

Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts

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I Introduction

To an extent quite without parallel in its history, the judges of the High Court of Australia have recently engaged in a sustained public conversation about the way in which appellate courts decide cases. The central theme of this discussion has been the legitimacy and attractions of deliberative processes on a multi-member court. Specifically, the Court's members – supplemented by the views of senior retired judges – have focused on the extent to which tensions exist between an individual judge's duty to independently decide a matter and his or her membership of a collective decision-making body.

The catalyst for the recent bout of Australian introspection on this topic was the publication of a lecture delivered by Justice Dyson Heydon, on the eve of his retirement from the High Court, and which explained his uninterrupted delivery of sole-authored opinions over the last 18 months of his tenure.¹ With characteristic acerbity, Justice Heydon outlined the dangers presented to judicial independence by 'the enemy within' an appellate court – namely, the use of institutional practices geared towards a norm of joint judgment delivery and the influence of one's colleagues in producing artificial consensus. The surest defence against 'judicial herd behaviour' was, Justice Heydon concluded, the adoption of an unwavering commitment to writing alone.

The practice of delivering judicial opinions in seriatim – that is, by each member of the Court – is a venerable tradition of the common law.² To the extent that Justice Heydon's lecture included a consideration of the benefits of dissenting and concurring opinions as opposed to strict unanimity, it did not deviate from the extra-curial

1 JD Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205 (*The Enemy Within*). For Heydon J's record of decision-making in his final two years on the High Court, see Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2011 Statistics' (2012) 35 *University of New South Wales Law Journal* 846; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2012 Statistics' (2013) 36 *University of New South Wales Law Journal* 514.

2 M Todd Henderson, 'From Seriatim to Consensus and Back Again: A Theory of Dissent' [2007] *Supreme Court Review* 283, 292-303.

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