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INTRODUCTION – WHAT MAKES A DISSENT ‘GREAT’?

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CHAPTER 1

Introduction – What Makes a Dissent 'Great'?

Andrew Lynch

I Introduction

The delivery of dissenting opinions is such a familiar phenomenon of appellate court decision-making in common law systems as to often go unremarked. Outside the United States of America, in which judicial dissent has long been viewed with a pronounced romanticism and has amassed a vast literature, direct scholarly attention has been limited. This is certainly true in Australia. Additionally, what judicial and academic discussion there is on the topic typically falls into one of two camps. In the first are contributions that engage in a fairly abstract weighing of the benefits of judicial dissent against its costs to the institutional authority and efficiency of the courts; these reflections are predominantly sourced from the judiciary. In the second is academic research with an empirical focus in which determining the frequency of judicial disagreement and the identification of regular coalitions and dissenters on the bench feature as dominant objectives.

Despite the value of these different contributions, an important gap in our understanding of this topic remains: specifically, when and how has dissent *really mattered*? A full appreciation of the practice of judges writing minority opinions – what motivates them to do so, the adoption of a particular tone or style, and the impact of disagreement upon the work and standing of the court and the later development of the law – can only be gained through a substantive discussion about the value and significance of particular examples. This book aims to fill this gap by presenting a diverse collection of such opinions in which the circumstances and consequences of judicial dissent are explored in detail.

At the same time, *Great Australian Dissents* is, as its title unambiguously indicates, a celebration of the genre. The contributing authors were invited to nominate a minority opinion they believe merits inclusion in the pantheon – but pointedly, they were not offered any pre-determined criteria for that purpose. Many of the dissents here will be ones widely anticipated by those who have studied and worked in the law, some may surprise, and the inclusion of others again may be hotly contested – just as they were at the two day workshop in which the chapters of this book were initially presented and discussed. The common purpose of the 21 authors across the 17 chapters that follow is to justify their selection to the reader. In doing so, they place the dissenting opinion in context so that its novelty and impact may be appreciated against the majority's approach and the existing law. The authors detail the opinion's immediate attractions and enduring appeal, if not vindication. In this way, the chapters of the book work in dialogue with each other to illuminate the topic of dissent more generally – not simply by providing instances when minority opinions have been distinctly valuable, but by also constructing a holistic understanding of those attributes and circumstances which lead some dissents to stand out as significant, even to become iconic, while so many lie forgotten.

The purpose of this chapter is to introduce this highly varied collection and also the central themes that emerge from it – the many different ways in which a minority opinion may, despite losing the day when the case was decided, nevertheless make some claim to greatness.

II Recognising Dissent

The precise origins of the practice of judicial dissent are unclear. Although the significance of the right to make speeches in the Appellate Committee of the House of Lords has been pointed to as providing a constitutional basis for the practice of judicial dissent in English law,[1] this is not the same as an historical explanation for the emergence of the practice.[2] Sir John Baker has described the transition from a seemingly open-ended search for judicial consensus in the late medieval period, which could produce stasis, to a willingness by the end of the 16th century to accept decisions by majority in order to achieve an authoritative judicial pronouncement of the law.[3] Minority opinions, it is clear from Baker's account, were not suddenly permitted, but are just the natural consequence of the seriatim practice of judgment delivery employed in the English courts for centuries, by which individual judges announced their opinion on the case in order of seniority.[4] Although Lord Mansfield briefly enforced a practice of unanimous opinion delivery upon his appointment as Lord Chief Justice in the second half of the 18th century,[5] the English tradition has otherwise been unbroken, albeit fluctuations in the relative levels of unanimity and dissent have certainly occurred over time.[6] The seriatim practice of judgment delivery, with its inherent capacity for explicit judicial disagreement was exported throughout the common law world.

A notable exception was the Judicial Committee of the Privy Council, which heard appeals from Britain's former colonial possessions. The Privy Council's rigid requirement of unanimity was something strongly disdained by Australia's Sir Garfield Barwick, and his part in ending that institutional practice is discussed in chapter 7 – the dissent is a curiosity in this collection for although its author was an Australian judge, it was not delivered in an Australian case. It should also be noted that there has been a lingering wariness around the delivery of dissent in criminal appeal matters due to the serious consequences for the accused.[7] In some jurisdictions this has taken the form of a statutory instruction to the courts to strive to unanimity. The dissent examined in chapter 8 provides an example of a dissenting judge having to overcome that sort of pressure for conformity in order to deliver an opinion that proved hugely influential on the English criminal law.

The use of seriatim opinions by the United States Supreme Court was short-lived. The Court's fourth Chief Justice, John Marshall, imposed the practice of near constant unanimity

1 John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 *Oxford Journal of Legal Studies* 221, 233; Alan Patterson, *The Law Lords* (Macmillan, 1982) 98.

2 Chris Young, 'The history of judicial dissent in England: what relevance does it have for modern common law legal systems?'(2009) 32 *Australian Bar Review* 96; Cf Michael Kirby, 'Judicial Dissent – Common Law and Civil Law Traditions', (2007) 123 *Law Quarterly Review* 379, 385-86.

3 John Baker, *The Oxford History of the Laws of England, Vol VI 1483-1558* (Oxford University Press, 2003) 49-51.

4 M Todd Henderson, 'From Seriatim to Consensus and Back Again: A Theory of Dissent' (2007) *The Supreme Court Review* 283, 292-94.

5 Ibid 294-303.

6 With respect to decision-making trends on the United Kingdom's final court since the 1970s, see Alan Paterson, *Final Judgment – The Last Law Lords and the Supreme Court* (Hart Publishing, 2013).

7 Alder, above n 1, 242.

on his colleagues in order to secure its fledgling authority.[8] The resistance of Justice Johnson, emboldened by Thomas Jefferson behind the scenes, prevented Marshall CJ from eradicating the potential for judicial dissent.[9] But the result was what the current court's Justice Bader Ginsburg has called a 'middle way':

> [There are] three patterns of appellate judgments by collegial courts: seriatim opinions by each member of the bench, which is the British tradition; a single anonymous judgment with no dissent made public, which is the civil law prototype; and the middle way familiar in the United States – generally an opinion for the court, from which individual judges sometimes disassociate themselves in varying degrees.[10]

While that description basically holds, the early 1940s was a watershed between the consensus driven approach instigated by Marshall and the rise again of individual expression on the Supreme Court through separate concurrences and dissents.[11] The delivery of an opinion 'for the Court' means that identification of both concurring and dissenting judgments is not only a much simpler task when reading the case reports of the United States Supreme Court, but it may be thought to assume a greater significance in the process of judicial deliberation and composition of judgments. A Justice who is disinclined to join the Court's opinion has the option of writing a separate concurring opinion or a dissent. Either represents a formal and deliberate breaking away – a disassociation 'in varying degrees' – from the central judgment which represents the views of the majority. By contrast, the status of judgments in the seriatim tradition was so indistinct as to baffle American observers:

> A judge may in fact be dissenting from his panel's disposition, but the reports never say so. Similarly, a judge may in fact be concurring – he may agree with the disposition but disagree with the reasoning of a majority of the panel-but the reports never say that he's concurring. You have to read through all the judgments in order to discover that any one of them is a concurrence. Indeed, there could not as a logical matter be dissents or concurrences in the English system, because no appellate panel ever adopts a single judgment as the judgment of the court…[12]

That observation has less purchase as the trend towards more unanimous or joint judgments increasingly supplants the pure seriatim practices which were the historical norm in the English and Australian courts.[13] But it relevantly highlights a consideration that explains the historical tendency to less strident expression of dissent in the English and Australian courts – often what ended up as a minority opinion was not consciously written as such, but was simply the judge's opinion on the case. What made it a dissent was nothing more than the failure of a majority of the bench to agree with it; the opinion possessed no inherent properties as a dissent. The dissent of Justice Anthony Mason in *Hospital Products Ltd v*

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[8] Henderson, above n 4, 305-25; John P Kelsh, 'The Opinion Delivery Practices of the United States Supreme Court 1790-1945' (1999) 77 *Washington University Law Quarterly* 137, 143-152.

[9] Meredith Kolsky, 'Justice William Johnston and the History of Supreme Court Dissent' (1995) 83 *Georgetown Law Journal* 2069, 2069-81.

[10] Justice Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65 *Washington Law Review* 133, 134.

[11] Henderson, above n 4, 325-41; Melvin I Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* (Pantheon Books, 2015), 209-26.

[12] Arthur J Jacobson, 'Publishing Dissent' (2005) 62 *Washington and Lee Law Review* 1607, 1609.

[13] See respectively, Paterson, above n 6, 99-110 and Justice Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 554, 557.

United States Surgical Corporation,[14] discussed in chapter 12, is a very good example and about which its author has said:

> At the time I wrote it I thought it could end up as the judgment of the Court or a judgment that formed part of a majority in the Court. But it didn't turn out that way. So, though not written as a dissenting judgment, it became a dissenting judgment.[15]

Some cases throw up issues that make consensus difficult to obtain, and the judges will resort to the highly individualised mode of expression in the seriatim tradition. The result can be that a crisp line between the majority that determines the High Court's orders and those who disagree simply does not exist. The cases discussed in chapters 10 and 13 are each of this description, and show a bench fragmented across a range of different issues. On such occasions, the dissents under examination will also be unlikely to make any overt display of their minority status – and indeed on some aspects of the case they may share substantial agreement with the reasoning of the majority or even the orders of the Court.[16] The United States Supreme Court has experience of partial dissents, even under circumstances where no solid majority sustains the 'opinion of the Court',[17] but an American audience would probably be surprised by the identification of such opinions, from which the reader has to draw out the author's differences from the rest of the Court, as 'great dissents'. If they barely look like a dissent, how can they be truly great?

III Great Dissenters; Great Dissent?

The whole notion of 'greatness' is a complex one, strongly linked to judicial reputation. Occasionally, Justices of the High Court of Australia have acquired the sobriquet of 'Great Dissenter'. In chapters 3 and 5 we are reminded that, though long forgotten now, Sir Owen Dixon wore this label in his first decade on the Court, in reference to his regular minority opinions on the interpretation of the constitutional guarantee of freedom of interstate trade and commerce. He soon shed the title when his views attracted the support of others and his swift emergence as the dominant force on the Court was assured. By contrast, a reputation for dissent defines the judicial careers of two later Justices – Lionel Murphy and Michael Kirby. The status of both as a minority voice on the bench shapes scholarly assessment of their contribution.[18] Invaluable as those personal studies are, it would be misguided to seek to understand the phenomenon of minority opinions, much less its significance, through the prism of any particular individual. To do so is not merely insufficient, but also risks distorting or limiting an appreciation of dissent as a broader experience.

These dangers are acutely apparent when one asks what the identification of an individual as a 'Great Dissenter' is supposed to signify. The title is an imported one, having a long lineage

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[14] (1984) 156 CLR 41.

[15] Katy Barnett, 'Sir Anthony Mason Reflects on Judging in Australia and Hong Kong, Precedent and Judgment Writing' on Melbourne Law School, *Opinions on High* (28 July 2014) <http://blogs.unimelb.edu.au/opinionsonhigh/2014/07/28/barnett-mason/>.

[16] See Andrew Lynch, 'Dissent : Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review* 470, 492-502.

[17] Mark A Thurmon, 'When the Court Divides: Reconsidering the Precedential value of Supreme Court Plurality Decisions' (1992) 42 *Duke Law Journal* 419.

[18] Michael Coper and George Williams (eds), *Justice Lionel Murphy – Influential or Merely Prescient*, (The Federation Press, 1997); Ian Freckleton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (Thomson Reuters, 2009); and Scott Guy and Kristy Richardson, 'Justices Murphy and Kirby: Reviving Social Democracy and the Constitution' (2010) 22 *Bond Law Review* 26.

in the appraisal of Justices of the United States Supreme Court. The first Justice John Marshall Harlan was referred to as the Great Dissenter on account not only of 'the sheer number of his separate opinions, but for their importance in helping to shape the country's constitutional development'.[19] Undoubtedly, Harlan J's most famous dissent stands also as one of the Court's – his objection to the constitutional validity of the 'Jim Crow' segregation laws of the Southern states in *Plessy v Ferguson*.[20] But Harlan J's influence, on this and other constitutional issues, was far from apparent at the time, with the importance of his legacy only emerging several decades after his death. In the meanwhile, the title of Great Dissenter was even more memorably attached to Justice Oliver Wendell Holmes Jr, not due to his rate of dissent, which was modest, but because of his persuasive oratory when in disagreement with a majority of the Court on questions of great significance.[21] Since then, the title has been invoked in respect of others (including Harlan J's grandson who also served on the Court)[22] – but it clearly refers to more than the mere fact of disagreement, pointing also to a discernible judicial attitude or a philosophy which is plaintively or persistently raised against the mainstream of the Court's opinion.

A similar flavour is found in Australian appellation of the 'Great Dissenter', although it is arguable that popular usage tends to emphasise the quantity of an individual's dissent over more specific qualities of judicial style or outlook. So far this century, the Australian media have identified Kirby J and then Heydon J in quick succession as the Great Dissenter on the High Court.[23] In many respects the conferral is not inapt. There is no doubt that Kirby J and Heydon J were distinct outliers on the bench for at least some of their time at the High Court; both had two consecutive years towards the end of their respective tenures in which they dissented in over 40 per cent of cases while all other judges had a dissent rate of less than 10 per cent.[24]

More importantly, Kirby J and Heydon J appeared to embrace their outlier status, speaking candidly and persuasively about the value of judicial individualism and the importance of dissent.[25] Further, they each maintained a distinctive vision of the judicial role which not only underpinned their disagreement with the rest of the Court but was something they articulated

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19 Urofsky, above n 11, 105.

20 163 US 537 (1896).

21 Allen Mendenhall, 'Holmes and Dissent' (2011) *The Journal Jurisprudence* 679, 681. Schwartz links these two aspects of Holmes J's reputation, saying he would forego dissent except when in disagreement on 'great cases': Bernard Schwartz, *A Book of Legal Lists: The Best and Worst in American Law* (Oxford University Press, 1997) 107.

22 See, eg, Tinsley E Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* (Oxford University Press, 1992); Michael Mello, *Against the Death Penalty – The Relentless Dissents of Justices Brennan and Marshall* (Northeastern, 1996); and Thomas F Shea, 'The Great Dissenters: Parallel Currents in Holmes and Scalia' (1997) 67 *Mississippi Law Journal* 397.

23 See, eg, Chris Merritt, 'It's unanimous: Kirby still the great dissenter' *The Australian* (16 February 2007); and Harriet Alexander, 'Great dissenter takes a swipe at 'closed minds' of the bench' *Sydney Morning Herald* (16 March 2013).

24 Regarding Kirby J: Andrew Lynch and George Williams, 'The High Court on Constitutional Law – the 2006 Statistics' (2007) 30 *University of New South Wales Law Journal* 188, 196; Andrew Lynch and George Williams, 'The High Court on Constitutional Law – the 2007 Statistics' (2008) 31 *University of New South Wales Law Journal* 238, 245. Regarding Heydon J: Andrew Lynch and George Williams, 'The High Court on Constitutional Law – the 2011 Statistics' (2012) 35 *University of New South Wales Law Journal* 846, 855; Andrew Lynch and George Williams, 'The High Court on Constitutional Law – the 2012 Statistics' (2013) 36 *University of New South Wales Law Journal* 514, 522.

25 See Kirby, above n 3; J D Heydon, 'Threats to Judicial Independence: the Enemy Within' (2013) 129 *Law Quarterly Review* 205; J D Heydon, 'Japanese War Crimes, Retroactive Laws and Mr Justice Pal' (2011) 85 *Australian Law Journal* 627.

at length in public speeches and articles.[26] Lastly, both took full advantage of the liberty that is afforded the judge writing alone in dissent, free from the deadening effects of compromise and the responsibility to lay down the law with colleagues in the majority, to compose highly memorable opinions replete with 'passages of great force, eloquence, and ardor'.[27] Justices Kirby and Heydon proved to be highly adept at delivering what, in the former's judgments, were referred to as 'kicks' against the positions adopted by their colleagues.[28]

In Kirby J's case, his biographer, Professor AJ Brown, noted that the kicks became 'increasingly poetically drafted, and increasingly noticed', but they were 'primarily tactical weapons in his battle for public opinion'.[29] In chapter 17, Brown reflects on the different audiences that apparently explain the stark differences between Kirby J's dissent and that of Chief Justice Gleeson in the unsuccessful challenge to Australia's immigration detention policies in *Al-Kateb v Godwin*.[30] The appeal to an external audience is a noted feature of some judicial opinions.[31] While that strategy may be particularly understandable in a dissent,[32] Professor Melvin I Urofsky claims that, 'unless it can show convincingly how wrong the majority is, it will never – no matter how well it may be written – be more than an angry tirade or enter into the constitutional dialogue'.[33] In his contrasting of the opinions in *Al-Kateb v Godwin*, Brown explores whether the decision to write for the public sacrifices a dissent's appeal to the Court on a later occasion.

Justice Heydon may not have as deliberately employed 'kicks' but his personal style also tended to forthrightness; his flair for acerbity avoided the tendency to hyperbole of Justice Antonin Scalia's dissents, while being no less quotable.[34] In chapter 18, the authors examine Heydon J's very final judgment and highly distinctive dissent in the context of earlier disagreements with the Court and his broader advocacy of a particular conception of judicial legitimacy, going back over several years. Once again, the issue of audience is a clear focus.

Despite all that, it is unclear whether either Kirby J or Heydon J will be regarded as a Great Dissenter by future generations. Although, their reputation for judicial disagreement is undoubtedly cemented in a way that was not the case for the young Dixon J of the 1930s, the ultimate indicium of a Great Dissenter is to speak to posterity. The question of subsequent influence, rather more nuanced than may first appear, is discussed in the next section, but in

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26 See, eg, Michael Kirby, *Judicial Activism – Hamlyn Lectures, 2003* (Sweet & Maxwell, 2004); J D Heydon 'Varieties of Judicial Method in the Late 20th Century' (2012) 34 *Sydney Law Review* 219.

27 Alan Barth, *Prophets with Honor – Great Dissents and Great Dissenters in the Supreme Court* (Knopf, 1974) xii. See also Justice Antonin Scalia, 'The Dissenting Opinion' (1994) *Journal of Supreme Court History* 33, 42.

28 A J Brown, *Michael Kirby – Principles/Paradoxes* (The Federation Press, 2011), 391-92; 396, 399.

29 Ibid 392, 399. See also Gavan Griffith and Graeme Hill, 'Constitutional Law: Dissents and Posterity' in Freckelton and Selby, above n 3, 217, 217.

30 (2004) 219 CLR 562.

31 Lawrence Baum, *Judges and their Audiences – A Perspective on Judicial Behaviour* (Princeton University Press, 2006); Nuno Garoupa and Tom Ginsburg, 'Judicial Audiences and Reputation: Perspectives from Comparative Law' (2009) 47 *Columbia Journal of Transnational Law* 451.

32 Lani Guinier, 'The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent' (2008) 122 *Harvard Law Review* 4.

33 Urofsky, above n 11, 407.

34 'Scalia has perfected the "opinion as attack ad" rhetoric': Mark Tushnet, *I Dissent – Great Opposing Opinions in Landmark Supreme Court Cases* (Beacon Press, 2006) xxii. As one commentator remarked on Scalia J's criticisms of the majority reasoning in cases from the Court's 2014-15 Term: 'Welcome to the era of the judicial dissent as body slam': Dahlia Lithwick, 'Sunday Book Review: "Dissent and the Supreme Court" by Melvin I. Urofsky' *The New York Times* (21 October 2015).

the context of whether an individual is aptly acknowledged as a Great Dissenter, only time can really tell. Although an opinion of Kirby J and Heydon J each appears in this collection, it is just too soon to know whether these or their other prominent dissents will endure, let alone prevail.

In any case, this is a book about great dissents, not Great Dissenters. While we might assume the former emanate from the latter, this need not be so. For one thing, those who are mythologised as dissenters may leave a plentiful, but nevertheless thin legacy. Professor Mark Tushnet confronted this paradox when he explained the omission from his personal selection of great dissents of the United States Supreme Court any opinions by Justice William O Douglas.[35] Douglas was the Court's longest ever serving Justice, its most prolific dissenter, and was regarded as a Great Dissenter in his lifetime.[36] But Tushnet described Douglas J's dissents as diminished not only by a 'somewhat slapdash' writing style but more significantly, as 'curiously time-bound'.[37] In short, they were of little value beyond the immediate case itself. Professor George Williams has offered a similar explanation for Murphy J's lack of influence in the High Court's development of implied constitutional rights, despite his pioneering opinions in the area, most especially with respect to the freedom of political communication. Williams said that Murphy J's legal method 'ensured that his decisions would not likely be repeated and would not be capable of being developed'.[38] Two opinions of Justice Murphy do appear in chapters 11 and 13 of this collection, though his idiosyncratic style is certainly acknowledged in assessing the impact of his views and the very limited extent to which they have been attributed by judges who came after him.

Conversely, it is clear that great dissents have been written by judges who enjoy no particular reputation for dissent. This should not be nearly as surprising as the previous observation. Judges who are the intellectual leaders of the court may find themselves occasionally in the minority, but the qualities that explain their usual ability to attract, if not actually shape, majority support amongst their colleagues can hardly be expected to have deserted them. Whether due to the high regard in which the judge is held, or the strength of reasoning in the particular dissent (indeed, probably a powerful combination of both), such opinions may stand over time as important ones. Their place on the legal landscape must be acknowledged by later generations, even if they are never simply adopted. Reputation clearly plays a part here also, but in this instance it lends the dissent an authority that might otherwise be lacking. It is no accident that many of the chapters in this book nominate as 'great dissents' opinions authored not by a Great Dissenter, but simply by a great judge.

Perceptions of judicial greatness matter because reputation is inevitably an aspect of subsequent citation and influence.[39] This is so generally not just in respect of dissents, but the latter depend much more on an appeal to 'greatness' – or, more prosaically, 'correctness' – if they are to have some future relevance. It seems unduly cynical to suggest that 'greatness', even 'heroism', is occasionally constructed by Justices with a view to the redemption of a

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35 Tushnet, above n 34.

36 Schwartz, above n 21, 106.

37 Tushnet, above n 34.

38 George Williams, 'Lionel Murphy and Democracy and Rights' in Coper and Williams, above n 18, 63. See also George Winterton, 'Murphy: A Maverick Reconsidered' (1997) *University of New South Wales Law Journal* 204, 206.

39 Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21 *University of Queensland Law Journal* 7; and Russell Smyth, 'Judicial Prestige: A Citation Analysis of Federal Court Judges' (2001) 6 *Deakin Law Review* 120.

minority opinion to support their preferred outcome in a later case.[40] However, it is necessary to appreciate that greatness may take diverse forms. In his 2012 book *Laughing at the Gods: Great Judges and How They Made the Common Law*, Professor Allan Hutchinson expressed the following understanding of judicial greatness:

> Great judges seek to make a critical accommodation with the legal tradition by combining heresy and heritage in a playful judicial style; they refuse to be hampered by customary habits of judicial mind. For them, law is not something to be mastered. It is a sprawling tableau of transformation in which experimentation and improvisation are valued as much as predictability and faithfulness to existing rules and ideas. They see possibilities and make moves that others overlook. Great judges flaunt conventional standards in the process of remaking them; their judgments are the exceptions that prove the rule. And, once they have done what they do, others are less able to view the world in the same way again.[41]

So far as Hutchinson's description emphasises the quality of true independence of mind, both from the views of one's colleagues and the weight of existing legal authority, he identifies what is, obviously, essential to the practice of dissent. However, the passage resonates with a particularly romanticised view of judicial dissent[42] – and thus sits awkwardly with many of the opinions for which the claim of greatness is made in this book. Certainly, many of those opinions are innovative, some possibly bold, and the charge of heresy has even long been levelled at one of them.[43] But it seems an overstatement to say that they are the product of a refusal 'to be hampered by customary habits of judicial mind', while it is even more doubtful that any might be described as 'playful'. Hutchinson's apparent equation of greatness with radicalism is not necessarily inaccurate but it is incomplete and, in the Australian legal tradition, decidedly marginal. Consider, by way of contrast, Chief Justice Murray Gleeson's perspective on judicial decision-making as a tonic to Hutchinson's further suggestion that great judges 'take an almost daredevilish approach':[44] 'Only someone given to mock heroics or lacking a sense of the ridiculous could characterise differences of judicial opinion in terms of bravery'.[45]

What is striking about the dissents gathered here is how they collectively challenge the stereotype of great dissents as those 'that soar with passion and ring with rhetoric … that, at their best, straddle the worlds of literature and law'.[46] To be sure, the Australian canon of dissent *does* have examples of that sort, most famously Justice Herbert Vere Evatt's heartfelt opinion in *Chester v Waverley Corporation*, discussed in chapter 4.[47] But far more commonly disagreement is expressed with simple, we might even say, quiet effectiveness. Two otherwise sharply contrasting examples in the collection demonstrate this point. In chapter 9,

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40 Richard A Primus, 'Canon, Anti-Canon, and Judicial Dissent' (1998) 48 *Duke Law Journal* 243, 259-264.

41 Allan C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge University Press, 2012) 15.

42 Consider the parallels with Mendenhall's remark that, 'Holmes hammered out succinct, hard-hitting prose that smacked of urgency and playfulness at once… The language of Holmes's dissents was acrobatic': above n 21, 680-81.

43 Justice Dixon's opinion in *Re Foreman & Sons Pty Ltd; Uther v Commissioner of Taxation* (1947) 74 CLR 508.

44 Ibid.

45 Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 136.

46 Justice WJ Brennan, 'In Defense of Dissents' (1986) 37 *Hastings Law Journal* 427, 431.

47 (1939) 62 CLR 1.

Justice Ninian Stephen's dissent in *Henry v Boehm* from the Court's neutered interpretation of the constitutional guarantee of freedom from discrimination on the basis of state residency was delivered with zero theatricality.[48] This reflected the author's general sentiment that it was 'not a matter of great zeal and enthusiasm that my view should prevail'.[49] Yet prevail his dissent ultimately did, receiving unanimous vindication on the next occasion the High Court considered the question.[50] The tone of Stephen J's opinion is not markedly distinct from the dissent celebrated in chapter 15, that of Justice Dawson in *Langer v Commonwealth*.[51] In that case, Dawson J was not seeking to break away from the constitutional mainstream, but rather to urge a consistent application of a newly developed principle that in earlier decisions he had gone so far as to reject. The opinion has not been later approved, and as the authors of that chapter surmise, is most unlikely to ever be so. In their specific features and later influence the two dissents could not be more different, but they share at least this: they eschew the clichéd image of a 'great dissent' as a self-consciously radical act.

Where Hutchinson's reflection on greatness serves this collection better is his more straightforward statement that great judges 'are not afraid to take a stance and will not always get it right … Even if their views do not always prevail or carry the day entirely, they manage by dint of their example and efforts to change the legal world and the way others think about the judicial role'.[52] That claim, neutral as it is on matters of style, is a more accommodating idea and transposes easily to the specific topic of judicial dissent. So far as that view connects judicial greatness with a willingness to forge one's own path or resist the pull of conformity then dissent offers the clearest manifestation of this. But Hutchinson also refers to the change that the individual effectuates through his or her independence, a consideration that arose in the earlier mention of posterity. It is time now to consider impact.

IV Vindication, Influence and Importance

To be a great dissent, an opinion must hold some future importance. It may never be agreed with but it cannot be ignored. This is even true of what is probably the most controversial inclusion in this collection, the dissent of Chief Justice John Latham in the High Court's most iconic decision, *Australian Communist Party v Commonwealth*.[53] In chapter 6, George Williams acknowledges that Latham CJ's dissent 'has been eclipsed by the brilliance of the majority position' but suggests that it remains important in offering essentially a counter-factual of what might have been had the *Communist Party Dissolution Act 1950* (Cth) been upheld. In other words, the dissent remains relevant in underscoring the correctness of the majority decision. The preference for some aspects of Latham CJ's dissent that was expressed by Justice Ian Callinan over 50 years later only shows that the opinion has not disappeared from view.[54]

The question of a dissent's potential influence over the later development of the law will never be more lyrically expressed than by the United States' Chief Justice Evan Hughes:

[48] (1973) 128 CLR 482.
[49] Stephen J quoted in Michael Coper, *Encounters with the Australian Constitution* (CCH, 1987) 152.
[50] *Street v Queensland Bar Association* (1989) 168 CLR 461.
[51] (1996) 186 CLR 302.
[52] Hutchinson, above n 41, 14.
[53] (1951) 83 CLR 1.
[54] *Thomas v Mowbray* (2007) 233 CLR 307, 484-86.

> A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.[55]

In *Federation Insurance Limited v Wasson And Others*, a joint judgment of the High Court echoed this view by saying that a 'dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its wisdom'.[56] To imagine dissent as an appeal to 'the intelligence of a future day' is one thing, but to talk of it as judicial prophecy, of which there is a rich tradition in the United States,[57] obscures the important role which the dissent itself may play in prompting a later change in the law.[58] It seems preferable to describe dissents, where appropriate, as 'foreshadows of the law'[59] or 'prescient',[60] than as acts of prophecy.

Even then, taken as a whole this collection suggests that ultimate and unambiguous vindication is far from an essential criterion when looking for greatness in Australian dissents. Only in chapter 9 of this book does the express and lasting vindication of a dissent see the reversal of the court's earlier decision. Some other dissents have enjoyed later adoption but they in turn have fallen victim to new winds of change or are presently under siege from critics. Fascinating examples are provided in chapters 5 and 8, and in chapter 13 Jeremy Gans charts the rise and fall of judicial opinion on key aspects of the criminal trial over almost a century. Other dissenting views have been woven into the fabric of the law almost by stealth – either because they have, over time, emerged from the chaos of an earlier cases with no clear majority, as chapter 10 argues in respect of Mason J's influential opinion in the *Australian Assistance Plan Case*,[61] or because lower courts have been cautious about being seen to depart from the majority decision in favour of a view that was expressed in dissent. The latter is notable in the subsequent treatment of Murphy J's dissent on public interest standing, considered in chapter 11, and Mason J's account of the essence of a fiduciary relationship in dissent in *Hospital Products Ltd v United States Surgical Corporation*, discussed in chapter 12.

However, most of the time, the spirit of the law continues to brood rather than act. Some of the dissents in this book may yet meet with a favourable, albeit delayed, reception. As an examination of a path in the law that was not taken, chapter 16's consideration of Justice Anthony North's dissent in the Federal Court of Australia on native title extinguishment highlights the lost opportunities in this contentious area, so critical to Australia's relationship with its Indigenous peoples and redress of their dispossession by colonisation. The chapter concludes by noting recent signs that the High Court may turn back from the path upon which it set in the case of *Western Australia v Ward* over a decade ago.[62] Whether the Court will head in the direction that was signalled by North J or develop some other route remains to be seen. But it is not hard to appreciate that the existence of a clearly stated alternative may enrich the Court's reassessment of the previously dominant approach.

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[55] Charles E Hughes, *The Supreme Court of the United States* (Columbia University Press, 1928) 68.

[56] (1987) 163 CLR 303, 314 (Mason CJ, Wilson, Dawson & Toohey JJ).

[57] Barth, above n 27; Felix Frankfurter, 'Mr Justice Holmes and the Constitution – A Review of his Twenty-Five Years on the Supreme Court' (1927) 41 *Harvard Law Review* 121, 162; Percival E Jackson, *Dissent in the Supreme Court – A Chronology* (1969) 3.

[58] See Tushnet, above n 34, 99.

[59] Donald E Lively, *Foreshadows of the Law – Supreme Court Dissents and Constitutional Development* (Praeger, 1992).

[60] Coper and Williams, above n 18.

[61] *Victoria v Commonwealth* (1975) 134 CLR 338.

[62] (2002) 213 CLR 1.

A quite different role is played by the joint dissent of Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* which is considered in chapter 3. That opinion has been followed, but only by later dissenters who shared its authors' rejection of the orthodox interpretation of the right to trial by jury in section 80 of the *Commonwealth Constitution*.[63] Successive majorities have not been swayed from their acceptance of the traditional view. But the stream of dissent has had an influence all the same, prodding the defenders of the status quo to give a better account of their position. This cannot have been the ambition of the dissenting Justices, and looks like defeat rather than vindication, but in this way their dissents have exerted a positive influence. In their failure, there is still greatness to be found, if only because it offers such a strong illustration of the value of judicial disagreement.

The path not taken is also a feature of the dissents in chapters 2 and 14. In the relevant cases, the Court fractured over a question of the judges' fundamental constitutional vision. These are not small disagreements; the dissents present a challenging alternative. In chapter 2, Justice Edmund Barton's conception of judicial power in Chapter III of the *Commonwealth Constitution* is revisited a century after his opinion was delivered. Given the contemporary dissatisfaction with the complexity of Chapter III jurisprudence and its oft-noted practical inconvenience, Barton J's principled yet pragmatic commitment to legal pluralism rather than formalist rigidity holds strong appeal to modern readers. As chapter 14 shows, the joint dissent of Justices William Deane and John Toohey in *Leeth v Commonwealth* features its own highly original vision – of a constitutional principle of equality that would be supported through judicial review.[64] Amelia Simpson reviews the vitriolic reaction to the boldness of that vision before defending the opinion as a clear instance of the value of dissent as 'crucial to the vitality of common law courts' dialectical and transparent approach to decision making'. Considerable odds are stacked against the redemption of either of these dissents, but this does not negate the fact that both possess a certain grandeur as articulations of a parallel constitutional future. As such, their vindication would indeed be a triumph, but at the same time it would augment rather than establish their greatness.

V Great *Australian* Dissents

Having spoken to both the identification of opinions as 'dissents' and the diverse ways in which 'greatness' may be understood, it would be remiss to ignore the third basic qualifying criterion – that these are *Australian* dissents. As already noted, while one of the opinions is not delivered in an Australian case, all are authored by Australian judges and we may say, recognising the Privy Council's place at one time in the Australian court hierarchy, in an Australian court. That might be thought sufficient, but it is possible to argue that there are national characteristics discernible in these dissents.

Consider, for instance, Peta Stephenson's discussion of Mason J's opinion in the *Australian Assistance Plan Case* on the scope of the executive power of the Commonwealth as the national government in the Australian federation. Stephenson places this dissent firmly in the historical context of the loosening of Australia's ties to the United Kingdom in the final decades of the 20th century. Another example is provided by Sean Brennan's focus on judicial disagreement in native title law, as the courts confront the reverberations of the *Mabo*

[63] (1938) 59 CLR 556.
[64] (1992) 174 CLR 455.

decision[65] – a unique legal, social and cultural turning point for Indigenous Australians and their relationship with the state.

Different evidence of an Australian sensibility appears in Evatt J's evocation of the settler's dread of losing a child in the bush in his dissent awarding Mrs Chester damages for nervous shock upon the death of her son. Barbara McDonald discusses "the lost child' as a recurring motif in Australian literature' and artworks in her reflection on Evatt J's dissent. This aspect of the national psyche also goes a long way to explaining the Australian public's fascination with the legal ordeal of Lindy and Michael Chamberlain following the tragic taking of their daughter Azaria by a dingo at Uluru in 1980. In chapter 13, Jeremy Gans contrasts the three very different minority views in the Chamberlains' unsuccessful High Court appeal against conviction.

More generally, it should be very apparent from the discussion above that the dissents assembled here are of a different ilk from those which might comprise a similar collection in another country. This is most obviously so when one considers the opinions that regularly feature in American compilations of 'great dissents'.[66] There are a number of reasons for this. One already canvassed is simply the different practices of judgment delivery between the two jurisdictions and one effect of seriatim opinions being often to render the writing of a dissent a far less deliberate and self-conscious exercise than in the United States. This in part seems to account for differences in style and tone. But additionally, the centrality of the Bill of Rights in America's political and social discourse ensures that many of the Supreme Court's decisions are assured of a much wider audience outside the court and the particular parties to litigation. The dominance of rights questions before the Court lends itself to grand rhetoric and invests many decisions, concerned as they often are with protest, religion, race, sex, life and death, with an obvious dramatic potential.

The Australian setting and mood is different. But it is a mistake to assume that by comparison it is dull. Despite the lack of a national bill of rights supported by judicial review, many of the cases in this book squarely concern civil liberties – the freedoms of political speech and association, protection from indefinite detention by the state, freedom from discrimination, and the right to trial by jury. Others focus on the rights of the accused in criminal proceedings. The deeper distinction with the United States lies in the more subtle, even elusive, way that judicial disagreement in Australia exerts an influence upon the law. This undoubtedly makes for less theatricality as a general rule and, as a consequence, dissent is not so heavily mythologised in Australian legal culture.[67] This is despite the fact that the rate of dissent in the High Court over the last four decades has been more on par with that of the United States Supreme Court than with the final courts of Canada, South Africa and the United Kingdom.[68] This book amply demonstrates that the more subdued complexity and variety of judicial dissent in Australia is no less fascinating than the American experience.

VI Matters of Opinion – and Omission

[65] *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

[66] See Barth, above n 27; Lively, above n 59; Schwartz, above n 21; Tushnet, above n 34; and Urofsky, above n 11.

[67] The same appears true in the United Kingdom where collections of significant dissenting opinions also bear little resemblance to the many American examples of the genre: see Neal Geach and Chris Monaghan, *Dissenting Judgments in the Law* (Wildy, Simmonds and Hill Publishing, 2012); and Frederick Reynold, *Disagreement and Dissent in Judicial Decision-making* (Wildy, Simmonds and Hill Publishing, 2013).

[68] Paterson, above n 6, 113.

Lastly, it is necessary to acknowledge that this book is obviously the product of the subjective opinions of its many contributors – they have chosen the dissents they wish to champion. Adopting a collective approach seemed a more robust way of devising such a list than through selection by a single author – which risks idiosyncrasy or repetition of the 'usual suspects'.[69] But inevitably, with the compilation of any list, there will be inclusions that others dispute and omissions that others decry. Stimulating debate about both is not unintended.

That said, at the workshop at which contributors presented and discussed earlier drafts of these chapters, there was discussion of particular opinions that could easily also be included in the pantheon of great Australian dissents. Amongst these were the minority opinions of Justices Isaacs and Higgins that were spectacularly vindicated in the High Court's pivotal decision on constitutional interpretation in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*.[70] The memorable dissents, over several cases in the early 1980s but culminating in *Commonwealth v Tasmania (Tasmanian Dams Case)*,[71] objecting to the expansion of the Commonwealth's powers to make laws with respect to corporations and external affairs were also noted as strong contenders for inclusion, as was Justice McHugh's dissent on the *persona designata* exception to the separation of judicial power in *Grollo v Palmer* in 1995.[72] The vast dissent of Callinan J in *New South Wales v Commonwealth (Work Choices Case)* – the longest opinion in the history of the Court – was also recognised as one with a claim to greatness, if only for its elegiac quality.[73] At a different time and with different contributors, these and other dissents might just as likely appear on a list of this kind.

Saying that in no way diminishes the claims that are made for the opinions that are featured in the chapters that follow. On the contrary, it emphasises that their nomination has been hard won and not without some agonising. The collection is a rich and diverse one – spanning almost a century of legal decisions with only the 1900s and the 1920s unrepresented. While, as might be anticipated, the bulk of the dissents are found in the decisions of the High Court, three other courts each contribute an opinion – the Privy Council, the Supreme Court of South Australia and the Federal Court of Australia. Only three dissenting judges appear on the list more than once – Justices Dixon, Mason and Murphy.

Ultimately, there is enormous variety in the Australians dissents gathered here and presented as great. It is impossible to view them as limited – whether as the product of particular judicial personalities, or to a specific era in Australian legal history, or as displaying a certain rhetorical or self-conscious style, or to having a similar effect upon the law's subsequent development. No two dissents are the same in even essential respects, excepting one common characteristic: they are not forgotten. Just why that is so I leave to the authors of each chapter to explain. But as a collection, the greatness of these dissents undoubtedly lies not only in their continued significance years after the cases that gave rise to them, but also in what they tell us about the work of Australian courts and the important benefits that judicial disagreement has brought to the evolution of Australian law.

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69 The latter danger is illustrated by the titles above n 66.

70 (1920) 28 CLR 129.

71 (1983) 158 CLR 1.

72 (1995) 184 CLR 348.

73 (2005) 229 CLR 1.