly baulk at the dogmatism of Heydon J's prescription: a self-imposed ban on writing with any colleagues. In the last year of his tenure, this is exactly how Justice Heydon acquitted his duties as a member of the High Court.[28] The institutional rate of unanimous opinions plummeted from about half to just 13% – the latter being those cases where Heydon J was absent from the bench.[29] Quite simply, Heydon J's stance amounted to a total rejection by a member of a multimember court of the collective dimension to judicial decision-making. While there is some precedent on the High Court of dysfunction and breakdown in collegial working relationships,[30] Heydon J's deliberate isolation from the rest of the Court, accompanied by a lengthy public defence of this approach as predicated on principles of judicial independence, is frankly unique.

A few months after Justice Heydon J's speech appeared in print, Sir Anthony Mason, a former Chief Justice of Australia (1987-95), reflected upon its arguments. Mason agreed that the risks identified by Justice Heydon exist but added that, 'they are not, in my view, as great as he suggests'.[31] Mason offered a concise history of variations in the High Court's attitude and practices geared towards the achievement of consensus. He claimed not to have encountered over his 45 year judicial career a dominating personality as described by Heydon, though conceded a suspicion that Isaacs J (1906-1931) may have been such a judge.[32] Mason also denied ever encountering a compliant High Court judge, ready simply to

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[24] Ibid 217.

[25] Ibid 219.

[26] Paterson, above n 1, 131.

[27] Ibid 134.

[28] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2012 Statistics' (2013) 36 *University of New South Wales Law Journal* 514, 525-26.

[29] Ibid 515-16.

[30] See Clem Lloyd, 'Not Peace but a Sword! – The High Court Under JG Latham" (1987) 11 *Adelaide Law Review* 175, describing the High Court of the late 1930s.

[31] Mason, above n 2, 109.

[32] Ibid.

follow the herd. Such extreme portraits to one side, Mason mused:

> 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 ... However inconvenient it may be, every Justice has a responsibility to endeavour to establish a working relationship with colleagues.[33]

This responsibility is effectively a precondition to the satisfaction of a greater institutional one which recognises the value of joint judgments. Mason recalled that when he joined the High Court in 1972 the practice was to deliver separate individual judgments. The practice of a daily conference instituted by Chief Justice Dixon (1952-64) had fallen away under his successor Chief Justice Barwick (1964-81) and 'there was not much discussion among the judges'.[34] When they did occur, joint judgments appear to have been the serendipitous result of exchanges between members of the Court suggesting amendments to a circulated draft. But the impetus for more concerted efforts had grown by the time of Mason's elevation to the Chief Justiceship. He maintains that the production of such opinions is justified by 'the collective or institutional responsibility of the Court to deliver its decision and a joint judgment best reflects that responsibility where possible'.[35] That responsibility is qualified by the fact that, of course, judges must be both free from pressure to join others and also true to their understanding of the law: 'compromise must not be allowed to triumph at the expense of judicial independence'.[36]

On writing together – and writing alone

Justices Kiefel and Gageler, two of the High Court's current members, have taken up this discussion. Each offer distinct perspectives on the purposes and merits of writing with colleagues and writing alone. It makes sense to examine Kiefel J's remarks, again the publication of an earlier speech, before those of Gageler J, despite the latter's contribution being made some months earlier in time. Titled 'The Individual Judge',[37] Kiefel J's article made no direct reference to Heydon J, yet it is impossible to see it as anything but a response to the arguments made by the latter in his 'Enemy Within' speech:

> From time to time, in England as well as in Australia, the view has been expressed that appellate court judges should write separate judgments. On this view, the practice of agreeing, and joining in, with a judgment written by another judge presents a risk to judicial independence itself. So too does collegiate discussion. On this approach, it is necessary to be independent from one's own colleagues.
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> This viewpoint appears to equate the notion of a judge's independence with individualism, in the sense of standing apart from others. It assumes that a judge cannot exercise independence of thought in the act of agreeing with the view of another. This is not a view shared by all.[38]

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33 Ibid 112.
34 Ibid 106.
35 Ibid 110.
36 Ibid.
37 Kiefel, above n 2.
38 Ibid, 554.

Kiefel J proceeds to detail the falsity of the view that collective decision-making practices must inevitably pose an unacceptable danger to the independence of mind required of each individual judge on a panel. In doing so, she draws extensively on Paterson's *Final Judgment* throughout. One suspects that this is due not simply to the richness of that resource, but also because it enables her to broach the topic of contemporary attitudes in a multimember court without commenting too directly on those of her colleagues. That said, Kiefel J does not shy away from discussing the High Court altogether and in fact is helpfully explicit in describing its current practice as one which 'requires the author of a judgment to join in any judge who circulates a concurrence with the judgment'.[39] She is unambiguous in her description of this as a 'requirement', distinguishing the practice from that in other Australian courts in which joining is a matter within the discretion of the opinion's author. The result of the High Court's approach is 'a greater degree of anonymity of authorship than other courts', where the identity of the judge primarily (or, at least, notionally) responsible for drafting the opinion tends to be apparent from the form in which opinions are delivered. Certainly, the contrast with typical practice in the United Kingdom Supreme Court as described in *Final Judgment* is very clear.

Kiefel J acknowledges that ironically this institutional practice geared towards reducing the unhelpful production of separate concurrences may have the opposite effect. Borne of 'a personal desire to stand out, to have one's own voice and develop one's own reputation',[40] some members of the Court may resist joining opinions with which they agree in order to pen a concurrence under their own name. When motivated by the prominence of the particular case or importance of its issues, Lord Neuberger called such an opinion a 'vanity judgment'. But more generally than simply those instances, Kiefel J suggests that for most judges on appellate courts the habits of individualism, so strongly developed at the private bar, need to be tempered by 'the virtue of judicial restraint and the need to quell that sense of self on occasions when institutional responsibility requires it'.[41] In this way, she makes plain her very different assessment from that offered by Heydon J as to where the challenge to decision-making in a multimember court lies. It is not the pressure to conform one needs to watch out for, but the in-grained propensity for individualism. Wariness about the latter does not require us to reject Justice Kirby's identification of the advantages of an appointments system that produces a 'a judiciary comprising strong-minded, experienced senior advocates-turned-judges, not accustomed to thinking of themselves as members of an institutional unit or government service'.[42] It is simply to recognise that these qualities do not require the bench to be as thoroughly atomised as Heydon J both insisted and then put into practice. Indeed, given the strong personal qualities of judicial appointees – and here we might recall Mason's doubt as to the existence of compliant High Court judges in living memory – surely we can justifiably feel relaxed, rather than anxious, about the spirit in which judicial collaboration takes place? No one is suggesting for a moment that agreement with a judge's draft opinion excuses others on the court from the task of thoroughly reasoning the case out for themselves. Is, Kiefel J asks, the composition of a complete judgment really necessary in order for that responsibility to be fulfilled? And even if the

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39 Ibid, 557.

40 Ibid.

41 Ibid 558.

42 Michael Kirby, 'Judicial Dissent- Common Law and Civil Law Traditions' (2007) 123 *Law Quarterly Review* 379, 388.

answer to that question is yes, must the opinion be published separately to authenticate the integrity of the author's agreement with his or her colleagues?

Justice Gageler, in remarks made some months before those of Kiefel J, did actually provide some thoughtful answers to these very questions. He did so after revealing a rather greater sympathy with the concerns voiced by Heydon J about the threat which colleagues might pose to judicial independence. To his mind, the fact that judges are largely drawn from a professional culture of robust individualism offers no real security since:

> …the risks to independent reasoning created by the 'tendencies and possibilities' to which Heydon alluded, and that Mason accepted to exist, are risks and possibilities inherent in any human decision-making. It would be wholly reasonable to expect disciplined judges to be well-equipped to manage those risks, but it would be folly to suggest that judges as a class are wholly immune from them.[43]

Gageler J approaches the topic of collective decision-making by adopting the 1785 writings of French mathematician and social scientist Nicolas de Condorcet. If that seems a bit left-field, then the factors in play will be immediately recognisable ones to even the most casual reader of Paterson's work:

> The central question with which Condorcet was concerned was how likely a group is to arrive at a correct judgment given three variables. The first is the judgmental competence of the individual group members. The second is the decision-making rule or deliberation process used to aggregate individual judgments into a group decision. The third is the size of the group.[44]

Gageler J's exposition of what is known as 'Condorcet's Jury Theorem' is lucid, compelling and should be read by anyone interested in decision-making in appellate courts. His consideration of the Theorem to explain the necessity and value of judges' individual 'decisional independence' is grounded in an appreciation of why we use multimember courts in the first place.[45] Essentially, this is to maximise the chance that the decision reached will be 'correct' (which Gageler acknowledges is simply short-hand for 'better' or 'preferable' by whatever external standard the decision is made and evaluated). For what the Theorem holds is that 'the probability of the judgment of the majority being correct will always exceed the probability of the judgment of an individual member being correct'.[46] If a judge is simply a 'passenger' or a 'parrot' (as was once alleged in an unhappier time on the High Court),[47] then he or she decreases that probability – and so may as well not be there at all.

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43 Gageler, above n 2, 199. In this view he is supported by the Sunstein's various behaviouralist studies of American judges, namely CR Sunstein, *Why Societies Need Dissent* (Harvard University Press, 2003) 166-93; and CR Sunstein, D Schkade, LM Ellman and A Sawicki, *Are Judges Political?* (Brookings Institution, 2006).

44 Ibid 193.

45 See also John V Orth, 'How many Judges does it take to make a Supreme Court' (2002) 19 *Constitutional Commentary* 681.

46 Gageler, above n 2, 193.

47 See Lloyd, above n 30.

Even where the judgmental competence is not uniform across the group's members due to the presence of one or more with special expertise, the probability that the group will reach the correct decision is still higher than for any of its members deciding alone. Gageler J reports that this remains true except for the most extreme variations in competence – something we might assume is fairly unlikely in the setting of a final court. This discussion is illuminating as to the appropriate use of an individual's expertise in the court's collective decision-making, and has ramifications both for the issue of how judges are assigned to hear cases as part of smaller panels on the Court and, more broadly, how much weight needs to be given to ensuring a diversity of legal specialisations when appointing judges to appellate courts.[48] Gageler J does not endorse Heydon J's edict of near-total insulation from one's colleagues. He pointedly does not call for deliberative independence 'which would rule out members being influenced in reasoning to their own decisions by information they have gained or realisations to which they have come in the course of deliberating with other members'.[49] When the latter have some acknowledged special expertise (or 'judgmental competence'), then for a judge to close off from them seems an almost perverse rejection of the institution's inherent capacities for better decision-making. The risk that deliberation poses to judicial independence 'is one to be managed'.[50] What alone matters, in the end, is that each judge takes responsibility for the decision which he or she arrives at – *not* whether he or she reaches it entirely in isolation from those also considering the same question.[51]

But what does decisional independence require in terms of a judge's labour? How does a judge ensure that the decision reached is truly his or her own? It will be recalled that Kiefel J queried whether drafting an opinion to work through the problem was really necessary. She emphasised the delay likely to be caused from such a practice – causing inconvenience to the litigants and also diminishing the scope for the individual judge to influence the content of a joint or unanimous opinion.[52] The latter consideration was not, of course, one to which Heydon J attached importance since his commitment to decisional independence extended through to the publication of separate reasons. But it is relevant to the approach of Gageler J who has conceded that there is benefit in judges, after 'having reasoned independently to the same conclusion', then reaching agreement on a common form of expressing the reasons for that decision.[53] Gageler J acknowledges that the production of reasons – even if they are then to be set aside – takes time but insists that this is exactly what an appreciation of Condorcet's Theorem demands. For a 'court of final appeal cannot ensure that the answers given by a majority of its members will be the best answers the court can give, except by ensuring that its members consider, and have sufficient time each to consider, those questions each to the best of his or her individual ability.'[54]

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48 A consideration acknowledged by Lord Sumption as 'perfectly legitimate': Lord Sumption, 'Home Truths about Judicial Diversity', Bar Council Law Reform Lecture, 15 November 2012, 4.

49 Ibid 195.

50 Ibid 197.

51 The discussion in *Final Judgment* on the extent to which non-Scottish members of the House of Lords and Supreme Court have adopted a deferential attitude towards the views of the two Scottish judges on appeals involving Scots law is certainly worth contrasting with, and is open to some criticism under, Gageler J's application of Condorcet's Theorem: Paterson, above n 1, 237-42.

52 Kiefel, above n 2, 556-57.

53 Gageler, above n 2, 201.

54 Ibid.

Kiefel J admitted that to tear up a set of reasons one has written and simply join in the opinion of a colleague with which one agrees is 'not always easy to do'.[55] In saying this she suggested that if an individual routinely drafts separate reasons as a practice of ensuring his or her decisional independence, then that member of the Court will very probably end up issuing more separate opinions than would otherwise be the case. Were the practice to be adopted more generally, it would inevitably thwart the production of joint judgments and cause the loss of their attendant institutional benefits. There is statistical corroboration in respect of the different attitudes which she and Gageler J have put forward on this question. Over the last two years – the same timeframe as their public pronouncements – Kiefel J has had among the highest rates of joining in opinions on the High Court while Gageler J has had, quite discernibly, the lowest.[56] It seems relevant to also point out that the latter has emerged, in his first two years on the Court, as the judge with the highest dissent rate – notably higher than Kiefel J, who in common with the rest of the bench, finds herself only rarely in the minority.

Conclusion

It is not the case that views on joint judgments or writing separately have not been aired on earlier occasions in Australia. The recent Gageler and Kiefel JJ speeches acknowledge several antecedent examples – indeed the former takes its cue as a memorial lecture to Sir Frank Kitto, a former justice of the High Court who initially posed the question 'Why write judgments?'.[57] But what has been novel about the recent Australian debate is the unusual circumstance of having such distinctive contributions on the issue made in such swift succession. Given the High Court's traditional tendency to reticence rather than self-examination, this has been both a little surprising and very welcome.

At the outset of this paper, it was observed that the tension between individual and collective judicial decision-making is, at the institutional level, destined to be a perennial one, subject to the competing approaches of individual judges serving together at any one time. The diverse positions presented here offer a clear illustration of this – not just in respect of the High Court of Australia, but more generally. In the context of the United Kingdom's final court, one of the advantages of the long time frame of Paterson's studies is their further demonstration of the cyclical nature of this debate. Courts, being dynamic human institutions, are subject to changes in mood and practice. So although decision-making in the High Court of Australia for the last 20 years has been marked by high levels of consensus typically expressed through joint judgments, that picture need not, in fact is most unlikely to, remain static. Greater individual expression of the reasons for favouring a particular outcome to a case may yet return to vogue – possibly revitalised by the distinctive arguments of, respectively, Justices Heydon and Gageler.

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[55] Kiefel, above n 2, 559.

[56] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2013 Statistics' (2014) 37 *University of New South Wales Law Journal* 544, 558-59; and Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2014 Statistics', Paper presented at Gilbert + Tobin Centre of Public Law, Constitutional Law Conference, Sydney, 13 February 2015.

[57] Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787.