THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2016 TERM

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'[c]ertainty generally is illusion…'[1]

I INTRODUCTION

In pondering the High Court's 2016 constitutional law term it is hard to ignore the broader commentary of the year. For *The Economist*, 2016 was the 'year of shocks'.[2] *The Sydney Morning Herald* noted that 2016 had been given the inauspicious and not easily obtained title of the 'worst year ever', citing any number of events from Brexit and the war in Syria to the loss of countless musical and acting legends as well as the likes of Justice Antonin Scalia and Muhammad Ali.[3]

In keeping with this dismal pattern, 2016 was a year when few constitutional challenges before the High Court succeeded with the only exception being the *Bell* decision,[4] which found that section 109 of the *Commonwealth Constitution* applied. This pattern held across decisions on executive power (*Plaintiff M68/2015*,[5] *NSW Aboriginal Land Council*[6]), electoral law (*Day*[7] and *Murphy*[8]) and decisions on section 80 (*Alqudsi*[9]) and section 51(xxxi) (*Cunningham*[10]) of the *Commonwealth Constitution*.

This article explores the 2016 High Court constitutional landscape and the key decisions it produced. It particularly reflects on the contribution of multiple concurring judgments, with multivocality being an evident configuration in the Court's 2016 constitutional pronouncements. It studies what this multivocality might be adding to our constitutional jurisprudence, most notably in terms of the rich description it provides and the potential for 'legal ripples' or disruption.

A Analysis and Larger Themes

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1 Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) X *Harvard Law Review* 457, 466.

2 Buttonwood, 'Seeing Through a Glass Darkly', *The Economist* (London), 24 December 2016, 88.

3 Christopher Borrelli, '2016 Was A Year Defined by Loss', *Sydney Morning Herald* (online), 5 January 2017 <http://www.smh.com.au/entertainment/movies/2016-was-a-year-defined-by-loss-20170102-gtkvpm.html>.

4 *Bell Group NV (in liq) v Western Australia* (2016) 90 ALJR 655 ('*Bell*').

5 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 ('*Plaintiff M68/2015*').

6 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 91 ALJR 177 ('*NSW Aboriginal Land Council*').

7 *Day v Australian Electoral Officer (SA)* (2016) 90 ALJR 639 ('*Day*').

8 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 ('*Murphy*').

9 *Alqudsi v The Queen* (2016) 258 CLR 203 ('*Alqudsi*').

10 *Cunningham v Commonwealth* (2016) 90 ALJR 1138 ('*Cunningham*').

In the last few years there has been a pronounced debate, particularly amongst the judiciary[11](including those currently on the bench) but also within the academy,[12] about the merits of joint over separate judicial opinion writing. Whilst over the High Court's history there have been periods of noted unanimity or cohesion,[13] there have also been tendencies towards judicial distinctness or 'individualism'[14] in its constitutional decisions.[15] The 2016 constitutional term is no exception.

While this article does not enter the territory of the annual court statistics ably

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11 Justice Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65 *Washington Law Review* 133; Michael Kirby, 'On the Writing of Judgments' (1990) 22 *Australian Journal of Forensic Sciences* 104, 118–19; Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787; Richard A Posner, *The Federal Courts: Crisis and Reform* (Harvard University Press, 1985) 236–43; John Doyle, 'Judgment Writing: Are There Needs for Change' (1999) 73 *Australian Law Journal* 737; Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of Its First 100 Years' (2003) 27 *Melbourne University Law Review* 864, 888; Sir Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102; Peter Heerey, 'The Judicial Herd: Seduced by Suave Glittering Phrases?' (2013) 87 *Australian Law Journal* 460; Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189; Justice Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 554; Justice P A Keane, 'The Idea of the Professional Judge: The Challenges of Communication' (Speech delivered at the Judicial Conference of Australia Colloquium, Noosa, 11 October 2014); Transcript of Proceedings, *Ceremonial – Retirement of French CJ* [2016] HCATrans 293 (5 December 2016); Chief Justice Susan Kiefel, 'Judicial Methods in the 21st Century' (Speech delivered at Banco Court, Sydney, 16 March 2017) 7–11.

12 Graeme Orr, 'Verbosity and Richness: Current Trends in the Craft of the High Court' (1998) 6 *Torts Law Journal* 291; Roderick Munday, 'All for One and One for All: The Rise to Prominence of the Composite Judgment within the Civil Division of the Court of Appeal' (2002) 61(2) *Cambridge Law Journal* 321; Enid Campbell, 'Reasons for Judgment: Some Consumer Perspectives' (2003) 77 *Australian Law Journal* 62; James Lee, 'A Defence of Concurring Speeches' [2009] *Public Law* 305; J D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205 (based on lectures given in 2012 in the UK); Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) 99–110; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2013 Statistics' (2014) 37 *University of New South Wales Law Journal* 544, 545–6, 561; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2014 Statistics' (2015) 38 *University of New South Wales Law Journal* 1078, 1079, 1086–7; Andrew Lynch, 'Review Essay: Courts and Teamwork: What It Means for Judicial Diversity' (2015) 38 *University of New South Wales Law Journal* 1421; Andrew Lynch, 'Collective Decision-Making: The Current Australian Debate' (2015) 21(1) *European Journal of Current Legal Issues* <http://webjcli.org/article/view/407/518>; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2015 Statistics' (2016) 39 *University of New South Wales Law Journal* 1161, 1165, 1174–7; Andrew Lynch, 'Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 156.

13 Mason, 'Reflections on the High Court', above n 11, 104 (referring to the Dixon Court). See also Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' (2004) 32 *Federal Law Review* 255, 266–73.

14 Orr, above n 12, 292; Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 89–90; Michael Coper, 'Joint Judgments and Separate Judgments' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 368.

15 Lynch and Williams, 'The High Court on Constitutional Law: The 2015 Statistics', above n 12, 1165. As to this fluctuation see generally Groves and Smyth, above n 13, 278.

traversed by Lynch and Williams for the last 15 years,[16] it is evident that multiple concurring judgments are a feature of the admittedly small batch of 2016 constitutional decisions. The unanimous decision in *Day*[17] is, of course, the prime outlier to this assertion. This case aside, important decisions like *Plaintiff M68/2015*,[18] while seemingly 6:1 in the result, mask considerable differences in approach across four majority judgments in which three judges expressed individual opinions. In *Murphy*,[19] while the Court was united in its result, only French CJ and Bell J wrote together with the rest of the bench penning a further five separate judgments. *Cunningham*[20] saw four majority judgments with three judges writing separately and one further judgment in which Gageler J dissented in part.

There can be an instinctive tendency to favour unity across our highest Court: to seek certainty or coherence,[21] whether or not this is likely to be an 'illusion' as Holmes famously suggested.[22] The increasing complexity of matters reaching the highest courts[23] means that at least some fragmentation is likely to remain. However, the reality and even the inevitability of this multiplicity of constitutional opinions (often concurring but sometimes dissenting) means we need to consider the worth of this phenomenon.[24]

Some of the standard criticisms of multiple reasons are, first, the burden they place on those digesting them 'to find gold'.[25] And, second, the impact on a decision's clarity and ratio decidendi.[26] Their prevalence has been said to slowly chip away at the credibility of the court as an institution.[27] Much importance is placed on the 'institutional responsibility'[28] of judges. Justice Kiefel, prior to her appointment as Chief Justice, contended that this responsibility can require judges to try to temper multiplicity where this is feasible whilst acknowledging that this is not always going to be.[29]

Chief Justice Marshall of the United States Supreme Court is often noted as having

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16 See the annual collation of the court statistics in the *University of New South Wales Law Journal*, beginning with Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years' (2003) 26 *University of New South Wales Law Journal* 32.

17 (2016) 90 ALJR 639.

18 (2016) 257 CLR 42.

19 (2016) 90 ALJR 1027.

20 (2016) 90 ALJR 1138.

21 Keane, above n 11, 13, 15. See Mason, 'Reflections on the High Court', above n 11, 110, 103, quoting *Hoyts v Spencer* (1919) 27 CLR 133, 148 (Rich J). See also Justice Stephen Gageler and Brendan Lim, 'Collective Irrationality and the Doctrine of Precedent' (2014) 38 *Melbourne University Law Review* 525.

22 Holmes, above n 1.

23 Frank H Easterbrook, 'Ways of Criticizing the Court' (1982) 95 *Harvard Law Review* 802, 805; Kiefel, 'The Individual Judge', above n 11, 559; Coper, above n 14, 368; Mirko Bagaric and James McConvill, 'The High Court and the Utility of Multiple Judgments' (2005) 1 *High Court Quarterly Review* 13.

24 Lee, above n 12; Bagaric and McConvill, above n 23, 37–8.

25 Coper, above n 14, 368.

26 Ibid. See also Kiefel, 'Judicial Methods in the 21st Century', above n 11, 8.

27 Ginsburg, above n 11, 142.

28 Ernst Willheim, 'Collective Responsibility' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 109; Kiefel, 'The Individual Judge', above n 11, 560; Keane, above n 11, 13–14.

29 Kiefel, 'The Individual Judge', above n 11, 558–60.

instituted a practice of unity and decisions from the United States like *Brown v Board of Education*[30] are often cited as assisting in the clear development of the law by virtue of their unanimity.[31] *Day*[32] is a 2016 exemplar of this. *Day* saw a unified seven-judge pronouncement declaring, in only 58 paragraphs, that none of the Plaintiffs' arguments challenging the Senate optional preferential voting reforms had 'any merit'.[33] Other 2016 offerings provide a distinct contrast. In *Alqudsi*,[34] which concerned the mandatory nature of section 80 of the *Commonwealth Constitution* and the inability for it to accommodate trial by judge alone, one issue raised was whether the bare majority decision on section 80 in *Brown v The Queen*[35] made it any the feebler. Was the weight of the Court's decision in *Murphy*[36] on the electoral roll-closure provisions affected by its six concurring judgments? And what about the spread of the Court in *Cunningham* on whether changes to certain parliamentary retirement allowances and the 'Life Gold Pass' amounted to acquisitions of property on unjust terms, purportedly contrary to section 51(xxxi) of the *Commonwealth Constitution*?

There is also concern that multiple judgments multiply the time taken for the decision to be handed down. While judges like Chief Justice Kiefel have been open about the frustration of waiting for that single judgment to be incorporated,[37] there can also potentially be clock-watching in getting all judges to agree on a single opinion[38] (as speculated in relation to the lengthy anticipation of *Cole v Whitfield*[39]). One can venture that the multiple opinions in *Murphy*[40] derived from a desire to hand down the Court's reasons in an expedited fashion and on the heels of the pre-election order made on 12 May 2016. Writing extra-curially, Justice Gageler has been explicit about the need for the best decision to emerge, even if this comes at a temporal cost.[41] His Honour has made clear that:

> A court of final appeal cannot ensure that the answers given by a majority of its members will be the best answers the court can give, except by ensuring that its members consider, and have sufficient time each to consider, those questions each to the best of his or her individual ability. If, having reasoned independently to the same conclusion, they are able to put immaterial differences aside and agree on a common form of expression of those reasons, then the systemic benefits can be expected ordinarily to outweigh the costs of doing so.[42]

B The Gifts of Multiplicity

30 347 US 483 (1954).
31 Lee, above n 12, 313; Ginsburg, above n 11, 138; Bagaric and McConvill, above n 23, 41.
32 (2016) 90 ALJR 639.
33 Ibid 649 [37] (The Court).
34 (2016) 258 CLR 203, 241 [89] (Kiefel, Bell and Keane JJ). See also *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
35 (1986) 160 CLR 171.
36 (2016) 90 ALJR 1027.
37 Kiefel, 'The Individual Judge', above n 11, 556–7; Kiefel, 'Judicial Methods in the 21st Century', above n 11, 10–11. See also Keane, above n 11, 14; Ginsburg, above n 11, 142; Lynch, 'Keep Your Distance', above n 12, 165.
38 Bagaric and McConvill, above n 23, 37.
39 Coper, above n 14, 368.
40 (2016) 90 ALJR 1027.
41 Gageler, 'Why Write Judgments?', above n 11, 200–3.
42 Ibid 201.

It seems that answering the separate/joint judgment conundrum, if it is even to be understood as a conundrum as such, really turns on what separate judgments add.[43] Judges can sometimes be explicit about rationalising their separateness.[44] For instance, in the 2016 decisions of *Cunningham*[45] and *Bell*,[46] Gageler J took a narrower stance than the rest of the Court. In *Cunningham*, his Honour dissented from the rest of the Court, not with respect to the retiring allowance which all judges found did not activate section 51(xxxi), but in relation to whether property was acquired without just terms for the purposes of the Life Gold Pass.[47] For Gageler J, in spite of their '[un]popularity', there was an acquisition other than on just terms in relation to the Life Gold Pass amendments.[48] Similarly in *Bell*, alongside the six judge joint majority decision, Gageler J expressed agreement with the majority[49] but on a narrower basis, namely that the operation of sections 22 and 29 of the *Bell Act*,[50] were sufficient to render the *Bell Act* invalid through an application of section 109 of the *Commonwealth Constitution*.

What about situations where separateness is not so readily explained? What can concurring High Court opinions, and multiple ones at that, contribute to our constitutional understanding? This begins to sidle into the polychromatic territory of coherence theory.[51] Writing in this field, Balkin points out ultimately, 'legal understanding' is 'something that the legal subject brings to the legal object…'.[52] Your view on the coherence of multiple or separate judgments is likely to depend on who you are[53] and your 'political culture' or influences.[54] For academics, multiplicity can make the process of judgment analysis much richer, even when they are concurring. They can, however, make the path of a law student all the more arduous as tortuous decisions like *Momcilovic*[55] attest. Accordingly, the comments mined here in relation the 2016 cases are obviously clouded by some degree of subjectivity. That disclaimer aside, two key potential contributions of multiple judgments are explored below, namely, rich description and 'legal ripples'.

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43 Kiefel, 'The Individual Judge', above n 11, 559–60; Mason, 'Reflections on the High Court', above n 11, 111.

44 Willheim, above n 28, 109; Coper, above n 14, 368; Kiefel, 'The Individual Judge', above n 11, 559.

45 (2016) 90 ALJR 1138.

46 (2016) 90 ALJR 655.

47 (2016) 90 ALJR 1138, 1153 [74].

48 Ibid 1159 [116]–[117].

49 (2016) 90 ALJR 655, 672 [78].

50 *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) ('*Bell Act*').

51 See, eg, Stephen Pethick, 'On the Entanglement of Coherence' (2014) 27 *Ratio Juris* 116; Ken Kress, 'Coherence' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 2nd ed, 2010) 521 ff; J M Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105; Joseph Raz, 'The Relevance of Coherence' (1992) 72 *Boston University Law Review* 273; Kenneth J Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions' (1984) 72 *California Law Review* 369.

52 Balkin, above n 51, 107.

53 Orr, above n 12, 2; Bagaric and McConvill, above n 23, 35–6.

54 Balkin, above n 51, 108 (framed through an 'internalization of cultural norms and shared frameworks of understanding': at 107).

55 *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*').

1 Rich Description

Unity can make reasons lacklustre. Scholars such as Sunstein[56] have recognised that compromise is often required for unanimity and that can require greater generality of findings. There is also a sense that the whole point of a multi-member appellate body is for diversity to be preserved and to allow each judgment to be expressed in accordance with a judge's conscience.[57] Multiple judgments allow the individual personality, preoccupations and experiences of a judge, potentially suppressed when unified with others,[58] to emerge.[59] This resonates with the expression that has become a 'cliché to call … a "cliché"',[60] that 'we are all realists now'.[61] But even independently of legal realist sensibilities, separate judgments can together enrich our understanding by the depth of factual and legal analysis they collectively weave and the aspects they choose to highlight or pass over.

Plaintiff M68/2015[62] and the *NSW Aboriginal Land Council*[63] cases from 2016 are illustrative in this regard.

Plaintiff M68/2015 was the first High Court judgment of 2016 and saw the Court split 4:3 as to whether the Commonwealth was exercising sufficient control as a result of the regional processing arrangements to be detaining the Plaintiff, a Bangladeshi national, on Nauru, as an 'unauthorised maritime arrival' to be suitably constrained by the principle in *Lim*.[64] Gageler J, Bell J and Kiefel J concluded that the Commonwealth maintained such control via the arrangements made in relation to the Nauru Regional Processing Centre either through 'detention'[65] or 'de facto'[66] detention of the Plaintiff. For their Honours, this meant that the detention was required to be limited according to *Lim*[67] to what was reasonably capable of being seen as necessary for the purposes of administrative processing and, if necessary, deportation.[68] Only Gordon J, however, found that the detention on Nauru went beyond the circumstances contemplated in *Lim* because the process of '[r]emoval

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56 Cass R Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733; Cass R Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (2007) 74 *Social Research* 1. See also Coper, above n 14, 368–9; Ronald Dworkin, *Justice in Robes* (Belknap Press, 2006) 67.

57 Lynch, 'Review Essay', above n 12, 1431; Lee, above n 12, 330–1.

58 See, Jeremy Gans, 'Catch-22 in the Court of Disputed Returns: *Re Culleton (No 2)*' on Melbourne Law School, *Opinions on High* (8 February 2017) <http://blogs.unimelb.edu.au/opinionsonhigh/2017/02/08/gans-culleton/>.

59 See, eg, Sonia Sotomayor, 'A Latina Judge's Voice' (2002) 13 *Berkeley La Raza Law Journal* 87, 92.

60 Michael Steven Green, 'Legal Realism as Theory of Law' (2005) 46 *William & Mary Law Review* 1915, 1917.

61 Ibid n 2. In fact, Groves and Smyth, above n 13, cite Llewellyn for the point that legal realism probably was the death knell for 'court teamwork': at 274.

62 (2016) 257 CLR 42.

63 (2016) 91 ALJR 177.

64 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*').

65 *Plaintiff M68/2015* (2016) 257 CLR 42, 154 [355] (Gordon J).

66 Ibid 108 [173], 111 [184] (Gageler J), 84–5 [93] (Bell J).

67 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ).

68 *Plaintiff M68/2015* (2016) 257 CLR 42, 86–7 [98]–[99] (Bell J), 111 [183]–[184] (Gageler J), 154 [356] (Gordon J).

from Australia was complete when the Plaintiff arrived on Nauru'.[69] This ultimately resulted in the Court fracturing 6:1 as to whether the detention, via section 198AHA of the *Migration Act 1958* (Cth) which was enacted on 30 June 2015 with retrospective effect to 18 August 2012, was constitutional.

The separate judgment writing is, to an extent, explained by the different approaches taken. Keane J, for example cross-refers to the joint majority judgment[70] but includes an expanded analysis of international comity.[71] Gageler J and Bell J come to similar legal conclusions but adopt different methods with much of Gageler J's judgment centering on the 'historical and structural context' [72] for the exercise of Commonwealth executive power and its power to detain the Plaintiff. His Honour particularly stressed the lack of executive power for the detention and consequent legislative lacuna for the arrangement prior to the insertion of section 198AHA and its retrospective application to nearly three years prior.[73] The five judgments interlace to richly delineate the complexity of the factual and legislative context, albeit from different angles and perspectives. For example, they present significant details of the unfolding of the proceedings,[74] the nature of the detention,[75] open centre reforms[76] on Nauru, and the terms of the Memorandum of Understandings, Administrative Arrangements and the contractual and subcontractual terms behind the regional processing. [77] This detailed contractual focus is particularly noteworthy in the dissenting judgment of Gordon J[78] which, as Saunders has noted, puts these intricate arrangements clearly on the 'public record'.[79] Gordon J has described the process of constructing reasons as akin to assembling a '3D jigsaw puzzle'[80] and her skill at such assembly is particularly evident in her dissent in *Plaintiff M68/2015*.

In the *NSW Aboriginal Land Council* decision the joint judgment of French CJ, Kiefel, Bell and Keane JJ and, writing on his own, Gageler J, dismissed the appeal in concluding that the closed Berrima Gaol was lawfully occupied and accordingly not 'claimable Crown lands' by the New South Wales Aboriginal Land Council for the purposes of the *Aboriginal Land Rights Act 1983* (NSW). They, in turn, also dismissed the appellant's contention that section 2 of the *New South Wales Constitution Act 1855* (Imp) had bestowed legislative power with respect to land but

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69 Ibid 163 [391] (Gordon J).

70 Ibid 114 [198].

71 Ibid 126–7 [250]–[258].

72 Ibid 96 [129].

73 Ibid 90 [114] ff. See also 109 [175]. See also 158–9 [373] (Gordon J).

74 See, eg, Ibid 89–90 [110]–[111] (Gageler J), 73 [53] (French CJ, Kiefel and Nettle JJ).

75 Ibid 61–2 [6]–[8] (French CJ, Kiefel and Nettle JJ), 81–5 [79]–[93] (Bell J), 107–9 [167]–[175] (Gageler J).

76 Ibid 64–5 [18]–[19] (French CJ, Kiefel and Nettle JJ), 76 [60]–[64] (Bell J), 90 [111] (Gageler J); 149–51 [338]–[346] (Gordon J).

77 See, eg, Ibid 60–3 [1]–[14] (French CJ, Kiefel and Nettle JJ), 116–17 [201]–[209] (Keane J), 135–151 [282]–[346] (Gordon J).

78 Ibid 135–151 [282]–[346].

79 Scott Stephenson, Michael Crommelin and Cheryl Saunders, 'Scott Stephenson, Michael Crommelin and Cheryl Saunders on the Judgments in *Plaintiff M68/2015 v Commonwealth*' on Melbourne Law School, *Opinions on High* (29 February 2016) <http://blogs.unimelb.edu.au/opinionsonhigh/2016/02/29/stephenson-crommelin-saunders-m68/>.

80 Justice Michelle Gordon, 'Applying Reason to Reasons – Start, Middle and the End' (Speech delivered at the AGS Administrative Law Forum, Canberra, 11 November 2016) 1.

not non-statutory executive power[81] concluding that the Crown was legally 'able to occupy the claimed land without additional statutory permission'.[82] A deep historical understanding emerges from these majority judgments. The joint judgment makes clear how the logical conclusion of the appellant's submission would mean that the UK retained executive control over Crown lands and explores how title to the Crown lands came to rest in the State of New South Wales.[83] Gageler J includes a prodigious historical and legislative study of the genesis of a hard-won responsible government in NSW (building on his earlier discussion in *Plaintiff M68/2015*), arriving long after representative government had taken hold.[84] Gordon and Nettle JJ dissent to conclude that the Berrima Gaol was 'not lawfully used or occupied' 'claimable Crown Lands'.[85] Their judgment contributes a fulsome, 'nuanced'[86] and methodical legislative study of the *Aboriginal Land Rights Act 1983* (NSW)[87] and, explicitly, its 'text, context and purpose'[88] to find that the 'occupation' of the land needed to be connected with the land's initial dedication.[89] It is in reading the three judgments of the Court, as a whole, that a rich description of the legislative, historical and factual context develops and crystallises.

But there can even be other gems cut by the richness of separateness and concurring judgments that take on a particular relevance here. Lee has examined the degree to which concurring judgments in the UK context can play a crucial 'buttressing' role.[90] This is just as evident here. We see, for example, Gageler J's judgment in *Bell* reinforcing that of the majority not only in validating their orders but in picking up on the Commissioner's submission that 'the drafter of the Bell Act either has forgotten the existence of the Tax Acts or has decided to proceed blithely in disregard of their existence'.[91] Similarly his Honour's historical exegesis in the *NSW Aboriginal Land Council* case[92] on the derivation of responsible government has a similar powerful 'buttressing' function in supporting the conclusions of the joint judgment. Add to that the *Cunningham* decision where we see the separate concurring judgments of Nettle J,[93] Keane J[94] and Gordon J[95] bolstering the joint judgment of French CJ, Kiefel and Bell JJ in highlighting various key legislative aspects such as the Remuneration Tribunal's power to alter the Life Gold Pass 'from time to time' or the historical,

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81 (2016) 91 ALJR 177, 195 [96], 201 [126]. As the joint judgment of French CJ, Kiefel, Bell and Keane JJ found that '[t]he purpose of s 2 … was not to abrogate executive power with respect to Crown lands … However … the executive's powers became subject to the control of the legislature': at 188 [52]. See also at 189 [62].

82 Ibid 189 [62] (French CJ, Kiefel, Bell and Keane JJ).

83 Ibid 188 [51] (French CJ, Kiefel, Bell and Keane JJ).

84 Ibid 195 [96] ff.

85 Ibid 211–12 [185].

86 Ibid.

87 For a discussion by Gordon J of the importance of fully appreciating the legislative 'arena' in judgment writing see Gordon, above n 80.

88 *NSW Aboriginal Land Council* (2016) 91 ALJR 177, 204 [146].

89 Ibid 212 [188]. Their Honours find that 'a more nuanced understanding of "occupation" better accords with the purpose of the *Land Rights Act* as informed by both its terms and its important legislative history': at 211–12 [185].

90 Lee, above n 12, 308 ff.

91 (2016) 90 ALJR 655, 676 [98].

92 (2016) 91 ALJR 177, 195– 202 [101]–[131]. See also *Plaintiff M68/2015* (2016) 257 CLR 42, 90–4 [115]–[123], 96 [129] (Gageler J).

93 (2016) 90 ALJR 1138, 1178 [244].

94 Ibid 1168 [189]–[192].

95 Ibid 1190–93 [337]–[358].

individual and practical implications of the various legislative alterations to, and Committee inquiries into, parliamentary entitlements.[96] It is the individual treatment and preoccupations of such judgments which can provide the rich or thick description that can potentially be sidelined by a unified pronouncement.

2 'Legal Ripples'

Inevitably, multiple judgments reason in distinct ways. Authors of separate opinions express matters differently, emphasise different facts or issues and amplify or develop particular legal points. Kress refers to the potential for kinks or divergences in decisions to be seen as 'ripple effects'.[97] Sartorially this resonates with the new 2016 High Court robes which bear 'sand ripple patterns' on the sleeves.[98]

This section examines three cases from the 2016 year as particular exemplifications of how difference, divergence and isolated observations across the Court can enrich our understanding and potentially the coherence of constitutional law. In so doing is not to suggest that unanimity cannot also aid coherence. Constitutional decisions like *Lange*[99] provide exceptional proof of that. Rather, what can be postulated, is that judges writing separately have greater freedom to make normative extrapolations. Such extrapolations can, in turn, contribute in some way to the coherence and advancement of our constitutional jurisprudence.

Alqudsi[100] related to the application of section 132 of the *Criminal Procedure Act 1986* (NSW) to an indictment for a Commonwealth offence and the consistency of section 132 (which allowed a procedure for trial by judge alone) with section 80 of the *Commonwealth Constitution*. The majority refused to overrule *Brown v The Queen*[101] in finding that section 80 could not be read to contemplate an exception in this context.[102]

The decision saw French CJ issue a mighty dissent. This is not something that has been a common feature of the Chief Justice's constitutional law pronouncements.[103] It is also to be his last, following his recent retirement after over 30 years in Australian Federal judicial service.[104] Being a dissenting judgment makes the 'legal ripple'

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96 See especially ibid 1178–94 [246]–[359] (Gordon J).

97 Kress, 'Legal Reasoning and Coherence', above n 51, 380–1 n 61:

> The terminology 'ripple effect' was chosen to reflect the common metaphors of a coherence theory as a unified field of propositions, or as a spider's web with propositions at the intersections of the web's strands. Because of the many interconnections among the propositions (or points), any change in the location of any proposition within the field or web will occasion ripple effects on the rest of the propositions in the field or web.

98 High Court of Australia, 'New High Court Robes' (Press Release, 6 October 2016) <http://www.hcourt.gov.au/assets/news/High-Court-Press-Release-New-Robes-06Oct2015.pdf>.

99 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

100 (2016) 258 CLR 203.

101 (1986) 160 CLR 171.

102 *Alqudsi* (2016) 258 CLR 203, 250 [113], 250 [115], 252 [120] (Kiefel, Bell and Keane JJ), 259 [141] (Gageler J), 278 [216] (Nettle and Gordon JJ).

103 However there are obvious exceptions such as in *Tajjour v New South Wales* (2014) 254 CLR 508 ('*Tajjour*').

104 Robert French, 'Seeing Visions and Dreaming Dreams' (Speech delivered at the Judicial Conference of Australian Colloquium, Canberra, 7 October 2016) <http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/frenchcj/frenchcj7Oct2016.pdf>.

argument a bit too easy to make. However, his comments are significant regardless. His Honour's concern with the approach taken by the majority (admittedly across three judgments) derived from the potential risks of interpreting section 80 with 'a formal rigidity which runs wider than the evident purpose of the provision'.[105] He observed that it possesses both an 'institutional' and 'rights protective dimension'[106] and that the 'final and paramount purpose of the exercise of federal judicial power is "to do justice"'.[107] While this does not mean that waiver becomes an entitlement it should mean that if the defendant and prosecution agree that a jury trial should be avoided, the Court can deem it 'in the interests of justice' and in line with 'both the institutional and rights protective dimensions of section 80'.[108]

In a separate majority judgment Gageler J, in rejecting the possibility of waiver of section 80, found that the applicant's approach amounted to a 'linguistic contortion' in effectively re-drafting section 80 to read 'that *some* trials on indictment of *some* offences against *some* laws of the Commonwealth might be by judge alone'.[109] Gageler J saw the applicant's approach as eliding another vital purpose to section 80 which his Honour traces: that of ensuring the 'democratic participation in the criminal law' by the community.[110] For his Honour, the framers of the *Commonwealth Constitution* would have been abreast of the importance of 'popular participation' through jury service and of it feeding into the founders' debates in relation to the *United States Constitution*.[111]

To this, Nettle and Gordon JJ in their joint judgment, revive a further strand; the primacy of section 80 interpreted as a Chapter III provision.[112] Chapter III controls the judiciary and how judicial power is exercised and the terms of section 80 mean that there is no ability for it to be read beyond its terms even if all parties agree that it should.[113]

These various emphases in *Alqudsi* hint at the beginning of legal ripples in the various justices' understandings of section 80, particularly in terms of the constitutional function played by and guiding the interpretation of the provision.

Murphy,[114] while unanimous in its result, highlights the beginnings of interference in legal principle. The case saw the Court reject a challenge to the provisions of the *Commonwealth Electoral Act 1918* (Cth) which prevent electoral enrolments during the 'suspension period' commencing 7 days after the issue of federal election writs. The Plaintiffs, however, contended that there was not a substantial reason to prevent enrolments closer to polling day. While a poor case for seeking to expand Australian electoral guarantees, *Murphy* saw a slight reframing of the watershed[115] electoral

105 *Alqudsi* (2016) 258 CLR 203, 221–2 [34].
106 Ibid 236 [70].
107 Ibid 238 [74].
108 Ibid [75].
109 Ibid 253–4 [126] (emphasis in original).
110 Ibid 256 [133].
111 Ibid.
112 Ibid 265–6 [167]–[172].
113 Ibid 277 [213], citing *Brownlee v The Queen* (2001) 207 CLR 278, 286 [11] (Gleeson CJ and McHugh J).
114 (2016) 90 ALJR 1027.
115 Ibid 1042 [53] (Kiefel J).

decisions in *Roach v Electoral Commissioner* [116] and *Rowe v Electoral Commissioner*,[117] with the facts of those cases being distinguished.

Across the several judgments in *Murphy*, we see differences in the approach taken to '"structured" proportionality'.[118] In *McCloy v New South Wales*[119] a majority of French CJ, Kiefel, Bell and Keane JJ set out a 'structured proportionality' approach for implied freedom of political communication analyses. This inquires into whether a law is suitable ('[having] rational connection to the purpose of the provision'), necessary (in the sense that there is no 'obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom') and adequate in its balance[120] (in terms of 'the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom').[121] The question in *Murphy* was whether such an approach would apply to a case with some 'affinity'[122] to the implied freedom of political communication but relating to limitations on the franchise and, particularly, the seven day period after the issue of election writs until polling day during which the electoral roll is suspended for the purposes of amendments or transfers of voters.

For Kiefel J, proportionality provides a transparent 'method'[123] 'to ascertain the rationality and reasonableness of a legislative restriction'.[124] While not expressly using the same tripartite headings, her Honour does appear to apply a structured proportionality approach to the electoral roll suspension period to conclude that it 'bear[s] a rational connection to [its] purposes',[125] that there are no 'alternative equally practicable means of achieving these purposes',[126] and that the impact of the roll closure 'is balanced by the certainty and efficiencies which are achieved'.[127]

Contrastingly, for Gageler J (reflecting his Honour's position in *McCloy*,[128] and hinted at in *Tajjour*[129]) rigid 'one size fits all'[130] proportionality assessments are 'an ill-fitted analytical tool'[131] when such an 'analysis' should '[cleave] to the reasons for the implication'.[132] While he seemed to accept that the suspension of the roll did have 'the practical effect of excluding' some voters,[133] and even required some 'variation of the' 'suitability' inquiry to be applied,[134] he doubted the appropriateness of what

116 (2007) 233 CLR 162 ('*Roach*').
117 (2010) 243 CLR 1 ('*Rowe*').
118 (2016) 90 ALJR 1027, 1079 [294] (Gordon J).
119 (2015) 257 CLR 178, 217 [79] ff (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').
120 Ibid 219 [87].
121 Ibid 195 [2].
122 (2016) 90 ALJR 1027, 1043–4 [63] (Kiefel J), 1048 [87] (Gageler J), 1079 [293], 1079 [295] (Gordon J).
123 Ibid 1044 [64].
124 Ibid 1044 [65].
125 Ibid 1045 [69].
126 Ibid 1045 [70].
127 Ibid 1045 [73].
128 (2015) 257 CLR 178, 235–8 [141]–[152].
129 *Tajjour* (2014) 254 CLR 508, 584 [164].
130 *McCloy* (2015) 257 CLR 178, 235 [142].
131 *Murphy* (2016) 90 ALJR 1027, 1050 [101].
132 *McCloy* (2015) 257 CLR 178, 256 [150].
133 *Murphy* (2016) 90 ALJR 1027, 1049 [97].
134 Ibid 1050 [102].

the Court were being asked to do in this case.[135] His judgment builds on a groundswell in this regard with French CJ and Bell J (in joint reasons),[136] Keane J,[137] and Gordon J[138] all noting a similar discomfort in their reasons in *Murphy*. For French CJ and Bell J only the 'suitability' question is likely to have broad application but ultimately it becomes a question of the 'character of the law' in question.[139] And as this was not 'a case about a law reducing the extent of the realisation of the constitutional mandate' it was difficult to apply steps such as 'necessity'.[140] A broader uneasiness with intransigent proportionality questions (further highlighting the fracturing in *McCloy*) is evident in the approaches of Nettle J,[141] Gordon J[142] and Gageler J[143] in *Murphy*. There is also an evident preference for judicial deference, although this is expressed in distinct ways.[144] Illustratively, Nettle J reflects on the need for the Court to avoid second guessing Parliament.[145] Gordon J speculates that:

> [t]he judiciary is not equipped to make definitive judgments about whether there are obvious, compelling and practical alternatives to particular provisions that are part of an *entire legislative scheme* that the Parliament is required to enact to comply with ss 7 and 24.[146]

Keane J was uncomfortable with the suggestion that the courts could effectively 'instruct the Parliament in the exercise of the power of the purse' if the legislature could be called to reform electoral legislation based on new technological advancements or 'facts'.[147]

Gageler J echoes views expressed before joining the bench,[148] that the tyranny of the majority and 'institutional' 'weaknesses'[149] should influence when a court intervenes in the legislative regime of Parliament. Back in 2009 when Justice Gageler, then as the Solicitor-General, gave the Maurice Byers Memorial Lecture he explained that:

> no coherent conceptual explanation for the observed constitutional phenomena can occur except through the prism of some over-arching understanding of the structure and function of the Australian Constitution and of the role of the exercise of judicial power in maintaining that structure and function.[150]

For Gageler J, that 'prism' sees political accountability through responsible and representative government as the fuel of the Australian constitutional framework, with

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135 Ibid.
136 Ibid 1038–9 [37].
137 Ibid 1063 [205].
138 Ibid 1079 [299]–[300].
139 Ibid 1039 [38].
140 Ibid 1039 [39].
141 Ibid 1070 [245]. See also *McCloy* (2015) 257 CLR 178, 258–9 [221]–[222].
142 *Murphy* (2016) 90 ALJR 1027, 1079 [299]; *McCloy* (2015) 257 CLR 178, 282 [311].
143 *Murphy* (2016) 90 ALJR 1027, 1050 [101].
144 See Murray Wesson, 'Crafting a Concept of Deference for the Implied Freedom of Political Communication' (2016) 27 *Public Law Review* 101.
145 *Murphy* (2016) 90 ALJR 1027, 1070 [245].
146 Ibid 1080 [303] (emphasis in original). See also at 1044 [65] (Kiefel J).
147 Ibid 1061 [195].
148 Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138, 152, 155.
149 *Murphy* (2016) 90 ALJR 1027, 1049 [93]. See also at 1049 [94]–[95].
150 Gageler, 'Beyond the Text', above n 148, 140.

the judiciary there to ensure that institutions function in accordance with their constitutional expectations.[151] Accordingly, in *Murphy*, we see this playing out in Gageler J's contention that stricter scrutiny is only justified in cases where 'the representative nature of a future Parliament'[152] is at stake, as demonstrated by the invalidation of the electoral provisions in *Roach* and *Rowe* which 'expanded an exclusion from the franchise'[153] and which isolated 'discrete minority interests'.[154]

The concurring judgments also start some undercurrents against some readings of the majority judgments in *Rowe*.[155] It seems clear that the Court will not endorse constitutional readings based around a maximisation of opportunities to enrol and to vote[156] (or maybe even the importance of a reduction in enrolment opportunities previously in place).[157] There is also a resonance with some of the positions taken by some of the minority judges in *Rowe*. For instance, Gordon J[158] and Kiefel J[159] state that it is only through failing to comply with electoral obligations that many people who could have voted were unable to. Gordon J is also critical of the utility of phrases such as 'disentitlement', 'disenfranchisement', and 'disqualification' without clear definition.[160] The classification of the 'end' intended by the legislation as tied up with, and vital to, the systematic running of Federal elections (evident in the separate opinions in *Murphy* of Gageler J,[161] Keane J,[162] and Gordon J[163]) carries the echoes of the dissenting judgments of Hayne J[164] and Kiefel J[165] in *Rowe*.

Finally, and bringing us back full circle to the beginning of the Court's year, *Plaintiff M68/2015*,[166] adds to the collection of recent decisions, domestically and even beyond (most recently the Brexit-influenced decision in *Miller*[167]) brightening and clarifying some of the blurry edges of executive power. In *Plaintiff M68/2015*, once again we see Gageler J's separate judgment engaging with the 'structure and function' of 'constitutional phenomena',[168] including responsible government[169] and the taxonomy of executive power in an effort to better understand the executive's power to detain. As with the majority in *Miller*, there is a focus on the 'depth' of ministerial or executive action.[170] In offerings in obiter dicta, Gageler J builds on some of the

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151 *Murphy* (2016) 90 ALJR 1027, 1055 [146]–[147], 1055 [152].
152 Ibid 1049 [96].
153 Ibid 1050 [105].
154 Ibid 1051 [107].
155 (2010) 243 CLR 1.
156 *Murphy* (2016) 90 ALJR 1027, 1040 [42] (French CJ and Bell J), 1043 [58] (Kiefel J), 1051 [108]–[110] (Gageler J), 1059 [180], 1060 [186]–[187] (Keane J), 1069 [240] (Nettle J), 1080–1 [309] (Gordon J).
157 Ibid 1081 [310] (Gordon J).
158 Ibid 1082 [320].
159 Ibid 1045 [74].
160 Ibid 1080 [307].
161 Ibid 1050 [104]–[105].
162 Ibid 1063 [204]–[205].
163 Ibid 1079–80 [301]–[302].
164 *Rowe* (2010) 243 CLR 1, 89 [264].
165 Ibid 146 [482], 147 [489].
166 (2016) 257 CLR 42.
167 *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583 ('*Miller*').
168 (2016) 257 CLR 42, 96 [129]. Gageler, 'Beyond the Text', above n 148, 140.
169 *Plaintiff M68/2015* (2016) 257 CLR 42, 146 [321]–[322], 99–100 [140].
170 Ibid 93 [121]–[122], 95–6 [128]; *Miller* [2017] 2 WLR 583, 607 [45] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).

ripples from the 2015 decision of *CPCF*[171] to cast-off a range of submissions[172] attempting to narrow the interpretation of the first limb in *Lim*,[173] to conclude that the executive's inability to detain in the absence of a relevant prerogative power,[174] or without statutory authorisation derives from an inherent constitutional incapacity determinable by 'the extent of its amenability to habeas corpus'.[175] Such 'inherent incapacity' cannot be undone by foreign legislation or a law introduced pursuant to 51(xxxix) of the *Commonwealth Constitution* (when 'it is not "incidental to the execution" of executive power to change an inherent characteristic of that power').[176] Accordingly, legislation authorising the detention as compatible with Chapter III of the *Commonwealth Constitution* was required to render the Plaintiff's detention lawful, a requirement met by the retrospective enactment of section 198AHA.[177]

Observations like these emerging from *Alqudsi*, [178] *Murphy* [179] and *Plaintiff M68/2015* [180] can come to play a central role in the maturing of Australian constitutional thought. In time, as they begin to smooth out confusion or iron out inconsistencies, constitutional coherence can be progressively enhanced.[181] Or, if later discounted or refined, their vocalisation can strengthen the conviction with which a particular constitutional direction is pursued.

II CONCLUSION

In conclusion, if univocality is what we seek in the High Court's constitutional offerings, we may not always find it. A constitutional High Court year like 2016 allows for reflection on whether we need to fear multiplicity or division where it does emerge. Through diversity and even dissonance, perceived legal coherence can give way and ultimately be formed anew through the tapestry of rich description or an emerging legal bubble or ripple. As Leonard Cohen (1934–2016) sang, '[f]orget your

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171 *CPCF v Minister for Immigration & Border Protection* (2015) 255 CLR 514, 567 [147]–[150] (Bell and Hayne JJ), 595 [259], 598–600 [270]–[275] (Kiefel J) ('*CPCF*'). Cf at 647–51 [478]–[492] (Keane J). See also *Plaintiff M68/2015* (2016) 257 CLR 42, 158 [372] (Gordon J).

172 See Transcript of Proceedings, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2015] HCATrans 256 (8 October 2015) (Mr Gleeson); Transfield Services (Australia) Pty Ltd, 'Outline of Submissions of the Third Defendant', Submission in *Plaintiff M68/2015 v Minister for Immigration and Border Protection,* M 68/2015, 18 September 2015, 10–11.

173 *Lim* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ).

174 *Plaintiff M68/2015* (2016) 257 CLR 42, 105 [164] (Gageler J).

175 Which, plays a 'structural role in limiting executive power': *Plaintiff M68/2015* (2016) 257 CLR 42, 104 [156] quoting Jonathan L Hafetz, 'The Untold Story of Noncriminal Habeas Corpus and the 1966 Immigration Acts' (1998) 107 *Yale Law Journal* 2509, 2526.

176 *Plaintiff M68/2015* (2016) 257 CLR 42, 105 [162].

177 Ibid 105 [163], 108–9 [174]–[175]. Note that the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth) did not seek to remove a right to bring proceedings against the Commonwealth (and right to compensation for acquisition of property) as was contained in ss 7–8 of the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).

178 (2016) 258 CLR 203.

179 (2016) 90 ALJR 1027.

180 (2016) 257 CLR 42.

181 One such example is the 'alter, impair or detract' section 109 phraseology of Dixon J in *Victoria v Commonwealth (The Kakariki Case)* (1937) 58 CLR 618, 630 which has been consistently cited with approval since. See, eg, *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 [28] (The Court); *Dickson v The Queen* (2010) 241 CLR 491, 502 [13] (The Court); *Bell* (2016) 90 ALJR 655, 665–7 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 672 [77] (Gageler J).

perfect offering. There is a crack in everything, that is how the light gets in'.[182]

[182] Leonard Cohen, 'Anthem', (Song, *The Future*, Columbia, 1992).