Adventures of a lone dissenter

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Michael Bradley

Having reached the statutory age of judicial senility, Justice Dyson Heydon has left the High Court to put his feet up and reflect on a life given to the law. How did he end up becoming The Great Dissenter or, as my kids would say, “Mr Grumpypot”? It wasn’t always thus. As recently as 2010, Heydon delivered dissenting opinions in only 15 per cent of cases, but that rose to 45 per cent in 2011 and 40 per cent in 2012.

That’s a lot of disagreement. If he’s right, the High Court has actually been wrong over 40 per cent of the time in the last two years. We do like to think that they know the law pretty well, but clearly he doesn’t think so. Interesting also that Heydon recently went 11 months without co-authoring a single judgment with another judge, which is very unusual and suggests a bit of a chill around the judges’ lunch table. (I don’t know, do they lunch together? They really should.)

Joint judgments make lawyers happy. Dissenting judgments can (usually) be safely ignored, but separate concurring judgments are just a pain. We won’t miss that aspect of Heydon’s efforts. A clue to why this eminent lawyer found himself on the “nay” side so often can be found in a speech he gave to a *Quadrant* dinner in 2003 titled: “Judicial Activism and the Death of the Rule of Law”. Marking his turf as a black letter lawyer, he had a spray at the High Court’s modern activism. Of an earlier Great Dissenter, Lionel Murphy, he said this: “His judgments were almost always brief. While this is certainly no sin in itself, he practised an exquisite economy in relation to what is conventionally called legal reasoning. The only content of a typical judgment was usually a series of dogmatic, dirigiste and emotional slogans. For some reason he came to fascinate and influence several other judges.”

He didn’t think things were getting better. Warning that “the discretion of a judge is the law of tyrants”, Heydon called for a return to the halcyon days of Sir Owen Dixon, CJ, (we’re talking the 1950s) when judges followed precedent and didn’t try to make law. Yes, Heydon was a Howard appointment. I guess Heydon would say that he didn’t become grumpy, the rest of the court just got more activist and he stood his ground. Anyway, far from a misanthrope, he contributed some of the funniest High Court one-liners, like this one regarding his dislike of the implied constitutional protection of freedom of speech from the 1997 Lange case: “For the most part, Australians know nothing of New Zealand affairs. The information which the Australian public does possess of New Zealand affairs is more likely to generate great public boredom, not interest.”

So what would a Heydonist world look like? Tobacco plain packaging would have failed, the Malaysia solution would have succeeded, refugees could be detained indefinitely, and we would not have an implied constitutional protection of freedom of speech. Not necessarily a worse place, and Heydon would say a damn sight more certain. But I have to say, I think “judicial activist” is a convenient label judges apply to other judges with whom they disagree. Heydon was the lone dissenter in the plain packaging case, on the quite radical ground that the legislation effected an acquisition of the tobacco companies’ trademarks. That would have changed 100 years of understanding of s51(xxxi) of the Constitution. Activiste, moi?

Michael Bradley is managing partner of Marque Lawyers.

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