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## More Than Just Precedent: Perspectives on Judgment Writing

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# **MORE THAN JUST PRECEDENT: PERSPECTIVES ON JUDGMENT WRITING**

THE HONOURABLE JUSTICE KATRINA BANKS-SMITH\*

## 1 INTRODUCTION

Notre Dame University is privileged to hold the Coram books of the late Honourable David Malcolm AC QC. Those books are a set of beautifully handwritten notes of trials and hearings before his Honour. It would be very rare these days for a judge to keep such a detailed record. Those notebooks are therefore an important piece of legal history, not just as a record of the particular trials but as a record of how judges work. I am very honoured to have been asked to deliver this fifth Memorial Lecture in tribute to David Malcolm's legacy, and inspired by those beautiful notebooks, I have chosen to talk about the written word and judgments as records.

But first I would like to say something about David Malcolm. I did not have the honour of knowing him. The only time I appeared before him was when I was admitted to the roll of practitioners in 1990. I regret that I am unable to speak first-hand of his attributes and qualities. They are, however, well recognised.

His professional record from Rhodes Scholar to Queens Counsel to Chief Justice of Western Australia was exemplary. As a barrister he appeared on many occasions before the High Court and the Privy Council. His judicial service included well-known highlights such as the quashing of John Button's murder conviction.<sup>1</sup>

His commitment to the community was broad, serving on many organisations. His commitment to education was enduring, as witnessed in the later years of his career by his service to this University as a Professor and Adjunct Professor of Law.

His legacy is recognised in particular by the naming of the David Malcolm Justice Centre in his honour, the building that now houses the Supreme Court of Western Australia and other offices vital to the administration of justice, including the State Solicitor's Office.

David Malcolm was also devoted to his wife Kaaren, and daughter Manisha, and they continue to be very much in the thoughts of those who recall his remarkable contribution. I acknowledge

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\* Judge of the Federal Court of Australia. (Speech, The Honourable David Malcolm Annual Memorial Lecture, The University Notre Dame Australia, School of Law, Fremantle, 9 October 2019).

<sup>1</sup> *Button v The Queen* [2002] WASCA 35.

Mrs Malcolm's presence here this evening.<sup>2</sup> I am also pleased to see students in the audience as in preparing this talk, I had students in particular in mind.

## II THE TOPIC

I am speaking today from the perspective of a civil judge. Leaving aside court time, the life of a civil judge is very much one of writing. For any decision of significance, written reasons must be given. Court time is in the main the interesting part, a theatre where the unpredictable is played out. Otherwise the role can be somewhat solitary, working away in chambers formulating thoughts, making decisions on evidence and writing.

The first part of this talk is about creating judgments. Some of the themes might be familiar. For example, what is the purpose of judgments? Who is the audience? How do judges write? What is revealed by different styles of writing? Some of this has been written about in detail and for those of you with an interest in how judges write, the Hon Michael Kirby's 1990 article 'On the Writing of Judgments' remains enlightening and current.<sup>3</sup>

But then in the second part, I would like to talk about the broader role of judgments, the life they might take on after delivery and their sometimes inadvertent role in recording social history.

I first started thinking about this topic when I came across a line in a book about American artists that commented on the extraordinary number of paintings in galleries of court room scenes, lawyers and jury debates. The author noted that this fascination is also reflected in literature about the law. In addition to art and literature, we can add movies, TV series and podcasts. Trials and true crime capture the interest and fascination of many, many people. I do not suggest that people are anywhere near as captivated by reading civil judgments.

But in their own way, judgments have a broader role in recording the history of a society than might be assumed. From the 19th century cases on disputed wills, expectancies, and improvident heirs and through the 20th century rise of industrial and consumer law, we have a written record of the changing face of society. I will make reference to some well-known and

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<sup>2</sup> I would like to thank Catherine Fletcher, Information Commissioner WA and member of the School of Law Advisory Board at The University of Notre Dame, for her invaluable assistance in providing archive materials relating to the Hon David Malcolm for the purpose of this talk.

<sup>3</sup> The Hon Michael Kirby, then President of the NSW Court of Appeal, 'On the Writing of Judgments' (1990) 64 (11) *Australian Law Journal* 691.

less well-known judgments from the last 50 years that reveal a record of sometimes the mundane and sometimes the more profound aspects of life in our community.

Sometimes the importance of a judgment as a record is only recognised through the lens of retrospectivity, but in other cases it may as well have been thumped down on the bench, rather than 'delivered', such is its immediate and obvious impact.

But first - to Part 1.

### III PART 1: CREATING JUDGMENTS

#### *A The Context*

As we know, judgments are records of the reasons for decisions. A judge has an obligation to find facts, record relevant findings of credibility, ascertain the applicable law and apply it in a method which exposes reasoning so that any rights of appeal can be exercised.

Courts are required to resolve conflicts and provide reasons to the parties. So most importantly, judges must write for the parties, but our precedent based system means the audience is potentially broader: beyond the parties, a judgment might bind other judges and it must permit application in broader or different factual circumstances.

From my perspective when sitting as a first instance judge, the primary aim is to write reasons that explain to the parties the outcome and address the issues they have raised. There is very rarely the luxury of time that might permit an attempt to add more generally to the jurisprudence of the law and write something of broader use. The reality in a busy court is that it is essential to focus on the issues between the parties and what the parties need to hear.

There is always the spectre of an appeal court hanging over us when we deliver a first instance judgment. On a day to day basis I try to write without undue concern about the appeal process. However, it would be artificial to assume that judges respond to their decisions being overturned with equanimity. I would suggest that most judges care deeply about their work and so naturally do not like being wrong - or, as some judges might see it, being considered by others to be wrong. However, the appellate process is vital in developing the law. It is also vital in correcting error and in that sense it provides a level of comfort to primary judges.

Writing at the appellate level is different. At that point the focus is very much on the law and whether there has been error below. Scrutinising the work of your fellow judge for error might

seem an unpalatable task, but generally speaking appellate courts undertake that task conscious of the difficulty of matters that come to them from a primary decision. Take for example the recent High Court decision in *ASIC v Kobelt*,<sup>4</sup> in which the High Court addressed whether particular conduct by Mr Kobelt in providing credit to Aboriginal people living in a remote community was unconscionable. Anyone who might think the answer was straightforward should reflect on the fact that there were five separate sets of reasons published and the decision in Mr Kobelt's favour was a 4:3 majority.<sup>5</sup>

There is also a practical caveat that limits the extent to which judges can indulge in the writing process. In his paper to which I have referred, Michael Kirby said:

Pressure upon modern judges - at first instance and on appeal - is, in most instances, much greater than it was in the case of their forebears. True, the High Court of Australia can now, by the requirement of special leave, control its workload. But for most judges, there is much less control. The backlog increases. Community and institutional pressure for speedier justice is relentless. The time for reflection, for careful planning, thoughtful research and for polishing prose, is strictly limited. And diminishing. It is in this world of unprecedented stress and pressure that most judges, today, complete their judgments.

I doubt that the position has improved since 1990. We must all do the best we can, and push our product out efficiently and carefully.

So all of those things are relevant to the context in which judges write. Now I am going to turn to the far more interesting question of style.

### B *The Question of Style*

Leaving aside the requirement to give reasons, there are no rules as to how an individual judge must write. Each judge brings their own legal, cultural and educational background to the task and it is inevitable that styles will differ.

Some prefer a succinct and clinical approach, and cavil with any attempt by judges to do more. Others take the opportunity to engage more generally, displaying knowledge of matters that go well beyond the issues at hand. It is perhaps the variety of approaches that makes judgment reading day after day a bearable and enjoyable task. The central task of recording the facts and the law might be predictable, but there are many tools or motifs used in writing that sometimes

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<sup>4</sup> *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18.

<sup>5</sup> The majority judgments were those of Kiefel CJ and Bell J; Gageler J; and Keane J. The minority was composed of Nettle and Gordon J, and Edelman J.

make it more interesting, and I will refer to five: the literary allusions; the swipes to the legal profession; the titbits for social media; the appropriate opportunity for entertainment; and the justified self-indulgence.

### *C Literary Allusion*

Perhaps unsurprisingly, Shakespeare continues to be the runaway winner as a rich source of inspiration for judges.

Over the last 50 years, Shakespeare has been referred to in more than a fleeting manner in over 64 superior court judgments. There is the occasional reference to a sonnet, but the most popular works are King Lear, The Merchant of Venice, Macbeth, Hamlet, Richard III and As You Like It.

In Owen J's 10,000 paragraph first instance judgment in the Bell litigation,<sup>6</sup> his Honour referred to not one but three different works of Shakespeare: Timon of Athens, Hamlet and Othello. I should add that Owen J includes many other references that disclose his enormous and enviable knowledge of the classics, history and religion.

This year Shakespeare was the source of renewed focus in the Federal Court, not only because of the Geoffrey Rush defamation trial.<sup>7</sup> To be fair, the subject matter in that case perhaps gifted the primary judge with the opportunity to quote King Lear and completely in context.

Perhaps less anticipated was this headline from the Australian Financial Review: 'Bard on side of court buttocks-flasher'.<sup>8</sup> This refers to Logan J's judgment in *Ogawa v Attorney-General (No 2)*,<sup>9</sup> in which the opening paragraph cites Portia's soliloquy on the quality of mercy from The Merchant of Venice in support of the potential for a royal pardon. Ms Ogawa, who holds a Doctor of Philosophy in Law, was jailed for contempt after flashing her buttocks when on trial.

The pickings are less rich when it comes to references to Australian authors or poets. Tim Winton, Richard Flanagan, Patrick White, Manning Clark and Christina Stead have scored a mention, but not quotes. Sally Morgan has been quoted in the context of Aboriginal history.

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<sup>6</sup> *Bell Group Ltd (in liq) v Westpac Banking Corp* (No 9) [2008] WASC 239 ('Bell').

<sup>7</sup> *Rush v Nationwide News Pty Ltd* (No 7) [2019] FCA 496 [1].

<sup>8</sup> Michael Pelly, 'Bard on side of Court Buttocks-flasher', *Australian Financial Review* (online 1 July 2019) <<https://www.afr.com/life-and-luxury/arts-and-culture/bard-on-side-of-court-buttocks-flasher-judge-20190625-p52197>>.

<sup>9</sup> [2019] FCA 1003.

There are also the odd quotes from Banjo Paterson, Marcus Clarke and Henry Lawson. There is clearly room for improvement by judges in this area.

### *D Swipes to the Profession*

There are then those judges who, having clearly withstood years of quiet frustration with the profession, allow things to finally reach a boil. Take for example, the occasion when Martin CJ of the WA Supreme Court, annoyed with a pleading strike out application, breathed life into the word 'pettifogging':<sup>10</sup>

In this case, I have reviewed the statement of claim and the objections to it and I have done so in the case management context to which I have referred. It is my view, that many of the objections which have been taken are pedantic and pettifogging in nature. In many cases, elucidating and resolving the objection would consume an amount of time and resources, which is entirely disproportionate to the benefit to be derived from that process in terms of the identification of the true issues which have to be met in the case.

Or consider the empathy-inducing catchwords of Hamill J in *R v Taleb (No 3)*:<sup>11</sup>

CRIMINAL LAW - Indictment - Amendment - Application made at the end of trial - Offence of engaging in conduct preparatory to foreign incursion offence - Complications of Criminal Code - Fault element not specified - Recklessness pleaded in original indictment - Prize for providing written submission on recklessness that made sense - Prize not claimed ...

### *E Titbits for Social Media*

Whilst law students and young lawyers in particular have long taken a special interest in sharing either hilarious or embarrassing moments before the court, and preferably the High Court, judges have certainly been feeding them quite a bit of material by way of amusing catchwords or one-liners in the last few years, spread enthusiastically by social media.

Catchwords that have been gleefully shared include this one from *State of New South Wales v Michael David Jones*:<sup>12</sup>

CIVIL LAW - continuing detention order - preliminary - hearing - amendments to legislation - nature of test at preliminary hearing - substantial body of evidence - rhubarb and apple crumble - no question of principle

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<sup>10</sup> *Barclay Mowlem Construction Ltd v Dampier Port Authority* [2006] WASC 281 [9].

<sup>11</sup> [2019] NSWSC 397.

<sup>12</sup> [2018] NSWSC 241.

Or the lovely opening line from Lee J of the Federal Court in *Oliver v Nine Network Australia Pty Ltd*:<sup>13</sup>

[1] Nothing good happens after two o'clock in the morning. Or another from Lee J, this time in *Reckitt Benckiser (Australia) Pty Limited v Procter & Gamble Australia Pty Limited*,<sup>14</sup> which concerned ongoing litigation about an advertisement for dishwashing detergent known as 'Fairy Platinum':

[5] The gentle rinse of dishwashing detergent is not reflective of the vigorous thrust of commercial rivalry between the protagonists. It is plain that the automatic dishwashing detergent market in which both RBA and PGA operate is highly competitive.

#### F 'Appropriate' Opportunity for Humour

There are some occasions where the subject matter really invites some humour. This is an area to be handled with care. Litigation is often one of the most stressful and financially draining experiences that people endure. The result has the potential to impact quite significantly. It is not a time for humour that might not be well received by a party.

However, it can be done appropriately. Take this detailed treatise on fish oil from Perram J in *Nature's Care Manufacture Pty Ltd v Australian Made Campaign Ltd*,<sup>15</sup> a case about whether fish-oil tablets were 'made in Australia' in circumstances where all ingredients were sourced overseas:

[21] I find that the fish oil imported from Chile smells unpleasant. I was provided with a sample of this fish oil as Exhibit MX-3 and have smelt it. It smells like a cross between stale fish and vinyl. My associate thinks it smells like semi-fermented grass cuttings revealing his more sophisticated nose. I have not tasted it but I am prepared to infer that it would be very unpleasant to consume even in small doses. I also accept that placing the fish oil in the soft-gel capsules has the effect of making palatable and flavourless a product which is essentially very unpleasant. It has another benefit too. By sealing the fish oil in the capsules the speed of oxidation is reduced and, along with that, the rate of deterioration in the fish oil caused by exposure to light. This is not the case with the liquid fish oil imported from Chile.

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[23] There is a related issue. Professor Barrow properly drew my attention to the phenomenon of 'burp-back'. 'Burp-back' occurs when a soft-gel capsule containing something malodorous such as fish oil is consumed. Once the capsule descends into the digestive depths of the stomach the soft-gel dissolves releasing its noxious payload

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<sup>13</sup> [2019] FCA 583.

<sup>14</sup> [2018] FCA 378.

<sup>15</sup> [2018] FCA 1936.



the odour of which, thus liberated, rises up the gullet to the mouth where, unsought and unwelcome, it presents itself as a salutary warning against the perils of belching. ...

### *G Deserved Indulgence*

Finally - there are occasions where it is expected that a judge might indulge a little and none of the parties would expect anything less. One of those cases was the epic *Bell* trial to which I have already referred. A single judge who wrestles with issues of such magnitude over such a period of time is fully entitled to add their own colour. I suspect Owen J had a few favourite expressions he wanted to utilise somewhere:

[9761] From time to time during the last 5 years I felt as if I were confined to an oubliette. There were occasions on which I thought the task of completing this case might be sempiternal. Fortunately, I have not yet been called upon to confront the infinite and, better still, a nepenthe beckons. Part of the nepenthe (which may even bear that name) is likely to involve a yeast-based substance. It will most certainly involve a complete avoidance of making decisions and writing judgments.

[9762] For the moment, in the words of Ovid (with an embellishment from the old Latin Mass): *Iamque opus exegi, Deo gratias.*<sup>16</sup>

### *H Before We Move On - Room for Improvement*

But to return to the more mundane, and the common criticisms of judgments that they are too hard to read and are too long.

In my view, those few examples to which I have referred indicate that writers have in fact embraced English as an evolving language. Judges have indicated a willingness to entertain English as a growing and living language: utilising a modern vocabulary; embracing the singular plural and other gender neutral and culturally sensitive terms; avoiding the over-defining of obvious expressions; and increasingly using the active as against passive voice. But these are details. The important task is to write accessible, readable judgments.

In her article 'Some Thoughts on Writing Judgments in, and for, Contemporary Australia',<sup>17</sup> Justice Mortimer records the progression from historically short reasons by way of notes of court hearings that were taken by observers or a court recorder, to the detailed judgments of our time.<sup>18</sup> Justice Mortimer notes that the notion that judges should explain their decisions is of

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<sup>16</sup> The work is done, thanks be to God.

<sup>17</sup> Justice Debbie Mortimer, 'Some Thoughts on Writing Judgments in, and for, Contemporary Australia' (2018) 42(1) *Melbourne University Law Review* 274.

<sup>18</sup> *Ibid* 283.

recent origin, and queries whether we currently have the right balance between explaining the use of judicial power and the way we use judicial time and resources, with consequential effect on the parties and other litigants of seeking access to justice.<sup>19</sup>

In days of electronic data and where business and many other communications take place largely by email, the quantum of recorded evidence is so large that even setting out the relevant facts and making findings on documents can be a very lengthy task, even before assessing any oral evidence.

Conversations around introducing short form judgments and similar innovations are frequent around the courts but there is no doubt that progress toward any quantum shift in the writing obligations of a trial judge is slow. However, there are some steps that are taken routinely to reduce the amount of judgment writing.

These days interlocutory skirmishes around pleadings, discovery, security for costs and the like are often directed to a confidential conference with a registrar or specific mediation. The success rate of that course in order to narrow the issues that require written judgments and reduce the need for interlocutory judgments in my experience is high.

A second step is continued emphasis by active case management on the role of the lawyers, and indeed their clients, in narrowing the scope of disclosure and document production and the nature of issues that are to be resolved by the court. This will often involve directing the parties to attempt to agree issues for determination. It will generally be a requirement where senior counsel are briefed that they confer about and engage in that process. All stakeholders in litigation stand to benefit from such an approach.

But that is enough about the creation of judgments. Let us now apply a retrospective lens.

#### IV PART 2: JUDGMENTS AS RECORDS OF HISTORY

We can move from viewing judgments as a pedestrian account of a moment in time, or a dispute in time, to seeing a more universal role. We can view judgments as a record of history. This role, perhaps not always appreciated, is significant.

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<sup>19</sup> Ibid.

History records cultural change and key events in a range of media, and there is no reason to exclude from that archive the written judgment with its precisely recorded factual details, its records of the common place, its record in extracts from transcripts of how we spoke and its snapshot of our social mores. Then there are Native Title judgments with their actual record of history: a record of oral history passed down, interviews, transcripts of descriptions by claimants and elders, explaining who is able to speak for country, who has control over country, identification by language group and similar connections.<sup>20</sup>

But the role of judgments in recording history is seen most keenly by any review of decisions that stand as turning points of cultural change - landmark decisions on religious freedom, women's rights, the rights of minorities, land rights, rights to counsel, sanctions against abuse of power, censorship laws, and so on.

For most Australians, *Mabo*<sup>21</sup> is the definitive landmark decision, a decision that negated the 17th century doctrine of *terra nullis* and recognised Aboriginal Australians as the original inhabitants of Australia. It led to the introduction of native title legislation and recognition of traditional rights. There are many other such decisions: *Chamberlain v The Queen*,<sup>22</sup> standing as a stark reminder to us all of the importance of keeping an open mind; *Dietrich v The Queen*,<sup>23</sup> acknowledging formally the right to a fair trial; and even from the dry area of contract law, *Waltons Stores (Interstate) Ltd v Maher*,<sup>24</sup> where the harshness of contract law was ameliorated by equity and the sword and shield of promissory estoppel.

I have chosen a selection of four cases from across environmental, criminal, family-related and consumer law, and not all High Court cases, to address the rhetorical question, 'how far have we come'?

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<sup>20</sup> See, eg, *Warrie (formerly TJ) (on behalf of the Yinjibarndi People) v State of Western Australia* [2017] FCA 803 at [142]; *Dempsey obh of Bularnu, Waluwarra and Wangkayujuru People v State of Queensland (No 2)* [2014] FCA 528 [548]-[556].

<sup>21</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>22</sup> *Chamberlain v R (No 2)* (1984) 153 CLR 521.

<sup>23</sup> *Dietrich v R* (1992) 177 CLR 292.

<sup>24</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

## *A Commonwealth v Tasmania*

First - when did we start taking the environment seriously?

South-west Tasmania is a remote and imposing part of Australia. It is now world famous and carefully protected as a wilderness area. Access is by foot, light plane or sea. Its weather is harsh, but its scenery is stunning. In the late 1970s the Hydro-Electric Commission, a Tasmanian State government agency, drafted a proposal for the construction of two dams on the Gordon River. Tasmania had been building hydro dams and power stations since the turn of the last century, in places with deceptively lyrical names like Miena, Tungatinah and Wyatinah. If you are familiar with Richard Flanagan's 'The Sound of One Hand Clapping', you might recall that the father, Bojan Buloh, was a Slovenian refugee, recruited as part of an immigrant labour force to live in a construction camp in the central highlands of Tasmania to do 'the wog work' of building a dam.

The Hydro is an important employer in Tasmania. On a personal note, my father, my father-in-law and one of my brothers all worked for the Hydro at some point, which gives you some insight into its significance to the Tasmanian economy.

The construction of the Gordon River dams would have generated one-third of the State's electricity needs, but at the cost of flooding the nearby Franklin River wilderness area, an area of some 9,500 hectares within the National Park. The Labor State government made the area a National Park in 1981 in acknowledgement of the area's natural significance and asked that the area be entered on the World Heritage List. An election the following year brought in a Liberal State government that supported the dams project, and the process of construction approvals began. The majority of Tasmanians supported the project in a 1981 plebiscite. State legislation was passed to vest land in the Hydro for the purpose of construction of the dams and auxiliary works: the *Gordon River Hydro-Electric Power Development Act 1982* (Tas).

However, an intense public campaign then began, under the stewardship of Dr Bob Brown and *The Wilderness Society*. There were over 1,200 arrests as protesters set up blockades of the site. Bob Brown even spent several days in prison. There were protest marches in the streets of Hobart. This was pre-social media, pre-mobile phones: yet thousands were galvanised to march in the streets to draw attention to the impending loss. The iconic yellow 'no dams' triangle was a hugely successful example of branding. That triangle was everywhere, from cars to bags to banners.

The protest gained international attention, and in late 1982 UNESCO declared south-west Tasmania a World Heritage Site under the *Convention for the Protection of the World Cultural and Natural Heritage*. At that time the only other Australian World Heritage Site was Kakadu. The timing was important. A Federal election was due in 1983. Bob Hawke promised that if Labor won the election, it would save the south-west wilderness. Labor won the election and, as promised, took steps to save the wilderness area. The government looked to its obligations under the World Heritage Convention and passed the *World Heritage Properties Conservation Act 1983* (Cth) which restricted activities on heritage sites, including those deemed heritage sites by international treaties.

The Tasmanian government was not best pleased. And so, it began. Tasmania challenged the Constitutional validity of the Act in the High Court, arguing that by the Act the Commonwealth exceeded its authority to legislate for external affairs (s 51 (xxix) of the Constitution) and to regulate corporations (s 51(xx)). The Commonwealth did not win all the arguments before the High Court and the decision itself was a 4:3 majority - but vitally, it decided that the Commonwealth had power under the external affairs power to stop the dams based on Australia's international obligations. And the Franklin River and surrounding south-west Tasmania wilderness area remain protected to this day.

In the reasons of the High Court<sup>25</sup> (and I add that they fill half a volume of the Commonwealth Law Reports and were written in a month) the Chief Justice captured the tension that brought the claim to the High Court whilst at the same time noted the strictly legal question with which it was concerned:

No lawyer will need to be told that in these proceedings the Court is not called upon to decide whether the Gordon below Franklin Scheme ought to proceed. It is not for the Court to weigh the economic needs of Tasmania against the possible damage that will be caused to the archaeological sites and the wilderness area if the construction of the dam proceeds. The wisdom and expediency of the two competing courses are matters of policy for the Governments to consider, and not for the Court. We are concerned with a strictly legal question - whether the Commonwealth regulations and the Commonwealth statute are within constitutional power.

The reasons necessarily contain a detailed consideration of the legal issues. But they do more than that. For example, they contain a history of the operations of the Hydro-Electric

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<sup>25</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 60.

Commission in Tasmania from 1895;<sup>26</sup> a list of items from the 64 sites at that time on the natural heritage sites maintained under the World Heritage Convention<sup>27</sup> (a list that now runs to some 1,121 items);<sup>28</sup> a complete history of the entanglement of state and federal legislation and regulations enacted during the course of the controversy; and a collection of agreements reflecting international concern about the environment and pollution.<sup>29</sup> In short, they provide a written record of the context in which the High Court came to consider in 1983 the particular legal questions to which its attention was limited.

The Dams case is widely seen to be the most influential constitutional law case in Australian history, but it also stands very much as a record of how protest and changing policy led to valid legislative intervention. It remains relevant as we now face unprecedented environmental challenges and as we continue to witness the cycle and value of lawful, non-violent protest.

### *B LCM v State of Western Australia*

Now to the criminal justice system and a sad indictment - when did we finally wake up to Foetal Alcohol Spectrum Disorder, or FASD?

History will show that it was not until this decade that the criminal justice system really understood that FASD was relevant to both cognitive and physical development. Although there were a handful of prior decisions that mentioned FASD,<sup>30</sup> the decision of the Western Australian Court of Appeal in *LCM v State of Western Australia*<sup>31</sup> is significant for three reasons: first, it frankly acknowledges a lack of appropriate knowledge amongst professionals of the symptoms and profile of FASD; second, it provides guidance to prosecutors, defenders and sentencing judges as to the relevance of the disorder in the context of mental impairment; and third, it reminds us that the justice system cannot act in isolation but is dependent upon a broader community interest and research into matters that effect criminal culpability.

The offender in LCM was a 15-year-old boy who violently assaulted his newborn son in a hospital room, causing injuries from which the baby died. He was convicted in the Children's

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<sup>26</sup> Ibid 12-13.

<sup>27</sup> Ibid 172-173.

<sup>28</sup> 'World Heritage List', *United Nations Educational, Scientific and Cultural Organization*, (Web Page) <<https://whc.unesco.org/en/list/>>.

<sup>29</sup> *Commonwealth v Tasmania* (n 25) 174-175.

<sup>30</sup> H Douglas, J Hammill, E Russell and W Hall, 'Judicial Views of Foetal Alcohol Spectrum Disorder in Queensland's Criminal Justice System' (2012) 21 *JJA* 178, 179.

<sup>31</sup> [2016] WASCA 164.

Court on a plea of guilty to manslaughter and in preparation for sentencing underwent the usual pre-sentence report process and was also reviewed by a psychologist and psychiatrist, neither of whom referred to any mental impairment or brain injury. He was sentenced to 10 years detention with eligibility for supervised release. He appealed his sentence on the ground that it was manifestly excessive.

While in detention, LCM was reviewed by a research team from the Telethon Kids Institute and was diagnosed with FASD. An essential element of the disorder is that the person has suffered a prenatal, permanent organic brain injury as a result of maternal alcohol consumption in pregnancy. Such foetal exposure to alcohol can produce a variety of different disorders within a spectrum, with effects that might be suffered to an extent which varies from minor to profound.

The late diagnosis of LCM's condition provided the basis for a second ground of appeal, being that the sentencing judge had not taken into account a significant mitigatory factor, the additional evidence of the FASD diagnosis not having been before his Honour at the time.

Additional medical reports attested to the precise nature of LCM's impairment. One of the specialists concluded that if a detailed nature of LCM's impairment had been understood and there had been some intervention early in his life, 'some of his and his loved ones' lived trauma may have been prevented'.<sup>32</sup> The appeal succeeded and the sentence was reduced, as the Court was satisfied that his prenatal brain damage had left him more vulnerable to traumas he had suffered as a child, a mitigating factor when his circumstances were considered as a whole.

What an important decision this is in terms of what we learn from it and apply going forward, and how fortuitous that the Telethon Kids Institute came across this particular young man.

### *C H v Minister for Immigration and Citizenship*

Migration cases provide a wealth of information about international civil unrest and the responses to refugee and asylum claims, but the case I want to mention is actually from the citizenship stream. It is not a case that was met with any great media attention, but it had important ramifications.

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<sup>32</sup> [2016] WASCA 164 [105].

At issue in *H v Minister for Immigration and Citizenship*<sup>33</sup> was whether the word 'parent' was limited to biological parents with a genetic link. The Full Federal Court found that a child could be an Australian citizen by descent through a person who was not a biological parent but acted in a parental capacity. It found that as a matter of statutory construction, there was nothing in the Act that limited the meaning of 'parent' to a biological parent but rather it has the meaning it bears in ordinary contemporary English usage. The reference to contemporary usage is important and acknowledges squarely the capacity for change. The following paragraphs are particularly poignant, in my view:

[128] The word 'parent' is an everyday word in the English language, expressive both of status and relationship to another. Today, as the Citizenship Act itself recognizes, not all parents become parents in the same way: see, e.g., s 8 of the Citizenship Act; *H v J* (2006) 205 FLR 464 at 466, citing *Re Patrick* (2002) 168 FLR 6 at [323], [325] (Guest J). This is not to say that parents do not share common characteristics; everyday use of the word indicates that they do.

[129] Being a parent within the ordinary meaning of the word may depend on various factors, including social, legal and biological. Once, in the case of an illegitimate child, biological connection was not enough; today, biological connection in specific instances may not be enough: Citizenship Act, s 8 referring to ss 60H and 60HB of the Family Law Act, in turn picking up prescribed State and Territory laws such as the *Status of Children Act 1974* (Vic). Perhaps in the typical case, almost all the relevant considerations, whether biological, legal, or social, will point to the same persons as being the 'parents' of a person. Typically, parentage is not just a matter of biology but of intense commitment to another, expressed by acknowledging that other person as one's own and treating him or her as one's own.

I doubt that such words would have been said had the question been addressed by the court a few decades previously.

In a similar vein, the decision in the *Commonwealth v ACT*<sup>34</sup> that saw the ACT's short-lived *Marriage Equality (Same Sex) Act 2013* (ACT) struck down was important in opening the door to the vote that led to the changes to *The Marriage Act 1961* (Cth), another defining moment in Australian legislative and social history.

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<sup>33</sup> [2010] FCAFC 119; (2010) 188 FCR 393.

<sup>34</sup> (2013) 250 CLR 441.



## D Free Range Egg Cases

But now to what might at first seem more prosaic - the topic of eggs. But in eggs we see the rise of the ethical consumer. In the last 10 years the ACCC has brought proceedings against some 11 egg producers. As Edelman J expressed it in *ACCC v RL Adams Pty Ltd*:<sup>35</sup>

[1] This penalty hearing is yet another case concerning false, and misleading or deceptive conduct concerning 'free range' animals. Sellers of products such as chicken, duck, or eggs obtain a premium price by representing their products to be derived from animals that live or lived 'free range'.

Some of the practices the courts have considered include egg producers engaging in misleading or deceptive conduct by putting cage eggs in cartons marked free range in order to meet high demand for free-range eggs, or similarly including non-organic eggs in cartons marked as organic.

Those cases have highlighted the importance of the product labelling in securing consumer dollars, and also the importance of model codes and enforceable standards that might clearly explain what is meant by terms such as 'free range'. For example, whilst descriptions such as 'free range densities' might say something about how many birds per hectare might be housed, what do they say about hours of access for the birds to the outside, or rotation of access? What do they say about protection of the animals? Are conditions consistent with consumer expectations?

The cases reflect the rise of the ethical consumer: that consumers care and are interested in how animals are treated by those who profit from our purchases, but that their concern can be exploited by producers.

This is an area where there are many lobbyists and consumer groups. But what is interesting is that experts in the field speak of the importance of regulation and enforcement by misleading and deceptive conduct legislation and the courts. In fact, enforcement action has been described as the strongest force for change and improvement in the area.<sup>36</sup>

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<sup>35</sup> [2015] FCA 1016.

<sup>36</sup> C Parker and J De Costa, 'Misleading the Ethical Consumer: The Regulation of Free-Range Egg Labelling' (2016) 39 *Melbourne University Law Review* 895 at 940.

It is interesting to consider the compilation of penalties set out in *ACCC v RL Adams*, indicating a range of fines in the realm of \$300,000 and \$400,000 in some cases. Those amounts have been exceeded in subsequent cases.

The number of proceedings against supermarkets and producers in the last decade in this area and the description of farming and production processes in the judgments stand as a fascinating record of a clear turning point in terms of consumer protection beyond safety or financial matters and into the ethical. I suspect we all look at egg carton labelling a little differently these days.

#### V CONCLUSION

It is often said that the volumes of law reports on the bookshelves are filled with cases where all the parties thought they were right. Whilst that comment stands as a reminder to the repeat litigant, it is important to remember that within those volumes, or electronic folders or databases, also lies a rich source of information about how we have looked at the world over time. I am a follower of Michael Apted's *7 Up* television documentary series. In fact, I have found the series strangely moving over the years, perhaps because of the so-called recognition factor. We see bits of ourselves in the people whose lives have been followed over the years, and we recognise that in so many ways we are all the same, with the same hopes and the same fears. Or perhaps I find it moving because as the participants age, so do I, like it or not. Such social documentaries of history are invaluable. We cannot reduce years of Australian legal judgments into a television documentary archive, but we can view them differently. They are not just about precedent, but also contribute to the social history of our mistakes and our progress.