I DISSENT; BUT WHY?

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1. In the course of a judicial career, a common law judge knows he or she will face the question I pose in this paper: "I dissent; but why?"

2. The answer, it seems to me, is most appropriately that given by Lord Denning in the 'Romanes Lecture' delivered in the Sheldonian Theatre in Oxford on 21 May 1959. His Lordship said, and I paraphrase ever so slightly:[1]

> "[A judge] should ever seek to do his part to see that the principles of the law are consonant with justice. If he should fail to do this, he will forfeit the confidence of the people. The law will fall into disrepute; and if that happens the stability of the country will be shaken. The law must be certain. Yes, as certain as may be. But it must be just too."

3. Justice Ruth Bader Ginsberg posed the question a different way, suggesting that judges writing separately should first ask: "Is this dissent or concurrence really necessary?"[2] Her own answer was that a dissent should be reserved for when "important matters are at stake".[3]

4. In Australia, other than during a brief 'honeymoon' period of concurrence in the four years following the establishment of the High Court of Australia, dissenting judgments have become a part of the legal landscape.[4]

5. In 2016, Professor Andrew Lynch published an edited collection of essays, *Great Australian Dissents*.[5] In his Foreword, Professor Lynch observes that the worth of a 'great dissent' may derive from numerous factors including: its rhetorical force as a piece of legal reasoning; its emotive power as a judicial lament for the 'error' into which the majority has fallen; the general importance of the issue at stake; as a challenge to the orthodoxy; and, sometimes, the subsequent recognition of a dissenting opinion's

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[1] Lord Denning, *The Discipline of Law* (Butterworths 1979) 293.

[2] Hon. Ruth Bader Ginsberg, 'The Role of Dissenting Opinions' (Lecture, Harvard Club of Washington, DC, 17 December 2009) 3.

[3] *ibid*.

[4] Michael Kirby, 'Judicial Dissent is an Appeal to the Future' (Speech, James Cook University, 26 February 2005) 3.

[5] Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press 2016).

correctness, and its ultimate vindication.[6] He notes that, "…an important gap in our understanding of this topic remains: specifically, when and how has dissent *really mattered*?"[7]

6. Lynch argues that dissenting judgments serve three crucial functions. First, they ensure that the judicial arm of government enjoys certain key capabilities associated with a society governed in accordance with democratic principles and values. Secondly, the process of adjudication may benefit from the possibility of dissenting opinions, by clarifying majority views and speaking to the integrity of the process and the independence of the judiciary. Thirdly, the law itself may be developed and advanced over time through the opinions expressed in dissenting judgments.[8]

7. The focus of my remarks in this paper is on the third function posited by Lynch, the role of dissent in the development of the law. In this respect, it may (and I say only may) be necessary to distinguish between the function of a dissenting judgment in an intermediate appellate court and one within a final, or apex, court of appeal. As the Chief Justice of the United States, Evan Hughes, famously wrote:

> "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[9]

8. A former Justice of the High Court of Australia shares this view positing that in Australian jurisprudence, dissents can have particular value as "an appeal to the future".[10]

9. However, I note there is a tension in distinguishing the right of apex and lower court judges to dissent. Apex courts are charged with developing the common law, but they also shoulder the burden of its preservation – a balancing act in the maintenance of the jurisprudential framework within which their court system operates. The certainty of justice we require of our courts comes from the clarity of the articulation of the law by the ultimate court. As such, it may be thought that a dissent by a judge of an apex court

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[6] *ibid*, 1-19.
[7] *ibid*, 1.
[8] Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia' (2003) 27 *Melbourne University Law Review* 724, 725-726.
[9] Charles E Hughes, *The Supreme Court of the United States* (Columbia University Press 1928) 68.
[10] Michael Kirby, 'Judicial Dissent is an Appeal to the Future' (Speech, James Cook University, 26 February 2005) 3.

is not something that should be entertained lightly – consistent with Justice Ginsberg's view referred to earlier. This difficulty has been the subject of debate among judges.

10. In his book, *The Discipline of Law,*[11] Lord Denning remarks that many a time he was asked "Why did you step down from the House of Lords?" His answer: "I was too often in a minority. In the Lords it is no good to dissent. In the Court of Appeal it is some good."[12]

11. Lord Denning reflects on the fact that, during the five years of his tenure in the House of Lords (1957-1962), the House held itself to be absolutely bound by the doctrine of *stare decisis*.

> "If a previous decision was wrong – and caused injustice – nobody could put it right except Parliament, and they were not interested in reforming the law. There were no votes in it."[13]

12. Nevertheless, Lord Denning remained optimistic that, despite the rebukes he received from his fellow Law Lords, his dissenting opinions in the Lords were worthwhile. He in fact dissented in his very first case in the Lords, *Rahimtoola v Nizam of Hyderabad,*[14] a case concerning sovereign immunity. He had the opportunity to return to the topic some 20 years later in *Trendtex v Bank of Nigeria*[15] and his conclusion, first expressed in *Rahimtoola*, that when sovereign states engage in commercial transactions, they should not be entitled to claim immunity, ultimately found statutory expression in the *State Immunity Act 1978* (UK).

13. In *Midland Silicones Ltd v Scruttons Ltd,*[16] Lord Denning's dissenting view that, when a contract is made for the benefit of a third party, it could be enforced for the benefit of that third party, was roundly condemned, particularly in the speech of Viscount Simonds.[17] However, as Lord Denning himself observed,[18] it paved the way for two cases which showed that the strict rule of privity could be avoided in some circumstances, *Beswick v Beswick*[19] and *Jackson v Horizon Holidays.*[20] It was also of

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[11] Lord Denning, *The Discipline of Law* (Butterworths 1979).
[12] *ibid*, 287.
[13] *ibid* .
[14] [1958] AC 379.
[15] [1977] QB 529.
[16] [1962] AC 446.
[17] *ibid*, 465-472.
[18] Lord Denning, *The Discipline of Law* (Butterworths 1979) 290.
[19] [1966] Ch 538; [1968] AC 58.
[20] [1975] 1 WLR 1468.

great significance to the development of the Australian jurisprudence on the issue, in particular through the decision of the High Court of Australia in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd,*[21]and informed various proposals for statutory reform including that of the Australian Law Reform Commission (ALRC) in its Report on *Insurance Contracts*,[22] one of which subsequently became s.48 of the Insurance Contracts Act 1984 (Cth) by which a third party beneficiary of a contract of insurance has the right to recover directly from the insurer.[23]

14. As I have already observed, it was not until 1966 that the House of Lords (and the Privy Council) lessened the constraints in relation to the doctrine of *stare decisis*. On 26 July 1966, Lord Gardiner, the then Lord Chancellor, made a statement in the House in which he said:[24]

> "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

By this time, Lord Denning had already returned to the Court of Appeal. His attempt to apply the same dissenting approach in that Court in *Davis v Johnson*[25], a case concerned with the interpretation of 'matrimonial home', was described in the House of Lords as a 'one-man crusade' to free the Court of Appeal from the shackle of *stare decisis*.[26] *Davis v Johnson*, which affirmed the rule in *Young v Bristol Aeroplane Company Limited* remains good authority in the United Kingdom, [27] and stands for the proposition

[21] (1988) 165 CLR 107.

[22] Australian Law Reform Commission*, Insurance Contracts* (ALRC No 20, 1982), [122]-[124].

[23] **Contracts of general insurance—entitlements of third party beneficiaries**

(1) A third party beneficiary under a contract of general insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract.

(2) Subject to the contract, the third party beneficiary:

(a) has, in relation to the third party beneficiary's claim, the same obligations to the insurer as the third party beneficiary would have if the third party beneficiary were the insured; and

(b) may discharge the insured's obligations in relation to the loss.

(3) The insurer has the same defences to an action under this section as the insurer would have in an action by the insured, including, but not limited to, defences relating to the conduct of the insured (whether the conduct occurred before or after the contract was entered into).

[24] Lord Denning, *The Discipline of Law* (Butterworths 1979) 296-297.

[25] [1978] 2 WLR 182.

[26] *Davis v Johnson* [1979] AC 264, 325.

[27] *Actavis UK Limited v Merck & Co Inc* [2009] 1 WLR 1186, [87]; *R (On the application of Rjm)(Fc) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311, [60].

that the Court of Appeal is bound to follow its own previous decisions, except for when they are inconsistent with that of the superior court.[28]

15. In Australia, the High Court has also stated, in the unanimous decision of *Farah Constructions v Say-Dee*, that intermediate appellate courts and trial judges should not depart from the decision of an intermediate appellate court in another (Australian) jurisdiction unless it is 'plainly wrong' and that 'seriously considered' dicta of the High Court must be followed.[29]

16. One of the 'great dissenters' in the Australian context was the Hon Michael Kirby, one-time President of the NSW Court of Appeal before his elevation to the High Court of Australia. So far as the development of Australian insurance law is concerned, he dissented in two cases that have become important for the consideration of reforms to Australia's insurance law.

17. The first was whilst President of the Court of Appeal in *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd*,[30] a case concerning the existence, or not, of an insurable interest in goods packed into containers but not yet loaded on board. A Brazilian shipper had loaded a cargo of leather into containers and caused the containers to be delivered to the carrier. However, at some stage before loading in Brazil, the goods were stolen from the container. The buyer invited the Court to find that, as a result of what it described as "the container revolution", the time at which risk passed had changed, and that goods intended for shipment should be regarded as shipped when they are loaded into a container and the container is sealed.

18. The majority (Clarke JA and Handley JA) held, in orthodox fashion, that under a standard FOB (free on board) contract, the risk in respect of goods loaded in a sealed container does not pass until the container has passed the ship's rail and that, prior to the passing of the risk, the buyer does not have an insurable interest in respect of the goods.[31]

19. In concluding that it was unnecessary for him to reach a concluded view on those issues, Kirby P referred to the United States Supreme Court decision in *Northeast Marine*

[28] *Davis v Johnson* [1979] AC 264, 281.
[29] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [135], [148], [158], [178].
[30] (1991) 25 NSWLR 699.
[31] *ibid*, 704G.

Terminal Co Inc v Caputo,[32] in which it had been observed that 'the container is the modern substitute for the hold of the vessel'. Hence, Kirby P said:[33]

> "To apply to containers the law developed for individually packaged cargo strikes me as yet another instance of the incapacity of legal principle to adapt and change to reflect new technological and commercial realities. When such developments as containerisation occur, it is desirable that the law should accept a new principle.
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> However, I concede that in the field of international shipping, any such new principle should, if possible, command widespread international acceptance."

20. President Kirby's dissenting judgment was considered by the ALRC in its Report, *Review of the Marine Insurance Act 1909*.[34] The ALRC observed that "[b]roadly, it may be argued that, in view of cargo containerisation, the law should deem containers to be functionally part of the ship, so that loading into the container should generally be considered as the point of delivery at which risk in the goods passes".[35] Ultimately, the ALRC did not consider that any reform of the nature suggested by Kirby P was justified as part of that review, preferring the issue to be resolved contractually. And so it was that the market responded. Changes have been made in later iterations of the Incoterms to address issues with FOB terms arising from the use of containers. These include the introduction of FCA (free carrier) – which makes the seller responsible for delivery of the goods to the custody of the carrier at a named place whereafter risk passes to the buyer – and FAS (free alongside ship) – where the seller is responsible for delivering the goods within reach of the ship's tackle whereafter risk passes to the buyer.[36]

21. The second insurance case of significance in which Kirby J dissented, by then a member of the High Court of Australia, was *Gibbs v Mercantile Mutual Insurance.*[37] Mr Gibbs was insured on a "Marine Pleasurecraft Policy" which, relevantly: covered third party liabilities; extended to any person navigating or in charge of the vessel; extended to cover commercial paraflying; and, contained a navigation warranty of 'Protected waters of WA as per permit'. Mr Gibbs conducted a commercial paraflying operation in the

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[32] 432 US 249 (1977), 270.
[33] (1991) 25 NSWLR 699, 701F.
[34] Australian law Reform Commission, *Review of the Marine Insurance Act 1909* (ALRC No 91, 2001), [11.60].
[35] *ibid*, [11.58].
[36] Andrea Lista, *International Commercial Sales: The Sale of Goods on Shipment Terms* (Informa 2017) 8-9, 150-151.
[37] [2003] HCA 39; (2003) 214 CLR 604.

estuarine waters of the Swan River in Perth where Mrs Morrell was injured while paraflying. The question for the High Court was whether the Marine Insurance Act 1909 (Cth) applied, in which case the insurer could avoid the policy for non-disclosure and material misrepresentation, or whether the contract of insurance was governed by the Insurance Contracts Act 1984 (Cth), in which case termination of the contract is available only where the breach could reasonably be regarded as being capable of causing or contributing to the loss. The majority (Gleeson CJ and, Hayne and Callinan JJ) held that the Marine Insurance Act 1909 applied — Gleeson CJ on the basis that the 'sea' extends to waters within the ebb and flow of the tide;[38] Hayne and Callinan JJ on the basis that what is determinative is the nature of the risk and the careless operation of marine craft is a peril properly described as one 'consequent on or incidental to, the navigation of the sea'.[39] Justice McHugh agreed with the Chief Justice that whether or not the peril took place on the sea was determinative but came to the contrary conclusion on the facts.[40] Justice Kirby took an altogether different approach to the issue. He held that the policy was a business third party liability policy which therefore did not fall within the scope of the Marine Insurance Act 1909.[41] If he was wrong as to that construction, Kirby J held that the word 'sea' should be given its ordinary meaning, particularly as the Marine Insurance Act 1909 draws a distinction between the sea and inland waters.[42] He referred to the ALRC's report, in which it was proposed that, instead of trying to define the sea for the purposes of the Act, the opportunity should be taken to make it clear that the Marine Insurance Act 1909 "clearly covers risks on inland waters".[43] Justice Kirby observed that, by inference, the ALRC had accepted that the Marine Insurance Act 1909 did not apply to inland waters.

22. The question of whether the Insurance Contracts Act or the Marine Insurance Act applies to particular contracts of insurance continues to cause some difficulty in Australia.[44] Somewhat disappointingly, we have not yet followed in the footsteps of the United Kingdom's more recent insurance law reforms.

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[38] *ibid*, [17].
[39] *ibid*, [197].
[40] *ibid*, [91], [102].
[41] *ibid*, [124]-[125].
[42] *ibid*, [146].
[43] *ibid*, [141], citing Australian law Reform Commission, *Review of the Marine Insurance Act 1909* (ALRC No 91, 2001) [8.82].
[44] *DMS Maritime Pty Limited v Navigators Corporate Underwriters Limited* [2020] QSC 382.

23. Despite the lapse of two decades, the Australian Government has still not responded to ALRC Report 91. If and when marine insurance law reform is again on the Government's agenda, there is little doubt that the dissenting judgments, and that of Kirby J in particular, will be considered in the context of redefining the coverage of the *Marine Insurance Act 1909*.

24. Another former judge of the High Court of Australia, the Hon Dyson Heydon, who may be described as Australia's other 'great dissenter' of the modern era, argues in his extra-curial writings that "judicial independence can be threatened when judicial majorities attempt to muzzle minorities".[45] His views go much further than asserting the importance of dissenting judgments when a judge considers him or herself duty bound to find in a way that differs from that of the majority. He mounts an argument against even joint or concurring judgments because compromise between judges is 'alien to the process of doing justice according to law'[46] and because "the behaviour of those judges who advocate or choose the course of concealment rather than revelation constitutes the most insidious of threats to judicial independence".[47]

25. Such had not always been his view. In his early days as a member of the High Court, Heydon J frequently joined with other judges, including in the case of *Farah Constructions v Say-Dee* mentioned earlier.[48] However by 2007, his status as the most frequent collaborator on the Court began to wane and he found himself increasingly in dissent.[49] It might be said that Heydon J began to exemplify the 'hazards' of dissent, as identified by Lynch — the destabilising effect that dissenting judgments may have on the state of the law, and the diminution of the authority of the court by individualism.[50]

26. One such example is Heydon J's dissenting judgment in *Westport Insurance Corporation v Gordian Runoff Ltd*,[51] a case which concerned an award of arbitration which determined the rights of the parties to treaties for reinsurance and the effect of s 18B(1) of the *Insurance Act 1902* (NSW) upon the obligation of the appellant reinsurers

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[45] J D Heydon, 'Threats to judicial independence: the enemy within' (2013) 129 Law Quarterly Review 205, 208.
[46] *ibid*, 221.
[47] *ibid*, 222.
[48] [2007] HCA 22; (2007) 230 CLR 89.
[49] Gabrielle Appleby and Heather Roberts, 'He who would not be muzzled: Justice Heydon's Last Dissent in *Monis v The Queen (2013)*' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 344-348.
[50] Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia' (2003) 27 Melbourne University Law Review 724, 751-759.
[51] [2011] HCA 37; (2011) 244 CLR 239.

under the treaties to indemnify the respondent, Gordian Runoff. In that judgment, Heydon J took the liberty of expressing the relative merits of arbitration and litigation. He said:[52]

> "The arbitration proceedings began on 15 October 2004 when Gordian served points of claim. This appeal comes to a close seven years later. The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy. It is not intended to make any criticisms in these respects of the arbitrators, of Einstein J, or of the Court of Appeal, for on the material in the appeal books none are fairly open. But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater *relevant* expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three. Comment on these melancholy facts would be superfluous."

27. A further example of Heydon J's individualism is that of his very last judgment as a member of the High Court of Australia, *Monis v The Queen.*[53] The case concerned the implied freedom of political communication in the Australian constitutional context, an implication arising from the compulsion for the citizenry to vote and the need for them to be informed about who they are voting for,[54] a matter which Heydon J viewed as an example of the Court's increasing departure from traditional, formalistic judicial method.[55]

28. Consequent upon the sending of letters to parents and relatives of soldiers killed in active service in Afghanistan which were critical of Australia's involvement in that conflict and of the part played in it by the deceased soldiers, Monis was charged under s 471.12 of the *Criminal Code* (Cth), which prohibits the use of a postal service in a way that reasonable persons would regard as being "offensive".

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[52] *ibid*, [111].
[53] (2013) 249 CLR 92.
[54] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557–560. See *Constitution of the Commonwealth of Australia* ss.7 and 24.
[55] Gabrielle Appleby and Heather Roberts, 'He who would not be muzzled: Justice Heydon's Last Dissent in *Monis v The Queen (2013)*' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 335.

29. The question raised in the appeal was whether that provision of the Criminal Code exceeds the legislative power of the Commonwealth because it impermissibly burdens freedom of communication about political matters. Whilst agreeing with two of his fellow judges that the section did burden the freedom of communication about political matters because it was not 'reasonably appropriate and adapted to serve a legitimate end', and that it should not be read down so as to make it valid,[56] Heydon J expressed the view 'That this is an outcome so extraordinary as to cast doubt, and perhaps more than doubt, on the fundamental assumption and the chain of reasoning which led to it'.[57]

30. He then proceeded to describe the contents of the letters sent to the parents before observing, in the most literary of manners:

> 239 "For most children, the death of a parent is a sad event. For most parents, the death of a child is worse. That is because many parents die when elderly, or at a great age when death comes as a blessed release. Parents of that kind have lived a full lifespan. But it is different when children die in their parents' lifetime. The natural order of events is reversed. The children have not fought their fight to finality. They have not run their full race.
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> 240 Yet when a child dies in battle, a parent's sadness is often assuaged by the feeling that the child's death was a necessary and meritorious sacrifice. Thus on 27 September 1915, in the course of the Battle of Loos, an 18 year old subaltern in the Irish Guards, who had experienced considerable difficulty in joining up because of bad eyesight, was shot through the head as his unit advanced. After a German counterattack, he was left behind. In due course he was posted missing, presumed dead. These events ruined the remaining years of his father, who wrote the following poem:
>
> '*My Boy Jack* 1914-18
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> 'Have you news of my boy Jack?'
> *Not this tide.*
> 'When d'you think that he'll come back?'
> *Not with this wind blowing, and this tide.*
> 'Has any one else had word of him?'

[56] *Monis v The Queen* (2013) 249 CLR 92, [236].
[57] *ibid*, [237].

Not this tide.

For what is sunk will hardly swim,

Not with this wind blowing, and this tide.

'Oh, dear, what comfort can I find!'

None this tide,

Nor any tide,

Except he did not shame his kind –

Not even with that wind blowing, and that tide. Then hold your head up all the more,

This tide,

And every tide;

Because he was the son you bore,

And gave to that wind blowing and that tide!'"

31. Whether this will be a dissent that matters may depend on whether a future and differently constituted High Court of Australia takes on the challenge posed by Heydon J in his final paragraph, having first described what he saw as the flaws in reasoning that led to the existence of the implied freedom:

> 251 "Close examination of the implied freedom of political communication would involve analysis of these issues. That examination may reveal that it is a noble and idealistic enterprise which has failed, is failing, and will go on failing. That close examination cannot usefully take place until some litigant whose interests are damaged by the implied freedoms argues in this Court, with leave if necessary, that the relevant authorities should be overruled. No endeavour of that kind was made in these appeals. Hence these appeals offered no occasion for close examination of the relevant questions. On the existing law, there is no alternative but to make the orders proposed by Hayne J – a result which, some may think, demonstrates how flawed the law is."

32. We have seen this at work in recent days. One of the new appointments to the High Court of Australia, Justice Steward, penned a judgment in *LibertyWorks Inc v Commonwealth of Australia*[58] that while not a dissent included a similar invitation to future parties to submit that the implied freedom does not exist. He opined:

> 249 "…for my part, and with the greatest of respect, it is arguable that the implied freedom does not exist. It may not be sufficiently supported by the text, structure and context of

[58] *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18.

> the *Constitution* and, because of the continued division within this Court about the application of the doctrine of structured proportionality, it is still not yet settled law. The division within the Court over so important an issue may justify a reconsideration of the implication itself. In that respect, it is one thing to proclaim the necessity of a freedom of political discourse given the type of representative and responsible government created by the *Constitution*; it is another thing entirely to make an implication about when and how that freedom may be legitimately limited. The continued division in this Court about how that latter task is to be undertaken is telling. It may suggest that the implied freedom cannot be adequately defined. However, no party submitted that the implied freedom did not exist. In such circumstances, it is my current duty to continue to apply it faithfully. Any consideration of the existence of the implied freedom should, if necessary, be a matter for full argument on another occasion.“

33. It may be that there is a tide in the affairs of (at least) the Apex courts and dissents may be a portend of changes coming in a future day. But it is worth noting that in Steward J's judgment in *LibertyWorks*, a recapitulation of a dissenting voice from *Monis* was made in almost the same terms… albeit without reference to Heydon J.

34. Chief Justice Kiefel has observed that dissenting judgments allow the most individualistic style of writing. She says that "With dissents, much greater liberty is possible and less care need be taken. A dissenting judgment may therefore be a very agreeable exercise for a judge to undertake".[59] We might assume that Heydon J's dissent in *Monis,* was satisfying, if not agreeable, to write. But whether it will, in the end, be judged as a dissent that mattered, one that will lead to the development and advancement of the law over the years to come – only time will tell.

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[59] The Hon Justice Susan Kiefel AC, 'The individual judge' (2014) 88 Australian Law Journal 554, 558.