Who Are Judges Writing For?

VICKI WAYE*

Compared with judgments from other jurisdictions Australian judgments tend to be long and complex. Are the Australian judiciary writing for a different kind of audience from their judicial counterparts elsewhere? This article explores that question and also considers the style of modern legal communication in Australia more broadly.

JUDGES are very concerned about the way their judgments, which constitute their chief mode of communication with the public, are written and perceived. This is confirmed by the frequent judgment writing workshops that judicial officers are required to attend and the amount of published literature on the topic of judgment writing, much written by judges themselves.[1] The published literature canvasses two broad if somewhat conflicting themes: (i) transparency and accountability of judicial reasoning; and (ii) concern regarding the length and complexity of judgments. Both themes are connected to the rule of law and access to justice. On the one hand, the rule of law mandates that the basis for judicial decision-making should be clear, independent, rational and lawful.[2] Given the supremacy of the law as a means for defining access to rights, obligations and resources, and in defining the relationship between individuals, between individuals and commercial entities, and between individuals and the state, ensuring that information about law is freely available and that access to the machinery of the justice system is universal are crucial requisites for a fair and just society. On the other hand, lack of clear understanding about the law and how it is applied breeds corruption, undermines governance and encourages unlawfulness.

---

* Professor of Law, University of South Australia.

1. Eg, M Kirby 'On the Writing of Judgments' (1990) 22 Aust J Forensic Sciences 104; RA Posner 'Judges' Writing Styles (And Do They Matter?)' (1995) 62 U Chi L Rev 1421; J Doyle 'Judgment Writing: Are There Needs for Change?' (1999) 73 ALJ 737; RJ Aldisert, *Opinion Writing* (Bloomington: Author House, 1990); JJ Spigelman, 'Reasons for Judgment and the Rule of Law' (Paper presented at the National Judicial College, Beijing and the Judges' Training Institute, Shanghai, 10 Nov 2003).
2. M Duckworth, 'Clarity and the Rule of Law: The Role of Plain Judicial Language' (1994) 2 Judicial Review 69, 88.

Nevertheless, it is possible to have too much of a good thing. Over-production of judicial reasons can result in lack of clarity and hinder understanding to the point where the law becomes inaccessible except for a small group of elite legal specialists. Furthermore, as our common law system is rooted in precedent, where unnecessary prolixity and density occurs in apex court decision-making this has profound implications for the judicial efficiency of all courts as well as those in the community responsible for legal compliance.

Compared with the decisions of apex courts from other common law jurisdictions, Australian High Court decisions are long and complex. Indeed, throughout Australia, a style of judgment writing has developed which encourages the lengthy recitation of facts, pleadings, and evidence, as well as amplified explication of reasoning accompanied by extensive discussion of numerous sources of precedent and commentary. Transparency and accountability are the justifications proffered by Australian judges for this particular style of opinion writing.[3] However, there is no reason to expect that the same considerations should not apply in other common law jurisdictions. Yet the balance between conciseness and excess is drawn very differently in jurisdictions such as the United States and Canada. Ideally, the balance between conciseness and amplification ought to be determined by the intended audience of the judgment. One has therefore to ask whether the Australian judiciary are writing for a different audience to their judicial counterparts elsewhere.

This article examines the Australian judgment writing style, and in particular considers the penchant for elaborated reasoning, noting that over a relatively short period Australian judgments have grown substantially longer. The article considers the reasons for this development. The article then compares Australian High Court judgments and judgment writing style with the judgments of the United States and Canadian Supreme courts. Reasons for the different approaches to decision making are discussed including historical judicial practices and current political constraints that operate to render the Australian High Court more sensitive to criticism of a lack of a mandate for judicial policy-making and more eager to demonstrate that its decision-making is fully justified according to law. Finally, the article makes suggestions that will enable Australian High Court judgments to be more easily digested by the community to whom they ought to be addressed.

AUSTRALIAN JUDGMENT WRITING STYLE

At its heart, Australian judgment writing is a form of rhetoric. It is a communication both expository and directive, designed to persuade agreement with the outcome it

3. M Kirby, 'Appellate Reasons' in G Blank & H Selby (eds), *Appellate Practice* (Sydney: Federation Press, 2008); G Downes, 'Writing Reasons for Judgment or Decision' (Speech delivered to the Administrative Courts of Thailand, Thailand-Australia Mature Administrative Law Program, Bangkok, 3 May 2007); B Beaumont 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 ALJ 743.

embodies.[4] The rhetorical character of Australian judgments is emphasised by the advice often given to judges to write for the losing litigant.[5] When writing for the losing litigant there are two considerations:[6]

(a) Satisfying the losing litigant, and more importantly the litigant's legal advisers, that the judgment accurately reflects justice and the law; and, as a corollary,

(b) minimising the likelihood of appeal.[7]

From that perspective, the judgment operates as an analytical justification which illustrates step by inferential step how the judge arrived at the outcome. [8]

Judgments also provide justification for decision-making to the wider legal community comprised of lawyers, fellow judges, judges on lower or higher courts and legal commentators from the academy and from the media.[9] Speaking to the legal community through a written exposition of fact, law and argument promotes the judgment's legitimacy by ensuring that it sits within a framework of established law or, where the judgment constitutes an extension of the law, that the extension is a natural and logical increment or qualification.[10]

While acknowledging the impact of judgments upon the community, judges do not necessarily make adjustments in their writing style which take account of the broader community audience.[11] It seems many judges assume that the broader public will not read what they have written and that most of what the public knows

4. JJ George, *Judicial Opinion Writing Handbook* (Buffalo: WS Hein, 5th edn, 2007) 3; Posner, above n 1, 1422; PM Wald, 'The Rhetoric of Results and the Results of Rhetoric: Judicial Writings' (1995) 62 U Chi L Rev 1371; JB White 'Law as Rhetoric; Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) 52 U Chi L Rev 684.
5. J Raymond, 'The Architecture of Argument' (2004) 7 Judicial Rev 39; J Doyle 'Judgment Writing: Are There Needs for Change?' (1999) 73 ALJ 737, 737; Kirby, above n 1, 106. This advice is consistent with case law: eg, *Kelso v Tatiara Meat Co Pty Ltd* [2007] VSCA 267, [191]; *B v B* [2006] Fam CA 1207, [2]; *Boland v Yates Property Corporation* (1999) 167 ALR 575, 656–7..
6. MB Niv, 'The Undesirability of Detailed Judicial Reasoning' (1999) 7 European J Law & Econ 161, 164.
7. DA Hoffman, AJ Izerman & JR Lidicker, 'Docketology, District Courts and Doctrine' (2007) 85 Wash U L Rev 681, outlining a broad ranging study of thousands of cases from four jurisdictions which found that judges publish lengthier, more reasoned judgments in commercial cases where there is a higher risk of appeal than in cases where the risk of appeal is slight.
8. George, above n 4, 25.
9. Lord Hope of Craighead, 'Writing Judgments' (9th annual lecture to Judicial Studies Board, London, 16 Mar 2005); E Campbell, 'Reasons for Judgment: Some Consumer Perspectives' (2003) 77 ALJ 62; NA Wanderer 'Writing Better Opinions: Communicating with Candor, Clarity, and Style' (2002) 54 Maine L Rev 47, 53; W Gibson 'Literary Minds and Judicial Style' (1996-97) 6 Scribes J Leg Writing 115, 124; Posner above n 1, 1429.
10. Wanderer, ibid 49.
11. P Horwitz, 'Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law' (2000) 38 OHLJ 101; Gibson, above n 9, 124; A Mikva, 'For Whom Judges Write' (1988) 61 S Cal L Rev 1357; Kirby, above n 1; Doyle, above n 1, 742.

about judicial opinion is provided by the media.[12] Moreover, for constitutional reasons, the community is an audience not easily invoked. Under the doctrine of the separation of powers, judges decide cases according to law and not according to community views or values. Invoking the broader community may imperil perceived judicial independence.[13]

In terms of judicial writing style, writing to the legal rather than the general community means that judgments commonly:

(a) are longer and contain more detailed discussion of the evidence and facts;

(b) contain more discussion of case law;

(c) contain more discussion of texts/articles/law reform papers and other academic material; and

(d) contain elaborated discussion and reasoning.

In other words, the judgment takes the form of a treatise speaking to an informed elite, exhibiting academic presentation techniques such as tables of contents, headings, paragraph numbers, extensive footnotes, charts and tables,[14] careful and precise use of language,[15]identifiable premises, methodological discussion of the facts and principles, systematic reasoning, extensive reference and deference to the pre-existing pool of knowledge, and an inbuilt means for future expansion of that knowledge.

STRUCTURE AND LANGUAGE

When drafting judgments, judges tend to follow a template.[16] The template typically contains the following:

(a) Introduction – how the case came before the court; identification of parties; jurisprudential nature of proceedings;

---

12. P Schulz, 'Are Courts On Trial? Who Appears for Their Defence? A Discourse Analysis of Politics the Judiciary and Media Reporting of Justice in Australia: Part 2' (2008) 30(2) Bulletin (Law Society of SA) 14; M Kirby, 'Law and Media: Adversaries or Allies in Safeguarding Freedom?' (2002) 6 Southern Cross Uni L Rev 1, 3.
13. E Maskin & J Tirole, 'The Politician and the Judge: Accountability in Government' (2004) 94 American Econ Rev 1034; E Handsley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 Syd L Rev183.
14. R Munday, 'Judicial Configurations' (2002) 61 Cambridge LJ 612; Lord Rodger, 'The Form and Language of Judicial Opinions' (2002) 118 LQR 226, 236; Craighead, above n 9, 6–7; M Kirby 'Appellate Reasons' (2007) 30 Aust Bar Review 3, 10–11.
15. MJ Morrison, 'Excursions into the Nature of Legal Language' (1989) 37 Cleveland State L Rev 271, 287.
16. Olsson AIJA, *Guide to Uniform Production of Judgments* (Melbourne: AIJA, 1992); George, above n 4, 181; RK Neumann, *Legal Reasoning and Legal Writing: Structure, Strategy and Style* (New York: Aspen Publishers, 2005) 29; GM Downes 'Decision Writing' (Paper delivered to the Superannuation Complaints Tribunal Members Conference, 1–2 March 2007).

(b) Issues of fact and law set out – an outline of the specific legal and factual issues necessary to determine the case;

(c) Facts found and evidence or other material referred to;

(d) Law – the law applicable to the factual and legal issues presented by the parties;

(e) Reasoning; and

(f) Result – the remedy granted or denied.

Compared with other genres of professional communication, which proffer brief non-specific descriptions of the setting for decision-making, applying the above template generally requires a lengthy, temporally driven exposition of much of the detail canvassed by the parties during the hearing of the case.[17] Further, discussion of the evidence proffered by the parties and the facts proven in the case will usually be more elaborated at first instance, that is, where the judge is hearing the case, than on appeal, where the appellate court reviews the legal correctness of the initial trial judge's decision. In the latter case, there will be a heavier focus upon the law and legal reasoning.[18] Overall the length of judgments does not necessarily relate to the judge's place within the court hierarchy. For example, the average length of a judgment delivered by single South Australian Supreme Court justices between October and December 2007 was 4,271 words, whereas the average length of a District Court judgment during the same period was 5,902 words reflecting the fact that a significant number of Supreme Court judgments delivered by single justices were ex tempore appeals from the Magistrates' Court. However, because of the Australian practice of delivering appellate judgments seriatim, appeal court judgments are generally much longer than the decisions of single judges.[19] For instance, the average length of the decisions of the High Court of Australia in 2007 was 21,354 words. Given that one of the primary roles of appellate courts is to establish a consistent meaning of the law and to guide future jurists and litigators the length and complexity of appellate court judgements is of particular concern.

LENGTH OF JUDGMENTS

A number of Australian commentators have observed a substantial increase in the length and complexity of judgments in modern times,[20] leading to concern that judges' capacity for communicating the law has diminished. Similar concerns regarding the length of judicial opinions have been expressed throughout the

17. J Lung, 'Discursive Heirarchical Patterning in Law and Management Cases' (2008) 27 English for Specific Purposes 424.
18. George, above n 4, 181, 313.
19. J Pierce, 'Institutional Cohesion in the High Court of Australia: Do American Theories Travel Well Down Under' (2008) 46 Cth & Comparative Politics 318, 319.
20. M Groves & R Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001' (2004) 32 FLR 255; E Campbell, above n 9, 63; Doyle, above n 1; B Beaumont 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 ALJ 743.

common law world.[21] The concerns are particularly acute in light of the nature of the modern public audience. Today's generation are pervasive users of collaborative communication technology and have indiscriminate access to virtually unlimited information.[22] To cope with information overload their reference libraries of choice are Wikipedia and Google.[23] They expect immediate interaction with information, become impatient with slow delivery and will quickly switch to databases which provide rapid and responsive answers to their questions.[24] They are multi-taskers engaged simultaneously with conversations on instant messenger services, watching television, listening to their iPods and reading. They are time constrained. They think about and process information in a completely different way to their predecessors,[25] preferring graphics to text, constructing their own understanding of events from a variety of information tools in mosaic rather than lineal fashion. They crave interactivity and have little tolerance for belaboured step by step logic.

Apart from making judgments available online there is scant evidence that the Australian judiciary have adapted their judgment writing style to accommodate the current generation. In fact, the increasing length of Australian judgments over time suggests an ever widening disjunction between the way judges write and the way information is absorbed and understood by the lay consumer. The increase in word length is exemplified by Figure 1 outlining the average word length of the decisions of the High Court of Australia over time.

Various reasons have been proffered for the increase in length including:

(a) Increase in the size, complexity and technicality of litigation

As outlined earlier, litigation has significantly grown in terms of outcome stakes, multiplicity of parties, problematic nature of the issues presented, and

21. Lady Justice Arden DBE, 'A Matter of Style? The Form of Judgments in Common Law Jurisdictions: A Comparison' (Speech delivered at the Conference in Honour of Lord Bingham, Oxford, 2008) G Lebovits, 'Short Judicial Opinions: The Weight of Authority' (2004) 76 New York State Bar J 64, noting that between 1960 and 1980, the average length of Federal Court of Appeals opinions increased from 2,863 words to 4,020 words; the average number of footnotes increased from 3.8 to 7; and the average number of citations rose from 12.4 to 24.7; Mikva, above n 11, 1358–60; R Forrester, 'Supreme Court Opinions – Style and Substance: An Appeal for Reform' (1995) 47 Hastings LJ 167, 177.
22. R Junco & J Mastrodicasa, *Connecting to the Net.Generation: What Higher Education Professionals Need to Know About Today's Students* (Washington: NASPA, 2007). The authors found in a survey of 7705 US college students that: 97% owned a computer; 97% used peer-to-peer file sharing; 94% owned a mobile phone; 76% used instant messaging; and 75% used Facebook. See further D Oblinger & J Oblinger *Educating the Net Generation* (Washington: Educause, 2005) ch 2.
23. S Carlson, 'The Net Generation Goes to College', *Chronicle of Higher Education*, 7 Oct 2005.
24. Obligner & Obligner, above n 22.
25. Ibid.

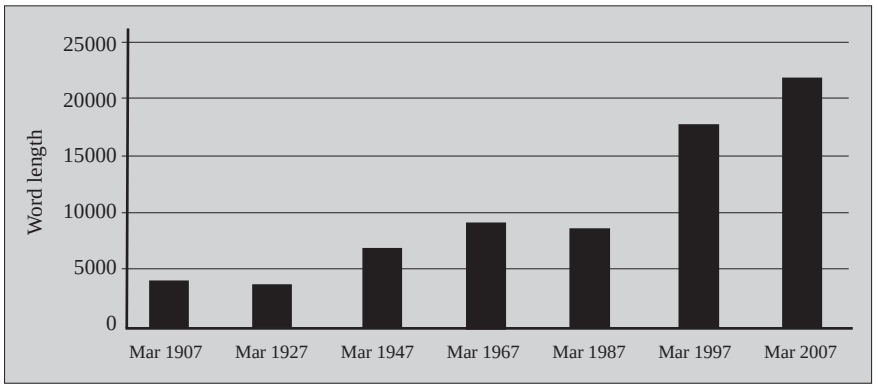

Figure 1: Average word length of High Court decisions in March from 1907 to 2007

the complexity and technicality of evidence adduced by the parties resulting in substantially increased litigation cost and longer, more detailed judgments.[26]

(b) Increase in the amount and indeterminacy of the law

Along with litigation, the quantity of law and therefore the intricacy of its application has substantially increased over the past 30 years. During that period the law has transformed from formalised, acontextual rules to more complex standards highly situational in operation which require complicated and detailed discussion as to their application and the justification for their application to specific scenarios.[27]

(c) Increase in the amount of written evidence and argument

We live in a 'digital' world where virtually every commercial communication is documented, digitised and stored within highly sophisticated knowledge management systems forming a gigantic repository of resources that litigating parties may later call upon as ammunition for their respective cases. When drafting their judgments, judges are required to sift through these repositories, discriminate between the valuable and non-valuable, and incorporate the relevant into their reasoning. As the amount and availability of commercial documentation increases so too does judgment length.

---

26. Victoria Law Reform Commission, *Civil Justice Review Report* (2008) 3.1; JF Henry 'The Courts at the Crossroads: A Consumer Perspective of the Judicial System' (2007) 95 Georgetown LJ 945; G Orr 'Verbosity and Richness: Current Trends in the Craft of the High Court' (1998) 6 Torts LJ 291. See further comments of the New South Wales Court of Appeal in *Digi-Tech (Australia) Ltd v Brand* [2004] NSWCA 58, [282].
27. P Schuck 'Legal Complexity: Some Causes, Consequences and Cures' (1992) 42 Duke LJ 1, 10; Orr, ibid 292.

Furthermore, as dependence on juries as the fact finders in disputes has significantly decreased, increasingly witness testimony and argument are now tendered in written form.[28] This too can also increase judgment length as written excerpts from testimony and argument can be more easily transplanted into judgments.[29]

(d) Increase in the amount of and access to legal information

One reason why there is lengthier discussion of case law contributing toward an overall increase in the length of modern judgments is the ease with which immense amounts of legal information including case law, statutes and legal journals from around Australia and the world can be accessed, downloaded and incorporated into judgments via databases such as AUSTLII and other such sources.

(e) Technological improvements in word processing

Some have accused the word-processor of being the responsible agent for the increased length of judicial opinions.[30] Word-processors permit cutting and pasting of large amounts of material into a template and consequently draw the author's attention away from producing a concise and comprehensible communication.

The approach of appellate courts to the sufficiency of reasoning has also been a contributing factor. Appellate courts have consistently held that reasons accompanying a judgment must be intelligible and disclose in sufficient detail how the judge resolved issues of law and fact.[31] Consequently, it is not enough for a judgment to state that certain witnesses were preferred to others when resolving factual issues. The reasons for preferring one witness over others or for preferring or rejecting other divergent forms of evidence must also be published. The extent to which the divergent evidence is accepted must also be outlined.[32] Similarly, where the law itself is unclear sufficient explanation must be provided indicating why the judge interpreted the law in the manner applied him or her.[33] Nonetheless, it has been recognised that overly extensive reasoning may mask significant issues and make important findings of law and fact difficult to detect.[34] Consequently, trial judges have been counselled against:

---

28. Hamilton J, 'Civil Procedure Reform: Gradualism or Revolution?' (2005) 17(7) Judicial Officers' Bulletin 55.
29. Groves & Smyth, above n 20, 263.
30. M Tushnet, 'The Supreme Court as Communicator: Carter's Contemporary Constitutional Lawmaking' (1987) 12 Law & Social Inquiry 225, 227; Groves & Smyth, above n 20, 265.
31. *Soulezemis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Harling v Hall* (1997) 94 A Crim R 437; *R v Power* (2003) 141 A Crim R 203; *Hunter v Transport Accident Commission* [2005] VSCA 1; *Major Engineering Pty Ltd v Helios Electroheat Pty Ltd* [2006] VSCA 107, [18].
32. *El-Tarraf v Franklins Ltd* [2001] NSWCA 463.
33. *Hunter v Transport Accident Commission* [2005] VSCA 1, [21]–[22].
34. *Digi-Tech (Australia) Ltd v Brand* [2004] NSWCA 58, [282]–[285] commenting critically on a first instance judgment of 778 pages with over 100 pages of cross-referenced appendices.

(a) mechanical reproduction of large tracts of submission and evidence;
(b) scattering of findings among discursive discussion;
(c) appending cross-referenced documents to judgments; and
(d) expressing every line of thought and reasoning.[35]

Despite this, lengthy rather than pithy judgments are the norm.

APPELLATE JUDGMENTS

As noted earlier, the lack of a broader consumer perspective in judgment writing is most evident in Australian appellate decision-making. Compared with appellate courts from other countries, the Australian High Court writes the longest judgments. The comparative average length of judgments from appellate courts of various jurisdictions during 2007 is set out in Figure 2 below.

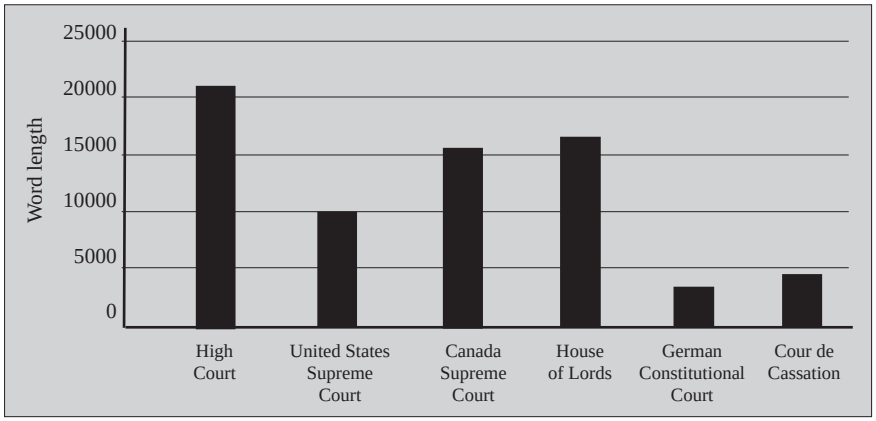

Figure 2: Average length of decisions, 2007

On the far right, is average output per case of two courts from two civil law countries:

(a) The German Federal Constitutional Court
(b) The French Cour De Cassation.

The output of these courts per case is substantially below that of common law courts. However, because of the substantial differences between civil law and common law systems, this article will not focus heavily on the contrast between Australian appellate decision-making with appellate decision-making in European jurisdictions. To do so would be comparing apples and oranges. Nevertheless, the following observations are pertinent:

35. Ibid.

(a) Since there is no question that the judge is making the law in a civil law jurisdiction but merely applying the law set out in a Code, the necessity for the degree of explanation and justification evident in common law judgments is lacking.

(b) Although past cases are influential in civil law jurisdictions and form part of the 'jurisprudence constante' they are not binding.[36] Consequently, there is no necessity for elaborated reasoning to guide and bind future courts and no necessity to make extensive references to past precedent.

(c) The employment of strict deductive reasoning and the minimisation of judicial policy-making reduce the scope for dissent within appellate judgments. In most civil law countries appellate judgments are delivered by the court as a whole not seriatim. In some countries dissents are prohibited.[37]

Such strong cultural and historical divergence regarding the place of judge made law in the legal system does not apply when comparing the decisions of the Australian High Court with decisions from the Canadian and United States' Supreme Courts. One still might ask, therefore, why the Australian High Court is particularly prolix compared with decisions from the same legal culture and similar federal constitutional context. The Figure 3 below indicates comparative judgment length over time.

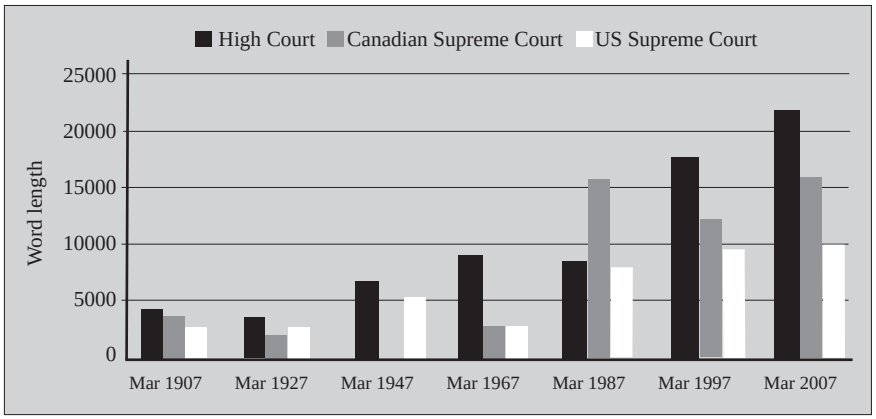

Figure 3: Average length of decisions in High Court of Australia, Canadian Supreme Court and United States Supreme Court, March from 1907–2007

36. V Fon & F Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26 Int'l Rev Law & Economics 519.
37. M Kirby 'Judicial Dissent – Common Law and Civil Law Traditions' (2007) 123 LQR 379, 382.

The figure confirms that each jurisdiction is producing lengthier judgments, especially over the last 20 years, and that the apart from 1987[38] when it was surpassed by the Supreme Court of Canada, the High Court has consistently produced the lengthiest judgments.

One reason that High Court judgments are longer and more difficult to interpret than other common law courts relates to the historical practice of delivering judgments seriatim rather than delivering an opinion of the court as a whole. When judgments are delivered seriatim each judgment is written independently and so each judgment comprises an individual account of the case, the reasoning employed and the legal material relied upon to support the position taken by each judge. Arguably, however, such judicial individualism duplicates judicial effort and prevents the court communicating with a clear and focussed voice.[39] Consider the High Court's decision in *New South Wales v Lepore*,[40] a case involving actions initiated against a number of state governments by pupils injured as a result of sexual assaults by teachers in the state governments' employ. The major legal issues in the case were whether the state governments were responsible to the pupils for their injuries as a result of a non-delegable duty of care or whether the state governments were vicariously liable for the criminal acts of their teaching staff.

Seven justices heard the appeal. Between them they delivered 6 judgments totalling 47,352 words. All of the justices agreed that school authorities owed pupils a non-delegable duty to ensure that reasonable care was taken to avoid harm, but a majority (Gleeson CJ, Gummow, Hayne and Callinan JJ) were unwilling to extend the concept of the non-delegable duty of care to cases involving intentional harm. Six of the justices (Gleeson CJ, Gaudron, Gummow, Hayne, Kirby and Callinan JJ) preferred the question of liability to be resolved according to principles of vicarious liability. Of these justices three (Gleeson CJ, Gaudron and Kirby JJ) believed that it might be possible to hold a school authority vicariously liable for sexual assaults committed by teaching staff, especially in cases where it could be established that there was a risk that this kind of behaviour might occur – for example, where the pupil resided in a boarding school and the teacher took on a parental role. The other three justices (Callinan, Gummow and Hayne JJ) did not think vicarious liability was warranted except in cases where the action was taken in pursuit of the employment or the employer's interests. Only one justice (McHugh J) determined that the state government was liable as a result of the principle of non-delegable duty. He refused to consider the question of vicarious liability.

The decision thus resulted in an unsatisfactory 3:3 split on the issue of how to apply the doctrine of vicarious liability to sexual assaults committed by teaching

38. This may well have been a statistical blip related to the decisions delivered during that particular month in 1987 by the Supreme Court of Canada.
39. M Gleeson, *The Rule of Law and the Constitution* (Sydney: ABC, 2000) 78 & 89; Campbell, above n 9, 68.
40. (2003) 212 CLR 511.

staff and other employees in a position where they care for others. While it is true that *New South Wales v Lepore* is only one example of the difficulties that can ensue when the practice of delivering judgments seriatim is adopted, there are others.[41] Certainly it appears that between the House of Lords, the Supreme Court of Canada, the Supreme Court of South Africa and the US Supreme Court, the High Court of Australia is the least likely to deliver a unanimous opinion.[42]

Although the practice of delivering judgments seriatim is nowadays largely historical and most current High Court decisions contain joint judgments,[43] the historical practice is nonetheless recent enough to impact upon writing style. Australian High Court justices still work far more autonomously from each other than their counterparts in other common law apex courts.[44] Systematic caucusing between High Court justices has been a relatively new phenomenon introduced by Chief Justice Murray Gleeson several years ago.[45] What is more, there is evidence that in Australia judicial conferencing tends to highlight and entrench differences of opinion among the justices instead of facilitating collaboration as it might elsewhere.[46]

Thus, even where a strong majority judgment is delivered, the judgment is likely to contain lengthy explication especially if the case is politically or socially controversial. *New South Wales v Commonwealth*[47] (the Work Choices case) is a good example. Despite the fact that a majority judgment was given by five justices of the High Court (expending 60,424 words) with two dissenting judgments, total judgment length was still 137,359 words. Albeit that the High Court was dealing with legislation itself 202,845 in length, the question raised by the case was not a particularly complex one, although concededly it was both legally and politically contentious. The High Court justices were required to determine whether the Commonwealth's legislative power extended to the regulation of

41. See M Bagaric & J McConvill, 'The High Court and the Utility of Multiple Judgments' (2005) 1 HCQR 13 estimate that while the majority of split High Court decisions involve only one dissenting judgment in a substantial minority of cases (20% in 2003) the High Court justices split closely either 4:3 or 3:2. It was also estimated that in 2004 the High Court was split 4:3 in 26% of constitutional cases: A Lynch & G Williams, 'The High Court on Constitution Law: The 2004 Statistics' (2005) 28 UNSWLJ 14.
42. R Wood, 'Institutional Considerations in Locating a Norm of Consensus: A Cross-National Investigation' (Paper presented at the MPSA Annual National Conference, Chicago, 3 Apr 2008).
43. Bagaric & McConvill, above n 41.
44. A Lynch, 'The Intelligence of a Future Day': The Vindication of Constitutional Dissent in the High Court of Australia 1981–2003' (2007) 29 Syd L Rev 195, 195; Kirby, above n 14.
45. High Court of Australia, *Annual Report* (1998–99) 5 stating that: 'In the past, there has always been informal discussion on such matters. The new series of meetings has formalised the arrangements to a greater extent and provided the occasion for the review of current thinking of the Justices concerning the cases reserved for decision. ... The discussions will not always secure agreement between the Justices and this is not their purpose. Even where important differences exist, discussion can help to clarify and refine opinions and reasoning.'
46. Pierce, above n 19, 333.
47. (2006) 231 ALR 1.

Australian employment contracts where the employer was a corporation. As we know a majority of High Court justices concluded that it did, thus providing the imprimatur for a short lived industrial revolution. Other lengthy politically or socially controversial cases include:

(a) *Commonwealth v Tasmania* (the Tasmanian Dams case)[48] – 120,181 words in length; determined that the Commonwealth had legislative power to prohibit clearing, excavation and other activities in the Tasmanian Wilderness World Heritage area, a major victory for environmental groups in Australia.

(b) *Mabo v Queensland No 2*[49] – 92,410 words in length; determined that English colonisation did not extinguish the land title of indigenous inhabitants.

(c) *Thomas v Mowbray*[50] – 85, 236 in length; considered the validity of 'control orders' under the Commonwealth's terrorism legislation.

It seems that the more important and controversial a case, the longer the exegesis required to justify its outcome. Ironically, therefore, the wider the repercussions the case is likely to have in the community the less likely that it will be digestible for the ordinary person and the more reliant the community will be on media reports, sometimes hostile, of what the justices intended. Given that the High Court sits at the head of the Australian court hierarchy and is responsible for settling major constitutional questions and for providing precedent to guide all other Australian courts the Court's prolixity has significant implications for our understanding of the meaning of the law and, in turn, for access to justice.

Compared with the length of decision-making in other common law jurisdictions, even the briefer High Court determinations where a consensus or close to consensus has been attained were excessively long. Examples are:

- *Betfair Pty Ltd v Western Australia*[51] – 18,836 words in length; held that legislation banning betting exchanges was unconstitutional.
- *Koompahtoo Local Aboriginal land Council v Sanpine*[52] – 37,824 words in length; examined common law basis for termination of contracts.

These judgments are considerably longer than the average length of judgments in the Canadian and United States Supreme Courts. For the lay person, this is all the more puzzling as a greater number of justices sit on each of the Canadian and United States Supreme Courts than the High Court.

48. (1983) 158 CLR 1.
49. (1992) 175 CLR 1.
50. (2007) 237 ALR 194.
51. (2008) 244 ALR 32.
52. (2007) 241 ALR 88.

US Supreme Court

Like opinions in the High Court, opinions in the US Supreme Court have been increasing over time, although not necessarily at a steady rate. For the first 20 years of its existence, the median length of Supreme Court majority opinions was 763 words, while in the last 25 years the median length of majority opinions in the Supreme Court had risen to 4,250 words.[53] Factors likely to influence overall length include the size of the majority writing the opinion (a bigger majority resulting in a smaller opinion); case complexity and case salience.[54] As outlined previously, similar factors appear relevant to the length of judgments in the High Court of Australia.

However, the writing style of judgments delivered by the United States Supreme Court and the Australian High Court is significantly different. Australian High Court justices adopt a highly legalistic style setting out the detailed background of the case before them followed by a lengthy and detailed discussion of prior case law from multiple jurisdictions, interwoven with reasoning heavily clothed in the language of logic and objectivity referred to earlier in this article. The contrast with more succinct American policy focussed discourse can be readily seen by comparing case law. Consider, for example, two decisions from each jurisdiction on the thorny issue of search and seizure. In *Kyllo v United States*,[55] evidence that marijuana had been grown in the defendant's house was excluded at trial because it had been discovered as a result of the warrantless use of a thermal imaging device. The Supreme Court commented:

> It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example, as the cases discussed above make clear, the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.[56]

The Supreme Court came to the conclusion that the line between permissible and impermissible snooping by police investigators stopped at the front door of the home. The decision was 7846 words long incorporating a 5:4 split among the Supreme Court justices. The majority and minority opinions were delivered as single opinions rather than seriatim from each justice and each opinion cross-referenced to the other making transparent the policy debate underlying the divergent positions between majority and minority. The majority opinion contained one quotation from an earlier case. The minority contained none. There were no references to foreign jurisprudence.

53. RC Black & JF Spriggs, 'An Empirical Analysis of the Length of US Supreme Court Opinions' (2008) 45 Houston L Rev 621, 634.
54. Ibid 660–6.
55. 533 US 27 (2001).
56. Ibid 33.

In Australia, where there is no constitutional protection against unreasonable search and seizure like the United States' Fourth Amendment, the philosophical conflicts between the right to privacy and responsible police investigation which pervade US jurisprudence are, by comparison, hardly visible. *Coco v The Queen*,[57] a decision of 12,304 words and therefore an exercise in brevity by High Court standards, provides a good contrast with the US style illustrated above. *Coco v The Queen* held that use of a listening device was unauthorised because the legislation allowing such use did not extend to gaining entrance to premises in order to install the device. In reaching that conclusion the decision set out: provisions of the relevant legislation in detail; material from the original decision authorising the insertion of the listening device; eight quotes from other cases in the majority judgment and 5 in another; and foreign jurisprudence. The tension between the right to privacy and the reasonable exercise of police investigative power underlying the statutory provisions examined by the Court was not mentioned.

As in the case of the Australian courts, writing style in the US Supreme has been largely influenced by historical practice. Unlike the Australian High Court and the Canadian Supreme Court which were initially subject to appeal to the Privy Council,[58] the US Supreme Court was always an apex court and never an intermediary court of appeal. Consequently, from very early on in its history, the US Supreme Court strove to develop an institutional identity as an important arm of government.[59] Whereas the Australian High Court and Canadian Supreme Court would not begin to develop and entrench an independent judicial tradition of sovereign common law and judicial review until the 20th century, the US Supreme Court began to do so from Chief Justice Marshall's time onward initially in the form of the aggrandisement of federal legislative power and later in the 20th century transmogrifying into the development of national constitutional values such as due process and equal treatment.[60]

Originally the US Supreme Court followed the custom of the English intermediate appellate courts and individual justices delivered their opinions in seriatim form. However, when Marshall was appointed Chief Justice in 1801 he insisted that the Court adopt the practice of delivering a single opinion.[61] Marshall believed that unanimity of opinion would strengthen the Court as a judicial unit and consolidate

57. (1994) 179 CLR 427.
58. Appeals to the Privy Council from the High Court were abolished in 1975: Privy Council (Appeals from the High Court) Act 1975 (Cth). Appeals to the Privy Council from the Canadian Supreme Court were abolished in 1949: British North America Act 1949.
59. Eg, *Martin v Hunter's Lessee* 14 US 304 (1816) 329 (Story J): 'The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them'.
60. A Bzdera, 'Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review' (1993) 26 Canadian J Political Sci 3, 8–10.
61. KM ZoBell, 'Division of Opinion in the Supreme Court: A History of Judicial Disintegration' (1959) 44 Cornell LQ 186, 193.

the Court's power.[62] Initially, as per the English practice, the opinions of the Court were delivered orally, but gradually in the early 19th century written opinions for official publication became the norm.[63] This model of unanimous written opinion where the eight associate justices accepted the guidance of the Chief Justice continued until the 1930s.[64] From that point onward, as the leadership of the court became less concerned with unanimity and the Court's jurisdiction was significantly reduced so that it heard more contentious and less routine cases, the number of concurring and dissenting opinions increased substantially.[65]

Although consensus is no longer the general rule with non-unanimous opinions, currently running between 70– 80 per cent over the last decade,[66] the culture of caucusing and bargaining for position among the justices, exchanging drafts of opinions and sharing the drafting of majority and minority opinions, appears to produce a much pithier, more synthesised style than that which exists in Australia. The greater degree of interaction among justices in the US Supreme Court, especially when drafting opinions, appears to lead to conceptualisation of the issues presented by each case on a broader, more integrated level. Policy debate is more upfront, not sublimated within a textbook account of legal development.[67] As a result, US Supreme Court opinions are less focussed than Australian High Court judgments upon lengthy and detailed discussion of prior case law; case law from other jurisdictions; the procedural history of the case; the evidence adduced and reasoning applied in the case by earlier courts; and the arguments and counter-arguments proffered by counsel and other justices.

Apart from collegial practice, another reason why US Supreme Court opinions tend to be less detailed and riven with lengthy discussions about other cases, is that the US Supreme Court has a stronger mandate for policy discourse deriving from a longer established institutional power base than the Australian High Court.[68]

---

62. Ibid 194; LK Ray, 'The History of the Per Curiam Opinion: Consensus and Individual Expression on the Supreme Court' (2002) 27 J Supreme Court History 176, 182–3.
63. WD Popkin, *Evolution of the Judicial Opinion: Institutional and Individual Styles* (New York: NYUP, 2007) 84
64. R Smyth, 'Historical Consensual Norms in the High Court' (2002) 37 Aust J Pol Sci 255, 257; Ray, above n 62, 178ff.
65. TG Walker, L Epstein & WJ Dixon, 'On the Mysterious Demise of Consensual Norms in the United States Supreme Court' (1988) 50 J Politics 361.
66. Black & Spriggs, above n 53, 633.
67. In DH Gruenfeld, 'Status, Ideology and Integrative Complexity on the US Supreme Court: Rethinking the Politics of Political Decision Making' in JM Levine & RL Moreland (eds), *Small Groups: Key Readings in Social Psychology* (London: Psychology Press, 2006) 137. See further HT Edwards, 'The Effects of Collegiality on Judicial Decision Making' (2003) 151 Uni Penns L Re 1639, 1684–5, arguing that collegiality produces better quality decision making because the rigorous exchange of views among judicial brethren enriches the deliberative process.
68. D Bennett, 'Damn It, Let Them Do It!' (Paper presented at the Constitutional Law Conference, Gilbert + Tobin Centre of Public Law, 2006), stating that the High Court was 'significantly more constrained, far less political, than its American counterpart. Without denying that there is considerable scope for value judgments, I believe that the cases show that open area is narrower and the scope for legal norms to determine matters greater (than the Supreme Court).'

Indeed, the ideological dialectic between the majority and minority opinions of the US Supreme Court justices makes the policy discourse of Supreme Court justices highly salient. Moreover, the Supreme Court itself is keenly aware of this mandate and consequently sensitive to the manner in which its opinions are delivered. Chief Justice Warren, for example, alive to the social and political significance of *Brown v Board of Education*,[69] insisted that its 'opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory'.[70]

Although, constitutionally, the power of both courts to engage in judicial review is well entrenched and both enjoy high levels of legitimacy, justices in the Australian High Court go to much greater lengths to contextualise their decision making within an elaborated legal framework.[71] Nevertheless, it would be too simplistic to bifurcate the decision-making between the two courts as, on the one hand, entirely policy driven in the US Supreme Court, and on the other, solely dependent on legal factors in the Australian High Court. Obviously, judges from both courts consider legal and ideological values when deciding cases.[72] What is interesting to note, however, is the US Supreme Court's greater transparency when exploring the social and political consequences of its decision-making compared to the 'strict and complete' legalism which tends to disguise the policy preferences of the High Court.[73] As Zines notes, when analysed, in fact High Court decision-making is 'consistent with viewing law as a means of fulfilling social purposes'.[74] The higher degree of legalism exhibited by the High Court therefore suggests that the Court may be more responsive to the political tensions that can arise when its decision-making overrules the actions of government or state and federal legislatures than the US Supreme Court whose status, prestige and power have been more firmly cemented over time.[75] Importantly from the perspective of the initial question asked by this article, as a result of its greater transparency, the US Supreme Court speaks more to the general community and is less limited to an audience of the legal elite than Australian courts are.

The imprimatur for greater policy-making in the United States appears to be strongly embedded within a culture where 'the law is king'.[76] As a result of early revolutionary history later augmented by the opportunities for advancement presented by the vast and initially relatively ungoverned American frontier,

69. 347 US 483 (1954).
70. DM O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: Norton, 1986) 281.
71. D Solomon, *The Political Impact of the High Court* (Sydney: Allen & Unwin, 1992) 184–6.
72. DL Weiden, *Judicial Decision Making in Comparative Perspective: Ideology, Law and Activism in Constitutional Courts* (Thesis, University of Texas, 2007) 196–7, observing that ideological views play a significant role in High Court decision making.
73. L Zines, *The High Court and the Constitution* (Sydney: Butterworths, 2008) 606.
74. Ibid 608.
75. KT McGuire, 'The Institutionalization of the US Supreme Court' (2004) 12 Political Analysis 128, 140.
76. RA Ferguson, *Law and Letters in American Culture* (Cambridge: CUP, 1984) 11.

American culture is infused by hostility toward government encroachment upon individual freedom to pursue wealth and happiness.[77] The law in the United States is viewed as an integral means of protecting and promoting that freedom, and the courts an important theatre for legalising political questions surrounding those freedoms.[78] Conversely, there has never been the same level of distrust between the Australian people and its government nor the same strong adoption of individualism at the expense of communal values. Australians look to the state to protect and support their personal welfare.[79] State provision of infrastructure, a strong social welfare system, universal health care, and historically higher levels of support and protection of industry exemplify the importance of collective wellbeing in Australian society. As a result, government is not perceived as antithetical to the pursuit of individual opportunity and the need for courts to act as a forum to protect individual freedoms is not so strongly felt as it might be in the United States. Instead, Australians tend to view their courts as official-centric and establishment in orientation.[80] Contrary to the position in the United States, Australian courts have been described as the weakest of the three arms of government.[81]

Another important point of difference between the two jurisdictions lies in the manner of judicial appointment. In the United States, appointments to the Supreme Court are made in a politically charged atmosphere, which encourages clear identification and commitment to political and ideological values.[82] By contrast, the appointment of Australian judges occurs behind closed doors. There is no public examination of the justices' views on controversial matters such as Commonwealth-State relations, indigenous rights or abortion. Ex post facto government justifications of appointment are largely based on the legal prowess of the candidate rather than their ideological track record.[83] While a number of High Court justices may have also had prior political experience, they are expected to eschew politics and ideology in favour of neutral legal values. United States Supreme Court justices are also expected to determine cases according to law, but, by comparison, they are not expected to act in an ideological vacuum. On the other hand, as Sir Owen Dixon has opined, 'Close adherence to legal reasoning is

77. L Henkin, 'Revolutions and Constitutions' (1989) 49 LA L Rev 1023.
78. SM Lipset, *American Exceptionalism: A Double-Edged Sword* (New York: WW Norton, 1996) 270.
79. Ibid.
80. Square Holes Ltd, *Courts Consulting the Community* (Adelaide, 2006) – a survey commissioned by the South Australian Courts Administration Authority found that although a majority of the survey's respondents expressed confidence in the South Australian courts a majority believed that large corporations and the wealthy were treated more favourably than others (p 4). Similarly although most were confident of receiving a fair trial less than half believed that the outcome of the case would be correct (p 14).
81. McHugh J, 'The Strengths of the Weakest Arm' (2004) 25 Aust Bar Rev 181.
82. Weiden, above n 72, 19; R Smyth, 'Explaining Historical Dissent Rates in the High Court of Australia' (2003) 41 Cth & Comparative Politics 83, 84–5.
83. See eg, L Yaxley, 'Susan Crennan Appointed to the High Court', *Radio National* (20 Sept 2005), interview with Attorney-General Phillip Ruddock, emphasising that the appointment was made on merit alone and that merit comprised 'legal excellence'.

the only way to maintain the confidence of all parties in Federal conflicts'.[84] Very rarely does the High Court appear to divide along ideological lines in the same manner seen in the US Supreme Court.[85]

Canada

Like their equivalents in the United States, justices from the Supreme Court of Canada engage in extensive caucusing before delivering a unanimous or majority/minority determination.[86] Consequently, as in the United States, appellate decision-making is a collegial rather than individualistic enterprise.[87] The judges meet, exchange drafts of their opinions, circulate memoranda, and make editorial changes with a view to reaching consensus where possible. As a result, McCormick estimates that between 1970 and 2002 unanimity was achieved in 73.7 per cent of the Court's decisions,[88] a much higher rate of unanimity than that experienced in the United States and certainly much higher than that of the Australian High Court.[89] According to McCormick, the greater degree of unanimity springs from the realisation that:

> [A] clear unanimous decision from the Court is the most effective way to resolve a significant legal issue. All judges know that disagreement clouds the authority of the Court's decision, and the more extensive the disagreement, the darker the cloud. All judges know that too much disagreement makes the Court look bad, if only because it leaves the losers wondering if they deserved to lose, and because it invites future litigation to see what the Court's position really is, especially after new judicial appointments.[90]

However, Belleau and Johnson report that between 1984 and 1999, after the implementation of the Charter of Rights, unanimity fell to approximately 50 per cent,[91] reflected in the very significant jump in judgment length from 1987 onwards. Nevertheless, unanimity appears to be undergoing a revival post-1997.[92]

---

84. (1952) 85 CLR xiv.
85. Weiden, above n 72, 146 but observing later in the thesis (196–7) that in fact the court does divide strongly on ideological lines.
86. P McCormick, 'Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada' (2004) 42 OHLJ 99.
87. Ibid; I Greene, C Baar, P McCormick, G Szablowski & M Thomas, *Final Appeal: Decision Making in Canadian Courts of Appeal* (Torronto: J Lorimer, 1998) 119 ff.
88. McCormick, above n 86, 107.
89. CL Ostberg, ME Wetstein & CR Ducat, 'Acclimation Effects on the Supreme Court of Canada: A Cross-Cultural Examination of Judicial Folklore' (2003) 84 Social Sci Q 704, 710.
90. McCormick, above n 86, 106.
91. MC Belleau & R Johnson, 'Judicial Dissent at the Supreme Court of Canada: Integrating Qualitative and Quantitative Empirical Approaches' (Paper delivered at the 1st Annual Conference on Empirical Legal Studies, Texas, 30 Jun 2006). See further Wood, above n 42, contending that the passage of the Charter of Rights had a 'significant abrupt and gradually decaying impact on the rates of concurrence (in the Canadian Supreme Court) after controlling for dissent rates.'
92. McCormick, above n 86, 109. See further Ostberg et al, above n 87, 710 commenting on the partisan ideological environment of the US Supreme Court compared with the Supreme Court of Canada.

The abandonment of seriatim opinion delivery is not quite so well established in Canada as it is in the United States. The Court's last genuine seriatim decision, *Hossack Estate v Hertz Drive Yourself Stations of Ontario* was delivered as late as 1965.[93] Nonetheless, since then, there have been occasions when appellate panels of the Supreme Court of Canada have delivered multiple individual opinions. Generally, however, where dissent has occurred it has been fragmented between groups of judges.[94] Unlike the US Supreme Court where majority and minority opinions tend to polarise on ideological grounds, a little over half of the dissenting opinions of the Canadian Supreme Court are split between two or more groups of judges upon an idiosyncratic rather than consistently ideological basis.[95] In that respect, dissenting judgments of the Canadian Supreme Court represent something of a half-way house between US and Australian dissenting judgments, also reflected by the difference in judgment length between the three courts.

Except for the fact that the judgments are written as a unanimous or joint judgment, in terms of drafting style, Canadian judgments are similar to those written by Australian justices. Judgments tend to canvass detailed procedural history of the case; statutory provisions (sometimes found in appendices rather than the body of the judgment); past cases; occasional (perhaps fewer) references to foreign cases; and occasional references to academic literature and law reform reports. Unlike Australian judgments, there appears to be more cross-referencing between majority and minority opinions making policy debate slightly more transparent, especially in cases where the Canadian Charter of Rights and Freedoms is raised. Thus, one immediate way of improving judgment length without departing too rapidly from current legal writing style might be to increase the practice of majority judgments in the Australian High Court and decrease the amount of duplication in minority judgments. Nonetheless, more effective communication with the broader public warrants changes in writing style in the future.

DOES OPINION LENGTH REALLY AFFECT ACCESS TO JUSTICE ANYWAY?

Defenders of the Australian judicial style may argue that adopting a more policy-oriented less legalistic approach to judgment writing and thereby reducing length and complexity will do little for improving access to justice and will only increase criticism that the courts are engaged in unwarranted activism.[96] The Australian judicial system is firmly grounded on the concept that the fairness and legitimacy of its decisions are promoted by reasoned opinions that demonstrate an elaborated application of the law. One wonders, however, whether a full survey of the legal landscape is necessary to achieve that goal. The experience of other apex courts like the US Supreme Court suggests not and that less legalism and more policy

93. McCormick, ibid 115.
94. Ibid 117.
95. Ibid 129; Weiden, above n 72, 197.
96. D Heydon 'Judicial Activism and the Death of the Rule of Law' (2003) 23 Aust Bar Rev110.

debate may simply make transparent what is currently non-transparent.[97] Evidence demonstrates that the more the public understand about the work of the courts and the more they read how the justices have framed their decisions with legitimising language implying judicial objectivity, the higher the level of esteem held by the public for the courts.[98]

In any event, writing in a more direct policy-oriented style and judicial activism are not one and the same. Judicial activism is a charge that relates to the substance of the decision, in effect, a complaint that the judgment has overreached the bounds of the judicial mandate by extending the reach of the common law into realms more properly addressed by the legislature or by overriding the political choices made by the legislature. Writing in a manner that is more easily understood by the community need not result in counter-majoritarian decision-making.

Though public disengagement appears likely,[99] there is little evidence that understanding of the law has diminished in Australia or the United States as the length of judgments has steadily increased. We may not need to worry about judicial verbosity if individual members of the community can access the benefits of elaborated reasoning through the mediation of legal experts. However, effective interpretation and dissemination of judge-made law by lawyers assumes two things:

(a) That lawyers themselves are able to address the information overload and complexity embodied within increasing judgment length;[100] and

(b) That legal information from lawyers whether acting in private practice or in community organisations is itself easily accessible by the broader community.

Both assumptions are likely to be over sanguine. Availability of legal advice and representation is not widespread, certainly not universal.[101] Further, given

97. Nonetheless statistics show that judicial invalidation of Congressional statutes reduces public esteem of the US Supreme Court: GA Caldeira, 'Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court' (1986) 80 American Pol Sci Rev 1209, 1222–3.

98. JL Gibson, GA Caldeira & VA Baird, 'On the Legitimacy of National High Courts' (1998) 92 American Pol Sci Rev 343, 345. Data gathered by this study 'suggests that courts generate specific support by becoming salient, by making their policymaking activity known to the mass public.' (p 356).

99. R Forrester, 'Supreme Court Opinions – Style and Substance: An Appeal for Reform' (1995) 47 Hastings LJ 167, 177.

100. Studies suggest that experts may not use information effectively when subject to information overload, even if they can access and process it more efficiently than non-experts: R Simnett, 'The Effect of Information Selection, Information Processing and Task Complexity on Predictive Accuracy of Auditors' (1996) 21 Accounting, Organizations & Society 699; J Shanteau, 'Competence in Experts: The Role of Task Characteristics' (1992) 53 Organisational Behaviour & Human Decisions 252.

101. JJ Spigelman, 'Access to Justice and Access to Lawyers' (Address to the 35th Australian Legal Convention, Sydney, 25 Mar 2007); R Atkinson, 'Access to Justice: Rhetoric or Reality' (Paper presented to Australasian Law Reform Agencies Conference, Wellington, 16 April 2004).

that complaints about length and complexity have largely emanated from within the legal community itself, it appears that many lawyers, intermediate and first instance judiciary find it difficult to assimilate High Court jurisprudence into the law that they are required to apply to the problems before them. As previously argued, our society is becoming increasingly legalistic and the need to understand the law is far more acute than it might have been when judgments were shorter and easier to read. The expansion of rights and benefits and the increase in the quantity and density of regulation over the last 25 years point to a need for greater clarity from the courts which interpret and apply the law rather than more verbosity.

Conversely, reducing length and complexity may have little impact on access to justice if the public remain unlikely to read judgments. However, American websites, such as 'Landmark Supreme Court Cases',[102] which are established as teaching resources to facilitate access to US Supreme Court jurisprudence by US school students, containing suggestions for learning activities, helpful diagrams of how cases moved through the court system, synopses of decisions and links to the full text of decisions suggest that making judgments more readable will generate public interest in the work of the court and improve access to justice. In the United States, access to US Supreme Court jurisprudence appears to be regarded as an important part of a broad liberal education encompassing understanding of institutional structures and civic responsibilities.[103]

Justice Michael Kirby, a strong dissenter within the Australian High Court, has argued that the individualism of Australian appellate reasons should be maintained to ensure that each judgment is a conscientious reflection of the judge's view of the law and not simply the product of 'group think' and compromise.[104] Individually crafted reasoning, it is argued, promotes transparency in the legal process and in the exercise of judicial power.[105] Reducing judgments to jointly written opinions will therefore undermine individual judicial accountability. Her Honour Lady Justice Arden provides an example, where despite her preference for a unanimous or majority opinion, it might be important to write an opinion to reflect a particular perspective.[106] She was called upon to write a judgment concerning a woman's ability to access fertility treatment. Although she agreed with the outcome of the majority of the Court, Arden LJ determined to write a separate judgment from a woman's perspective which she felt had not been expressed in the all-male judgment of her peers.

Others counter-argue that the delivery of individual judgments undermines the authority of the court as an institution, especially at the level of a court like the High

102. <http://www.landmarkcases.org>.
103. See eg, RS Leming, *Teaching the Law Using US Supreme Court Cases* (ERIC Clearinghouse for Social Studies, 1991).
104. Kirby, above n 14, 4.
105. Ibid 6.
106. Arden, above n 21, 6.

Court where the cases heard are likely to be controversial and irreversible,[107] and that the accountability of individual justices to the public is somewhat of a furphy given the strong entrenchment of the separation of powers and the guarantee of judicial tenure under the Constitution. They disagree that single or majority opinions suppress individual views. Rather, they contend that in a collegial environment, where consensus is the norm, divergent views are more likely to be given a full airing during the deliberative process. On the other hand, in an atomistic decision-making environment there is less opportunity for exchange of views and hence less opportunity for rigorous debate, review and revision.[108] Finally, one may ask, if the business of producing individual judgments leads to obfuscation and prolixity, to whom are individual judges accountable if their judgments cannot be read or understood by anyone apart from specialist legal counsel? If the function of judgments is to inform readers of the law, judges will fail in that task unless their words can clearly and concisely convey what the law is.

CONCLUSION

This article began by posing a question: just who are the Australian judiciary writing for?

Given the length and complexity of Australian judgments, they appear to be writing for each other. While judges may say they are writing for the losing litigant, who theoretically represents the community, in reality they are writing for the losing litigant's legal advisers who will examine the judgment in detail to determine whether the judgment should be accepted or appealed. At the highest point in the court system where appeals are no longer available, the High Court is essentially writing to all judges below it in the judicial hierarchy and to all those senior members of the legal profession who litigate within those courts.

The Australian judiciary are thus caught in a terrible irony. By endeavouring to be as individually transparent and accountable as possible to an informed but limited audience and justifying their decision-making with a lengthy and detailed thesis, the very accountability they seek is undermined because they are no longer speaking to the community. Even those working within the law are far from satisfied with the communication skills exhibited by their most senior courts.

This situation has arisen for a number of reasons:

(a) the growth in the quantity and density of the law itself;
(b) the growth in the amount of complex litigation;
(c) the exponential growth in digital documentation; and
(d) increased access to legal material from many jurisdictions.

---

107. G Shiffman, 'Construing Disagreement: Consensus and Invective in "Constitutional" Debate' (2002) 30 Political Theory 175, 180; McCormick, above n 86, 107 commenting on the decision of the Canadian Supreme Court to favour single majority opinions.
108. Edwards, above n 67, 1646–7.

We thus could say that the judiciary are merely a micro example of the general phenomena of information overload and complexity which pervade modern life.[109] But how might the judiciary respond to this problem?

First, the judiciary need to determine whether the community is their intended audience. Clearly, if lawyers and judges remain the target audience little change appears justified. But, if, as suggested, the courts want to enhance their role as an arm of government a re-orientation in writing style toward a broader more democratic audience is recommended.

How might this re-orientation be implemented? Ideally, the judiciary should strive for 'true' transparency and less legalism. Other jurisdictions demonstrate that it really is not necessary to incorporate detailed discussion of the evidence, arguments of counsel and other case law to arrive at a fully reasoned judgment which sits legitimately within the legal framework. If judges are guided by what the community needs to know the goal of making the judgment accessible and useful to the community should be met.

Second, at the appellate level, the appellate court should endeavour to speak with one voice. Where consensus is not possible, the dissentients should also try to speak with one voice. More joint judgments and less individual judgments would assist in clarifying the message. Furthermore, dissenting judgments should be crafted as such. Instead of drafting as if the judgment were to be delivered seriatim, it is recommended that dissenting judges confine themselves to addressing the basis for their dissent.

Presentation also matters. Judgments should be presented in a way which makes them easier to search and process the information they contain. How other organisations present information on the internet can be illuminating. A search of company sites shows a layering of information, where general summative information is found in the first few pages which can later be drilled down to more specific detailed information as the reader requires. Presenting judgments in the same way may assist by creating tiers of detail and complexity which can be utilised according to need to know. Organising information into groups and cascading hierarchies not only makes the information easier to access it also makes it easier to process and apply.[110] Information can also be manipulated in a way which enables the judiciary to frame and highlight what parts of the judgment they consider to be the most and least important from a variety of perspectives

109. M Castells, *The Rise of the Network Society: Economy Society and Culture* (Blackwell, 2000) ch 1.

110. DN Kleinmuntz & DA Schkade, 'Information Displays and Decision Processes' (1993) 4 Psychological Sci 221; JR Bettman, JW Payne & Staelin R,'Cognitive Considerations in Designing Effective Labels for Presenting Risk Information' (1986) 5 J Pub Policy & Marketing 1; DA Schkade & DN Kleinmuntz, 'Information Displays and Choice Processes: Differential Effects of Organization, Form, and Sequence' (1994) 57 Organizational Behaviour & Human Decision Making Processes 319.

– for example, an appellate court, the community, regulatory enforcement body or the losing litigant. [111] Groupings and hierarchical organisation can be further enhanced by advanced graphic organiser signalling such as tree diagrams which map the organisation of the text to follow.[112] Cross-referencing in the text by way of first level, second level and third level headings to these signalling devices will also improve their efficacy.

Presenting judgments in a hierarchical rather than narrative style is likely to necessitate the adoption of an inductive not deductive logical structure and therefore will require quite radical changes in judicial writing style. A deductive structure proceeds in ascending order, outlining the specific facts, evidence and issues and only later discussing the general principles which should be applied to those facts. Facts and surrounding material such as procedural history are generally laid out in specific detail and presented in chronological order rather than issue or topical sequence. When written in this manner, the judgment proceeds much like a detective novel.[113] The main legal questions and their resolution appear to be approached obliquely and the reader only understands where the judgment is going after digesting much background material. Most Australian judgments currently apply a deductive structure. However, while deductive structure constitutes a useful way to analyse a problem, it makes for ponderous reading and relies upon the reader being able to follow complex chains of inferential reasoning. On the other hand, an inductive structure presents information to the reader in descending order of importance. It begins with the main message and gradually expands upon that message with more detailed information, often presented in topic sequence instead of chronological order. Presented in distinctive hierarchies instead of a long chronological narrative the discussion and application of legal principle thereby becomes more easily comprehended by the reader.

If adopting an inductive hierarchical style is too radical, alternatively understanding of different segments of particularly lengthy judgment text could be enhanced by a short abstract at the start of each segment.[114]Judges may also wish to think about the use of executive summaries. Executive summaries help readers absorb the main message of the judgment without necessarily having to read through the judgment in detail.[115] Although editors of reports provide something akin to an executive summary in the headnote section of their reports, given the large number of unreported decisions in modern times and the lack of any significant policy discussion in the headnotes, an executive summary is still warranted.

---

111. L Lagerwerf, L Cornelis, J de Geus & P Jansen, 'Advance Organizers in Advisory Reports: Selective Reading, Recall and Perception' (2008) 25 Written Communication 53; Bettman et al, ibid 9.
112. Lagerwerf et al, ibid 57.
113. J Bowden, *Writing a Report: How to Prepare, Write and Present Effective Reports* (Oxford: How to Books, 7th edn, 2004) 61.
114. Ibid 58.
115. JE Sussams, *How to Write Effective Reports* (London: Aldershot, 2nd edn, 1991) 16–18.

Whatever strategies the judiciary adopt to make their judgments more accessible it is clear that they face a tremendously difficult task in finding the right balance between transparency and comprehensibility. This article has argued that currently in Australia that balance is skewed too far in favour of transparency. Incorporating the community into the reading audience to a greater extent by reducing prolixity and endeavouring to deliver a more focussed statement about the law will go some way toward democratising access to the law and consequently improving our system of governance.